1924

CANADA
LAW REPORTS

Supreme Court of Canada

REPORTER
C. H. MASTERS, K.C.

CIVIL LAW REPORTER AND ASSISTANT REPORTER
ARMAND GRENIER, K.C.

PUBLISHED PURSUANT TO THE STATUTE BY
E. R. CAMERON, K.C., Registrar of the Court

OTTAWA
F. A. ACLAND
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1925

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir Louis Henry Davies C.J., K.C.M.G.
" " Francis Alexander Anglin, C.J.
" John Idington J.
" " Lyman Poore Duff J.
" Pierre Basile Mignault J.
" Arthur Cyrille Albert Malouin J.
" Edmund Leslie Newcombe J.
" Thibaudeau Rinfret J.

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Sir Lomer Gouin K.C.
" Ernest Lapointe K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. E. J. McMurray K.C.

87724—A½

MEMORANDA

On the first day of May, 1924, the Right Honourable Sir Louis Henry Davies, Chief Justice of the Supreme Court of Canada, died.

On the sixteenth day of September, 1924, the Honourable Francis Alexander Anglin, Puisne Judge of the Supreme Court of Canada, was appointed Chief Justice of the Supreme Court of Canada, in the room and stead of the Right Honourable Sir Louis Henry Davies, deceased.

On the thirtieth day of January, 1924, the Honourable Arthur Cyrille Albert Malouin, one of the Puisne Judges of the Superior Court for the province of Quebec, was appointed a Puisne Judge of the Supreme Court of Canada, in the room and stead of the Honourable Louis Philippe Brodeur, resigned.

On the first day of October, 1924, the Honourable Arthur Cyrille Albert Malouin resigned the office of Puisne Judge of the Supreme Court of Canada.

On the twentieth day of September, 1924, Edmund Leslie Newcombe, one of His Majesty's Counsel and Deputy Minister of Justice for the Dominion of Canada, was appointed a Puisne Judge of the Supreme Court of Canada, in the room and stead of the Right Honourable Sir Louis Henry Davies, deceased.

On the first day of October, 1924, the Honourable Thibaudeau Rinfret, one of the Puisne Judges of the Superior Court of the province of Quebec, was appointed a Puisne Judge of the Supreme Court of Canada, in the room and stead of the Honourable Arthur Cyrille Albert Malouin, resigned.

On the twenty-third day of December, 1924, the Honourable Francis Alexander Anglin, Chief Justice of Canada, was appointed member of His Majesty's most Honourable Privy Council.

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

Angers v. *Gauthier* ([1924] S.C.R. 479). Leave to appeal refused, 7th November, 1924.

Bayer v. *American Druggists' Syndicate* ([1924] S.C.R. 558). Appeal withdrawn.

Board of Trustees of the Rom. Cath. S.S. for Toronto v. *City of Toronto* ([1924] S.C.R. 368). Leave to appeal granted, 21st July, 1924.

Canadian Pacific Railway Co. v. *Ouellette* ([1924] S.C.R. 426). Leave to appeal granted *in forma pauperis*, 24th July, 1924.

Donohue Bros. v. *Corp. La Malbaie* ([1924] S.C.R. 511). Appeal dismissed with costs, 21st January, 1925.

Fidelity Phenix Ins. Co. of N.Y. v. *McPherson* ([1924] S.C.R. 666). Leave to appeal refused, 22nd January, 1925.

King, The v. *Assessors of Woodstock* ([1924] S.C.R. 457). Leave to appeal granted, 5th December, 1924.

Manitoba Act, 13 Geo. V, c. 17, Reference ([1924] S.C.R. 317). Leave to appeal granted, 25th August, 1924.

The Security Export Company v. *Hetherington* ([1923] S.C.R. 539). Appeal allowed, July 23, 1924.

Ontario Metals Products Co. v. *Montreal Life Ins. Co. of N.Y.* ([1924] S.C.R. 35). Appeal dismissed with costs, 9th December, 1924.

Warner Quinlan Asphalt Co. v. *The King* ([1924] S.C.R. 236). Leave to appeal refused, 24th July, 1924.

Western Assur. Co. v. *Caplan* ([1924] S.C.R. 227). Appeal dismissed, 1st July, 1924.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

TABLE OF CASES CITED

B

C

C

D

E

F

G

G

H

J

K

K

L

M

Mc.

N

O

P

Q

R

S

S

T

U

V

W

W

Y

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

JACK STEELE .....APPELLANT; 1923

AND *Dec. 15.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Appeal—Bail—Jurisdiction—Section 1019 Cr. C.

A judge of the Supreme Court of Canada has no jurisdiction to admit to bail an accused person pending his appeal to this court, such jurisdiction being conferred by section 1019 (1) of the Criminal Code upon the Chief Justice of the appellate court or a judge of that court designated by him.

APPLICATION on behalf of the appellant for an order that he be admitted to bail pending his appeal to this court from the judgment of the Court of Appeal for British Columbia.

The appellant was convicted on October 16, 1923, on a charge of having had carnal knowledge of a girl under sixteen, and sentenced to imprisonment for one year. Appeal was taken from the sentence to the Court of Appeal for British Columbia, and the same was dismissed on November 22, 1923, but one judge of the Court of Appeal dissented. Under section 1024 of the Criminal Code, the appellant then appealed to the Supreme Court of Canada.

The appellant was admitted to bail pending the hearing before the court of first instance, and also pending his appeal to the Court of Appeal for British Columbia; but, upon application to the Court of Appeal to admit him to bail pending the determination of his appeal to this court, the Chief Justice of the Court of Appeal held that that court had no jurisdiction, presumably considering that, in-

*PRESENT:—Sir Louis Davies C.J. in chambers.

1923
STEELE v. THE KING.
The Chief Justice

asmuch as an appeal had been taken to the Supreme Court of Canada, the Court of Appeal was *functus officio*. Hence the application to this court.

Section 1019 (1) of the Criminal Code, as enacted by section 9 of 13-14 George V, c. 41, reads as follows:—

1019 (1). The Chief Justice or the Acting Chief Justice of the Court of Appeal, or a judge of that court to be designated by him, may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

Smellie K.C. for the appellant.

THE CHIEF JUSTICE.—On this application coming before me in chambers I could not find in the Criminal Code jurisdiction given me to make the order asked for. After consultation with such of my brother judges as were available, forming with myself a majority of the court, we have come to the conclusion that this court has no jurisdiction to make the order but that section 1019 (1) of the Criminal Code confers jurisdiction upon the Chief Justice or the acting Chief Justice of the Provincial Court of Appeal, or upon a judge of that court to be designated by him, to admit the appellant to bail pending the determination of his appeal. The latter words of the section " the determination of his appeal " must be construed as extending to the continuance of his appeal from the provincial Court of Appeal to this court and that therefore the jurisdiction to admit the appellant to bail pending the appeal here rests with the judge specially named in that section.

Application is refused.

1923
*Nov. 19, 20.
*Dec. 4.

CANADIAN NORTHERN RAILWAY CO. (DEFENDANT) ..... APPELLANT;

AND

LEON PRESCESKY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Railway—Level crossing—Absence of statutory signals—Proper lookout—Contributory negligence—Questions for the jury.

In an action against a railway company for injuries sustained through a collision of appellant's train with respondent's automobile at a railway crossing, it was established that appellant failed to give the statutory signals; and the respondent declared in his evidence that

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

if the whistle had been sounded and the bell rung, he would have heard and thus avoided the accident. He also detailed circumstances which led to his not giving greater attention to the possibility of a train coming. The trial judge found negligence on the part of appellant but withdrew the case from the jury and dismissed the action on the ground that the plaintiff was guilty of contributory negligence in not keeping a proper lookout for approaching trains. On appeal, a new trial was ordered.

Held, Davies C.J. dissenting, that, it was a question for the jury to determine, having regard to all the circumstances, whether there was a reasonable excuse for the respondent's failure to perceive the approach of the train by which he was injured.

Canadian Pacific Railway Co. v. *Smith* (62 Can. S.C.R. 134) and *Canadian National Railways* v. *Clark* ([1923] S.C.R. 730) discussed.

Judgment of the Court of Appeal ([1923] 2 W.W.R. 1141) affirmed, Davies C.J. dissenting.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge which had dismissed the respondent's action and ordering a new trial.

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

D. L. McCarthy K.C. and *D. O. Owens* for the appellant. A person crossing a level railway crossing must act as a reasonable person should act and not attempt to cross without looking for an approaching train; and where the evidence is conclusive that he did not look, the trial judge is justified in withdrawing the case from the jury, on the ground of contributory negligence.

P. Makaroff for the respondent. It is within the province of the jury to determine whether the negligence of the plaintiff or the defendant was the direct and effective cause of the accident.

THE CHIEF JUSTICE (dissenting).—As a majority of this court has dismissed this appeal and determined that a new trial must be had, I will refrain from discussing at any length the facts as proved at the trial already had.

The learned trial judge nonsuited the plaintiff at the close of his case on his own evidence to the effect that he had driven on to the railway crossing for eighty yards before reaching it without looking along the track to see if any train was approaching from the eastward, that is in the direction the plaintiff was travelling, toward the

(1) [1923] 2 W.W.R. 1141.

1923

CANADIAN NORTHERN RY. CO. v. PRESCESKY.

The Chief Justice.

crossing. Plaintiff stated that at about this distance of eighty yards from the crossing he had looked eastwardly along the tracks and did not see any train and that he had not looked afterwards. The evidence was that the nearer he approached the crossing the further along the track he could see and that if he had looked he could and would have seen the train from many places in the road between the eighty yards where he says he did look and the crossing itself.

The substantial question to be determined at the close of the plaintiff's case was whether the plaintiff was guilty of contributory negligence in not having so looked before attempting to pass over the level crossing.

I have gone very carefully into the evidence and have reached the conclusion that in so neglecting to look for an approaching train along these eighty yards he was clearly guilty of such negligence as contributed to the accident on the crossing from the train crashing into his auto; and that there was nothing in the evidence which would excuse the neglect of this plain duty of looking and no evidence from which the jury could find such excuse.

I would, therefore, allow this appeal concurring with the nonsuit granted by the learned trial judge and his reasons for granting it.

IDINGTON J.—This action was brought by the respondent against the appellant for damages to himself and his automobile, which he was driving, and in which he was alone, when struck by a special train of the appellant at the intersection of the appellant's railway and the public highway on which respondent was travelling.

The action was rested upon the failure of the appellant to either ring the bell or blow the whistle, as required by statute to do when approaching a public highway.

The respondent swore that neither was done and that when he was approaching the said crossing he looked towards the east along the railway, saw no train and, owing to the angle of his approach he was facing westerly rather more than if approaching the railway at right angles, and that the regular train from the west was due about that time and, owing to the growth of trees and shrubs, and the shape of the land alongside the railway

track to the west (and the train likely to come therefrom) it required close attention watching for the said train.

There was, according to the evidence, only one train a day each way and the one from the west passed the point in question about nine o'clock in the forenoon, and the other, going westerly, about five o'clock in the afternoon.

Counsel for respondent, if I understood him correctly, said that indeed there was only one of these trains each day.

This part of appellant's road seems to be a branch line far north and over which there is not much traffic.

The respondent had lived near the point in question for five or six years and knew the condition of things I have just adverted to, and hence paid more attention to the probabilities of a train coming from the west than the possibilities of a special train coming from the east at that time of day.

I cannot see how he was blameworthy for so doing.

Unfortunately there was a special train from the east coming at a higher rate of speed than usual on that road, carrying only the engine with its tender, and a single coach; and respondent, depending upon such a possibility giving due warning, according to statute, was thus taken unawares.

The learned trial judge upon motion for a nonsuit granted same and refused to submit the case to the jury. It was eminently a case for the jury to have passed upon.

Hence the Court of Appeal for Saskatchewan unanimously reversed that ruling and directed a new trial, costs of the first to abide the event.

From that decision the appellant has appealed to this court.

I agree in all essential features with the reasoning of Mr. Justice Martin writing the judgment for said court, and therefore am of the opinion that this appeal should be dismissed with costs here and in said Court of Appeal.

The respondent submits, by way of cross-appeal, that the costs of the last trial should be allowed also instead of being made to abide the event.

In a case of this kind, I respectfully submit, that the proper course is to try it out (subject to the motion for non-suit) and thus avoid the costs of a new trial and, as

1923

CANADIAN NORTHERN RY. CO. v. PRESCESKY.

Idington J.

is often done by the learned trial judge who can, if clearly holding that the plaintiff must, by reason of contributory negligence, fail, at the close enter judgment for the defendant and trust to the appellate courts finally determining all involved therein.

I would therefore, seeing counsel for appellant pressed for the contrary course, allow said cross-appeal.

Repeated trials are undesirable, and can be avoided by the method I have suggested in such cases as this; and especially when as I respectfully submit they often come so close to the line as apparent in the recent cases of *The Canadian Pacific Railway Company* v. *Smith* (1), and *Canadian National Railways* v. *Clark* (2), recently decided by this court.

DUFF J.—It is necessary, in my judgment, that there should be a new trial in this case. It is, of course, important to avoid unnecessary comment upon the facts. It will be sufficient to say, I think, that in my opinion the point for decision on the appeal put concretely cannot be better stated than in the argument of Mr. McCarthy. The question is this: Was there in the facts which the jury was entitled to find on the evidence anything which the jury, acting judicially, might consider to be a reasonable excuse for the failure of the respondent to see the approaching train? The infrequency of traffic on the line, the fact that the respondent's attention was fastened on the possibility of the approach of a train which was expected in the usual course from the west and the respondent's statement that he actually listened for the statutory signals were circumstances which I think should not have been withheld from the jury.

There is some misapprehension, I think, a misapprehension which to me, I must admit, is unaccountable, of the purport of the decision in *Smith's Case* (1). In that case the evidence adduced by the plaintiff himself established conclusively that if the plaintiff had given his attention to the matter at all he must have seen the train by which he was struck, a train which he knew would by the usual rule be passing at that time. As to excuse for failing to look, there was no suggestion of an excuse in the respondent's own evidence. It was suggested by his coun-

(1) [1921] 62 Can. S.C.R. 134. (2) [1923] S.C.R. 730.

sel that his attention was distracted by the horn of a motor following him, which indeed, was blown for the purpose of awakening his attention to his surroundings and the danger he was running into. This suggestion had no support in the respondent's own testimony and was not one to which, in the opinion of the majority of the court, the jury, acting judicially, could, in view of the undisputed facts and the respondent's silence upon the point, have given effect by holding the circumstances to constitute a reasonable excuse for the respondent's conduct.

In *Clark's Case* (1), on the other hand, the respondent stated that as he approached the railway track, which was hidden by a bluff, knowing a train was due to pass about that time, he listened for the bell and the whistle and looked for the smoke, and that hearing nothing and seeing nothing, he surmounted the bluff with the conviction that the train was not approaching. These circumstances, in the opinion of the court, were circumstances which might properly be considered by the jury in the inquiry whether or not there was a reasonable excuse for the failure of the respondent to see the train by which he was injured.

The elaborate discussion of facts in such cases as this does, no doubt, involve some risk of evidence being shaped to fit into the frame of some headnote or dictum; but questions of credibility are peculiarly for the jury, and such evidence as that given in *Clark's Case* (1) and in this case cannot properly be withheld from them by the trial judge.

ANGLIN J.—For the reasons assigned by Mr. Justice Martin when delivering the judgment of the Court of Appeal, I would dismiss this appeal with costs, merely adding a reference to the language of Lord Sumner in *The King* v. *Broad* (2), and to the recent judgment of this court in *Canadian National Railways* v. *Clark* (1).

The costs here were not materially increased by the plaintiff's cross-appeal in regard to the disposition made by the Court of Appeal of the costs of the abortive trial.

(1) [1923] S.C.R. 730.

(2) [1915] A.C. 1110, at pp. 1118 and 1119.

1923

CANADIAN NORTHERN RY. CO. v. PRESCESKY.

Mignault J.

While the cross-appeal must be dismissed, I think it may properly be without costs.

MIGNAULT J.—I am of the opinion that the appeal should be dismissed with costs and the cross-appeal without costs for the reasons stated by my brother Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Borland & McIntyre.*

Solicitors for the respondent: *Makaroff & Bates.*

1923

*Oct. 10, 11.
*Dec. 4.

CLARENCE CUNNINGHAM (DEFENDANT) ..... APPELLANT;

AND

ROBERT INSINGER (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Sale—Option—Mine—Extension of time for payment—Condition—Damages.

The respondent, a mine owner, gave the appellant, a mine operator, an option to purchase a mine for a sum payable by instalments. On the first instalment falling due, the appellant negotiated for an extension of time for payment which was granted by the respondent, on condition that the appellant should do certain development work not mentioned in the option. The appellant failed to pay; he subsequently relinquished possession of the mine and surrendered the option, but without having done the work. The respondent sued for an account and for damages amounting to the cost of the work.

Held, Idington J. dissenting, that the respondent was entitled to recover.

Per Duff and Anglin JJ.—Upon the assumption of a finding by the trial judge that the work was part of a scheme the execution of which the respondent regarded as essential to the proper development of the mine, the respondent had the right to ask as damages resulting from the breach of agreement the cost of performing the development work which the appellant had agreed to do and the measure of damages ought not, as is usual, to be restricted to the pecuniary value of the advantage the respondent would have obtained by performance of the agreement.

Per Idington J., dissenting.—The undertaking to do the work in question and consideration therefor were not a collateral independent contract but by the express terms thereof declared to be a mere "modification of the terms and conditions" of the optional agreement for purchase, and should therefore be construed as if same had conditionally formed a clause therein, and thus subject to the effect to be given the pivotal and predominant provision thereof which entitled appellant at any time to terminate the whole agreements by the relinquishment, as

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

happened, of his option, involving therewith the surrender to respondent of all machinery, implements and equipment by and with which it was contemplated the work in question was to have been done and thus creating such a situation as basis for estimating damages as never could be properly held to be the actual cost of the work, and thus within the reasonable contemplation of the parties which must ever form, according to our long settled rule of law, the basis for awarding damages for breach of such like contracts.

APPEAL from a decision of the Court of Appeal for British Columbia, affirming the judgment of the trial judge and maintaining the respondent's action.

The respondent, a banker owning a group of mines called Hewitt (which had previously been operated) gave the appellant an option to purchase it for the sum of $175,000 payable in two instalments of $87,500 each in one and two years respectively. The appellant had the right to mine and ship ore but was obliged to pay 15 per cent of the net smelter returns to the credit of the respondent at the Bank of Montreal to be applied on account of the purchase price. The appellant was also required to do certain development work in no. 7 tunnel. When the first instalment of $87,500 became due, the appellant negotiated for an extension of time for payment of part of it, $37,500. This was granted in consideration of the appellant agreeing, besides paying interest on the deferred payment, to do certain further development work not mentioned in the option, viz., to drive no. 8 tunnel ahead and continue same without interruption until reaching the ore shoot then being mined in no. 7 tunnel, an estimated distance of 1,200 feet and then constructing a raise from no. 8 to no. 7 level, a distance of 350 feet. This no. 8 tunnel had been driven as a drift on the vein by the former operators, and the further development agreed to be done by the appellant was for the purpose of continuing this tunnel and thus developing the downward continuation of the ore theretofore being mined in the no. 7 tunnel above and making a connection therewith. The appellant did not do more than 25 feet of this work, and ten days prior to the due date for payment of $37,500, he requested a further extension of time. The respondent notified the appellant that his proposals were not acceptable and demanded possession of the premises, declaring the option at an end. The appellant relinquished possession of the mines and surrendered his option without doing the development work above referred

1923

CUNNINGHAM v. INSINGER.

to. The respondent took action for an account of ore mined, milled, shipped or treated by the appellant, and for damages for failure to do the development work. The trial judge gave judgment for the respondent for an account; and as to the action for damages, he directed a reference to ascertain the quantum of such damages at the rate of $15 per foot for all work not done by the appellant, thus involving a determination that the proper measure of damages was what it would cost the respondent to do the work the appellant failed to perform. This judgment was affirmed by the Court of Appeal.

Lafleur K.C. and *Hamilton K.C.* for the appellant. The damages which the respondent ought to receive, in accordance with the settled rule, are those which may fairly and reasonably be considered to arise from the breach, according to the usual course of things. Applying this rule, the respondent is only entitled to recover the pecuniary value of the advantage he would have obtained by a performance of the agreement which would in this case be the equivalent of any increase in the value of the mine to arise therefrom.

Tilley K.C. for the respondent. The respondent has the right to recover as damages the cost of doing the work, as this work formed a necessary part of a plan of exploration or development requisite, from a miner's point of view, for developing the property as a working mine.

THE CHIEF JUSTICE.—After reading as much of the evidence as I considered material and giving much consideration to the arguments at bar and the judgments in the courts below, I would dismiss this appeal with costs.

I substantially concur with the reasons for judgment of Mr. Justice Galliher in the court below.

IDINGTON J. (dissenting).—The respondent covenanting with the appellant that he, the respondent, was entitled to certain mining properties in British Columbia, agreed to give the appellant an option to buy same, for the sum of $175,000 of which one half was to be paid by the 15th of August, 1918, one year after the date of the said agreement.

The agreement further provided that the appellant should be given possession of the said mining properties and certain appliances theretofore used in developing same.

and be entitled to enter into said possession immediately and operate same on a basis of making no payments, save only the payment for certain taxes, insurance, etc., not now in dispute, and for so-called royalties, if any, out of the proceeds of the shipments of ore or concentrates from the said mineral claims of which 15 per cent was to go to the credit of the respondent and the balance to the credit of the appellant.

As the 15th of August, 1918, when the due date of the first instalment of purchase price was to fall due, was approaching, the appellant seems to have had some conversation with the respondent upon the rather discouraging situation presented to appellant as a possibly intending purchaser.

He had already, in development, spent far more than expected, having regard to the results, which would fall far short of making up the first payment.

That was followed by a correspondence drawn out till November, and the object of it all was a negotiation for an extension of six months for the payment of the balance of the first instalment of the optional purchase price which the royalties did not cover.

The basis of the result of that correspondence appears in a letter from appellant to respondent, quoted in full by Mr. Justice McPhillips in his opinion dissenting from the judgment now being appealed from.

The respondent's letter of acceptance dated 26th October, 1918, begins thus

> I received your letter of October 19, proposing the following as modifications to the terms and conditions of our agreement for the purchase by you of the Hewitt group of mining claims in the Slocan District,

and after reciting the proposed modifications, adds one or two minor suggestions which he couples with his assent.

And thereupon by the letter of appellant dated 2nd November, 1918, he accepts same and adds, however, a warning note as to the mine not proving as promising as at one time, and the effect the Spanish influenza epidemic was having upon the available man power.

The appellant seems, therefore, to have done his best, and, long before the 5th of February, had paid the sum of $50,000, applicable on account of the first option, and, in course of development work throughout, was already very largely out of pocket.

1923

CUNNINGHAM v. INSINGER.

Idington J.

It was clearly evident to both at the time of this modification that he would be by the expiration of the extension granted, getting nothing but three and a half months' time to pay, at the utmost, the sum of $37,500, and probably less. In other words, for that extension of time of payment, he would (by the construction put by the courts below upon " the modification of the terms and conditions " of the agreement, as respondent aptly phrased what was agreed upon) be paying, or practically be made to pay, from $20,000 to $30,000 for such privilege.

It is sworn by appellant that it would take seven or eight months to a year to do the tunnelling provided for by said modification, and admitted by a witness for respondent seven or eight months.

The learned trial judge held that notwithstanding the appellant's absolute relinquishment in June, 1919, of his said option, and the acquisition by respondent, as the result of appellant's expenses, of not only the said $50,000 but about $25,000 more, the appellant was bound to go on and complete the tunnelling contemplated by the modification in November of the original agreement.

In other words, though the respondent had cancelled, in April, 1919, so far as he could, the contract, and the appellant relinquished all right to exercise his option, the modifying clause had to be specifically performed by appellant, or the cost thereof paid by the appellant, and, in short, be treated as an independent document instead of a mere modification of the original agreement and thus part thereof.

I entirely dissent from any view that entertains any such consequences as within the reasonable contemplation of the parties.

It is quite clear to my mind that the modification contained in the correspondence must be read merely as a modification, and as if the same had, conditionally and in anticipation formed a clause therein and hence subject to the operation of all the rest of the contract or any other of its many provisions, and harmonized therewith.

I agree so entirely with the judgment of Mr. Justice McPhillips in the court below that I need not repeat, but adopt, what he has said therein.

Indeed but for the purpose of bringing prominently forward the express view of the respondent, in his letter above referred to, as to the nature of what was agreed to be done and the rule of law applicable to the basis of, and measure of, damages, being what the parties can be held to have had within reasonable contemplation, I would not have felt impelled to add anything.

The appeal herein should, therefore, in my opinion, be allowed with costs, and the second, third and fourth clauses of the judgment of the learned trial judge be stricken out.

The best consideration I have been able to give to the conduct of the parties relative to the respondent's cancellation, claimed by the respondent, is that there should be no costs allowed to either in regard thereto, or to the counter-claim herein.

The formal judgment of the learned trial judge when thus amended will, I assume, cover an account of what the appellant got during the period between the respondent's claim to cancel, and the appellant's relinquishment, which is to me rather in doubt on the evidence and treated on the same basis as the result of operations prior to the attempted cancellation.

DUFF J.—It is not necessary in the view I take of this case to decide the questions discussed as to the construction of the agreement of the 15th August, 1917. I think when the letter of the 26th October, 1918, is read with the correspondence which preceded it, it does establish a promise on the part of the appellant as a term of the extension of the option to drive tunnel no. 8 without interruption until reaching the ore chute in the no. 7 tunnel. The appellant's obligation was no doubt subject to the implied condition that the respondent should do whatever might be necessary on his part to enable the promise to be performed, and if the option had been brought to an end by the respondent, and the appellant in consequence had been excluded from working the mine, then a case would probably have arisen in which the appellant would have been relieved from his obligation. I am far from satisfied, however, that the implied condition did become operative in the circumstances which actually arose, the appellant retaining possession of the mine and insisting upon his right

1923

CUNNINGHAM v. INSINGER.

Duff J.

to do so. It is not strictly necessary to pass upon this point, although I confess the inclination of my opinion is decidedly in favour of the view that so long as the appellant remained in possession, asserting his right to be there under the contract, his obligation continued.

I have come to the conclusion that the obligation was an absolute one, and that the difficulties which arose, assuming that they would have constituted an excuse under the terms of the contract of 1917, afford no answer to the respondent's claim under the subsequent contract.

The judgment of the learned trial judge is now for the first time challenged on the ground that the rule applied for the purpose of ascertaining the damages to which the plaintiff is entitled is not the correct rule. The learned trial judge in a word held the defendant to be responsible for the cost of completing the work he had agreed to do.

Mr. Lafleur on behalf of the appellant argues that in accordance with the settled rule the damages which the plaintiff ought to receive are those which may fairly and reasonably be considered to arise from the breach, according to the usual course of things, and that applying this rule the plaintiff is entitled to recover, and only entitled to recover, the pecuniary value of the advantage he would have obtained by a performance of the contract which would, in this case, be the equivalent of any increase in the value of the mine to arise therefrom.

It would be inadvisable, I think, to attempt to lay down any general rule for ascertaining the damages to which a mine-owner is entitled for breach of a covenant to perform development work or exploratory work by a person holding an option of purchase. Cases may no doubt arise in which the test suggested by Mr. Lafleur's argument would be the only proper test, and difficult and intricate as the inquiry might be, it would be the duty of the court to enter upon an examination of the effect of doing the work upon the value of the property.

On the other hand, cases must arise in which the plaintiff's right is plainly to recover at least the cost of doing the work. If it were conclusively made out, for example, that the work to be done formed part and a necessary part of some plan of exploration or development requisite, from

the miner's point of view, for developing the property as a working mine, and necessary, from the point of view of businesslike management, so that it might fairly be presumed that in the event of the option lapsing the owner would in the ordinary course have the work completed, then the damages arising in the ordinary course would include the cost of doing the work and would accordingly be recoverable under the rule.

In the case before us I think no serious difficulty arises. The letters appear to afford abundant evidence that both parties were proceeding upon the footing that this work was necessary in the course of developing the mine according to the owner's plans and it is upon the basis of that being accepted as a fact, I think, that the learned trial judge proceeded. No suggestion appears to have been made at the trial that he was applying an erroneous rule or that he was proceeding upon an erroneous assumption of fact; his method of arriving at the damages was not impugned in the notice of appeal nor, so far as one can gather, on the argument before the Court of Appeal; indeed, it was not until the oral argument in this court that the point was raised. In the circumstances I do not think this court can be called upon to interfere on the ground that the evidence does not adequately establish the necessity of the work. An analogous rule has been applied for the purpose of ascertaining the damages recoverable for breach of a covenant to keep in good repair in a lease or a covenant in such an instrument to sink a mine shaft. As already intimated, however, I am not disposed to base my decision upon any supposed rule of law other than the general rule to which reference has been made. Having regard to the manner in which the case was conducted in the courts of British Columbia, I think the proper application of the general rule is that which I have indicated above.

ANGLIN J.—At the close of the argument I was satisfied that the construction placed by the learned trial judge (affirmed on appeal) on the contract in regard to the driving of no. 8 tunnel and the upraise work was correct. Further consideration has not changed that opinion. I also remain convinced that the excuses for non-performance

1923

CUNNINGHAM v. INSINGER.

Anglin J.

preferred by the defendant do not afford an answer to the plaintiff's claim. The opinions of the trial judge and of Mr. Justice Galliher cover this aspect of the case. The plaintiff is therefore entitled to recover such damages as are the natural and ordinary consequence of the defendant's failure to carry out his undertaking and will compensate for the breach. *Watson* v. *Charlesworth* (1).

The learned judge directed a reference to ascertain

> the quantum of such damages at the rate of $15 per foot for all work not done which was stipulated to be done by paragraph 3 of Ex. 19

the letter containing the defendant's undertaking to do the work in question. This, I take it, involves a determination that the proper measure of damages is what it will cost the plaintiff to do the work the defendant failed to perform.

I see no reason to question the learned judge's explicit finding that $15 per foot will be a fair amount to allow for the cost of that work.

We should also, I think, import findings that the work in question formed part of a scheme the execution of which the plaintiff regarded as essential to the proper development of his mine and fully intended, in any event, to carry out. There is evidence to warrant such findings. The defendant himself reported this work to the plaintiff as the first of several

> necessary essential improvements to make the mine a success.

Acting on the advice of Mr. M. S. Davys, a mining engineer, the plaintiff insisted on the promise by Cunningham to undertake and prosecute this work immediately and continuously as the basis of any extension to be given him. Davys deposes that he and Mr. Moore had agreed that the work in question should be done. The plaintiff relied upon Davys, and it is a fair inference not only that he regards the work as essential but that it is work which he will have done. It is probably necessary to reach that conclusion in order to justify the departure made by the trial judge from the ordinary rule that the measure of damages for breach by a defendant of a contract to perform work on the plaintiff's land is the actual pecuniary loss sustained by the plaintiff as a result of such breach, i.e., the difference between what would have been the value of the premises had

(1) [1905] 1 K.B. 74, 88; [1906] A.C. 14.

the work contracted for been done and their value with it unperformed. The question is by no means free from difficulty and, as presently advised, it is only because I think the learned trial judge must have dealt with it on the footing indicated and because his having done so was warranted by the evidence that I accept the measure of damages as determined.

Reference may be had to *Pell* v. *Shearman* (1); Mayne on Damages (9 ed.), pp. 237-8; Sedgwick on Damages (9 ed.), s. 619; *Wigsell* v. *School for Indigent Blind* (2); *Joyner* v. *Weeks* (3). In the last cited case the Court of Appeal (p. 43) treated the breach of a tenant's covenant to yield up premises in good repair as subject to a convenient rule of inveterate practice ordinarly applicable specially to such cases and tantamount to a rule of law that the measure of the lessor's damages should be the cost of making the omitted repairs. A recent decision of an Appellate Divisional Court in Ontario may also be averted to, *M. J. O'Brien Ltd.* v. *Freedman* (4).

The appeal on the counter-claim also fails. The defendant's failure to pay relieved the plaintiff from the obligation of depositing a deed in escrow and his title papers.

MIGNAULT J.—After carefully considering the evidence both documentary and oral, I do not think that the appellant has made out a case for disturbing the judgment of the Court of Appeal.

In my opinion, on the construction of the agreement entered into by the parties, by their letters of October 19, October 26, and November 2, 1918, the carrying on of the development work mentioned in paragraph three of the appellant's letter of October 19, was the consideration of the extension of time granted by the respondent for the payment of the balance of the first instalment under the option contract between the parties. It was in no wise a condition of the original option to be unenforceable in case the option to purchase was not exercised by the appellant. On the contrary, the only possible interest the respondent could have in view when he stipulated for this develop-

(1) [1855] 10 Ex. 766.
(2) [1882] 8 Q.B.D. 357.
(3) [1891] 2 Q.B. 31, 37-8.
(4) 25 Ont. W.N. 240.

1923
CUNNINGHAM v. INSINGER.
Mignault J.

ment work, was in case the appellant relinquished his option. If he purchased the property, and paid for it, it would be a matter of indifference to the respondent what development work had been done. Moreover, the letter stated that the work should begin immediately.

On all the other grounds urged by the appellant, I am content to express my full concurrence in the judgment of Mr. Justice Galliher in the Court of Appeal.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hamilton & Wragge.*
Solicitors for the respondent: *Lennie & Clark.*

1923
*Oct. 31.
*Dec. 4.

MORRIS KATZMAN (DEFENDANT) .....APPELLANT;

AND

OWNAHOME REALTY (PLAINTIFF) .....RESPONDENT.

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

Statute of Frauds—Memo. in writing—Signature as owner—Evidence of agency—Admissibility.

Property was listed with a broker for sale the listing card stating that "the owner's name is Mrs. B. Katzman." Mrs. K. who signed had no interest in the property but her husband had. A sale was effected and in an action by the broker for his commission:—

Held, that parol evidence was not admissible to contradict the statement in the document as to ownership by showing that Mrs. K. in signing it was acting as agent of her husband.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the respondent.

The only question for decision on this appeal is whether or not there was a memo in writing signed by the party to be charged or his agent sufficient to satisfy the addition made in 1916 to the Ontario Statute of Frauds. The trial judge allowed evidence to be admitted to show that Mrs. Katzman who signed the memo did so as agent of her husband the appellant, which would be sufficient if established. The appellant contends that such evidence should not have been received.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

F. Davis for the appellant referred to *Keighley* v. *Durant* (1); *Barry* v. *Stoney Point Canning Co.* (2).

Zeron for the respondent cited *Toulmin* v. *Millar* (3); *Stratton* v. *Vachon* (4).

THE CHIEF JUSTICE.—I am of the opinion that this appeal should be allowed. I concur in the reasons for so doing stated by my brothers Anglin and Mignault JJ.

IDINGTON J.—This is an action to recover a commission claimed by the respondent by way of remuneration for the sale of real estate.

The action falls within section 13 of the Ontario Statute of Frauds, as amended by the addition of said section in 6 Geo. V, [1916], c. 24, sec. 19, which reads as follows:—

No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized.

The only writing presented herein and claimed by the respondent to comply with said provision is a listing of the property in question, which reads as follows:—

Description of property to be sold by Ownahome Realty Construction, King George Hotel.

Price, $125.000.
Cash, $25,000.
$3,000 every 6 months.

40 Rooms.
Size of Lot, 60 by 130.
2 Stores on Sandwich, Bar on corner, 1 on Goyeau.
Rents now at $12,000.
(On back of card).
Owner's name, Mrs. B. Katzman.
Property for sale at Sandwich St. at Goyeau.
Address, 24 Hall Ave. Border Cities, 7th June, 1921.

In the event of the Ownahome Realty finding a purchaser for the property described herein, I agree to pay them a commission of 3 per cent on the selling price.

B. Katzman.

The signature is that of the wife of appellant whose full name is "Morris Katzman" and her's is "Becky Katzman."

This was given without any authority from the husband who is sued herein along with one Orechkin and the said wife of appellant.

(1) [1901] A.C. 240.
(2) 55 Can. S.C.R. 51.
(3) 58 L.T. 96.
(4) 44 Can. S.C.R. 395.

1923

KATZMAN v. OWNAHOME REALTY CO.

Idington J.

It is to be observed that she therein professes to be owner and in fact contracts in no other sense.

She is clearly proven not to have been the owner of any interest therein, and her husband to have only owned an equity therein along with said Orechkin. Some expressions used in the evidence might lead one to believe that he and Orechkin were equally interested and others indicate that they were not equally interested.

It is quite clear that they had only an equity altogether of about sixty thousand dollars in said property, and that she had no interest whatever in the property.

From the fact that this action was brought, as the result of a search in the Registry Office, after the property had been conveyed to one Davis, it seems that the respondent was rather puzzled to know who had become under any such obligation as it sets up in regard to it.

I assume that, as has been held under the Statute of Frauds, a principal may, under immediately attendant or preceding circumstances leading up to the signature of such a contract as falls within the meaning of the statute as amended by the new section, be held to have signed by an agent.

But I can find, after diligent search, no decision which converts a contract made by any one pretending to sell as his or her own, as this contract clearly does, into a contract by the actual owners.

The pretence that this contract was so converted by the acts of the husband, or of him and the other joint owner, seems to me to be without any foundation in law.

And still more remote from giving any legal operation under said statute as against the appellant is the reliance by respondent upon what transpired between the respondent, the appellant and one Molley leading ultimately, respondent alleges, to a sale to one Davis.

The respondent had, some weeks after the signing of the above quoted contract with it by the appellant's wife, discovered that the said Molley lived in and owned an apartment house in Detroit, on the opposite side of the river, which he was disposed to exchange for the hotel now in question.

Respondent's managing agent, Pyne, induced the appellant and Orechkin, his joint owner, to accompany him to

look at said apartment house, and consider it on an exchange basis. Having done so they at once decided against the said proposal and all connected therewith. Some weeks or a month later Molley, who it is alleged, besides being engaged in looking after his said apartment house, ran a theatre or something of that kind, mentioned this incident to one Davis, a large real estate owner on both sides of the river who had employed Molley to assist him in his affairs.

The mention of it to Davis seems to have set him thinking that he might by trading some of his properties acquire from appellant and Orechkin their King George hotel now in question. Ultimately Davis made such a deal with them, and some months later the respondent's managing agent heard of it and conceived the idea that as result thereof he could rest an action thereon.

The said Davis had died we are told before this action came to trial and Molley was not called as a witness, and the evidence of Molley's proposal and the resultant report thereof is relied upon for the conclusions sought to bring this case within the principles acted upon in the cases of *Toulmin* v. *Millar* (1), *and Burchell* v. *Gowrie and Blockhouse Collieries* (2).

I cannot see any resemblance between the meagre facts presented herein and those respectively acted upon in said cases cited to us.

I cannot see how or why, as held by the learned trial judge herein, the agent's act in each case was, by what he did, the efficient cause of the sale, or more correctly on the facts, the mere use by Davis of the knowledge of what was going on, can be said to have been an efficient cause produced by the respondent, upon the facts presented as bringing about the exchange and entitling it to claim compensation.

Moreover I am not prepared to hold, in face of the requirements of the statute above quoted, such remote and far from being necessary results of the respondent's acts as within the meaning of the said Act's requirements, even if the above quoted contract of the appellant's wife could have been looked at otherwise than I have set forth above. Independently of a written contract by the seller with the

(1) 58 L.T. 96.

(2) [1910] A.C. 614.

1923
KATZMAN
v.
OWNAHOME
REALTY CO.
Duff J.

agent there is nothing in all that is relied upon to render appellant liable.

I therefore am of the opinion that this appeal should be allowed with costs throughout and the respondent's action be dismissed with costs.

DUFF J.—I think Mr. Davis' point is well taken that the memorandum of the 22nd February, 1922, cannot avail the respondent in answer to the objection based upon the statute (6 Geo. V, c. 24, sec. 19). Mrs. Katzman in the memorandum describes herself as the proprietor because the property which was the subject of the arrangement is described as " my property." The respondent cannot allege that Mrs. Katzman was signing as the agent of her husband without contradicting the statement implied in this description, that she is the owner of the property for which the agent is to find a purchaser. *Formby Bros.* v. *Formby* (1).

The objection having been raised for the first time at this stage, I think there should be no costs of the appeal to the Appellate Division.

ANGLIN J.—The plaintiff (respondent) seeks to recover from the defendant (appellant), Morris Katzman, a commission on the sale for $115,000 of an hotel property in the city of Windsor to one John Davis, a resident of the city of Detroit. The property in question belonged to the appellant and one Jake Orechkin. In addition to asserting that action by the plaintiff was not the efficient cause of the sale being brought about, the defendant invokes the protection of the statute 6 Geo. V (1916), c. 24, sec. 19, as amended by 8 Geo. V (1918), c. 20, s. 58, whereby there was added to section 13 of the R.S.O. 1914, c. 102, the following clause:

> No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless the agreement upon which said action shall be brought shall be in writing separate from the sale agreement, and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

To meet the requirements of this section the appellant produces the following contract:

(1) [1910] 102 L.T. 116.

Description of property to be sold by Ownahome Realty Construction, King George Hotel.

Price, $125,000.
Cash, $25,000.
$3,000 every 6 months.

40 Rooms.
Size of Lot, 60 by 130.
Two stores on Sandwich, Bar on corner, 1 on Goyeau.
Rents now at $12,000.
(On back of card).
Owner's name, Mrs. B. Katzman.
Property for sale at Sandwich St. at Goyeau.
Address, 24 Hall Ave.

Border Cities, 7th June, 1921.

In the event of the Ownahome Realty finding a purchaser for the property described hereon, I agree to pay them a commission of 3 per cent on the selling price.

B. Katzman.

The learned trial judge held that Morris Katzman had authorized his wife, Becky Katzman, to sign the document which I have quoted, that she did in fact sign it and that her doing so was subsequently ratified by her husband. Subject to a question of law as to the possibility of ratification by an undisclosed principal of an act which his agent has purported to do not as agent but as principal, these findings of fact appear to be sufficiently supported by evidence; but in any event, in the view I take of the appeal, they need not be questioned.

It will be noted that in the contract produced and sued upon Mrs. Becky Katzman describes herself as the owner of the property—"Owner's name, Mrs. Becky Katzman." In addition to signing the document in her own name without any indication that in doing so she was acting as agent for her husband, she expressly purported to contract for payment of the commission as owner of the property to be sold, thus distinctly negativing such agency. Under these circumstances I am of the opinion that parol evidence was not admissible to shew that she was in fact contracting as agent for her husband; *Humble* v. *Hunter* (1); *Formby Bros.* v. *Formby* (2). Such evidence would necessarily tend to contradict a material statement in the writing in which the contract is embodied and upon which the plaintiff must rely to satisfy the statute. I am therefore of the opinion

(1) [1848] 12 Q.B. 310. (2) 102 L.T. 116.

1923

KATZMAN v. OWNAHOME REALTY CO.

Anglin J.

that the contract produced does not satisfy the requirements of the statute so as to enable the plaintiff to maintain this action as against the present appellant, Morris Katzman.

The action was originally brought against Morris Katzman, Jake Orechkin and Mrs. Morris Katzman. It was properly dismissed at the trial as against Orechkin, no attempt having been made to shew agency for him on the part of Mrs. Katzman. Judgment was given against the two Katzmans. In the Divisional Court the plaintiff was put to its election whether it would treat Mrs. Katzman as a principal or as an agent for her husband in making the contract for commission. Desiring to hold Morris Katzman it determined to treat his wife as agent in the transaction. The appeal of the defendant, Mrs. Morris (Becky) Katzman, was accordingly allowed and the action against her dismissed, the judgment against her husband being maintained. This may have been a misfortune for the respondent as its present failure to succeed as against Morris Katzman may leave it without redress in respect of a commission for which it might possibly otherwise have been entitled to hold Mrs. Katzman personally liable.

MIGNAULT J.—The respondent could not bring its action against the appellant claiming a commission for the sale of real property, unless there was an agreement in writing to pay it, separate from the sale agreement, and signed by the party to be charged therewith or some person thereunto by him lawfully authorized. 6 Geo. V (Ont.) c. 24, sec. 19, as amended by 8 Geo. V, c. 20, sec. 58.

The agreement on which the respondent's right to bring this action is based is however signed not by the appellant but by the latter's wife who describes herself and signs as owner of the property to be sold.

The learned trial judge nevertheless found on parol evidence that the appellant authorized his wife to sign the agreement as his agent and subsequently expressly ratified her act. He gave judgment for the respondent and his judgment was unanimously affirmed by the Second Appellate Divisional Court of Ontario.

The appellant, for the first time, raised the objection in this court that the respondent cannot by parol evidence

contradict the agreement in writing produced by it in support of its action and shew that the appellant's wife made this contract on the appellant's behalf.

To my regret, because this objection should have been made earlier, I find myself constrained to hold that it is well taken. In other words, where a plaintiff produces and relies upon an agreement which was entered into by a third person as principal, parol evidence is not admissible to shew that such person contracted merely as the defendant's agent. *Humble* v. *Hunter* (1); *Formby Brothers* v. *Formby* (2).

There is no possible doubt that the appellant's wife signed the agreement as principal, and only by contradicting it could the respondent establish its right of action against the appellant. This it cannot do.

The appeal should be allowed with costs and the respondent's action dismissed with costs. No costs to either party in the Appellate Divisional Court.

Appeal allowed with costs.

Solicitors for the appellant: *Davis & Healy.*
Solicitors for the respondent: *Zeron & McPhee.*

JOHN J. SHIELDS .....APPELLANT;

AND

THE LONDON AND WESTERN TRUSTS COMPANY, ADMINISTRATOR OF THE ESTATE OF WILLIAM B. SHIELDS DECEASED ..... RESPONDENT.

1923
*Nov. 15.
*Dec. 4.

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

Statute of Limitations—Possession of land—Interruption—Proceedings for partition—Declaratory judgment.

In 1916 proceedings were taken for partition and sale of land which had belonged to the deceased father of the parties. S., one of the parties thereto and a tenant in common with the others, had then had exclusive possession of the land for less than ten years. The proceedings resulted in a judgment declaring five of said parties, including S., to be the owners of the land and the partition and sale were not

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) 12 Q.B. 310.

(2) 102 L.T. 116.

1923

SHIELDS v. THE LONDON AND WESTERN TRUSTS CO.

proceeded with. In 1922 proceedings were again taken for partition in which S. claimed a statutory title by possession of the whole land. *Held,* that the former judgment had interrupted the continuance of possession by S. and his title had not accrued.

Whether or not a summary proceeding for partition and sale shall be fully tried by a judge in chambers or an issue be ordered to try some important matter raised is a question of practice and procedure with which the Supreme Court will not, as a rule, interfere.

Per Anglin and Mignault JJ. It is also a matter of judicial discretion and it cannot be said that the order of the Appellate Division in this case, that it should be tried in chambers, was a wrongful exercise of such discretion.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment of a judge in chambers directing the trial of a question of law and ordering the partition and sale of land as applied for.

Proceedings by originating summons were taken for the partition and sale of land. When the case came before the judge in chambers the appellant claimed title to the whole land by virtue of the Statute of Limitations and the judge directed a trial to determine the title. On appeal his order was set aside, the Appellate Division directing that the case should be tried summarily and also deciding the question of title in favour of the respondent and directing a reference to take the necessary proceedings for partition and sale. From that judgment the appeal was taken to this court.

Betts K.C. for appellant.

John C. Elliott K.C. for respondent.

THE CHIEF JUSTICE.—I think this appeal fails and should be dismissed with costs.

I am inclined to think that the judgment of the Divisional Court from which this appeal has been taken dealt substantially with matters of procedure and practice of the courts of Ontario and in accordance with our practice would not be interfered with by this court, unless some manifest injustice was shown of which there is here no evidence whatever.

Without, however, basing my judgment upon that ground, I am of the opinion, on the substantial question in this appeal, as to whether the Statute of Limitations ceased running in favour of the appellant and his mother and sister by reason of the judgment for administration and partition or sale pronounced in the proceedings of

1916-1919, that it did and that consequently the appellant's claim that a statutory title by possession had subsequently ripened and accrued to him cannot be upheld.

That judgment for administration and partition of sale was one for the benefit of all parties interested (including the present appellant) and they were all bound by it. Appellant's claim to add the years of his possession of the lands and premises in question previous to that judgment in order to make up his statutory possessory claim cannot, therefore, be allowed in my view of the effect of the 1916-1919 proceedings and judgment.

IDINGTON J.—The appellant raises very many points relative to the correct practice and procedure to be taken in Ontario courts by those seeking partition of real estate held by tenants in common as respondent does herein as administrator of the estate of one William B. Shields, deceased, and one of five who had been duly declared owners of the equity of redemption in certain lands.

Indeed on a motion of the four surviving owners, including the appellant, and respondent as representative of said deceased, the said equity of redemption had been declared to be vested in the appellant and his said co-owners.

The uniform jurisprudence of this court has been to refuse to exercise its jurisdiction in such matters unless some grave violation of natural justice has been involved in the departure from the correct practice or procedure.

Therefore the appellant has no grounds of complaint herein, in his vain attempt to get a very serious injustice done to the respondent, one of his co-tenants.

His attempt to set up the Statutes of Limitations is rather absurd as well as unjust in face of the past history of the property in question and the litigation it has gone through.

And in face of his repudiation of any claim thereunder for himself in his answer by affidavit to the originating motion below, it seems rather absurd.

I think the judgment of Mr. Justice Middleton speaking for the majority of the court below is right.

This appeal should be dismissed with costs.

1923

SHIELDS v. THE LONDON AND WESTERN TRUSTS CO.

Duff J.

DUFF J.—The appellant has failed to advance adequate reasons for interfering with the decision of the Appellate Division on the ground principally relied upon in support of the appeal, namely, that the procedure followed is not a procedure sanctioned by the Ontario practice. The procedure approved by the majority of the Appellate Division seems to be a convenient one, and the controversy raised in relation to it is not a controversy as to rights or as to the jurisdiction of the Supreme Court of Ontario, but one as to whether this or that mode of bringing the points in dispute up for adjudication is the correct one. It would not be in consonance with the principles which have governed this court in dealing with such matters to examine questions of this character in the absence of some very special circumstances such as are not present in this case.

Another ground of appeal is set up, and that is that the Appellate Division is wrong in its conclusion that the appellant has failed in his contention based upon the Statute of Limitations. A judgment for administration and partition was pronounced in 1916, and a vesting order was granted on the 29th May, 1919. I am not satisfied, having regard to what took place before the Master in 1917, that by virtue of the master's report in that year a new starting point did not arise for the running of the statute. It is at least arguable that the case is within the last paragraph of Lord Cairns' judgment in *Pugh* v. *Heath* (1), where it is laid down that sec. 6 of the Act

in defining when the right shall be deemed to have accrued is not necessarily exhaustive.

I do not read the judgment of Middleton J. as proceeding upon the ground that what took place amounted to a statutory acknowledgment of title. However that may be, I am satisfied that in effect what was done amounted to the bringing of the action within the meaning of sec. 5, "action" being defined by the first section as including "any civil proceeding."

The appeal should be dismissed with costs.

ANGLIN J.—The Ontario Consolidated Rule of Practice No. 615 reads, in part, as follows:—

615. (1) An adult person entitled to compel partition of land or any estate or interest therein may, by originating notice served on one or more of the persons entitled to a share therein, apply for partition or sale.

(1) 7 App. Cas. 235, at page 238.

(2) The Master shall proceed in the least expensive and most expeditious manner for partition or sale, the adding of parties, the ascertainment of the rights of the various persons interested, the taxation and payment of the costs and otherwise.

Rule 606 reads, in part, as follows:—

606. (1) The judge may summarily dispose of the questions arising on an originating notice and give such judgment as the nature of the case may require or may give such directions as he may think proper for the trial of any questions arising upon the application.

Rule 615 confers a special summary jurisdiction. The conditions of its exercise are:—

(*a*) that the applicant shall be "an adult person entitled to compel partition."

(*b*) that the notice of application shall be "served on one or more of the persons entitled to a share" in the land, estate or interest sought to be partitioned.

By an originating notice of motion, served only on the appellant, the respondents, as administrators of the estate of the late William B. Shields, applied in November, 1922, to a judge of the High Court Division of the Supreme Court of Ontario for a judgment for the partition or sale of the north part of lot 6, Con. 9, Tp. Mosa, Co. Middlesex, containing about 100 acres and said to be worth some $4,000 or $5,000. This farm had belonged to the late James Shields, father of the appellant and of the late William B. Shields. James Shields died intestate in 1895, leaving him surviving a widow, now dead, and eight children.

In 1916 a judgment for the administration and partition or sale of the estate of the late James Shields was pronounced on the unopposed application of two of his sons, Andrew J. and George Shields. Upon the reference then directed the Local Master at London reported that the persons entitled to the equity of redemption in the lands formerly owned by the intestate James Shields were

Jessie Shields, John J. Shields, James Shields, the estate of William B. Shields and Catherine Leitch, as tenants in common, subject to the dower interest of Annie Shields, widow of the intestate.

Andrew and George Shields, the applicants for administration and partition, were found to have no interest in the lands of their deceased father. This report was upheld on appeal by Mr. Justice Kelly, the Appellate Divisional Court and eventually by this court. Subsequently on the 29th of May, 1919, Mr. Justice Sutherland, on the application of the several heirs so found entitled, including the

1923
SHIELDS
v.
THE LONDON AND WESTERN TRUSTS CO.
Anglin J.

present appellant and Annie and Jessie Shields, made an order (suggested to have been inofficious) confirming the report of the local master and vesting *inter alia* the lands now in question in the persons who had been found entitled by the local master. No further steps appear to have been taken in those proceedings.

On the return of the application now before us made by the present respondents, the appellant filed an affidavit in which he deposed in part as follows:—

4. Since the death of my said father, the occupation of the said land has been as follows:

Ever since the death of my said father and up to the month of September, 1921, I and my sister Jessie, and my mother, Annie C. Shields, resided continuously upon the said lands as our home and farmed the same in conjunction with the remaining lands constituting the farm of my said late father and adjoining the land in question herein. Up to the year 1909, various other members of the family also resided upon the said farm and helped to do the work thereon.

5. Since the year 1909 the said farm, including the lands in question herein have been occupied and farmed exclusively by myself and my said sister, Jessie Shields, and my said mother, Annie C. Shields, up to the present time, with the following exceptions:

(*a*) My mother, Annie C. Shields, died on the said farm in the month of September, 1921.

(*b*) My brothers, William Shields and James Shields, paid occasional visits in the winter months to the vicinity of the said township of Mosa and on such occasions stayed with me at the said farm, but never on such occasions exercised any acts of ownership over the said farm or any part thereof or claimed to be the owners thereof.

6. It was always the understanding in the family, with the exception perhaps of my brothers Andrew J. and George, that the lands and premises in question herein were to be the property of my said sister Jessie, and my said mother, Annie C. Shields.

7. I claim that my sister, Jessie Shields, and my said mother, Annie C. Shields, and myself, if I desired to assert such a claim, which I do not, have by reason of the exclusive occupation by our three selves of the said farm for a period exceeding the last ten years, have acquired an absolute title by possession to the said lands.

8. My said sister, Jessie Shields, and myself are at present in exclusive possession of the said farm, including the lands in question herein.

Notwithstanding this disclaimer, however, the appellant in his factum says:—

They (the respondents) are aware that the land in question has been the home of the present appellant and his sister, Jessie Shields (to the exclusion of all other members of the Shields family), for a long series of years and that *these two claim absolute ownership of the said lands* and deny any title whatever thereto in the applicant.

And again:

The said appellant and the said Jessie Shields have continued in exclusive possession of the said lands as owners thereof, and they claim that in or about the year 1920 * * * the ten years prescribed by the

Statute of Limitations expired and that they became forthwith invested with the absolute title to the said lands.

I take it, therefore, that the disclaimer of the appellant was intended to operate only in favour of his sister, Jessie Shields, and that, if possessory title in her should not be established, he intends to retain and assert his interest as a co-owner. Service on him was, therefore, probably a sufficient compliance with the requirement of Rule 615 that the notice of the application for partition or sale should be "served on one or more of the persons entitled to a share."

The substantial objection raised to the application is that the applicants' title to the land has been extinguished since the former administration proceedings were had, by the expiry of the ten years' period prescribed by the Statute of Limitations, which was running when those proceedings were taken. The question for determination was whether they stopped the running of the statute and established a new point of commencement.

When the application came on for hearing before Mr. Justice Smith, in chambers, he took the view that the allegation of the appellant challenging the title of the respondents as barred by the Statute of Limitations raised a question that should not be disposed of on a summary application. He accordingly dismissed the motion for partition and directed that the costs of it should be costs in any action to be brought by the appellant for the determination of the question that had arisen.

On appeal this order was reversed by a Divisional Court which held (the Chief Justice of the Common Pleas dissenting) that the question of title was purely one of law and could readily and conveniently have been disposed of by the judge in chambers, all the necessary material having been before him, and could then be so dealt with by the Divisional Court—in fine, was such a question arising on the originating notice as r. 606 contemplates should be so dealt with.

The court held that the possession of the appellant and Annie C. Shields and Jessie Shields had been so interrupted by the proceedings for administration and the investigation and the determination of title therein, that the running of the Statute of Limitations in their favour had been thereby stopped. Mr. Justice Middleton, de-

1923

SHIELDS v. THE LONDON AND WESTERN TRUSTS CO.

Anglin J.

livering the reasons for judgment of the majority of the court said:—

> I regard this (the Master's report in the earlier proceedings determining the interests of several parties, confirmed on appeal) as a judicial declaration of the rights of the co-owners, which is not now subject to review. It is true that nothing is said in the report as to the actual occupation of the lands and that it is quite consistent with the Master's finding that some one or other of the tenants in common may have been in exclusive possession and that if nothing had intervened this possessory title would in the end have ripened into a title under the statute good as against other tenants in common. But I think this gave a new starting point for the statute for no more effective acknowledgement of title can be imagined than a declaratory judgment of a court having competent jurisdiction.

Speaking of the vesting order, the learned judge added:

> Much might be said as to the necessity of the application for this order or as to its operative effect, but at any rate it is an acknowledgement by John J. Shields of the title of his co-tenants for he was a party to the application.

The Chief Justice dissented from the judgment on both points.

So far as the present appeal challenges the propriety of the Divisional Court determining the issue under the Statute of Limitations, the question presented is purely one of the discretion to be exercised under r. 606. It is essential to the summary jurisdiction conferred by r. 615 that the applicant should be "an adult person entitled to compel partition." Whether the respondents met that requirement was controverted by the present appellant setting up title by possession in himself and his mother and sister. That question had to be determined before the special jurisdiction conferred by r. 615 could be exercised. Should the determination of it be by the judge applied to or the court hearing an appeal from his order, or should a trial to decide it be directed? Obviously the matter was one for the exercise of judicial discretion and, having regard to all the circumstances, it is impossible to hold that the discretion of the Divisional Court was wrongly exercised, if, indeed, the matter be not one of practice and procedure on which we are not accustomed to entertain an appeal.

But I entirely agree with the view, which I understand to be held by Mr. Justice Middleton, that if there be any serious difficulty in ascertaining the applicant's status to apply under r. 615 or the rights of the parties, and especially if material facts are controverted (*Lewis* v. *Green*

(1)), the discretion given by r. 606 would be properly exercised by directing that an action be brought or an issue tried to determine these matters. To such cases the practice approved in *Smith* v. *Smith* (2), and *Stroud* v. *Sun Oil Co.* (3), is still applicable—Rule 606 (1) was in force as Rule 941 of the Consolidation of 1897, when those cases were before the court.

As to the substantial question whether the Statute of Limitations ceased running in favour of the appellant and his mother and sister by reason of the proceedings of 1916-19 for administration, etc., with the utmost respect, I am inclined to think that an affirmative conclusion cannot be based on anything in the nature of an acknowledgment. The only acknowledgment recognized by the Statute of Limitations (R.S.O. [1914], c. 75, s. 14) is an acknowledgment in writing *signed by the person in possession.* Because the answer to a Bill in Chancery required to be signed by the defendant it was accepted as a sufficient acknowledgment. *Goode* v. *Job* (4); and so with an affidavit, *Tristram* v. *Harte* (5). The notice of motion for the vesting order in the present case does not serve as such an acknowledgment because not signed by the applicants in person. The signature of it by their solicitors, as agents, is insufficient. *Ley* v. *Peter* (6). I fail to find in the administration proceedings anything in the nature of an acknowledgment which would satisfy the statute.

But the judgment for administration and partition or sale, pronounced in 1916, I think stopped the running of the statute. Admittedly the appellant's mother and sister had not then acquired title by possession. The present respondents and the other persons found entitled by the master still owned their respective interests in James Shields' estate. The judgment for administration, etc., was, when pronounced, a judgment for the benefit of all parties interested and they were all bound by it. Any action which the present respondents could have brought to recover possession of their interest in the land or to try the question of title thereto would have been stayed

(1) [1905] 2 Ch. 340.
(2) 1 Ont. L.R. 404.
(3) 7 Ont. L.R. 704; 8 Ont. L.R. 748.
(4) [1858] 1 E. & E. 6.
(5) [1841] Long & T. 186.
(6) [1858] 3 H. & N. 101.

1923
SHIELDS
v.
THE
LONDON AND
WESTERN
TRUSTS CO.
Anglin J.

by the court on application, because such matters were proper subjects for determination in the administration proceedings and full relief could be had under the existing order, r. 615 (3) Williams on Executors, 11 ed. pp. 1624-6. The administration judgment operated not only in favour of the applicants for it and of creditors but also in favour of the estate—that is, of the personal representative. Re *Ballard* (1). It was effective as a judgment in favour of all the heirs of James Shields who might substantiate their respective rights and interests in his estate in the course of the proceedings. The present respondents' interest was so established and in their favour the statute ceased running when the judgment for administration was pronounced. *Finch* v. *Finch* (2); *Uffner* v. *Lewis* (3).

The order for sale, likewise for the benefit of all parties interested, was quite inconsistent with the Statute of Limitations continuing to run in favour of one or more of them. In re *Colclough* (4); *In re Nixon's Estate* (5); *Irish Land Commission* v. *Davies* (6).

Rather, therefore, because the administration proceedings of 1916-19 should be regarded as an action (*In re Fawsitt* (7), brought for the assertion and establishment of the present respondents' interest in the lands in question and that interest was therein established, than because any acknowledgment of their title by the appellant and his mother and sister was involved in them, I am disposed to agree with the conclusion of the Appellate Divisional Court that it sufficiently appears that possessory title in Annie and Jessie Shields, such as would destroy the respondents' status as applicants for partition, does not exist.

However, any adverse determination by the present judgment of the claim to a possessory title put forward on behalf of Jessie Shields and of whoever is now entitled to represent her dead mother would not be binding upon them. They are not, as yet, parties to the proceedings and, when brought in in the master's office, will be at liberty to assert whatever rights they may be advised to claim and to require their determination under clause 3 of r. 615.

(1) 88 L.T. Jour. 379.
(2) 45 L.J. Ch. 816.
(3) 27 Ont. A.R. 242, at p. 247.
(4) [1858] 8 Ir. Ch. R. 330, 337-8.
(5) [1874] Ir. R. 9 Eq. 7.
(6) [1891] 27 L.R. Ir. 334.
(7) 30 Ch. D. 231.

1923

SHIELDS v. THE LONDON AND WESTERN TRUSTS CO.

Mignault J.

For these reasons the appeal in my opinion fails and should be dismissed with costs.

MIGNAULT J.—I am of opinion that the appeal should be dismissed with costs for the reasons stated by my brother Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Cronyn, Betts & Black.*

Solicitors for the respondent: *Ivey, Elliott, Weir & Gillanders.*

ONTARIO METAL PRODUCTS COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (DEFENDANT) ..... } RESPONDENT.

1923

*Nov. 13, 14.

*Dec. 4.

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

Insurance, Life—Application—Statements by insured—Non-disclosure—Materiality—R.S.O. [1914] c. 183, Insurance Act—5 Geo. V, c. 20, s. 19 (O).

The Ontario Insurance Act Co., sec. 156 (5), provides that no inaccuracy in the statements contained in an application for insurance shall avoid the policy unless it is material to the contract. A policy of life insurance declared that "the policy and the application * * * constitute the entire contract between the parties" and that the statements made by the insured should "be deemed representations and not warranties." In his application the insured declared that the statements and answers to the Medical Examiner were true and were offered to induce the company to issue the policy. The Medical Examiner by question 17 asked: What illnesses, diseases, injuries or surgical operations have you had since childhood. Give the number of attacks, dates, duration, severity, etc., of each? 18. State every physician who prescribed for you or treated you or whom you consulted in the preceding five years, and the nature of the complaints with full details under question 17. In reply to questions 19 and 20 the insured declared that he had answered the first two questions fully.

Held, that questions 17 to 20 must be read together; that the insured was only required by Q. 18 to state what physicians had prescribed for or treated him or had been consulted in respect to the illnesses, etc., to be specified under Q. 17 which did not comprise those which could be termed trivial ailments.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the appellant.

The facts are stated in the above head-note.

R. S. Robertson K.C. and *Lionel Davis* for the appellant.

Hellmuth K.C. and *Arnoldi K.C.* for the respondent.

THE CHIEF JUSTICE.—I would allow this appeal with costs here and in the Division Court, and restore the judgment of the trial judge.

I concur in the reasons stated by my brother Anglin J.

IDINGTON J.—I so, in the main, agree with the reasoning of the learned trial judge and his conclusion of fact in light of the relevant law to be applied thereto,, and so entirely with the reasoning of the learned Chief Justice of the Common Pleas, presiding in the Second Appellate Division of the Supreme Court of Ontario from which this appeal is taken, that I see no useful purpose to be served by repeating same here, but would allow this appeal with costs here and below, and restore the judgment of the said learned trial judge.

On the preliminary objection that the said learned Chief Justice takes (as to dropping the jury) I am, though inclined to think the jury could, by reason of common sense, have reached the same conclusion as the learned trial judge, yet, owing to some rulings of his in the course of the trial admitting, against objection of counsel, evidence respondent's counsel pressed for, it might have led to a new trial, if unfortunately the jury had decided otherwise than he has done. Apart from that minor and perhaps trivial exception I accept without reservation his entire reasoning.

I may be permitted to submit with great respect to each of the members of the majority of the court below, that the conception expressed by them in varying terms that the deceased had consulted, and that his treatment had been prescribed by, Dr. Fierheller, is, I submit, not quite accurate.

The said doctor expressly declares he had made no examination of deceased and seems to me to have merely assented to administering a treatment the deceased desired because his wife had been the better of some such like treatment, using probably the same, but it is not clear

whether exactly the same, elements by way of injection instead of taking them through the mouth.

The deceased evidently thought he was entitled to be his own doctor directing a medical man to do as he (the deceased) desired, and hence the mistaken answer inadvertently given to Dr. McCullough who however says, if known to him, it would not have changed his recommendation to accept respondent's application but would have led him to set forth in different terms the answers he wrote down for deceased to sign and which are the basis of all the trouble.

It is for the court here to decide and not for Dr. Merchant whether or not that is good defence.

DUFF J. (dissenting).—This appeal, in my opinion, should be dismissed. The evidence is, I think, conclusive that any competent medical examiner, if he had been informed of the facts of the treatments of Mr. Schuch by Dr. Fierheller, would have reported those facts to the head office, as it would have been his duty to do, with every probability that the policy would not have issued without a further examination.

Material facts, in the relevant sense, are facts which might influence the mind of a reasonable man in deciding upon the acceptance or rejection of the risk or the rate of premium. In determining the question it is not the state of mind of the particular insurer which is to be considered, but

> the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter in weighing the risk and considering the premium.

Nova Scotia Marine Ins. Co. v. *Stevenson* (1).

> That is material which a reasonable man would regard as material.

Joel v. *Law Union and Crown Ins. Co.* (2). The mis-statements were consequently mis-statements material to the risk and sufficient to avoid the policy unless there is something in the statutory law through which the appellants can escape that result. The appellants' argument proceeded upon the assumption that we must apply our minds to a consideration of the probable results of a further examination of the applicant; the law, I am quite satisfied,

(1) [1894] 23 Can. S.C.R. 137, at page 141.

(2) [1908] 2 K.B. 863.

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

Duff J.

does not require us to enter upon any such speculation. The applicant, stating that he had not only had no illness, disease, injury or surgical operation other than those mentioned, but that no physician or practitioner had prescribed for him or treated him or been consulted by him within the preceding five years, placed before the company a misstatement of the facts which precluded the very line of inquiry which, as I have already said, the evidence, I think quite conclusively, shews would have been pursued.

The next question concerns the effect of section 156 (5) of the Ontario Insurance Act. The policy provides that

> this policy and the application, a copy of which is indorsed hereon or attached hereto, constitute the entire contract between the parties hereto;

and the application so made part of the contract contains the declaration:

> All the following statements and answers and all those I make to the Company's Medical Examiner in continuation of this application are true and are offered to the company as an inducement to issue the proposed policy.

The appellants argue quite cogently that if these provisions stood alone they would, if no statutory enactment intervened, have the effect of making the policy conditional upon the truth of the statements in the application irrespective of their materiality. Then it is said that by force of section 156 (5) this implied condition—implied by law—cannot take effect; that section requires that the condition should be expressly limited in its operation to statements material to the contract. The answer given by Mr. Hellmuth is, I think, conclusive. The same clause which contains the sentence just quoted qualifies it by the stipulation,

> all statements made by the assured shall, in the absence of fraud, be deemed representations and not warranties.

The concluding sentence of the clause shews that "statements" here includes statements in the application.

That stipulation, quite apart from statutory enactment, would clearly have the effect of limiting the implied condition to cases in which the representations are in relation to something material to the contract, and is consequently, in my opinion, a sufficient expression within the meaning of section 156 (5) that the implied condition is so limited

ANGLIN J.—The plaintiffs sue as beneficiaries under an insurance policy for $50,000 on the life of the late Frederick Joseph Schuch. The sole defence to their claim is based on alleged misrepresentation and suppression in the application for the policy by the insured of material facts in regard to his health and to his medical attendance during the five years immediately preceding the date of the application. This misrepresentation or suppression is charged to have been wilful. Three issues are thus presented: Was there misrepresentation or concealment of facts? If so, was such misrepresentation fraudulent? And: Were such facts material to the risk?

A judge of great experience, and who is always exceedingly painstaking, tried the action and in a carefully considered opinion determined that there had been no misrepresentation or suppression of material facts and accordingly gave judgment for the plaintiffs. In the Appellate Divisional Court the learned Chief Justice of the Common Pleas presiding reached the same conclusion upon an independent examination of the evidence. The contrary view, however, was taken by a majority of the court, who were of the opinion that material facts had been wilfully suppressed and that the insurance was thereby avoided. Under these circumstances, I have thought it my duty to examine the entire record with more than ordinary care in order to make up my own mind upon the issues involved. *Mersey Docks and Harbour Board* v. *Proctor* (1).

The insurance policy contains the following provision:

> This policy and application herefor, copy of which is indorsed hereon, or attached hereto, constitutes the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and no such statement of the insured shall avoid or be used in defence to a claim under this policy unless contained in the written application herefor, and a copy of the application is indorsed on or attached to this policy when issued.

The misrepresentations of fact relied upon are found in a portion of the application, thus made part of the contract, under the heading, "Statements to Medical Examiner." This heading is immediately followed by the note:

> These must be recorded in the handwriting of the Medical Examiner, who should satisfy himself that the applicant's statements and answers are full and complete.

(1) [1923] A.C. 253, 258-9; 92 L.J. K.B. 479.

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

Anglin J.

This portion of the application was subscribed by the applicant, below the words,

I certify that each and all the foregoing statements and answers were read by me and are fully and correctly recorded.

In order to determine whether there was the misrepresentation by the insured charged against him (having regard to the form of the questions, concealment or suppression of material facts would amount to misrepresentation) it is essential, first, to ascertain the effect of the questions put to the insured, to which it is said he gave untrue answers, and then to form a correct appreciation of the evidence in regard to the facts relied on to support the allegation that the answers were untrue. These questions and answers are numbered 17 to 21 inclusive and I think it advisable to set them out in full and in the form in which they are found in the printed application. Their true purport and effect will thus be more readily apparent. The italics are mine and indicate the answers filled in in the handwriting of Dr. McCullough, the Medical Examiner, the rest of the extract consisting of printed matter in the document furnished by the insurance company.

17. What illnesses, diseases, injuries or surgical operations have you had since childhood?

Name of disease, etc.	Number of attacks	Date of each	Duration	Severity	Results	Date of complete recovery
Small Pox.....	*one*	*42 years ago*	*unknown*	*unknown*	*unknown*	*unknown.*
Trivial ailments since childhood.	.....	.....	.....	.....	.....	.....
Typhoid? doubtful diagnosis.....	*one*	*10 years ago*	*2 weeks*	*very slight*	.....	*Complete recovery in 2 weeks.*

18. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted, in the past five years.

Name of physicia n or practitioner	Address	When consulted	Nature of complaint	
None.....	.....	.....	.....	Give full details above under Question 17.

19. Have you stated in answer to question 17 all illnesses, diseases, injuries or surgical operations which you have had since childhood? (Answer yes or no.)
Yes.

20. Have you stated in answer to question 18 every physician and practitioner consulted during the past five years, and dates of consultations? (Answer yes or no.)
Yes.

21. Are you in good health?
Yes.

In the first place in regard to the answer to question No. 21, the finding of the trial judge that the insured was

in good health when he applied for and received the policy is abundantly supported by the evidence. Dr. McCullough, the defendant's examiner, so found him and says that nothing deposed to during the trial by Dr. Fierheller would change his opinion. Dr. Clarkson, a leading expert witness for the defence, when the result of Dr. Fierheller's testimony was stated to him on cross-examination, was prepared so to assume. He admitted that

> it would be fair to assume that he had got well over whatever he had been treated for in those earlier years.

The weight of the medical testimony is that the cancer, of which Schuch died in 1920, probably did not exist in December, 1918, when the insurance was taken, and all the witnesses agree that Schuch would then have been entirely unaware of it if it did exist. As the learned trial judge put it, the death of the insured by cancer

> can be eliminated from the case just as would be a death by railway accident.

The actual truth, and certainly the perfect good faith, of the answer made by the applicant to question no. 21 cannot, upon the evidence before us, admit of any doubt. See *Yorke* v. *Yorkshire Ins. Co.* (1).

The group of questions—17 to 20 inclusive—must be read together and effect given to them in the sense in which a layman so reading them would understand them. It is well established law that the preparation of the form of policy and application being in the hands of the insurers, it is but equitable that the questions to which they demand answers should, if their scope and purview be at all dubious, either in themselves or by reason of context, be construed in favour of the insured, especially after his death when we are deprived of the advantage of his version of what occurred upon the medical examination and of any explanation by him of his understanding of the questions and of his reasons for giving the answers to them recorded by the medical examiner. The insurers put such questions and in such form as they please, but they "are bound so to express them as to leave no room for ambiguity." To such a case the rule *contra proferentem* is eminently applicable. *Thomson* v. *Weems* (2); *Life Association of Scotland* v. *Foster* (3); *Fowkes* v. *Manchester and London Life Assur-*

(1) [1918] 1 K.B. 662, 669. (2) 9 App. Cas. 671,687.
(3) [1873] 11 C.S.C. (3rd series) 351, 358, 364.

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

Anglin J

ance Association (1); *Joel* v. *Law Union and Crown Ins. Co.* (2); In re *Etherington and The Lancashire, etc., Ins. Co.* (3); *Condogianis* v. *Guardian Assurance Co.* (4).

The company put two general questions, nos. 17 and 18, followed in each instance by particulars or details indicative of a limitation on their scope. Thus under no. 17 the "Name of Disease, etc.," is asked, the "Number of Attacks," the "Date of Each," its "Duration," "Severity," "Results," and "Date of Complete Recovery," indicating that the question, notwithstanding the generality of its terms, "diseases, injuries, or surgical operations," was intended to be restricted to what might be regarded as specific diseases or specific injuries of a serious nature or which entailed surgical operations, diseases, etc., in respect of which such particulars as are asked might reasonably be expected to be demanded.

Again under question no. 18 the applicant is asked to state the "Name of the physician or practitioner," "Address," "When consulted," and "Nature of complaint. Give full details above under Q. 17"—thus affording fair ground for the assumption that it is only when the applicant had "consulted" a physician and in regard to a complaint which he was required to specify under question no. 17 that the name and address of such physician need be given under question no. 18. Moreover, in question no. 20 the applicant is asked

> have you stated in answer to question 18 every physician and practitioner *consulted* during the past five years and dates of *consultations,*

thus confirming the impression which the particulars given under question no. 18 were calculated to create and may actually have given to both the examining doctor and the assured, that it was only when he had "*consulted*" a physician that the insured was expected to give his name and address. *Noscuntur a sociis* applies. Beal on Cardinal Rules of Interpretation (2nd ed. p. 162); *Ystradyfodwg Pontypridd Main Sewerage Board* v. *Bensted* (5).

In *Connecticut Mutual Life Assurance Co.* v. *Moore* (6), the trial judge, dealing with general questions in a form of

(1) [1863] 32 L.J. Q.B. 153, 157, 159, 160.
(2) [1908] 2 K.B. 863, 886.
(3) [1909] 1 K.B. 591, 596.
(4) [1921] 2 A.C. 125, 130.
(5) [1907] A.C. 264, 268.
(6) 6 App. Cas. 644.

medical examination somewhat similar to those now before us, said to the jury (p. 650):—

They have stipulated that his answers shall form part of the contract which he is about to enter into. They say to him in effect, "You must answer these questions correctly; if from forgetfulness or inadvertence you answer a question incorrectly, we hold the policy void." They have a right to make that stipulation; but it is, in my judgment, a stipulation that should be construed with great strictness. When they put a very general question under a stipulation of that kind, it is only reasonable and just to put on that general question a fair construction; for instance, take the question they put with reference to any other illness, local disease, or personal injury; I think that question must be read in a fair and common-sense way. If the applicant had had a headache the very day before, and had not stated it in his application, it could not be said that this policy was good for nothing simply because he had not stated that; and yet a doctor would tell you that a headache was an illness, and that it came, strictly speaking, within that term. Subject to that limitation, that the questions are to be read in a fair and common-sense way, having regard to all the circumstances surrounding the man, and all the information that the company may reasonably expect to receive, I tell you that, in my view, the company have required the applicant to give correct answers to the questions they put.

And again, referring to a question as to medical attendance and the evidence in regard to it, the judge said (p. 651):—

Now the term "attended" in a policy of this kind must be read in a reasonable manner. The mere circumstance that a man had gone to a physician for some trifling ailment, and had received some care or attention from him, would not, it appears to me, render him the attendant of the applicant in such a sense that it would be necessary to state that he had been his last medical man, or that he had last attended him. It appears to me that the attendance meant is an attendance for something that deserves consideration, and might be expected to be present to the mind of a man when he was making an application of this kind. The object of the question, I presume, is to enable the company to communicate with the last medical man of the applicant, so that if he pleases to give them information they may get it. At any rate they would know who he is then, and have an opportunity of seeing him; but they would not require that, if the applicant had got from him a piece of sticking plaster for a cut finger, his name should be in the application.

Their Lordships (p. 654)

after carefully considering the summing-up of the learned judge * * * are unable to say that the jury was in any way misdirected or misled and a new trial was refused.

Reading questions nos. 17 to 20 together and with the particulars and details asked in respect of them, and having regard to the fact that they were prepared by the company, they should, in my opinion, be construed as requiring the assured to state only diseases, illnesses or injuries of a somewhat serious kind and to give the names and addresses

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

Anglin J.

only of physicians whom he had consulted and who had prescribed for or treated him for some such matters.

Now let us consider briefly the matters the non-disclosure of which is said to establish the untruth of the insured's answers. At intervals during the years 1915, '16 and '17 a physician administered to the late Frederick Joseph Schuch a series of hypodermic injections consisting of a mixture of iron, arsenic and strychnine. Baldly stated, this no doubt looks formidable and would bespeak somewhat important medical treatment, probably warranting an inference that the insured had been suffering from recurrent attacks of a serious disease or illness. But the circumstances must be carefully considered before such a conclusion is reached. For them we must resort to the evidence of Mrs. Schuch, the widow of the insured, and of Dr. Fierheller, who administered the injections and was a witness for the defendants—and the evidence of the latter must be taken as a whole. The learned trial judge in his carefully considered judgment said:—

> The witnesses on both sides gave evidence, as I thought, honestly and with the desire to give their sincere views.

While Dr. Fierheller's use of terms may not at times have been quite precise, the substance of his evidence is clear and I respectfully but emphatically dissent from the animadversion upon his credibility implied, if not expressed, in the judgment of Mr. Justice Latchford and also from the conception of the tenor of his testimony indicated by Mr. Justice Riddell in the Appellate Divisional Court.

In the first place the medicine taken by Schuch was not a specific for any disease. It was a tonic suitable for a person in a nervous run-down condition ascribable to strain from over-work. The medical evidence is practically in accord on that point. It is likewise common ground that in the case of a person who manifests such a decided aversion to taking medicine through the mouth, as Schuch did, hypodermic administration is devoid of any significance indicative of the existence of serious trouble. It is also stated by Dr. Magner and conceded by Dr. Clarkson that the conditions that led to Schuch's taking this tonic in 1915 and again in '16 and '17 were independent one of the other. It was not a continuous condition of which outbreaks were intermittent. He had no chronic trouble.

The only disease for which it is suggested by the defendants that Schuch was treated by Dr. Fierheller was anæmia; and the sole basis for that suggestion is an unfortunately loose use of the phrase "anæmic condition" by Dr. Fierheller. More than once Dr. Fierheller explained that he did not intend to suggest that Schuch had anæmia, either pernicious or secondary—that he was satisfied he had neither—that he meant nothing more than that

> he was a little pale as a man might be from overwork and being tired—purely that he was pale and had not a very robust appearance. He was a spare, sallow-complexioned fellow.

Much of the medical evidence for the defence is based on the assumption that Schuch in fact had anæmia—notably that of Dr. Merchant and to some extent that of Dr. McMahon.

It is undisputed that Schuch took his business very seriously, that he was a hard-working man at all times and very attentive to business. Mrs. Schuch tells us that he "felt he had to do everybody else's work." In 1915, '16 and '17 his factory was engaged in the manufacture of munitions which entailed a great deal of extra work. During that time Schuch was rarely at home, his wife tells us, leaving early in the morning and returning at midnight. She saw him only on Sundays and he was then unusually tired after the week's work. Yet he never missed a day at the factory and he did not think it necessary to have a medical examination. He did not "consult" a physician during this period.

Mrs. Schuch was under the care of Dr. Fierheller for bronchitis in January, 1915, and, as she "did not pick up," the doctor in February prescribed for her as a tonic the mixture of iron, arsenic and strychnine and he administered it hypodermically. Schuch learned of this treatment and its beneficial effect. Mrs. Schuch describes him as "fussy" about his health and disposed to try any medicine that was in the house. "He took all my cough medicines and that sort of thing." He also took any patent medicines that were about. She adds that he had no illness—"nothing beyond coming home very tired."

Dr. Fierheller made no examination of Schuch. He had never attended him. He cannot remember whether on the first occasion, in March, 1915, he prescribed for Schuch the treatment of iron, arsenic and strychnine, which his

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

Anglin J.

wife had been taking, or whether Schuch did not ask for it and he did not merely accede to his request. He says Schuch's condition did not call for any examination. He was "nervous, tired and run-down," and "that was all." The doctor is quite clear, however, that in 1916 and 1917 Schuch simply came back and said something to the effect —"I am feeling a bit run-down and would like some more of those treatments"; and the doctor again acceded to his wish. There was no consultation, no advice and no prescription. Schuch responding to these treatments, the doctor adds, showed that he had no chronic trouble but that it was merely a case of an overworked man tired and run down—so it appeared to him. Dr. Magner thought the improvement devoid of significance. Dr. Fierheller adds:—

> He was the sort of man who fussed about himself a bit when he was not just feeling up to the mark and liked the doctor to give him something as a "pick-me-up"—something as a tonic.

That, I think, is a fair synopsis of the circumstances under which Schuch received the hypodermic tonic injections from Dr. Fierheller in 1915, '16 and 17. On the evidence before us he then had no disease. Dr. Clarkson, a leading expert witness for the defendants, said that there was nothing in Dr. Fierheller's evidence as to Schuch's condition and the treatments given him to indicate that he was sick. Even Dr. McMahon, the most uncompromising of the defendants' medical experts, admits that if on examination he found Schuch a healthy man, as Dr. McCullough did, he might have regarded him as "all right" as an insurance risk although informed that he had been taking a mixture of iron, arsenic and strychnine as a tonic.

In my opinion, Schuch might very well, as a reasonable man, *Joel* v. *Law Union and Crown Insurance Co.* (1) have considered that during these years he had not an illness, *Yorke* v. *Yorkshire Ins. Co.* (2), which the insurance company would expect him to mention in answering question no. 17 and that he had not consulted or been prescribed for or treated by a physician within the meaning of question no. 18. Under the circumstances the hypodermic injections might well have been deemed as of no greater significance than would have been the taking of any well-

(1) [1908] 2 K.B. 863, 884. (2) [1918] 1 K.B. 662, 667-8.

known tonic bought at a pharmacy and self-administered —not "treatments" within the purview of question no. 18. Schuch, I think, almost certainly regarded his condition in each of those three years as due entirely to overwork and at most a "trivial ailment" which he was not required to particularize.

Dr. McCullough was quite unable to recall certain matters that Schuch had mentioned to him which he had covered by the term of his own choosing "trivial ailments." Schuch probably did not mention Dr. Fierheller's name to Dr. McCullough; but it is quite likely that he did allude to having been run down from overwork and, with Meredith, C. J. C. P. (notwithstanding Dr. McCullough's denial), I am not entirely satisfied that he was not told about Schuch's having taken a tonic and that the doctor did not forget that incident. He would, quite properly in my opinion, if fully informed as to the taking of the tonic and the attendant circumstances, have described the conditions for which it was taken as "trivial ailments." Dr. McCullough himself tells us that if he had had before him all that Dr. Fierheller deposed to his examination of Schuch would have been just the same, and he would have sent in his report with a recommendation of acceptance. Drs. Magner, King and Rolph agree that if on examination they had found Schuch to be in good health, as Dr. McCullough did, nothing in Dr. Fierheller's testimony would have affected their judgment that he was a good insurance risk. Upon the whole of Dr. Fierheller's evidence, Schuch, during 1915, '16 and '17, in my opinion, did not have an illness or disease which he was obliged to disclose under question no. 17 and it does not appear that he consulted or was prescribed for by a physician.

I am at a loss to understand how Mr. Justice Middleton received the impression that Schuch

> had consulted and had been prescribed for and treated by Dr. George Fierheller on many occasions during the five years.

The only evidence on this aspect of the case is that of Dr. Fierheller. Whatever doubt may exist as to Schuch having been "treated" (I entertain none), there can be no question that neither consultation nor prescription has been shown. Dr. Fierheller distinctly negatives both for 1916 and 1917—and as to 1915, while he at first said that it was

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

Anglin J.

partly true that he had acted on Schuch's suggestion in giving him the hypodermics, he was not clear whether they began by his prescribing them or by Schuch's asking for them. Yet Mr. Justice Middleton's judgment against the plaintiff is based on "the matter (to him) of moment" that Schuch

had during the five years consulted and been treated by Dr. Fierheller at least seventy times,

because he says

it may well be that the physical condition described by Dr. Fierheller would not amount to "illnesses, diseases, injuries or surgical operations" within the meaning of question No. 17, and if the case depended upon that and that alone, I do not think I should have come to the conclusion at which I have arrived.

For reasons already fully stated question no. 18, in my opinion, does not cover the "treatments" which Dr. Fierheller administered. The burden of proving the untruth of the answers made by Schuch rested upon the defendants who alleged it. Taylor on Evidence (11th ed.) Vol. 1, par. 367; *Joel* v. *Law Union and Crown Ins. Co.* (1); *Dillon* v. *Mutual Reserve Fund Life Association* (2); *Elkin* v. *Janson* (3). That burden they have not discharged.

Whether if the answers should be regarded as untrue in the sense that they were inaccurate, the facts not disclosed should be held to be material is perhaps not quite so clear. With the trial judge I strongly incline to think that

if the facts as stated in the evidence by Dr. Fierheller with relation to the condition of Schuch and his treatment had been known to the defendant company it is not at all probable that they would have refused the premium and the issue of the policy, nor do I think that they would even have required the examination which the officials now think they would have required.

The evidence of Drs. McCullough, Magner, King and Rolph, to which allusion has been made, goes far to support these views. If in order to find materiality the court or jury should be satisfied that the matter not disclosed *would*, if disclosed, have led to the risk being declined, I would be disposed to find against materiality. If, on the other hand, it is sufficient that it *might* have led to that result (*Brownlie* v. *Campbell* (4); but see *Smith* v. *Chadwick* (5)), non-materiality is not so obvious. In *Nova*

(1) [1908] 2 K.B. 863, 880.
(2) [1904] 4 Ont. W.R. 351, 354.
(3) [1845] 14 L.J. Ex. 201.
(4) 5 App. Cas. 925, 954.
(5) 9 App. Cas. 187, 196.

Scotia Marine Is. Co. v. *Stephenson* (1), Mr. Justice King delivering the judgment of this court said:

> The test of materiality is the probable effect which the statements might naturally and reasonably be expected to produce on the mind of the underwriter in weighing the risk and considering the premium.

In 17 Halsbury's Laws of Eng. at p. 550, the question is stated to be

> whether the matter represented or concealed was such as would influence the mind of a reasonable and prudent insurer in accepting or declining the risk.

See 6 Edw. VII (Imp.) ch. 41, s. 18, s.s. 2.

What a reasonable man would regard as material is not necessarily what the assured so regarded, *Joel* v. *Law Union and Crown Ins. Co.* (2). See also *Pickersgill, etc.* v. *London and Provincial, etc. Ins. Co.* (3); *Traill* v. *Baring* (4). In the view I have taken, however, that by its requisitions for information the company elected to relieve the insured from any duty to disclose matters in regard to his past health which its questions did not cover (having by an express provision of its policy agreed that only the statements contained in the written application should avail it as matter of defence; *Joel* v. *Union and Crown Ins. Co.* (2); *Ayrey* v. *British Legal and United Provident Ass. Co.* (5)), and that there was in fact no misrepresentation or concealment of anything required to be disclosed by questions nos. 17, 18, 19 and 20 it would seem to be unnecessary to pass upon the question of materiality.

But, whatever should be held on that issue, I agree with the learned Chief Justice of the Common Pleas that the evidence did not warrant the finding of the majority in the Appellate Divisional Court that there had been fraudulent misrepresentation or suppression by the insured. The trial judge, who saw and heard Dr. Fierheller and Dr. McCullough give evidence and was in the best position to pass upon that issue, distinctly held that Schuch had

> " effected the insurance in good faith."

That finding in my opinion should not have been disturbed. *Nocton* v. *Lord Ashburton* (6).

(1) 23 Can. S.C.R. 137, 141.
(2) [1908] 2 K.B. 863, 884.
(3) [1912] 3 K.B. 614, 619.
(4) 4 DeG., J. & S., 318, 330.
(5) [1918] 1 K.B. 136, 141.
(6) [1914] A.C. 932, 945.

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

Mignault J.

I would for these reasons allow this appeal with costs here and in the Divisional Court and restore the judgment of the trial judge.

MIGNAULT J.—Much turns in this case on the proper construction to be placed on the questions and answers contained in the medical examination of the insured, the late Frederick Joseph Schuch, on December 3, 1918. The questions are on a printed form and the answers, as they were required to be, are in the handwriting of the medical examiner, who was Dr. J. S. McCullough of Toronto where the contract of insurance was made. At the end of the examination paper, the insured certified that his answers to the questions were fully and correctly recorded by the medical examiner.

The questions and answers on which the respondent relies to dispute liability are the following. (See statement by Mr. Justice Anglin at page 40.)

These answers were written by Dr. McCullough. Schuch had told him of a surgical operation he had had eight years before for hernia, as appears by the answer to question 28, but the medical examiner did not note it under question 17. Dr. McCullough is unable to tell what statement Schuch made that he described as "trivial ailments since childhood," which were Dr. McCullough's own words.

The respondent contests its liability under the insurance policy on the ground that these answers were untrue, and it also alleges fraud on the part of Schuch. The insurance was effected in December, 1918. Schuch died in the beginning of April, 1920, after an operation for intestinal cancer. It is not pretended that this cancer existed, or if it did that it could have been discovered, at the time of the medical examination. But it is said that in 1915, 1916 and 1917 Schuch consulted, and was treated by, Dr. George Fierheller, of Toronto, for a nervous, run-down and somewhat anaemic condition which fact he should have disclosed, and that consequently the policy is void.

The evidence is almost exclusively of a medical character. Dr. Fierheller described the condition of Schuch at the time of the alleged treatments. Dr. McCullough spoke of his examination of the insured, and then each side called the regulation number of medical experts who testified on the

basis of the evidence given by Dr. Fierheller. There were only three lay witnesses, the agent who solicited the insurance, Schuch's widow, and an employee of the assured.

Schuch, during the years 1915, 1916, 1917 and 1918, was a very busy man engaged in a large business and making out of it more than $25,000 the year previous to the insurance, according to information secured by the respondent's inspector. During a part of this time he manufactured munitions for the government. He never took a holiday. In appearance, he was a rather tall, thin man, with a pale or sallow complexion and had been so for years. His exact weight, at the time of the insurance, was 148 pounds and his height 5 feet and 10½ inches.

Dr. Fierheller states that in the spring of 1915 he was in attendance on Schuch's wife for bronchitis. He prescribed a tonic for her, consisting of a mixture of arsenic, iron and strychnine, known as Zambellatti's preparation, which is a well recognized tonic medicine, and it was administered to her hypodermically. Whether at the doctor's or Schuch's suggestion the witness is unable to say, but at the same time as Mrs. Schuch received these injections they were given to the insured. He received this tonic during March, April and May, about very third day. In 1916 there were four similar treatments in April, three in May, six in August, seven in September and ten in October, the insured going to the physician's office for these injections. In 1917, from August 29th to October 28th, Schuch received an injection of this tonic about every three days. From October 28th, 1917, until August, 1919, there were no more treatments. It is to be observed that Schuch had these tonic injections administered to him entirely at his own request and without having consulted Dr. Fierheller, as the latter expressly says.

Dr. Fierheller, in his examination in chief, described Schuch's condition at the time he received this tonic as " very nervous, run-down and somewhat anaemic." But in his cross-examination he says he used the word anaemic loosely, as signifying that Schuch was a little pale. He did not suggest for an instant that he had anaemia, either secondary or pernicious, or of any kind whatever. Nor is there a word of evidence pointing to Schuch ever having

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

Mignault J.

had anaemia in any shape or form. He was very nervous and run-down, which can be explained by the fact that he was a very hard working man, and his worries would be increased during the war because he was by birth an Austrian although a Canadian citizen. And these treatments did him good.

Before going further, it should be stated that, according to the medical evidence on both sides, no significance is to be attached to the fact that this tonic mixture was taken by means of hypodermic injections instead of by the mouth.

The effect of Dr. Fierheller's evidence, to my mind, is correctly summed up by Dr. Edmund King, when he said:

> Well, after taking all Dr. Fierheller's evidence into consideration, I simply came to the conclusion that this was an overworked man, and after so much hard work he became exhausted and run-down, as we all do and want our holidays, and that he took his holidays in this particular manner by going and getting a boost-up, if I use that expression properly, a boost or a tonic, and whether he had it by the stomach or had it hypodermically, it is of no importance whatever.

The question now is whether, the onus being on it to make out a sufficient case of non-disclosure to avoid the policy, the respondent has discharged this onus. The trial judge thought that it had not; the members of the Appellate Divisional Court, with the exception of the Chief Justice of the Common Pleas who agreed with the trial judge, were of the contrary opinion. To answer it, I have read every word of the evidence most carefully, and I cannot help feeling that the incidents referred to by Dr. Fierheller have been somewhat grossly exaggerated. I think we are entitled, inasmuch as in a case of this nature the judge discharges the duty of a jury, to look at the whole matter in a common-sense way and as a reasonable juryman would, using our knowledge of the world and of men, for it would be news to me that a man who had occasionally taken a tonic, when he felt tired or run-down from overwork, should, when examined for insurance, state this fact to the medical examiner. Certainly a reasonable man would not consider it material to tell the medical examiner that he had taken a tonic from time to time as many thousands do without any reference whatever to their physician.

Moreover the true meaning of the questions submitted by the medical examiner must be considered, especially as they would impress the person examined, assuming him to

be a reasonable man, before coming to the conclusion, as the Appellate Court did, that the answers were untrue and fraudulent.

In my opinion, questions 17 and 18 must be read together. The insured is, by the latter question, asked to state every physician or practitioner who has prescribed for or treated him or whom he has consulted in the past five years. Obviously what is meant here—and any reasonable man would so understand it—is prescription, treatment or consultation in connection with the illnesses, diseases, injuries or surgical operations which the insured was asked to mention by question 17, the more so as the last words of question 18 refer back to question 17. Then consultations are emphasized by the heading "When consulted" under question 18, as they are emphasized in question 20, and here there is no evidence that Schuch ever consulted about any illness Dr. Fierheller, who cannot say that he did. Clearly if a man consulted a physician to find out whether he could safely drink the city water, he would not be required to state that under any reasonable construction of question 18. It must be consultation in connection with the illnesses, etc., enumerated in question 17, and there is no evidence that Schuch was ill, or what is more material, that he knew he was ill.

Dealing now with the duty of disclosure incumbent on the insured under a contract of life insurance at common law, I may refer to the often quoted dictum of Lord Blackburn in *Brownlie* v. *Campbell* (1).

> In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides* (sic.), that if you know of any circumstance at all that may influence the underwriters' opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy.

The dictum of Lord Blackburn may be further supplemented by what Fletcher Moulton L.J., said after quoting it in *Joel* v. *Law Union and Crown Insurance Co.* (2).

> There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know. That duty, no doubt, must be performed, but it does not suffice that the applicant should *bona fide* have

(1) 5 App. Cas. 925, at p. 954. (2) [1908] 2 K.B. 863, at p. 883.

1923

ONTARIO METAL PRODUCTS CO. v. MUTUAL LIFE INS. CO.

Mignault J.

performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it; and if he has fallen short of that by reason of his *bona fide* considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided.

And at page 884, Fletcher Moulton L.J. adds:—

The question always is: Was the knowledge you possessed such that you ought to have disclosed it? Let me take an example. I will suppose that a man has, as is the case with most of us, occasionally had a headache. It may be that a particular one of these headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache undistinguishable from the rest. Now no reasonable man would deem it material to tell an insurance company of all the casual headaches he had had in his life, and, if he knew no more as to this particular headache than that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action. It was what he did not know which would have been of this character, but he cannot be held liable for non-disclosure in respect of facts which he did not know.

Both the Dominion Parliament and the Ontario Legislature have enacted statutes (7-8 Geo. V (Can.), 1917, ch. 29; R.S.O., 1914, ch. 183, as amended by 5 Geo. V (Ont.), ch. 20, sect. 19) concerning the contract of insurance.

Subsections 5 and 6 of section 156 of the Ontario Act are as follows:—

(5) No contract of insurance shall contain or have indorsed upon it, or be made subject to any term, condition, stipulation, warranty or proviso, providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into the contract by the corporation, unless such term, condition, stipulation, warranty or proviso is and is expressed to be limited to cases in which such statement is material to the contract, and no contract shall be avoided by reason of the inaccuracy of any such statement unless it is material to the contract.

(6) The question of materiality in any contract of insurance shall be a question of fact for the jury, or for the court if there is no jury; and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement, or document relating thereto shall have any force or validity.

By the policy issued to Schuch, it is stipulated (reproducing paragraph (*d*) of section 91 of the federal Act) that this policy and the application herefor, copy of which is indorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such state-

ment of the insured shall avoid or be used in defence to a claim under this policy unless contained in the written application herefor and a copy of the application is indorsed on or attached to this policy when issued.

Whether or not this condition and the enactments I have mentioned add anything to the common law, it appears clear that if the insured performed his duty of full disclosure to the extent that a reasonable man would have performed it, if he knew of nothing which a reasonable man would have deemed material or of a character to influence the insurers in their action, the insurance policy cannot be avoided for non-disclosure. Measured by this test, the answer made by Schuch to the question (question 21) whether he was in good health cannot be attacked, because Dr. McCullough, after a careful examination, came to the same conclusion. And the failure to mention that he had taken this tonic at different intervals when he felt tired or run down, does not, if no reasonable man would have deemed it material to tell an insurer of the tonics he had taken under such circumstances, amount to sufficient non-disclosure to avoid the policy.

I do not attach any importance to the *ex post facto* statement of the medical officers of the respondent that, if they had known that Schuch had had this tonic administered to him as stated by Dr. Fierheller, they would have refused to accept the risk. The test is not what they now say they would have done, but what any reasonable man would have considered material to tell them when these questions were put to the insured.

My conclusion is that Schuch disclosed everything which a reasonable man would have deemed material, and even more when he mentioned the small-pox he had had in infancy, and consequently I entirely share the opinion which the learned trial judge formed after hearing all the evidence.

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

Appeal allowed with costs.

Solicitor for the appellant: *Lionel Davis.*
Solicitors for the respondent: *Arnoldi, Grierson & Parry.*

*1923
Oct. 18, 19.
Dec. 21.

MYRYLO LUKEY (DEFENDANT) AND THE ATTORNEY GENERAL FOR SASKATCHEWAN AND THE ATTORNEY GENERAL FOR ONTARIO (INTERVENANTS) ..... } APPELLANTS;

AND

THE RUTHENIAN FARMERS' ELEVATOR COMPANY, LTD., (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Dominion company—Right to sell its shares—Provincial legislation—Prohibiting same without licence—Ultra vires—B.N.A. Act, sections 91, 92—Interpretation Act, R.S.C. (1906), c. 1, s. 30—Companies Act, R.S.C. [1906] c. 79, s. 5—The Sale of Shares Act, R.S.S. [1920], c. 199, ss. 4, 21, 22.

The respondent is a company incorporated by authority of the Parliament of Canada with its head office in Winnipeg. Its agent obtained in the province of Saskatchewan from the appellant Lukey an application for shares in the respondent company for which he gave the promissory notes sued on. This application was forwarded to Winnipeg where it was accepted and the shares allotted to him. Section 4 of "The Sale of Shares Act" of Saskatchewan (R.S.S. [1920] c. 199) provides that "no person shall sell or offer or attempt to sell in Saskatchewan any shares * * * of a company * * * without first obtaining from the Local Government Board a certificate; and in the case of an agent a licence." No such certificate or licence had been obtained by the respondent company or by its agent.

Held, Idington J. dissenting and Anglin J. expressing no opinion, that the provisions of section 4 of "The Sale of Shares Act," in so far as they purport to apply to the sale of its own shares by a Dominion company, are *ultra vires* of the provincial legislature.

Held also, Duff and Anglin JJ. *contra,* that there had been an attempt by the respondent to sell its shares in Saskatchewan within the meaning of section 4 of "The Sale of Shares Act."

Judgment of the Court of Appeal ([1923] 3 W.W.R. 138) affirmed, Idington J. dissenting.

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) reversing the judgment of the trial judge (2) and maintaining the respondent's action.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1923] 3 W.W.R. 138. (2) [1922] 3 W.W.R. 396.

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

A. Blackwood for the appellant Lukey. The shares have been offered for sale or attempted to be sold in Saskatchewan within the meaning of section 4 of "The Sale of Shares Act."

Cross K.C. for the Attorney General for Saskatchewan. This provincial legislation falls primarily within the jurisdiction of the legislature under s.s. 13 of s. 92 of the B.N.A. Act over "property and civil rights in the province," and also under s.s. 16 of s. 92 "matters of a merely local or private nature." *Citizens Insurance Co.* v. *Parsons* (1); *Attorney General of Ontario* v. *Attorney General of Canada* (2); *Attorney General of Manitoba v. Manitoba Licence-Holders' Association* (3).

This legislation does not interfere with the status and powers of a Dominion company within the meaning of the decisions in the *John Deere Plow Co.* v. *Wharton* (4) and *Great West Saddlery Co.* v. *The King* (5). See *Colonial Building and Investment Association* v. *Attorney General for Quebec* (6); *Bank of Toronto* v. *Lambe* (7).

Bayley K.C. for the Attorney General for Ontario. The legislation in question is validly enacted under section 92 of the B.N.A. Act.

The Sale of Shares Act does not touch upon any subject matter reserved exclusively for the Dominion Parliament by section 91 of the B.N.A. Act.

F. Heap and *Geo. F. Macdonnell* for the respondent. The prohibition of the statute as to selling, etc., without a licence is expressly limited by section 4 of "The Sale of Shares Act" to selling, etc., in Saskatchewan; and it is submitted that no act of the prohibited kind took place in that province.

The Sale of Shares Act is *ultra vires* of the provincial legislature. *Great West Saddlery Co.* v. *The King* (5).

(1) [1881] 7 App. Cas. 96.
(2) [1896] A.C. 348.
(3) [1902] A.C. 73.
(4) [1915] A.C. 330.
(5) [1921] 2 A.C. 91.
(6) [1883] 9 App. Cas. 157.
(7) [1887] 12 App. Cas. 575.

1923

LUKEY
v.
RUTHENIAN FARMERS' ELEVATOR CO., LTD.

The Chief Justice.

THE CHIEF JUSTICE.—This appeal raises two questions: first, whether as a fact there was an "attempt" by the respondent company to sell its shares in the province of Saskatchewan contrary to section 4 of the Saskatchewan Sale of Shares Act (R.S.S., c. 19) and, if so, does the statute apply to Dominion corporations and compel them, before selling or attempting to sell their own shares, to obtain a certificate or licence as provided in the statute?

On the questions as to their having been an "attempt to sell" its own shares without having obtained such certificate as the statute provides for, I have no doubt that, under the facts, there was such an attempt, although it did not become effective until ratified in Manitoba where the respondent company had its head office.

As to the other question which is one of grave and great importance, namely whether the statute applies to Dominion companies selling or attempting to sell their own shares in the province of Saskatchewan without first having obtained a provincial licence, I am of the opinion that the statute while broad enough in its terms to include Dominion companies selling or attempting to sell their own shares, should not in such cases be construed as including Dominion companies; because it was not within the powers of the provincial legislature to prohibit the sale within the province by a Dominion company of its own shares, or to compel the company to take out such a licence to do so as the statute in question provided for. In other words, I hold it not to be within the power of the legislature either to prohibit the sale by a Dominion company of its own shares within the province, or to require such a company to take out from the Local Government Board a certificate or, in the case of an agent, a licence before making or attempting to make any such sale.

In my judgment the power of a Dominion company to sell its own shares throughout the Dominion goes to the root of its essential powers and capacities and any attempt by a provincial legislature to prohibit altogether the sale by a Dominion company of its own shares in a province, or to make the legality of such sale depend upon the company's first obtaining a licence, or a certificate from a Local

Government Board, must necessarily be beyond the powers of a provincial legislature.

I have read the many cases cited at bar by counsel, notably *John Deere Plow Co.* v. *Wharton* (1), *and Great West Saddlery Co.* v. *The King* (2), decisions of the Judicial Committee of the Privy Council, and the reasoning in those cases of Lord Haldane, who delivered the judgments of their Lordships, has served to confirm me in the conclusions I have reached as to the powers of the provincial legislature on the sole question we have now to determine.

I have carefully read and studied the ably reasoned opinion of the learned judges of the Court of Appeal for Saskatchewan and concurring generally as I do in those reasons I do not feel it necessary to repeat them over again in detail.

I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—This appeal arises out of an action brought by respondent upon two promissory notes given by the defendant appellant, each for the sum of one hundred dollars, in payment of shares in the respondent company obtained through an agent in Saskatchewan.

The said agent is alleged to have acted in his sale of said shares and taking said promissory notes on behalf of the respondent in violation of the provisions of the "Sale of Shares Act" of Saskatchewan.

The action was tried by Judge Ross, a district judge of the said province of Saskatchewan, and decided upon an admission of facts appearing in the case.

He held that upon said admission of facts the plaintiff, now respondent, could not succeed; and upon the authorities he cites and others cited by counsel for appellants before us, he was right, assuming that the statute of Saskatchewan in question was not *ultra vires*.

It was suggested in the court below by counsel for the company then appellant, now respondent, that the notes having been accepted by the respondent in Manitoba there is no basis for invoking the Act now in question. What actually transpired might have been made clearer but in any event I would infer that all that is really involved in the case, and the real foundation of the claims, took place

(1) [1915] A.C. 330. (2) [1921] 2 A.C. 91.

1923

LUKEY v. RUTHENIAN FARMERS' ELEVATOR CO., LTD.

Idington J.

in Saskatchewan, and was only ratified by the company, and that its rights are tainted by the illegality charged, if any.

The important feature of this appeal is the question raised as to whether or not the Saskatchewan Act which is involved was *ultra vires* or not.

There would seem to be a very serious evil prevalent in the methods adopted for selling such securities as mentioned in the Act, and need of a remedy therefor.

At least each of the respective legislatures of Manitoba, Alberta, and Ontario has enacted an Act more or less similar to that in question, for the purpose of protecting the public and frustrating the object of those pursuing such undesirable methods.

We are not referred to any similar legislation by the Dominion Parliament, or effective measures taken by it having the like object in view.

What is urged by the respondent is that the Dominion "Companies Act" enacted under and by virtue of the residuary powers which Parliament has under the B.N.A. Act, enabled the respondent to acquire, by its incorporation, powers such as set forth in its charter obtained under said Companies Act, and these can in no way be impaired by any more provincial legislation.

If the Act under which respondent had become incorporated had been enacted under the enumerated powers given Parliament by section 91 of the B.N.A. Act, as, for example, the banking incorporation powers given by item no. 15 of said section 91, or under item no. 27 of said section 91 and excepted, by item no. 10 of section 92, from the expressly enumerated powers, given by that section to local legislatures, then the local legislature of a province perhaps could not interfere in any way.

But these corporations of Parliament are all expressly excepted, or intended to be, from the operation of the Saskatchewan Act now in question, as I read it.

The respondent could not have been incorporated by Parliament under any of these specific powers I have just referred to.

The decision in the case of *The Citizens Ins. Co.* v. *Parsons* (1), seems to me expressly in point or so nearly so as we can hope to find on such a question as raised herein.

(1) 7 App. Cas. 96.

To make that clearer I may recall the history of the provincial legislation there in question. A serious public evil became prevalent in Ontario by reason of trivial objections taken in insurance cases by which such companies often escaped unjustly payment of losses suffered by the insured and against which the insurer was supposed to have agreed to indemnify.

The misleading nature of the conditions and the kind of printing used to express them was the basis of the evil.

The local government of Ontario appointed a commission to inquire into the evil and recommend a remedy. That commission of very able men, of whom at least two were judges, reported that what are now known as "statutory conditions" should be indorsed on every insurance policy, and recommended that if the insurance company desired to be protected by further conditions, such must be printed in red ink.

Surely if ever there was a case of interference by a local legislature with the supposed powers conferred by the Dominion Parliament in the charter it had issued or adopted and affirmed, that was.

The insurance companies challenged its being *intra vires* the powers of the Ontario legislature. Hence *The Citizens Ins. Co.* v. *Parsons Case* (1).

It was also tested at the same time by an action of *Parsons* v. *The Queen Ins. Co.* (1). Both cases were argued together, at all events in the last court of resort.

The history of *The Citizens Ins. Co. Case* (1) is briefly outlined in the judgment of the Judicial Committee of the Privy Council delivered by the late Sir Montague Smith and reported at page 104 of said report, as follows:—

> It will only be necessary to premise that "The Citizens Insurance Company of Canada," the defendant in the first action, was originally incorporated by an Act of the late province of Canada, 19-20 Vict., c. 124, by the name of "The Canada Marine Insurance Company." By another Act of the late province, 27-28 Vict., c. 98, further powers, including the power of effecting contracts of insurance against fire, were conferred on the company, and its name was changed to "The Citizens Insurance and Investment Company;" and, finally, by an Act of the Dominion Parliament, its name was again changed to the present title, and it

(1) 7 App. Cas. 96.

1923

LUKEY
v.
RUTHENIAN FARMERS' ELEVATOR CO., LTD.

Idington J.

was enacted that, by its new name, it should enjoy all the franchises, privileges, and rights, and be subject to all the liabilities of the company under its former name.

That there should be no question of what the lastly referred to Act enacted I may say that I find it was assented to 12th April, 1876, and is c. 55, in vol. 11, of the Acts of the Dominion Parliament passed in the 39th year of the reign of Her late Majesty Queen Victoria, and is as follows:—

> 1. The name of the said company is hereby changed to The Citizens Insurance Company of Canada, by which name in future the said company shall enjoy all the franchises and privileges, and shall hold all the rights and assets, and shall be subject to all the liabilities heretofore held, enjoyed and possessed, or which have heretofore attached to The Citizens Insurance and Investment Company; and no suit now pending shall be abated by reason of the said change of name, but may be continued to final judgment in the name under which it shall have been commenced.

I submit that this enactment is quite as specific an enactment by Parliament, when read in light of the previous enactments, recited in the foregoing extract from the judgment as quoted above, and confers by all the relevant powers Parliament had, quite as substantial a status and extensive grant of incidental powers, resting upon the power of Parliament, as anything the respondent ever received therefrom by its incorporation under the Dominion Companies Act.

Yet the judgment in said case to test the validity of such provincial legislation as I have referred to, varying its most essential power of framing its own contract, and imposing thereon a limitation until then undreamed of, stands good law to-day and better expresses what all those concerned in the B.N.A. Act meant, than we hear urged by those born in later days when forced to argue otherwise.

I am quite unable to reconcile the interpretation given by the learned judges in the Saskatchewan Court of Appeal to the opinion judgment of the Judicial Committee of the Privy Council in the *Great West Saddlery Co.* v. *The King* (1), with the decision in the said cases of *The Citizens Ins. Co.* v. *Parsons* (2), and *The Queen Ins. Co.* v. *Parsons* (2), heard together, and treat that in the latter as if overruled thereby.

(1) [1921] 2 A.C. 91. (2) 7 App. Cas. 96.

For my part any opinion judgment must be read in light of the question at issue and therein decided and all else *obiter dicta* be simply given the weight due to opinion.

The *John Deere Plow Case* (1), so much referred to by said learned judges, involved simply this: Could a provincial legislature by its enactments insist that the corporate creation of Parliament, or its enactments, must go out of existence? Such an attempt as the authorities in British Columbia then and thus tried to enforce was quite unjustifiable.

I eliminate from my consideration of that case all else but that single point, save due respect to the *obiter dicta* in the reasons given.

When we come to the *Great West Saddlery Case* (2) and what was raised therein and the results reached, what are they?

In the final paragraph of the judgment of the court above therein, the net result seems to be covered by the following quotation:—

> Here again their Lordships think that the provincial legislature has failed to confine its legislation to the objects prescribed in s. 92, and has trenched on what is exclusively given by the British North America Act to the Parliament of Canada. If the Act had merely required a Dominion company, within a reasonable time after commencing to carry on business in Saskatchewan, to register its name and other particulars in the provincial register and to pay fees not exceeding those payable by provincial companies, and had imposed upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and levying a tax. But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion. Further, if it is the intention and effect of the Act that a Dominion company when registered in the province shall be subject (by virtue of the definition section or otherwise) to the general provisions of the Saskatchewan Companies Act or shall become liable to dissolution under s. 28, the Act would be open to question on that ground; but it is right to say that such a construction was disclaimed by counsel for the Attorney general of Saskatchewan and (as regards the liability to dissolution) has been excluded by an amending Act passed while these proceedings were pending. Section 25 of the Saskatchewan Act, which requires a Dominion company to obtain a licence, stands on the same footing as the enactments in Ontario and Manitoba which have been held void as *ultra vires;* and in this case

(1) [1915] A.C. 330. (2) [1921] 2 A.C. 91.

1923

LUKEY
v.
RUTHENIAN FARMERS' ELEVATOR CO., LTD.

Idington J

also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground.

The pith and substance of that judgment as I read it is that if a reasonable time had been given to furnish the material required for purposes of taxation or otherwise, perhaps much could not be complained of as matter of law especially as to the Saskatchewan statute therein in question.

The temporary suspension of the exercise of its corporate rights was more than the court above felt it could justify and hence held *ultra vires,* though the individual citizen exercising as such all the business rights that any corporate body could exercise, was left liable to pay the taxing licence fee before actually beginning to carry on business.

In other words, if instead of insisting upon prepayment of the taxing licence fee, as usually done in many other instances in common use in Canada, a reasonable time had been allowed, the company could not be held to have been held up, or the Act *ultra vires.*

Such at least is my view of what may be reasonably taken of the net result of basis of complaint in that case, so far as Saskatchewan was concerned.

The reasoning for that purpose, or far beyond it, does not lead me to infer that either *Citizens Ins. Co.* v. *Parsons; Queen Ins. Co.* v. *Parsons* (1), or *The Colonial Building & Investment Association.* v. *Attorney General of Quebec* (2), have all, or any of those three just named decisions, been overruled. And until they are, I cannot see why the legislature of Saskatchewan cannot (to protect its citizens against evil practice of even a creation of the Dominion Parliament, unless possibly one brought into existence by virtue of the exclusive powers assigned Parliament by subsections of section 91 of the British North America Act) enact such provisions as are directly in question herein and so far as relevant to the disposition of the issues raised thereby as to render it necessary for the court passing thereon to hold that the enactment on the facts stated invalidates the plaintiff's claim.

Whether the power to do so be rested upon the power over property and civil rights, or upon local conditions

(1) 7 App. Cas. 96. (2) 9 App. Cas. 157.

or as against local evil arising from dishonest methods to be combatted it seems to me so far as necessary for the disposition of, and maintenance of the defence in this case, to fall within one or other of such powers, and hence *intra vires*.

Why should a corporate entity have greater rights than the individual citizen? And how far?

The Colonial Building & Investment Association v. *The Attorney General of Quebec* (1), shews how the right to enforce provincial mortmain Acts has been recognized as valid even against Dominion corporations.

I most respectfully submit that a prevalent gross dishonesty such as the Act in question aims at checking, and thereby preventing the ruin of possibly thousands of helpless people, ignorant of financial schemes of our so-called enlightened days, is quite as well within the powers of our local legislatures, as the several provincial Acts forbidding the sale to any one of a glass of beer, even by a legal entity, clothed, indeed created, by the residuary Dominion powers of incorporation.

See the cases of *The Attorney General for Ontario* v. *The Attorney General for the Dominion* (2); *The Attorney General of Manitoba* v. *The Manitoba Licence Holders Association* (3).

Turning from that aspect of the relevant facts to another presented by the case of *Attorney General for the Dominion and the Attorney General for the Province of Alberta and others, and the Attorney General for the Province of British Columbia* (4), not that it is directly in point herein, but is illustrative of what limitations exist as to the power of Parliament, conversely as it were, and worth considering.

If the very simple method of getting incorporation from the Dominion had ever been thought of as fraught with the consequential freedom from all interference on the part of provincial legislatures such as now set up herein and otherwise, why was it not resorted to?

(1) 9 App. Cas. 157, at pp. 168 and 169.
(2) [1896] A.C. 348, at pp. 365 and 370.
(3) [1902] A.C. 73.
(4) [1916] 1 A.C. 588.

1923

LUKEY v. RUTHENIAN FARMERS' ELEVATOR CO., LTD.

Idington J.

Why was the item of "Trade and Commerce" in section 91 of the British North America Act so frequently resorted to as a means of giving the Dominion power to exercise exclusive power sought?

And when our old acquaintance "trade and commerce" seemed at last exhausted as means to such an end, why are we troubled anew with Dominion incorporating means of giving the Dominion Parliament a power hitherto, at least since the decision of *Citizens Ins. Co.* v. *Parsons* (1), unknown?

It seems rather late in the day to argue that a mere corporate body has any greater power or rights than any ordinary citizen in the way of overriding and escaping the operation of the exclusive powers assigned to the provincial legislatures over all property and civil rights, over direct taxation, or means of enforcing same, or over all matters of a merely local or private nature in the province. The ordinary citizen if possessed of the necessary means is entitled to embark in anything save those subject matters specifically assigned by the British North America Act to the exclusive jurisdiction of the Dominion Parliament.

The evil aimed at by the legislation now claimed to be *ultra vires* existed long ago, as exemplified by the case of *Scott* v. *Brown, Doering, McNab & Co.* (2), and certainly needed a remedy within the powers of each local legislature where the evil existed.

The legislation now attacked is simply an attempt to protect the innocent confiding mass from such like schemes as by the court dealing with said case demonstrated to be illegal, in short an illegal means of rendering fraud possibly successful, unless when the wealthy man was the victim and chose to fight it out.

If this case fell within its true meaning then the entire scheme was fraudulent (as in the case just cited) and no room exists for setting up the pretence of a delivery of a note in Winnipeg which in fact was delivered into the mail in Saskatchewan by respondent's agent after breach of the Act in question at every angle thereof and tainted with illegality.

(1) 7 App. Cas. 96.

(2) [1892] 2 Q.B. 724.

I should have said above that the illustrations of counsel for the Attorney General for Ontario given in his factum, of the necessity for Dominion corporations created under the residual powers of Parliament complying with local statutes as the Statute of Frauds, Bills of Sale, and Chattel Mortgages, and Conditional Sales Acts, and similar legislation yet never questioned but observed, are well worth considering herein.

These requirements vary in different provinces and possibly in some they do not all exist.

The legislation here in question simply goes a step further and is somewhat more complicated but in principle, I submit, the same.

Nearly all are to prevent fraud or wrongdoing; and as the business of the commercial world becomes more complicated the necessary legislation becomes, of necessity, more so also.

I desire to say that in referring to "The Sale of Shares Act" as if to the whole, I by no means am to be taken as holding that there is nothing in it *ultra vires* for I have only carefully considered the provisions actually necessary for the disposition of the issues necessarily raised for the determination of the defence herein.

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

DUFF J.—The defendant's contract with the respondent company originated in an offer to purchase shares addressed to the directors of the respondent company, whose head office was in Winnipeg. That offer was accepted by allotment at Winnipeg and notice of allotment given there. The contract of sale was a contract concluded in Manitoba, and therefore was not a sale in Saskatchewan within the meaning of section 4 of the Act; nor do I think there was any offer or attempt "to sell in Saskatchewan" within the meaning of section 4. The offer, in point of fact, was an offer made by the defendant, and was an offer to purchase, and it was also an offer which contemplated completion at the head office in Manitoba. The acts of the company's agent may have amounted to an attempt in Saskatchewan to bring about a sale of the shares by a contract to be com-

1923
LUKEY
v.
RUTHENIAN FARMERS' ELEVATOR CO., LTD.
Duff J.

pleted in Manitoba, but there was no attempt to sell in Saskatchewan; that is to say, there was no attempt to bring about the making of a contract of sale in Saskatchewan, which, I am disposed to think, is necessary in order to constitute an attempt within the section. Again, such attempt as there was did not enter into the contract sought to be enforced as one of the constitutive elements of it; and the contract would appear to have been a good contract, even assuming it to have been in fact brought about by a solicitation on part of the agent of the company which was an unlawful solicitation and under the ban of the statute.

There has been, however, some difference of judicial opinion upon this point, which is, perhaps, not quite free from doubt, and in view of the fact that the court below have based their decision upon the conclusion at which they arrived, that it was not competent to the Saskatchewan Legislature to enact the statute upon which the defendant relies, I think it is advisable to express my opinion upon the question raised by the appellants' attack upon this view.

The question is: Does the statute apply to sales of shares, stocks, bonds or securities of a Dominion company? And the answer to that question admittedly depends upon the answer to the question whether the Saskatchewan Legislature has power to control by such legislation the sale of such objects by a Dominion company. The plan of the Act is to require every company desiring to sell any stocks, bonds, debentures or other securities to apply to the Local Government Board for a certificate to the effect that the company is complying with the Act as a condition of a lawful sale. On the application the company is required to furnish certain information specified in the Act, and it is the duty of the Board to examine the statements and documents filed, and further if deemed desirable, to make a detailed examination of the company's affairs. The Board is then under the duty to issue a statutory certificate if it finds that the company is solvent, that its constitution and by-laws and its proposed plan of business and its proposed contracts

provide a fair, just and equitable plan for the transaction of business and appear to indicate a probability of a fair return on the shares, stocks, bonds or other securities * * * proposed to be offered for sale.

If it finds otherwise its duty is to refuse the certificate. The Board has authority to revoke the certificate on discovering that the assets of the company have ceased to be equal to its liabilities or that it is conducting its business in an unsafe, inequitable or unauthorized manner or is jeopardizing the interests of its stockholders or investors in shares, stocks, bonds or other securities offered for sale by it.

The prohibitions of the Act are comprehensive. Sales, offers to sell, attempts to sell in Saskatchewan are forbidden by section 4 in the absence of a certificate subject to the qualification that this does not apply when (section 21) the

sale or attempted sale is not made in course of continued or successive acts.

The issue, putting forth and distribution of any advertisement in any newspaper or other periodical of any circular letter or other paper containing

an offer to sell, solicitation or purchase or intimation of the facts of shares, stock, bonds or debentures being open to subscription or purchase, shall be evidence of an attempt to sell in the course of continued and successive acts in violation of the Act.

By section 5,

no person shall print, publish, issue or distribute any advertisement, prospectus, circular, letter or other document containing an offer to sell or request to purchase any of such shares, stocks, bonds or other securities unless the company whose shares, stocks, bonds or other securities are offered for sale shall first have obtained from all the board the required certificate.

It is perhaps not easy to attach a precise meaning to the qualification of section 21; but although section 4 might not affect a company carrying out a distribution of shares arranged prior to incorporation among the promoters of the company or among existing shareholders according to mutual arrangement, it seems clear enough, having regard to sections 5 and 22, that in the absence of a certificate a company to which the Act applies is debarred from issuing any document bringing the opportunity of subscribing for its shares or purchasing its debentures to the attention of possible subscribers or purchasers.

1923

LUKEY
v.
RUTHENIAN FARMERS' ELEVATOR CO., LTD.

Duff J.

It is convenient to consider the operation of the Act by reference to a company having its head office in the province, so that the allotment of stock to shareholders—in other words, sales of its shares by the company—would in the ordinary course take place in the province. Such a company, being minded to obtain capital by the sale of its shares through a general subscription, becomes, if governed by the Act, subject to the necessity of submitting its constitution, its by-laws, its plan of business, as well as its assets, to the Local Government Board and (if required) of modifying these to meet the views of the Board as to what is fair and equitable and likely to be commercially successful, as a condition of lawfully proceeding with its plans for obtaining capital by the sale of its shares. As regards the borrowing of money within the province through sale of its bonds and debentures, it is in the like case.

The general principles governing the respective authorities of the Dominion and the provinces in relation to the subject of Dominion companies, in so far as presently relevant, are stated by Lord Haldane on behalf of the Judicial Committee in *John Deere Plow Co.* v. *Wharton* (1). The view there expressed may be summarized for our present purposes thus: The power of legislating with reference to the incorporation of companies with other than provincial objects belongs exclusively to the Dominion Parliament as being a matter not coming within the classes of subjects assigned exclusively to the legislatures of the provinces within the initial meaning of the words of section 91, and as being a matter affecting the Dominion generally and covered by the expression, " the peace, order and good government of Canada." Moreover, the power to regulate trade and commerce covered by the second head of section 91 upon the Dominion enables the Parliament of Canada to prescribe to what extent the powers of companies, the objects of which extend to the entire Dominion, should be exercisable and what limitations should be placed on such powers. This is not to say that the power to regulate trade and commerce is lawfully capable of execution in such a way as to trench on the exclusive jurisdiction of the provincial legislatures over civil rights in general within the provinces but a province in exercise of its jurisdiction cannot legislate so as

(1) [1915] A.C. 330, at pp. 339-341.

to deprive a Dominion company of its status and powers. It was also laid down that the Parliament of Canada had power to enact certain sections of the Dominion Companies Act and the Interpretation Act.

In *Great West Saddlery Co.* v. *The King* (1), their Lordships in applying these general principles observed that even in the case of provincial laws competently enacted and applicable to Dominion companies they had carefully refrained from saying, in the judgment just referred to, that the sanctions by which such provincial laws might be enforced

> could validly be so directed as indirectly to sterilize * * * if the local laws were not obeyed * * * the capacities and powers which the Dominion had validly conferred.

And their Lordships added that

> where one had legislative power, the other has not, speaking broadly, the capacity to pass laws which will interfere with its exercise.

I think that, for our present purpose, the implications of these two judgments receive valuable illustration by reference to the provisions of the Dominion Companies Act and the Dominion Interpretation Act, which were held to be within the legislative authority of the Dominion. Section 5 of the Dominion Companies Act, which was held to be *intra vires,* gives authority to constitute certain subscribing shareholders a body corporate and politic for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends; and by force of section 30 of the Interpretation Act, this imports authority to vest in such a corporation the power to sue and be sued, to contract and be contracted with in its corporate name, to have a common seal, to have perpetual succession, to acquire and hold personal property or movables and to alienate the same at pleasure, to vest in the majority the power to bind other members by their acts and to exempt individual members of the corporation from personal liability for its debts or obligations.

This is an express decision that the authority of the Dominion under the residuary clause fortified by that under section 91 (2) embraces authority to provide for the constitution of companies falling within the class of joint

(1) [1921] 2 A.C. 91, at p. 100.

1923

LUKEY v. RUTHENIAN FARMERS' ELEVATOR CO., LTD.

Duff J.

stock companies as that phrase is commonly understood, companies, that is to say, having capital divided into shares owned by shareholders who are the members of the company, whose liability in respect of the debts and obligations of the company is limited, possessing independently of provincial legislation in each of the provinces the status of a juridical person, having the right to contract, and having the right to invoke the jurisdiction of the courts, subject always, of course, to the measures passed by provincial legislatures of general application in relation to such civil rights. And I think upon principle no distinction can be drawn between the provisions of the Act dealing with these subjects and those which imply power to acquire capital by selling the company's shares; nor do I think any sound distinction can be drawn between such provisions and those which expressly authorize the company to borrow money on its own credit and to give as security for the money so borrowed its bonds and debentures charged upon its property.

It is indisputable I think that if the restrictions established by the statute be validly enacted it is equally within the power of the province to prohibit entirely, in the absence of a certificate, the sale of shares. There cannot I think be any distinction in principle from the constitutional point of view between sale by isolated acts and sale in course of continuous and successive acts. And the learned judges of the court below have rightly considered I think that the true question is whether to create such a prohibition is competent to a provincial legislature.

The authority to incorporate companies and endow them with status and powers, maintainable and exercisable independently of provincial sanction, would appear at least to involve the authority to dictate the constitution of the company including the procedure by which membership in the corporation is acquired, as well as to prescribe the character of relations which shall obtain between the corporation and its members. And legislation defining this procedure and creating powers expressly or impliedly to enable it to be carried out, is strictly not within the scope of legislation on the subject of " civil rights " as contemplated by 92 (13) but belongs to the class of legislation on the

subject of "incorporation of companies" and therefore is not within the scope of section 92 when governing companies with objects other than "provincial rights" within the meaning of 92 (1).

The enactments of the impugned statute necessarily have as already mentioned the immediate effect of preventing Dominion companies with head offices in Saskatchewan exercising in the normal way the power to obtain capital through subscription for their shares. Not only is that the effect of the legislation, it is of the essence of its design. For by its provisions the exercise of the powers of such a company is made conditional upon submission by the company to a provincial control which would deprive it of the free right of exercising its capacities according to the constitution validly imposed upon it by the Dominion; the constitution, the arrangements between the company and its members, between different classes of members, between the members and the management as touching the control of its affairs, and the distribution of profits are all subjected to the supervision of the provincial Local Board.

The legislation in question no doubt has for its purpose, its principal purpose at all events, the protection of those who are properly the objects of the care of the legislature of Saskatchewan, the inhabitants of that province, from the allurement of attractive offers of investment by bubble companies or companies engaged in improvident enterprises, or companies operating according to plans designed for the enrichment of promoters and managers, at the expense of investing shareholders.

It is quite true that the provinces have a large authority in relation to the suppression of local evils and the prevention of them and although legislation devoted to such purposes almost invariably affects civil rights, such legislation as a rule falls under section 92 (16) or under one of the more specifically defined categories of section 92 and not under 92 (13) as legislation in relation to civil rights. *Russell* v. *The Queen* (1); *Attorney General of Manitoba* v. *Manitoba Licence Holders Association* (2); *Quong-Wing* v. *The King* (3). But provinces exercising such author-

(1) 7 App. Cas. 829. (2) [1902] A.C. 73.
(3) [1914] 49 S.C.R. 440.

1923
LUKEY
v.
RUTHENIAN FARMERS' ELEVATOR CO., LTD.
Duff J.

ity must in doing so observe the constitutional limitations to which they are subject and not effect their objects by means of enactments which both in necessary result and in purpose constitute regulation of Dominion companies in the exercise of powers which belong to them as essential and characteristic.

This is not to say that such companies are withdrawn from the operation of provincial laws dealing generally with matters that may be embraced in whole or in part within the objects of the company. Dominion companies empowered to deal in intoxicating liquors for example are subject to provincial laws regulating or suppressing the sale of liquor; but such laws are not laws aimed at Dominion companies as such or at joint stock companies as such and do not in effect or in purpose prohibit or impose conditions upon the exercise of powers of Dominion companies which are essential in the sense that they are necessary to enable them in a practical way to function as corporations according to the constitutions imposed upon them by the Dominion.

The appeal should be dismissed with costs.

ANGLIN J.—The appellant, Lukey, is sued upon two promissory notes given by him for the purchase price of shares in the respondent company, which is incorporated under the Dominion Companies Act and has its head office in the city of Winnipeg, Manitoba. Lukey's subscription was solicited and the notes sued on were obtained in Saskatchewan by an agent of the respondent company in the course of a general campaign to dispose of its stock. As was intended, they were forwarded by him to the company's head office and the application was there accepted and the shares subscribed accordingly alloted. The appellants (Lukey, and the Attorney General of Saskatchewan and the Attorney General of Ontario, who both intervened), assert that the transaction above outlined was in contravention of section 4 of the Saskatchewan Sale of Shares Act (R.S.S. ch. 199) which reads as follows:

4. No person shall sell or offer or attempt to sell in Saskatchewan any shares, stocks, bonds or other securities of a company other than the securities hereinbefore excepted without first obtaining from the Local Government Board a certificate, and in the case of an agent a licence, as hereinafter provided,

and that this illegality vitiates the notes sued upon. It was admitted that at the time of Lukey's subscription the company was uncertified and its agent unlicensed under the Saskatchewan statute.

The respondent maintains that there was no sale of shares in Saskatchewan or any offer or attempt to sell shares in that province in violation of section 4 and it also contests the validity of that legislation in so far as it affects Dominion corporations. Both grounds were relied upon in answer to this appeal.

The trial judge (Ross J.D.C.) held that the solicitation of the subscription in Saskatchewan was within the prohibition of section 4 above quoted and that that section was *intra vires* of the Saskatchewan legislature. He accordingly dismissed the action.

The Court of Appeal reversed this judgment, holding unanimously that section 4 is *ultra vires* in so far as it affects Dominion corporations. Turgeon J.A. (with whom Haultain C.J.S. concurred) also agreed with the trial judge that the transaction fell within the statutory prohibition. On this latter question Lamont, MacKay and Martin JJ.A. expressed no opinion, the latter observing that the only ground of appeal pressed in the argument was the unconstitutionality of section 4.

With the utmost respect, I am of the opinion that what took place in Saskatchewan was neither a sale in that province of, nor an offer or attempt to sell therein, shares of the respondent company. The sale was undoubtedly made when Lukey's application was accepted in Winnipeg. Up to that time there had been merely an application for shares accompanied by a proposition to make payment, should the application be accepted and the stock allotted, by giving two promissory notes for the purchase price tendered with the application for that purpose. The company's agent did not sell its shares in Saskatchewan; neither did he attempt or offer to do so. He did attempt to secure an application for shares there to be forwarded to Winnipeg for acceptance by the company and he did offer to take and forward such application. But neither of those acts falls within the prohibition of section 4, if its language be read in its ordinary and grammatical sense, the ad-

1923
LUKEY
v.
RUTHENIAN FARMERS' ELEVATOR CO., LTD.
Anglin J.

verbial phrase, " in Saskatchewan," modifying the verb " sell " and " to sell " in the respective clauses; and I know of no reason why it should be given any other construction. There is no ground for construing the section as if its second member read—shall " offer or attempt in Saskatchewan to sell."

Taking this view of the nature of the transaction and of the scope and effect of the legislation, I am not disposed to canvas academically the question whether the legislature transcended its constitutional powers. Their Lordships of the Judicial Committee have frequently intimated that such questions should be dealt with only when the disposition of the case before the court requires it.

I would for these reasons dismiss this appeal. The respondents' costs should be paid by the appellants.

MIGNAULT J.—The first question is whether on the admitted facts the case comes within the statute, chapter 15 of the statutes of Saskatchewan for the year 1916 and amendments.

Section 4 of the statute is as follows:

4. No person shall sell or offer or attempt to sell in Saskatchewan any shares, stocks, bonds or other securities of a company, other than the securities hereinbefore excepted, without first obtaining from the board a certificate, and in the case of an agent a licence, as hereinafter provided.

It is to be noticed that what is prohibited here is to sell, or offer, or attempt to sell, in Saskatchewan, shares of a company which has not obtained a certificate from the board.

The respondent is a Dominion company incorporated by letters patent under the Dominion Companies Act, with its head office in Winnipeg, province of Manitoba. It had not obtained the certificate referred to in section 4.

The respondent's agent obtained in Saskatchewan from the appellant Lukey an application for shares in the respondent company, for which Lukey gave the promissory notes sued on. This application was forwarded to the head office of the company in Winnipeg where it was accepted and the shares were allotted to him.

The sale of the shares no doubt did not take place in Saskatchewan, or at least not wholly in Saskatchewan. I will assume it took place in Manitoba. But was there in Saskatchewan an attempt to sell these shares?

The words of section 4 are " attempt to sell in Saskatchewan." Does that mean attempt to make a sale which sale is to be effected in Saskatchewan, or does it mean an attempt in Saskatchewan to sell these shares, or in other words to get somebody in Saskatchewan to buy them?

The statute was enacted for the protection of the inhabitants of the province of Saskatchewan. The legislature of that province could not control or prohibit anything done out of the province and it must be assumed it did not intend to do so.

But it could, if otherwise this legislation can be sustained, deal with matters happening in Saskatchewan, and I will assume it intended to prohibit not only the sale but also the attempt to sell such shares (treating the words " attempt to sell " as a compound verb), if it occurred in Saskatchewan.

Did the respondent, through its agent " attempt to sell," in this sense, the shares in question, and was this done in Saskatchewan?

I would answer yes, just as much as an order for the purchase of goods, solicited in Saskatchewan by a commercial traveller, the order to be filled in another province, would be an attempt to sell these goods in Saskatchewan. And it was in furtherance of this attempt to sell the stock of the respondent company that its agent obtained the notes sued on in this case.

I think therefore the case before us comes within the statute.

On the second question, the validity of the Saskatchewan statute as applied to the sale of its shares by a Dominion company, my opinion is that the appeal fails.

I have already quoted section 4 which shows what the purpose and effect of this statute really is. I may add that section 4 is followed by provisions which carry out this purpose in minute detail. Thus the company whose shares it is desired to sell shall file with the board (which is the local government board of Saskatchewan) a statement showing the plan on which it proposes to do business, a copy of all contracts which it proposes to make with or sell to its contributors and a statement of its actual financial condition and of its property and liabilities (section 6). The board

1923
LUKEY
v.
RUTHENIAN FARMERS' ELEVATOR CO., LTD.
Mignault J.

examines the statements and documents filed and if deemed advisable makes a detailed examination of the company's affairs (section 8). If the board finds that the company is solvent, that its articles of incorporation, constitution and by-laws, its proposed plan of business and proposed contracts provide a fair, just and equitable plan for the transaction of business, and appear to indicate the probability of a fair return on the shares, stocks, bonds and other securities, it shall issue a certificate to the company reciting that the company has complied with the Act and is permitted to sell its shares, stocks, bonds and other securities (section 9). If, however, the board finds otherwise than as mentioned above, it shall refuse the certificate (section 10). A company shall not, nor shall any person, either as principal or agent, transact business in form or character similar to that set forth in section 4, until such company or person has obtained a certificate, as provided by section 9 (section 13). If any alteration or amendment is made in the charter, memorandum of association, articles of incorporation, constitution or by-laws of the company after a certificate has been granted under section 9, such alteration or amendment shall in every case operate as an immediate revocation of the certificate (section 14). Should the company transact business on any other plan than that set forth in the statement required to be filed by section 6, or make contracts other than those shown in the copy of the proposed contracts required to be filed by section 6, the certificate granted upon the faith of such statement or proposed contracts so shown shall become *ipso facto* null and void, and no business thereby authorized shall be transacted until a new certificate has been obtained (section 14a). The statute provides for the obtaining of a new certificate and for the appointments of agents who must be licensed by the board. It also requires the filing with the board of an annual statement of the financial condition of the company, failing which the company shall forfeit the right to continue the business of selling its shares, bonds or other securities in Saskatchewan (sections 16 and 17).

No matter how praiseworthy may be the object which the legislature had in view, the question to be decided is whether in attempting to attain this object it has trans-

cended its powers, in so far as these enactments apply to a Dominion company.

The test or crucial question, the answer to which determines whether legislation of this character is within the jurisdiction of the provincial legislature, in so far as it affects Dominion companies, was stated by Lord Haldane in *Great West Saddlery Co.* v. *The King* (1), as follows:

> Do these provisions interfere with such powers are are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion, and so affect its status?

I think the answer should be in the affirmative. The selling of its stock or bonds in order to obtain the capital necessary to carry on its business, is an act connected with the very life of a company. Capital is for the company seeking to obtain it what blood is for the human body. Without it the company cannot live and carry on its business and capital can be obtained by the company only by selling its stock or by borrowing money. The Saskatchewan statute prevents the Dominion company from selling its stock and bonds or other securities unless and until a certificate of approval is obtained from the local government board. This is an interference with the powers conferred on the company by the Parliament of Canada to carry on its business in the province of Saskatchewan, and so affects its status. And the legislation cannot be sustained as coming within property and civil rights, or as being a matter of a merely local or private nature in the province. It really conflicts with the right of the Dominion Parliament to incorporate companies, and to grant them power to carry on their business throughout the Dominion.

The statute therefore is not a defence to the respondent's action.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant Lukey: *Alex. Blackwood.*
Solicitors for the respondent: *Wilson, Graham & Stewart.*

(1) [1921] 2 A.C. 91, at p. 114.

1923
*Oct. 15, 16.
*Dec. 21.

TOWN OF KAMSACK (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN NORTHERN TOWN PROPERTIES COMPANY, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Municipal Corporation—Assessment and taxation—Crown land—Contract—Construction—B.N.A. Act, s. 125—"The Town Act," R.S.S. [1909] c. 85, ss. 2 and 301.

Certain land had formed part of an Indian reservation and was surrendered in trust for disposal by the Crown. Under a contract with the Crown the respondent paid an advance of $10 per acre and the Indians were to share equally with it in the proceeds of sale of the townsite lots after the respondent had recouped itself for the advance and subdivision expenses; title to be retained in the Crown and patent to issue from it direct to each purchaser from the respondent.

Held, Davies C.J. dissenting, that the respondent had no beneficial or proprietary interest in the land which would render it liable to assessment under "The Town Act." (R.S.S. [1909] c. 85); and that the land was at the time of the assessment Crown land and as such exempt from assessment.

Judgment of the Court of Appeal (16 Sask. L.R. 429) affirmed, Davies C.J. dissenting.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge (2) and dismissing the appellant's action.

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

Chrysler K.C. and *J. G. Banks* for the appellant.

D. H. Laird K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—After hearing the argument in this case and reading the judgments in the Court of Appeal I incline to the opinion that the order in council, when properly read in connection with the existent facts when it was made, as I gather them from the record and from the exhibits and plans submitted, did convey some "interest"—an interest in the land—to Mackenzie & Mann, (to which the present respondents have succeeded)

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1922] 16 Sask. L.R. 429; [1923] 1 W.W.R. 161.

(2) [1922] 3 W.W.R. 1.

though the Crown did retain to itself the legal title to such lands as trustees for the Indians on whose behalf the lands were to be held. When sold one half of the proceeds of such sales were to be given to the Indians.

I am inclined to agree with the trial judge and would concur in the argument and substantive contention of the plaintiff. So I come to the conclusion, though not without some doubt, that the appeal should be allowed with costs and the judgment of the trial judge restored.

IDINGTON J.—The appellant sued respondent to recover taxes alleged to be due by virtue of assessments made upon lands which, in my opinion, were clearly vested in the Crown at the time when such assessments were made and hence void, by virtue of section 125 of the B.N.A. Act; and as they were unoccupied lands and hence not assessable against anybody under the Assessment Act of Saskatchewan, which expressly exempts the interest of the Crown in lands, including any such held in trust for the Crown, could not properly be assessed against respondent.

A fair way to test the arguments put forward by appellant would be, to see what the legal result would be of attempting to sell the lands for non-payment of the said taxes in question.

Let any one try to follow out anything, probable or possible, in the way of the results of such an attempted sale and ascertain what they would be and, I submit, he must see how futile such a proceeding would be on the facts presented herein.

Presumably it is because someone has applied that test to the facts in question and realized the absurd results such an attempt would produce, that resort has been had to this suit.

Occupants such as Smith, a lessee of the Crown, in the case of *Smith* v. *Vermilion Hills* (1), might be assessed as such and become under such an assessment debtor of the municipality and be sued as Smith was. In the facts presented herein there is nothing resembling the facts there in question.

There is simply presented by the order in council relied upon by the appellant a recital therein of a proposed sale

(1) [1914] 49 Can. S.C.R. 563.

1923
TOWN OF KAMSACK v. CAN. NOR. TOWN PROPERTIES CO., LTD.
Idington J.

by the superintendent of Indian Affairs who had no authority to sell, nor did he pretend to have, and on these facts thus presented to the Minister he discarded any such proposition, as he had a perfect right to do, and proceeded to recommend something else constituting Mackenzie & Mann sales agents on the terms set forth, and that constitutes the order in council which did not give them any interest in the lands which would be taxable.

The other cases cited arising out of Alberta legislation are quite irrelevant herein.

I agree so fully with the reasoning of the learned judges in the Court of Appeal below, reaching the conclusion that the lands never were assessable and hence the assessments void, that I need not repeat same here.

I think, therefore, this appeal should be dismissed with costs.

DUFF J.—This appeal, I think, should be dismissed. I have been unable to come to the conclusion that the transaction evidenced by the order in council of the 28th September 1904, had the effect of constituting Messrs. Mackenzie & Mann either the purchasers or the holders of any beneficial interest in the lands. The fact which appears to me to be fatal to the contention of the appellants upon this point is that the price at which the lands were to be sold is not fixed, nor is there any evidence that the arrangement included any procedure for determining the price which Messrs. Mackenzie and Mann had a legal right to insist upon being followed. No doubt the arrangement was made in the full expectation that as the policy of selling the lands had been decided upon and as both the department and Messrs. Mackenzie and Mann were interested in selling them to the best advantage, no difficulty would be experienced in agreeing upon prices. I think it must be taken from the material before us that in this most important particular the parties proceeded upon reciprocal faith in one another's reasonableness. In the circumstances an agreement that the price should be such as a court of justice should regard as reasonable cannot, I think, be implied.

That being so there was not, I think, in point of law either a contract or a trust legally enforceable vesting in

Messrs. Mackenzie and Mann any right which could be described as a right or interest in the land.

I think there is nothing in the Saskatchewan Assessment Act which prevents this point being raised in answer to the appellants' action. Section 389 is in identical terms with section 65 of the Ontario Assessment Act (R.S.C. c. 193) that was in question in *Toronto Railway Co.* v. *City of Toronto* (1) where that section was held to be without effect when the assessment is a nullity by reason of the absence of jurisdiction.

Admittedly the lands assessed are, as regards the legal title, vested in the Crown, and the evidence does not indicate that they were in the occupation of the respondents except, perhaps, as agents for the department of Indian Affairs. *Prima facie,* therefore, they were not subject to assessment, and I think it was open to the respondents to show that the lands were the property of the Crown within the meaning of section 125 of the British North America Act.

ANGLIN J.—The Court of Appeal unanimously held that the respondent had no such proprietary interest in the lands in question as would render it liable to assessment under the Saskatchewan Assessment Act. The lands are vested in the Crown in right of the Dominion of Canada and, as such, are exempt from assessment under the Saskatchewan statute and by virtue of the paramount authority of section 125 of the British North America Act.

The reasons for these conclusions are so fully and so clearly stated by Mr. Justice Turgeon in his opinion, concurred in by the learned Chief Justice of Saskatchewan and Mr. Justice MacKay (Martin J.A. reached the same conclusions), that it is quite unnecessary to do more than say that I accept them as the basis of my judgment dismissing this appeal.

MIGNAULT J.—The validity of the assessment which the appellant seeks to enforce depends on the answer to the question whether the respondent or the Crown in the right of the Dominion is owner of the property assessed. The learned trial judge decided this question in favour of the

(1) [1904] A.C. 809.

1923

TOWN OF KAMSACK v. CAN. NOR. TOWN PROPERTIES CO., LTD.

Mignault J.

appellant, holding that the ownership of these lands was vested in the respondent. This judgment was unanimously reversed by the Court of Appeal for Saskatchewan, which was of the opinion that the Crown was the owner of the lands assessed. The appeal is from the latter judgment.

To determine this question of ownership, it is necessary to construe the order in council of the Dominion Government, dated the 28th of September, 1904. The lands assessed were part of an Indian reserve and were surrendered to the Crown by the Indians. An agreement was then made between the Government and Messrs. Mackenzie, Mann & Co., whom the respondent now represents, the terms of which—for there is no other contract—are set forth in the order in council.

This order in council is based on a memorandum from the superintendent of Indian Affairs stating that Messrs. Mackenzie, Mann & Co., representing the Canadian Northern Railway Co.,

are purchasers from the Department of Indian Affairs of what is known as the Kamsack Townsite comprising an area of 241.94 acres in Cote's Indian Reserve in the Pelly agency, Assiniboia. An advance of ten dollars per acre has been paid by the company, and the Indians are to share equally in the proceeds of the sales of lots after the company has recouped itself $5,000 made up of the $2,419.40 advance, and the cost of laying out the townsite, dedicating streets, etc.

The Minister further states that the company has applied for patent for the land in the townsite; but as owing to the circumstances that the Indians are to share with the company in the proceeds of the sales and that the sale of the townsite is necessarily incomplete, patent cannot issue therefor, it is considered that it would be well to provide for the issue of a patent to each purchaser from the company of land in the townsite on report of the sales agent.

Notwithstanding the use of the word "purchasers" in the order in council, I am of opinion that the ownership of these lands remained in the Crown. This is shown by the express statement in the order in council that

the sale of the townsite is necessarily incomplete

and that patent cannot issue therefor. It was recognized that the Indians, for whom the Crown was trustee, were to share with the company in the proceeds of the sales to be made and it was proposed to issue a patent to each purchaser from the company of land in the townsite on report of the sales agent.

The Crown therefore remained the owner of the lands until patents were issued to purchasers from the company.

Mr. Chrysler for the appellant referred to section 101 of the Indian Act (R.S.C. c. 81) excepting from the general exemption from taxation of Indian lands

> those lands, which having been surrendered by the bands owning them, though unpatented, have been located by, or sold, or agreed to be sold to any person.

There is here no sale or agreement of sale of these lands to the company. The most that can be said is that the order in council gave selling rights as agents to Messrs. Mackenzie, Mann & Co., their remuneration to be one-half of the proceeds, after they had recouped themselves their expenses. The company had an interest in the price to be obtained on the sale of lots, but this is not an estate or interest in the lands themselves.

Mr. Chrysler also referred to the recent decision of the Judicial Committee in *City of Montreal* v. *Attorney General for Canada* (1). The question there was as to a provincial statute, amending the Montreal charter and providing that persons occupying for commercial or industrial purposes Crown buildings or lands should be taxed as if they were the actual owners, and should be held liable to pay municipal taxes. It was held that as the tenant was only liable as long as his occupancy continued, the taxation was in respect of his interest as lessee and accordingly was not a tax on Crown lands so as to be *ultra vires* under section 125 of the British North America Act.

Reference was also made to the judgment of their Lordships in *Smith* v. *Rural Municipality of Vermilion Hills* (2), where it was held that persons holding Dominion land under grazing leases could be assessed in respect of their interest in the land under such leases, "land," in the taxing statute, being defined as including any estate or interest therein.

I do not think that these cases help the appellant. The lands in question were not sold or leased to the respondent, and it has no interest or estate therein under the order in council. When it disposes of lots, the necessary patent issues to the purchaser from it but the sale would be a direct purchase by the purchaser from the Crown,

(1) [1923] A.C. 136. (2) [1916] 2 A.C. 569.

1923
TOWN OF KAMSACK v. CAN. NOR. TOWN PROPERTIES CO., LTD.
Mignault J.

even though an agreement to purchase the lots might have been made between the purchaser and the company.

I do not attach any importance to the numerous letters written in connection with the assessment of these lands by Mr. Nichol, the representative of the respondent. Although these letters refer to the respondent as owner of the land, it is obvious that no such expression could give it a title or interest which it did not possess under the order in council. And there is no room here for the application of the doctrine of estoppel.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Banks & Stewart.*

Solicitors for the respondent: *Patrick, Doherty & Cumming.*

1923
*Oct. 22, 23.
*Dec. 21.

THE FIDELITY & CASUALTY CO. OF NEW YORK (DEFENDANT)..... APPELLANT;

AND

VICTOR MARCHAND (PLAINTIFF).....RESPONDENT.

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

Insurance—Automobile—Insured injuring own child—Action by tutor against father—Damages paid without consent of company—Right to recover—Arts. 165, 250, 1053 C.C.

The appellant company issued in favour of the respondent an automobile insurance policy against loss from liability imposed by law upon him for damages resulting from any accident caused by reason of the use of the respondent's automobile. The respondent, while backing his car from his residence to the public highway, ran over and injured his minor son. The respondent took the necessary steps to have a tutor appointed to enable an action to be brought by his son against himself for damages and was condemned to pay $5,000. The respondent paid this amount to the tutor before the delay for appealing had expired and while the appellant company was considering the advisability of so appealing. The liability of the appellant under the policy was subject to certain conditions amongst which were condition A. which provided that the assured should "at all times render to the company all co-operation and assistance within his power," and condition E. which provided that "the assured shall not * * * settle any claim * * * without the written consent of the company previously

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

given." Upon an action by the respondent to recover from the insurers the amount of $5,000 paid by him to the tutor.

Held, Idington J. dissenting, that the respondent was not entitled to recover on the policy, as such payment by him without the consent of the company was a voluntary payment and constituted a settlement of the claim made in violation of condition E. of the policy.

Per Davies C.J. and Duff J.—Such payment was moreover made in violation of condition A. of the policy.

Held also that the respondent was guilty of actionable negligence against his own child for which he was liable under Art. 1053 C.C. Anglin J. *semble.*

Per Idington J. (dissenting).—Such payment was not such an acquiescence in the judgment as to bar an appeal by the company, if it had been desirous to take it.

Judgment of the Court of King's Bench (Q.R. 35 K.B. 5) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming the judgment of the Superior Court and maintaining the respondent's action.

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

Lafleur K.C. and *Crépeau K.C.* for the appellant. A minor son has no right of action against his father for damages caused by a *quasi-délit* (a tort) of the latter. *Newton* v. *Seeley* (2); *Clark* v. *Bonsal* (3); *Hensley* v. *McDowell Furniture Co.* (4); *Hewlett* v. *George* (5); *McKelvey* v. *McKelvey* (6); *Roller* v. *Roller* (7); *Taubert* v. *Taubert* (8).

The accident in question was not caused " by reason of the use, ownership or maintenance of the automobile " within the terms of the policy.

Conditions of the policy had been violated by the respondent, as he has not at all times rendered to the company all co-operation in his power, contrary to condition A. and he has paid the amount of the judgment to the tutor without the appellant company's consent, contrary to condition E. of the policy.

(1) [1923] Q.R. 35 K.B. 5.
(2) [1919] 177 N.C. 528.
(3) [1911] 157 N.C. 270.
(4) [1913] 164 N.C. 148.
(5) [1891] 68 Miss. 703.
(6) [1903] 111 Tenn. 388.
(7) [1905] 37 Wash. 243.
(8) [1908] 103 Minn. 247.

1923

THE FIDELITY & CASUALTY CO. OF NEW YORK v. MARCHAND.

The Chief Justice.

Pélissier K.C. for the respondent. A minor child has the right to sue his own father for tort, as the general rule of liability contained in article 1053 C.C. is in as wide terms as possible and renders every person responsible for damage caused by his fault to another.

The respondent has complied with all his obligations under the policy.

THE CHIEF JUSTICE.—This is a very curious and unique case and nothing similar to it has occurred in my experience. The plaintiff respondent in the course of using his automobile while backing from his gate into the public highway ran over and seriously injured his own little son, aged five and a half years. The respondent was in my opinion clearly guilty of actionable negligence for which he was liable under the civil law of Quebec, article 1053 C.C. Respondent took the necessary steps to have a tutor appointed for his little boy to enable an action to be brought against the respondent for damages for his negligence. He had previously taken out an automobile assurance policy with the appellant company indemnifying him against loss "from the liability imposed by law" for damages on account

of bodily injuries or death suffered by any person or persons as the result of an accident occurring by reason of the use, ownership or maintenance of any of the automobiles described in this policy.

(which included the one in question).

The liability of the company under the policy was expressly subject to certain conditions amongst which were conditions "A" and "E," the latter reading as follows:

The assured shall not voluntarily assume any liability nor interfere in any negotiations or legal proceedings conducted by the company on account of any claim; nor, except at his cost, settle any claim, nor incur any other expense without the written consent of the company previously given; except that he may provide at the time of the accident, and at the cost of the company, such immediate surgical relief as is imperative.

The tutor appointed for the injured boy was so appointed at the instance of the respondent plaintiff and brought an action against the latter to recover damages for the boys' injuries in which $5,000 was recovered against the respondent. I do not rest my judgment upon the action of respondent in causing a tutor to be appointed and bringing an action against himself for damages, but it

seems to me beyond reasonable doubt that the plaintiff in settling the action and paying to the tutor the damages found in the action before the time for appealing the same had expired and while the matter of appeal from the judgment was being considered by the company, acted in violation of condition "A" which *inter alia* provided that the assured should

at all times render to the company all co-operation and assistance within his power,

and in direct violation of condition "E" as above set forth.

The question of the company's appealing from the judgment against the respondent for damages was under consideration by the company at the very time the respondent plaintiff paid the claim. It was a voluntary payment on his part and it was a settlement of the claim

without the written consent of the company previously given.

The excuse put forward that the plaintiff respondent feared an execution might be issued against him cannot be considered for a moment in view of the fact that he himself while defendant in the action was really *dominus litis* and so controlled all the proceedings therein. The payment was made without the appellant company's consent and not only contrary to the provision in condition "A" that he should at

all times render to the company all co-operation in his power,

but also to the express conditions of condition "E" above set forth.

So far from co-operating with the company he acted without their knowledge or written consent in paying the judgment recovered against him before the time for appealing such judgment had expired.

On these latter grounds I would allow the appeal and dismiss the action with costs.

IDINGTON J. (dissenting).—I agree with the reasons assigned by the learned trial judge and those of the learned judges in the Court of King's Bench (save the items of dissent on the part of Mr. Justice Howard relative to the construction he puts upon the verdict of the jury in the case of *Marchand* v. *Marchand*) in their answer to the

1923

THE FIDELITY & CASUALTY CO. OF NEW YORK v. MARCHAND.

Idington J.

fourth question, and the conclusion reached by the trial judge to allow the respondent's claim, and by the Court of King's Bench to dismiss the appeal therefrom.

I cannot agree with said dissenting item in Mr. Justice Howard's opinion judgment.

It is to be observed that the learned trial judge in that case was perhaps in a better position to interpret and construe that answer than any other judge who has had to consider it and hence his view should have great weight in that regard.

The several objections taken by the appellant before us seem to have been all taken in the courts below and so thoroughly dealt with as to cover everything involved in this appeal and furnish a complete answer thereto.

Counsel for appellant before us seemed to lay more stress upon the payment, of the judgment in the case of *Marchand* v. *Marchand,* by the defendant therein and now respondent herein, before the expiration of the time for appealing had actually expired in that case, and hence deprived appellant of its rights under the conditions in its policy, than on some of their other objections.

I may therefore be permitted to remark that anything and everything material in way of legal objection that could have been taken in such an appeal has been argued over again in this case both in the trial court determining this case, and in the Court of King's Bench, and decided against the present appellant's contention.

And if the majority of this court take the view that I do, as expressed above, it will be thus demonstrated that the appellant never had anything in law or fact to appeal about and hence has in no way been damaged, but saved costs of an unfounded appeal—if it ever had intended to appeal—which I do not believe it ever had.

Of course I am of the same opinion as some of those dealing with the point below who seemed inclined to hold that the payment made, under the circumstances, was not such an acquiescence in the judgment as to bar an appeal and hence if appellant had been sincerely desirous of appealing and believed to be so, it could have got an appeal therefrom notwithstanding such payment.

I hold that this appeal should be dismissed with costs.

DUFF J.—The claim of the respondent against the appellants was under a policy of insurance by which the appellants agreed to indemnify the respondent against loss from the liability imposed by law upon him for damages on account of bodily injuries or death resulting from an accident caused by reason of the use of the respondent's automobile. A most distressing accident having occurred, in which a young child of the respondent was injured by the respondent's automobile, proceedings were taken on behalf of the child and judgment recovered against the father, and the respondent's claim in the action out of which this appeal arises was for indemnity in respect of this judgment. One ground of defence was that in point of law an infant child has no right of action against his father by the law of Quebec in respect of injuries caused by the father's tort. As regards that contention, I will merely say that in face of the unrestricted terms of article 1053 I could not give my adherence to it in the absence of some text of law or some very decisive authority. No such text or authority has been referred to, and my conclusion is that the contention cannot be maintained.

The appellant company is, however, I think entitled to succeed on other grounds. By two conditions of the policy, (*a*) and (*e*), the assured is required, upon the occurrence of an accident, immediately to give the fullest information obtainable to the company, in writing, and if a claim is made on account of the accident, to give notice of it with full particulars. If a suit is brought, the assured is required to forward to the company every summons or other process as soon as the same has been served on him. It is expressly declared that the company " reserves the right to settle any claim or suit." The assured is required, when requested by the company, to give aid in securing information, in affecting settlements, and in prosecuting appeals; and it is specifically declared that

the assured shall at all times render to the company all co-operation and assistance within his power.

Further, the assured undertakes not to assume voluntarily any liability, nor to interfere in any legal proceedings conducted by the company on account of any claim, nor,

except at his own cost, to settle any claim * * * without the written consent of the company previously given.

1923

THE FIDELITY & CASUALTY CO. OF NEW YORK v. MARCHAND.

Duff J.

The respondent, acting as he conceived, no doubt, in pursuance of his duty to protect the interests of his child, took steps by calling a family council and obtaining the appointment of a tutor, and in instructing attorneys to have legal proceedings instituted; and it is not seriously disputed that in the course of these legal proceedings the respondent did all he thought he could honestly do to further the interests of the plaintiff in the litigation. The appellant company at an early date, before, indeed, filing a plea to the action, advised the respondent that it proposed to take up the defence of the tutor's action as entitled to do by the terms of the policy; that the company would appear and defend in the respondent's name, but that in doing so it had no intention of renouncing any of its rights as against the respondent under the terms of the policy. The respondent is notified that the company is entitled to expect from him the assistance guaranteed by him, and he is at the same time advised that in view of his conduct, the company is entitled by reason of breach of conditions of the policy on his part to repudiate responsibility, and that it reserves the right to do so after judgment in the action. Judgment was recovered, and while the appellant company was considering the advisability of appealing the respondent paid the amount of the judgment. I think it is not open to serious question that this payment was a voluntary payment. In form, no doubt, it was a payment made under pressure of execution or imminent execution, but that pressure was applied, not only with the consent of the respondent, but, one can have no manner of doubt, by his instigation. Pressure and payment were alike aimed at the same purpose, that of enabling the respondent to advance against the appellant company a claim for indemnity.

This transaction is within the letter of the conditions above mentioned as being a " settlement " of the plaintiff's claim without the written consent of the company, and it is within the object and the spirit of the conditions mentioned, in that it was an act of a kind plainly within the contemplation of those conditions, namely, a collusive act, having for its purpose to assist the recovery of reparation from the insurance company through means of a judgment

against the respondent. It is of no relevancy that the claim against the respondent was a valid one, and one which, in the ordinary course, if the conditions of the policy had been complied with, the appellant company would ultimately have been obliged to pay. The conditions are perfectly reasonable conditions, framed with the object of protecting the insurance company against risk of collusion between the automobile owner and persons claiming damages for alleged torts. Such conditions would be robbed of nearly all practical value if in applying them the question of the validity of the professed claim must be investigated. For the purpose of protecting the company against collusion in relation to fabricated or unfounded claims, it is necessary that the conditions should exclude the possibility of such conduct in connection with any claim of any character.

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

ANGLIN J.—I am satisfied that the injury to the plaintiff's minor son was a "bodily injury caused by reason of the use of" the insured's automobile within the meaning of clause no. 1 of the policy sued upon.

The answer to the question whether a minor can maintain an action for an offence or quasi-offence against his father depends in this case upon the civil law of Quebec. The numerous American opinions cited by counsel for the appellant (to which I might add a reference to Eversley on Domestic Relations (3rd ed.), p. 578) are not authoritative. The case appears to fall within article 1053 C.C. and I am by no means convinced that considerations of public policy require the courts to refuse to entertain such an action. However, it is not necessary to determine that important question on this appeal.

While I am not satisfied that the steps taken by the respondent to enable an action to be brought against himself on behalf of his son avoided the policy sued upon, his payment of the judgment recovered in that action before the time for appealing against it had expired was, in my opinion, the settlement of "a claim * * * without the written consent of the company previously given" in violation of condition (E) of the policy, which precludes recovery.

1923

THE FIDELITY & CASUALTY CO. OF NEW YORK v. MARCHAND.

Anglin J.

I cannot think that the plaintiff stood in any real danger of a seizure being made in execution of the judgment against him. His obvious control of the proceedings in the action brought in the name of the tutor of his son makes it reasonably certain that he did not.

On this ground I am, with respect, of the opinion that this appeal must be allowed.

MIGNAULT J.—The case submitted for our decision is certainly an extraordinary one.

The respondent, owner of an automobile, obtained from the appellant an automobile liability policy, whereby the appellant agreed to indemnify him

against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons as the result of an accident occurring while this policy is in force by reason of the use, ownership, or maintenance of any of the automobiles described * * * while used * * * within the limits of the United States of America and Canada.

The appellant also agreed

to defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, by any person or persons within the limits designated in the preceding paragraph and under the circumstances therein described and as the result of an accident occurring while this policy is in force.

The policy was made subject to certain conditions of which the two following are material to the issue:—

A: Upon the occurrence of an accident the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company at its home office or to the agent who has countersigned this policy. If a claim is made on account of such accident the assured shall give like notice thereof with full particulars. If thereafter any suit is brought against the assured to enforce such a claim, the assured shall immediately forward to the company at its home office every summons or other process as soon as the same shall have been served on him. The company reserves the right to settle any claim or suit. Whenever requested by the company, the assured shall aid in securing information, evidence, and the attendance of witnesses; in effecting settlements; and in prosecuting appeals. The assured shall at all times render to the company all co-operation and assistance within his power. E: The assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the company on account of any claim; nor, except at his own cost, settle any claim, nor incur any other expense without the written consent of the company previously given; except that he may provide at the time of the accident, and at the cost of the company, such immediate surgical relief as is imperative.

The amount of the policy was $5,000 for loss from an accident resulting in bodily injuries to or in the death of one person.

While the policy was in force, on the 6th June, 1919, at St. Genevieve, Quebec, the respondent, when backing his car along a semi-private road leading from his residence to the public highway, and when moving reversely on the highway in order to turn the car in the direction of the village where he desired to go, had the misfortune to very seriously injure his minor son, Sarto, aged five and a half years, who was running or playing in the vicinity of the automobile. As required by his policy he promptly notified the appellant of the accident. Of course, the respondent secured medical and surgical care for his child and disbursed therefor certain sums of money. This he could do under the policy without admitting liability or affecting his recourse against the appellant. Some negotiations appear to have been carried on between the respondent and the appellant, the former seeking to have the latter pay the amount stipulated under the policy, but the appellant disputed its liability.

The respondent then conceived what I may describe, without using the term offensively, as a most extraordinary scheme in order to obtain from the appellant the amount of his policy. He took the initiative of having a tutor appointed to his minor son in the person of his brother, Alphonse Marchand, and had the family council summoned for that purpose and on its advice Alphonse Marchand was made tutor, and Adrien Marchand, another brother, subrogate tutor. This was clearly done in order that the respondent might have an action instituted against himself by the tutor acting for the child. And unnecessarily, because no judicial authorization is required by a tutor in order to take an action on behalf of his ward (article 304 C.C.), the tutor was authorized, on the advice of the family council, to institute an action claiming $5,000 from the respondent by reason of the injuries sustained by his minor son. The respondent assisted at the family council and took part in its deliberations.

Action claiming $5,000 as damages was then taken by the tutor on behalf of Sarto Marchand against the respond-

1923

THE FIDELITY & CASUALTY CO. OF NEW YORK v. MARCHAND.

Mignault J

ent upon whom the action was duly served. The respondent, as required by the policy, sent the papers served on him to the appellant, and the latter decided to defend the action, as it was bound to do, and so notified the respondent in writing. Defence was entered by attorneys employed by the appellant in the name of the respondent and, option for a jury trial having been made, the trial took place in October, 1920. The respondent gave his testimony and the jury found that he had not taken the required precautions to avoid the accident, their answer being

Il aurait pu éviter l'accident en éloignant l'enfant de l'auto de quelque manière.

and they assessed the damages at $5,000.

On this finding, which was taken to be a finding of negligence, judgment was entered on the 7th of October against the respondent in favour of the tutor for $5,000. It may be added, because the appellant laid some stress on this point, that when the respondent desired to take advice as to these proceedings and his dealings with the appellant, he invariably consulted Mr. Pélissier K.C., who was the attorney of the plaintiff in the damage suit.

The legal delays for issuing execution on this judgment, fifteen days, expired on October 22, and, by the law governing the action, appeal could have been taken within two months from the date of the judgment. Nothing was done on either side until the 2nd of November, except that the attorneys employed by the appellant were asked if they intended to appeal, and the purport of the answer of a junior member of the firm, who was not charged with the case, is the subject of conflicting testimony.

On the 2nd of November, the respondent paid the amount of the judgment, with interest and costs, and on the same date a letter was written by Messrs. Pélissier, Wilson and St. Pierre, the attorneys for the tutor in the damage action, to the appellant advising it of this payment and stating that they were instructed by the respondent to take action against the appellant to recover the amount due under the policy. The answer of the appellant protested against this payment, which was made without notice, and at a time when, says the appellant, it was seriously considering the advisability of taking an appeal from the

judgment. The present action ensued, and the respondent succeeded before the Superior Court and the Court of King's Bench, Mr. Justice Howard dissenting in the latter court.

Mr. Lafleur, on behalf of the appellant, submitted three questions for the consideration of this court. 1. Has a minor son a right of action against his father for damages caused by a *quasi délit* (a tort) of the latter? 2. Assuming that a right of action exists, does the accident in question come within the policy? 3. Assuming that both these questions are answered adversely to the appellant, has the respondent fulfilled his contractual obligation to co-operate with the appellant?

I will deal with each of these questions in the order mentioned.

First question. Before this case was submitted, I may frankly say that I had never heard of a civil action by or on behalf of a minor child against his father or mother, claiming damages for injuries caused by the negligence of the latter. In its factum, the appellant refers to a very recent decision by a North Carolina court in which, on grounds of public policy, it was held that such an action does not lie, and the judgment mentions some American cases apparently to the same effect. Such decisions, however, are not authorities before our courts. In the absence of authority to the contrary, the question really is whether an exception founded on family relationship can be admitted in view of the very general rule of liability contained in article 1053 of the civil code. This rule is in as wide terms as possible and renders every person capable of distinguishing right from wrong responsible for damage caused by his fault to another. There is here no limitation, no exception of persons, and the class of those to whom compensation is due is as wide as that of the persons on whom liability is imposed. It seems, therefore, sufficient to say *lex non distinguit,* however repugnant it may seem that a minor child should sue his own father, although it would probably be equally repugnant that a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damage he has suffered. I

1923

THE FIDELITY & CASUALTY CO. OF NEW YORK v. MARCHAND.

Mignault J.

think, therefore, that the first question must be answered in the affirmative.

Second question. This question calls for an examination of the terms of the policy and the circumstances of the accident. There is undoubtedly here a liability imposed by law, whether article 1053 C.C. be alone considered or whether it be supplemented by article 1406 R.S.Q. placing on the owner or driver of a motor vehicle the burden of proof that the loss or damage did not arise through his negligence or improper conduct. It is argued that the answer of the jury that the negligence of the respondent consisted in not having removed his minor child from the vicinity of the automobile shows that the accident was not caused "by reason of the use of the automobile" but by the failure of the respondent to take proper care of his child. The testimony of the respondent at the trial of the damage action is, however, to the effect that when he backed the car on the public highway, looking backwards to the left, he knew that his child was "à l'avant de ma machine, à droite." It was negligence of the grossest kind to turn his front wheels, as he says he did, knowing that his child was on the front of the car to the right while he looked backwards to the left. This undoubtedly was negligence in the use of the automobile, and the answer of the jury surely means that the respondent should not have moved his car when he knew that, instead of obeying his order to return to the house, the child was still in the vicinity of the front wheels, or, in other words, it was an act of negligence to set the car in motion without seeing that the child was away from the wheels. This question must therefore be answered in the affirmative.

Third question. This is really the determining inquiry as to the right of the respondent to recover from the appellant the amount of the policy. It was the duty of the respondent, under conditions A. and E., in the event of a suit taken against him on account of an accident; (*a*) to immediately forward to the company every summons or other process as soon as served on him; (*b*) when requested by the company to aid in securing information, evidence and the attendance of witnesses, in effecting settlements and in prosecuting appeals; (*c*) at all times to render to the

company all co-operation and assistance within his power; (*d*) not to voluntarily assume any liability or interfere in any negotiations or legal proceedings conducted by the company on account of any claim; (*e*) except at his cost, not to settle any claim, nor incur any other expense, except for immediate surgical relief at the time of the accident, without the written consent of the company previously given.

All these contractual obligations of the respondent may be summed up by stating that it was his duty to co-operate with the appellant in the event of a suit being taken against him on account of an accident in the use of his automobile. Has the respondent fulfilled this duty?

He undoubtedly sent to the company a copy of the summons and process served on him and he does not appear to have refused to give information when required. But he caused the suit to be taken against him, and paid the amount of the judgment without the consent of the appellant. Is that rendering to the company all co-operation and assistance within his power?

It is said that it was his duty as a father to protect his minor child and to indemnify him for the damage he had caused him (article 165 C.C.). It may be observed that the duty to indemnify a person injured by the negligence of the driver of an automobile would exist even towards a stranger, and the maxim of the Roman law, *neminem laedere,* quoted by the learned Chief Justice of Quebec, merely expresses the universal duty which is laid down in general terms by article 1053 C.C.

But granting that this duty is of a more cogent character in the case of a father who negligently injures his own child, nothing prevented the respondent, who is a man of considerable means, from repairing the injury out of his own moneys. But the point is that nothing was further from the intention of the respondent; his idea was to make the appellant pay the indemnity, and for that reason the action which the respondent caused to be taken against himself was limited to the amount of the policy, no more and no less. To succeed against the appellant on the policy, the respondent must have fulfilled his contractual

1923

THE FIDELITY & CASUALTY CO. OF NEW YORK v. MARCHAND.

Mignault J.

obligations, and it is no answer to say that he preferred his parental duty to his contractual one.

No one would contend that if the respondent had negligently injured the child of a neighbour, he could, consistently with his obligation to co-operate with the appellant, take the initiative of the action instituted against him. In my opinion, his relationship to the victim of the accident does not alter his contractual obligation towards the appellant, if he desires to recover on the policy. It is not the respondent's son who was insured but the respondent himself, and the appellant's contract was to indemnify him subject to the conditions of the policy. If the respondent has violated these conditions he cannot recover the insurance, even if his only object was to fulfil his duty towards his child. It merely obscures the issue to say that the respondent did what any father would have done, what one of the learned judges of the Court of King's Bench stated he would himself have done, had he negligently injured his child. The real question is whether the respondent has fulfilled his contractual obligation to co-operate with the appellant; and if he has not done so he cannot recover on the policy.

But even if the respondent's conduct in taking the initiative of the damage action instituted against him could be reconciled with his contractual obligations towards the appellant, I am of opinion that he clearly violated condition E when he paid the amount of the judgment without the written consent, or any consent, of the appellant. It is said that there was a judgment against him, that execution of this judgment was then due and that the respondent was not obliged to wait until his property was seized before settling it. It suffices to answer the respondent was in no danger of an execution or a seizure; he fully controlled the whole proceedings which he had initiated and was really the *dominus litis*, although nominally the condemned defendant. And a right of appeal still existed to which the voluntary acquiescence of the respondent put an end. The least that can be said is that the respondent should not have paid before notifying the appellant and giving it the opportunity to appeal from the judgment if it was so minded.

It may be objected that where a person insured under a liability policy negligently injures one of his own minor children, it is difficult to fulfil the conditions of the policy as to non-interference in a damage action and co-operation with the insurer. Even if that be so, the conditions of the contract must govern the contracting parties. Here the initiative of having a tutor named to the minor could have been taken by any relative (article 250 C.C.). And I entirely fail to see why collusion with the plaintiff should be allowed when the latter is a blood relative and forbidden when he is a stranger. In every case the contract, and not the relations between the insured and the injured party, must determine the right of recovery.

With all possible deference therefore I cannot concur in the reasoning which prevailed in the courts below on this crucial question. In my opinion, the respondent has not fulfilled the conditions of the policy and has therefore no right of recovery against the appellant.

I would allow the appeal and dismiss the respondent's action with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Elliott & David.*

Solicitors for the respondent: *Pélissier, Fortier & Thibaudeau.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT).... APPELLANT;

AND

DENNIS A. MURPHY (PLAINTIFF).....RESPONDENT.

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

Negligence—Railway—Injury to passenger—Announcement of stoppage—Stoppage short of station—Mistaken belief of passenger—Finding of jury.

M. was travelling to West Toronto on a G.T. train. When the last station on his journey had been passed an official went through the train calling out "next stop" or "next station" West Toronto. Before reaching that station the train had to stop for a few seconds in obedience

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

1923

GRAND TRUNK RY. CO. OF CANADA v. MURPHY.

to a stop signal and M. went to the platform of his car, on which there were no step doors, and alighted falling to the ground and sustaining severe injury. In action against the Ry. Co. he admitted that he had understood the announcement to mean that the next station would be West Toronto. The jury found negligence by the company and that such negligence was—"We believe that the defendants should * * * when compelled to stop trains use precaution to prevent passengers from alighting." A verdict for M. was maintained by the Appellate Division.

Held, Idington and Duff JJ. dissenting, that the action should be dismissed; that it was the duty of the officials of the company to stop the train as they did; that they were under no duty, either statutory or imposed by regulations of the Railway Board, to warn passengers that the train had not reached the station which was the only precaution suggested on M's behalf as available; and that there was no breach of the common law duty to carry safely as, owing to the brief period of the stoppage and the haste in which M. left the car, an effective warning was not possible.

Per Duff J.—By the announcement "next stop West Toronto" M. was placed in a situation which, without further warning, might be one of peril, and the trial judge refused to submit to the jury the suggestion of counsel that the announcement should have been accompanied by a warning that the train might stop at the semaphore, basing his refusal on the admission of M. that he understood the announcement to mean that the next station was West Toronto. This may have been regarded by the jury as a direction that on this crucial question such admission was conclusive against M. and there should be a new trial the finding of the jury as to negligence being too vague and uncertain to permit of a judgment against the company.

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 respondent.

The facts are stated in the above head-note. The case has been tried twice. A judgment of nonsuit on the first trial was set aside by the Appellate Division and a new trial ordered.

D. L. McCarthy K.C. and *R. E. Laidlaw* for the appellant.

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

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario composed of four judges, the Chief Justice of the Common Pleas, and Middleton, Latchford and Logie JJ. The Chief Justice and Middleton J. were to allow the appeal from the judgment entered by the trial judge for

(1) 52 Ont. L.R. 642.

$4,000 on the findings of the jury and to dismiss the action, while Latchford and Logie JJ. were to dismiss the appeal. The court being equally divided the appeal was consequently dismissed, whereupon the company entered an appeal to this court.

The case had been twice tried first before Mr. Justice Hodgins who non-suited the plaintiff at the close of his evidence which non-suit was set aside on appeal and a new trial directed. The new trial was heard before Mr. Justice Riddell sitting with a jury who found for the plaintiff, now respondent, for $4,000 damages.

The questions and answers of the jury were as follows:

(1) Was the casualty in question a mere accident, or was it caused by negligence? Ans. It was caused by negligence.

(2) Was it caused by the negligence of the defendants? Ans. Yes.

(3) If so, what was the negligence? Answer fully. Ans. We believe that the defendants should on occasions when compelled to stop trains, use precautions to guard passengers from alighting from trains so stopped.

(4) Could the plaintiff, by the exercise of ordinary care, have avoided the casualty? Ans. No.

(5) What should he have done? Ans. Nothing.

(6) Was the train in motion when the plaintiff stepped off? Ans. No.

(7) Damages. Ans. $4,000.

After the jury had answered the questions as above set forth, the learned trial judge declined to hear argument on behalf of the appellant. He said,

I think it is a matter to be disposed of by the Divisional Court and it is so near the line it ought to go to the Divisional Court in any case.

I agree so fully with the judgments of the Chief Justice of the Common Pleas and Mr. Justice Middleton, for allowing the appeal and dismissing the action, that I feet it is not necessary for me to repeat in full their reasoning.

As Mr. Justice Middleton says there might be evidence to justify the holding that the plaintiff was not negligent, but he goes on to say:

When we turn to the question of the defendant's negligence the case is different. * * * If the jury intend to impute fault to the brakeman in not going again through the car to warn the passengers against alighting, then they impose upon him a duty in conflict with his statutory duty to go back upon the track and protect the rear of the train. They probably did not intend this because the trial judge warned them that they must specify all the negligence which they thought existed and that the negligence found would alone be regarded. The plaintiff in his evidence pointed out this as the thing that he complained of, and the jury refused to find for him.

1923

GRAND TRUNK RY. CO. OF CANADA v. MURPHY.

The Chief Justice.

The truth probably is that the jury desired to find for the plaintiff but could not put their hands on any particular fault, and so resorted to the device of a vague general statement. More is required than this. Negligence "in the air" is not enough. See, for example, *Newberry* v. *Bristol Tramways Co.* (1), where a similar finding was paraphrased: "We find there was negligence but we cannot tell what. We negative the various suggestions of negligence, to which the evidence has been directed, but we divine the existence of some other negligence too obscure to be named in words or to be proved by testimony." The principle is there stated by Hamilton L.J. (now Lord Sumner) "that the jury cannot fix a defendant with liability for want of care, without proof given or reason assigned, out of their own inner consciousness and on their own notion of the fitness of things." A verdict must rest on a foundation of actuality and not merely upon an ideal or vague view. If the jury meant that the train should have had a larger crew so that there might have been a man on guard at each door, then the jury went too far because the crew necessary on each train is subject to specific regulations by the Railway Board, and the decision of the board governs.

On the argument I asked the plaintiff's counsel if he could surmise exactly what the jury intended, and he could not. His answer was in effect: It is not for the plaintiff or for the jury to say what should be done, it is enough to say something should have been done. I do not agree with this. The plaintiff must shew something done which ought not to have been done, or something omitted which should have been done, before he can recover.

I would, therefore, allow the appeal and dismiss the action.

IDINGTON J. (dissenting).—This appeal arises out of a case in which the respondent by the evidence, as I read it, had presented a rather simple problem for solution yet there has been a very remarkable difference of judicial opinion in the course thereof.

He was a passenger on appellant's train from Chesley to West Toronto which passed through and had stopped at Weston.

The distance between Weston and West Toronto is between three and four miles and usually takes only about nine minutes to run.

The respondent was accompanied by his wife and they naturally were alert to any announcement to be made by the train officials as to when to get off the train at West Toronto, their point of destination.

The trainman in charge having, as West Toronto was approached, announced "Next stop West Toronto," they got ready to answer said call as the train slowed up and

(1) [1912] 107 L.T. 801.

duly proceeded to the nearest door of their car which was next to the last of a very long train consisting of ten cars of which six were passenger cars.

The train stopped and they got on to the open platform of their car and appellant, though it was pitch dark, went down the steps of the car and then, assuming he was quite safe, stepped off, but it turned out that the last step of the car was three or four feet from the ground. The result was a violent fall from which he suffered very serious injuries.

Hence he sued appellant for the damages thus suffered attributing same to the negligence of the appellant in inviting him thus to alight at the next stop which was not, as supposed, the next station.

The case has been tried twice on substantially the same evidence.

On the first trial Mr. Justice Hodgins, before whom it was tried, dismissed the action.

That ruling was set aside by the unanimous judgment of the Appellate Division of the Supreme Court of Ontario and a new trial granted, which took place before Mr. Justice Riddell who submitted to the jury seven questions, which appear with the answers thereto, as follows:—

(1) Was the casualty in question a mere accident, or was it caused by negligence? Ans. It was caused by negligence.

(2) Was it caused by negligence of the defendants? Ans. Yes.

(3) If so, what was the negligence? Answer fully. Ans. We believe that the defendants should, on occasions when compelled to stop trains, use precaution to guard passengers from alighting from trains so stopped.

(4) Could the plaintiff, by the exercise of ordinary care, have avoided the casualty? Ans. No.

(5) What should he have done? Ans. Nothing.

(6) Was the train in motion when the plaintiff stepped off? Ans. No.

Was the plaintiff aware that it was in motion? Ans. No.

(7) Damages. Ans. $4,000.

It is quite clear therefore that mere accident was not the cause of respondent's injuries but appellant's negligence, and respondent was exonerated from any negligence on his part.

The learned trial judge who ought to know the due import and significance of these answers at once entered judgment for the respondent with costs.

Upon appeal to the Appellate Division of the Supreme Court of Ontario by the appellant here, the court hearing

1923

GRAND TRUNK RY. CO. OF CANADA v. MURPHY.

Idington J.

said appeal was equally divided, and hence the appeal failed and was dismissed accordingly.

The appellant then brought this appeal here. Its main contention, indeed only one in law, is that the answer to the third question is not sufficiently explicit and comprehensive.

I read it, as I think such questions and answers must always be read, in light of the evidence and the learned trial judge's charge, and so reading same I can find no difficulty in the case and agree with the learned judges Latchford and Logie in the court below maintaining, for the respective reasons each has assigned, the judgment of the learned trial judge upon said verdict.

If the stop at the point where the respondent got off was quite likely to be rendered necessary by reason of the immense traffic converging at the West Toronto station yard, then it clearly was the duty of the appellant to have taken precautions to guard passengers from alighting from trains so stopped. I do not think it was necessary for the jury to have written a treatise on the subject to enable any one to comprehend the true import of their answer.

Nor do I intend to elaborate upon the manifold methods by which one of many precautions might have been taken. I prefer, with all due respect for those who differ from me in so concluding, to apply common sense to the usual method of reading such question and answer verdicts in light of the evidence and the learned trial judge's charge.

I may be permitted to add that I fail to see any resemblance between what is presented herein and what transpired in the case of *Newberry* v. *Bristol Tramways Co.* (1), relied upon by Mr. Justice Middleton in the court below, or the case of *Hood and Wife* v. *Walthamstow District Council* (2), cited by counsel for appellant.

The decisions in the cases of *Glasscock* v. *London, Tilbury & Southend Railway* (3); *Readhead* v. *Midland Railway Co.* (4); *Scott* v. *London Dock Co.* (5); *Bridges* v. *North London Railway Co.* (6), cited by respondent's counsel, are much more in point.

(1) 107 L.T. 801.
(2) [1915] 79 J.P. 161.
(3) 18 Times L.R. 295; 19 Times L.R. 305.
(4) [1869] L.R. 4 Q.B. 379.
(5) [1865] 3 H. & C. 596.
(6) [1874] L.R. 7 H.L. 213.

And as to the case of *Newberry* v. *Bristol Tramways Co.* (1) cited by counsel for appellant herein I may say that if he had cited it to the learned trial judge and got through him a similar answer to that given by the foreman of the jury in that case, it might have had some application.

I cannot in absence thereof attach any importance to such a remote contingency.

I must therefore come to the conclusion that this appeal should be dismissed with costs.

DUFF J. (dissenting).—The respondent was a passenger on the appellant's railway from Chesley to West Toronto. The train was due to arrive at the plaintiff's destination at 9.15 p.m., but on the day when the accident occurred, the 5th November, 1921, it did not arrive until ten o'clock. The train comprised ten cars, and the car in which the plaintiff was riding was not vestibuled, and had no step-doors to prevent passengers from descending the car steps for the purpose of alighting. There were three other cars of the same design in the train. The evidence is to the effect that two train officers separately called out to the passengers, "Next stop West Toronto," and the last one punched the railway tickets. Shortly afterwards the train stopped, no further announcement having been made or warning given. The night was dark and, according to the plaintiff's evidence, he was unable to see where he was. The train had, in fact, stopped before reaching the station, and the plaintiff, assuming that he was at the West Toronto station, got up with his wife, walked on to the platform of the car, went down three steps and in stepping off the last of these fell, injuring himself seriously. The jury negatived contributory negligence, and found that the injuries suffered by the plaintiff were due to the negligence of the appellant company.

There was a conflict of evidence at the trial upon several questions, principally upon the question as to whether or not the train had in fact stopped. This question the jury answered in favour of the plaintiff.

The stopping of the train before reaching the station of West Toronto was explained by witnesses called on behalf

(1) 107 L.T. 801.

1923

GRAND TRUNK RY. CO. OF CANADA v. MURPHY.

Duff J.

of the appellants. As the railway line approaches St. Clair Avenue in West Toronto it takes the form of a curve just before it reaches the railway yard, about a quarter of a mile west of that street. At or near the entrance to the yard there is the usual semaphore or distance signal. At St. Clair Avenue there is also a signal which, the trainmen said, was set at Stop as they passed the distance signal. Thereupon the train was slowed down and, according to their evidence, the stop signal having been raised before they reached St. Clair Avenue, they increased the speed and proceeded. On this last point the jury declined to accept their evidence.

There was evidence (as the Divisional Court held in ordering the second trial) from which the jury might draw the conclusion that the announcements and the stop together amounted in the circumstances to a representation that the train had reached the place where the passengers for West Toronto were to leave it. Moreover, it would be within the province of the tribunal of fact to decide whether (in view of the possibility, knowledge of which by the company could not be denied, of the train being brought to a standstill by the St. Clair Avenue signal) the announcements so made without qualification and without warning given then or afterwards *prima facie* constituted negligence in themselves, as conduct calculated in a contingency which the company ought to have anticipated, to lead passengers without warning into a situation which without warning was a dangerous one.

Passengers are entitled to rely upon the servants of a railway company performing their duty to exercise reasonable care to avoid putting them into a position of peril. They are entitled to act on such announcements as are made without analyzing them critically, and without suspicion, and to proceed with confidence on the plain obvious meaning of them.

It is arguable no doubt that the verdict expresses with sufficient certainty a finding to this effect; but I am forced to the conclusion that the verdict is too vague, too uncertain in its meaning and effect, to be treated as a proper basis for a judgment against the appellants. But I confess that I am quite unable to discover any adequate

ground for awarding judgment against the respondent, dismissing the action.

As I have said there was evidence to support a finding of negligence in the sense above mentioned. With great respect, I think the manner in which the case was left to the jury was calculated to divert their minds from the real question before them. In answer to the request of the plaintiff's counsel to submit to the jury his suggestion that the announcements should have been accompanied by a warning of the possibility of a stop at the semaphore, the learned trial judge in effect declined to do so, giving as his reason, in the presence of the jury, the admission of the plaintiff that he knew that when the conductor announced the next "stop" he meant the next station. This was to ignore the contention that the effect of the announcement was that the next stop would be the station at which the plaintiff was to alight, and might easily be regarded by the jury as a direction that upon the question—the crucial question in the case—whether the appellants negligently misled the plaintiff by the announcements, the plaintiff's admission referred to by the learned trial judge was conclusive against him. I am inclined to think that to this observation of the learned judge is to be attributed the form of the answer to the third question.

The learned trial judge had, it should be noted, asked the jury to consider two suggestions made by the plaintiff himself in his evidence. One, that the announcement of the station should be delayed until the signal for proceeding was received at St. Clair Avenue; and an alternative one, that if, on approaching the yard, the signal at St. Clair was set at "stop" the passengers should then be warned to keep their seats.

The importance of this way of presenting the plaintiff's case to the jury, excluding the suggestion made by the plaintiff's counsel that the announcements should have been accompanied by a warning, while submitting the suggestions just mentioned, received illustration in Mr. McCarthy's argument. Naturally he emphasized the phraseology of the answer to the third question as confining the scope of the answer to precautions coming into effect either after the train had stopped, or after the certainty, or the

1923

GRAND TRUNK RY. CO. OF CANADA v. MURPHY.

Duff J.

immediate probability, of a stop had become apparent. Whether or not this is the necessary meaning of this answer, at least I am convinced that it is the better reading of it; and the conclusion was urged upon us, as involved in certain decisions of this court, that the jury, having thus defined the negligence they were finding, necessarily negatived any charge of negligence based upon the absence of precautions coming into play at an earlier stage, such as the warning suggested by Mr. Ferguson. If that be the correct way of looking at the verdict and, as I have already intimated, I am by no means satisfied that it is not, then it is impossible to affirm, I think, that the learned judge's observations, above referred to, did not very gravely affect the form of the findings.

Then I think the learned judge gave the jury the impression that in answer to the third question they should seek to indicate the precautions negligently omitted by the appellants. As I have said, given a stop long enough to lead the plaintiff to think the station had been reached, and the absence of warning and the absence of contributory negligence, the *ensemble* of the facts, beginning with the announcements themselves, might have been stated, if that was their view, as constituting the negligence for which they held the appellants responsible; and it is barely possible that, as Mr. Scott argued, this is precisely what the jury, without assistance, was attempting to do; although, if such was their object, I agree that they signally failed in it.

It was not for the plaintiff to specify the appropriate precautions. The fact that without warning he had been invited into a situation which without warning was a situation of peril, by the appellants, was *prima facie* a breach of their duty to him as a passenger. If the appellants' answer was to be that this was unavoidable it was for the appellants to shew that; the burden of explanation was upon them. A finding against the appellants on that issue could not be set aside as unreasonable.

There should be a new trial. In view of the opinion of the majority of the court there is no object in discussing the question of costs.

ANGLIN J.—The respective functions of the court and the jury in cases such as this were definitely stated by the House of Lords in *Bridges* v. *North London Railway Co.* (1). It is for the court to determine whether there was any evidence of facts upon, or by legitimate inference from, which a jury might find that negligence of the defendants *dans locum injuriæ* was established. If there is such evidence, it is for the jury to decide whether it warrants such a finding. *Robson* v. *North Eastern Ry. Co.* (2). If they determine that it does it is not within the province of an Appellate Court to hold that it does not and on that ground to set aside the verdict.

Some facts in this case are perfectly clear. There were two calls—either " West Toronto next stop " or " West Toronto next station "—made by the train crew and heard by the plaintiff at a time when the train was still at a considerable distance north of that station. The signal for the diamond crossing at St. Clair Avenue, which is about one-quarter of a mile north of the West Toronto station, was set against the train and the engineer could not lawfully cross that thoroughfare until that signal had been reversed. The train slowed down when approaching the diamond crossing and, on conflicting evidence, the jury found that it actually stopped north of St. Clair Avenue and that fact cannot now be questioned. Their further finding negativing contributory negligence on the part of the plaintiff involved acceptance of his story that, when he attempted to alight, he believed the train had stopped at the station and that he used reasonable care in making that attempt. Those facts, I agree, must also now be assumed.

That nothing was done after the train stopped to prevent passengers alighting and that the plaintiff was injured while in the act of alighting from the train are undisputed facts. It must be assumed that when he attempted to alight the train was stopped north of St. Clair Avenue. The precise duration of that stop is not proven. The train crew all denying that any stop was made, and agreeing in the statement that the train had only slowed down and that the signal having been reversed it proceeded to the

(1) L.R. 7 H.L. 218. (2) [1876] 2 Q.B.D. 85, 87.

1923

GRAND TRUNK RY. CO. OF CANADA v. MURPHY.

Anglin J.

station without actually stopping, of course no evidence of the duration of the stop could be had from them. The plaintiff and his wife say the train had stopped before he opened the door of the car to reach the platform preparatory to alighting. Thompson, a witness called for the plaintiff, says that the train did not stop until the plaintiff was on the platform. At most, only a few seconds elapsed between the stopping of the train and the plaintiff's stepping off. His wife says the train started again immediately after he had stepped off—that she had not time to follow him. It, therefore, seems to be certain that the stop, if made (as we must assume it was), was but momentary.

The train comprised ten cars, the six in the rear being passenger coaches. The train crew consisted of a conductor and two trainmen, each of the latter being in charge of three of the passenger coaches. The plaintiff travelled in the coach next to the last. It was the duty of the trainman in charge of the three rear coaches, in the event of a stop being made between stations, to go back on the track to protect his train against the danger of any following train running into it while stationary. There was no attempt to shew that the train crew was not adequate or that it did not meet the requirements of the regulations of the Board of Railway Commissioners.

The only finding of negligence made by the jury was the following:

> We believe that the defendants should on occasions when compelled to stop trains use precaution to guard passengers from alighting from trains so stopped.

This finding must be read in the light of the evidence and the charge of the learned trial judge. So read, notwithstanding its generality, it is not open to the objection that prevailed in *Newberry* v. *Bristol Tramways Co.* (1), and in *Hood et ux.* v. *Walthamstow Urban District Council* (2). I am disposed to regard it, as did Latchford and Middleton JJ., as sufficiently expressing the jury's view that some precaution was practicable. Since the only precaution suggested by the plaintiff, or on his behalf, was that the train crew should, after the train had stopped, have warned passengers not to debark because the train was not yet at

(1) 107 L.T. 801. (2) 79 J.P. 161.

the station, the jury's finding should be taken to imply that the failure to give such a warning was negligence *dans locum injuriæ*. The question presented, therefore, is whether, upon the evidence in the record and such inferences as they could legitimately draw from it, the jury could reasonably make such a finding.

The calling out of the name of each station a short time before the train reaches it is customary and is such a convenience to the passengers whose destination it is and to the conductor who is obliged to collect their tickets or hat checks that its discontinuance would evoke a storm of protest. The stopping of the train at the diamond north of St. Clair Avenue, while not altogether unexpected, is not usual; it is said to occur in the case of the train with which we are dealing about once a week. This stop was made in the discharge of an imperative duty. Neither singly, nor taken together, did the announcement of the station and the stop following it involve any fault or negligence. But, having regard to the darkness (10.10 p.m.), a situation was thus created in which it might not unreasonably be anticipated that some passenger, in the belief that he had been invited to alight, would make the very mistake which the plaintiff made and might sustain injury, as he did, without being himself in any way negligent or at fault. That the possibility, if not probability, of such an occurrence was, or should have been, realized by the defendant's officials and employees also seems clear. It follows that if its happening could have been prevented by any reasonably practicable precaution, omission to take it would be negligence.

It is upon the practicability of giving an effective warning under the circumstances that, after most anxious consideration of the whole record, it seems to me evidence to support the plaintiff's case is lacking. A finding that there was sufficient time after the train had stopped for the train crew to have taken steps that would probably have prevented the plaintiff making the mistake he did in my opinion cannot be supported on the evidence before us. On the contrary, it seems to be reasonably certain that there was no opportunity for their giving the warning, the omission of which is the fault relied on by the plaintiff. It may be that the moment the train stopped the members of the

1923

GRAND TRUNK RY. CO. OF CANADA v. MURPHY.

Anglin J.

train crew available for that duty should have started going through the train to give some warning. But, having regard to the evidence indicating that the stop was momentary and to the fact that the plaintiff stepped off the car immediately upon its being made, no jury, in my opinion, could reasonably find that any attempt to give such warning would have been effective to prevent the plaintiff's alighting or to bring to his attention the danger of attempting to do so. Not only is this a fair inference from the facts in evidence; it is, I think, the only legitimate inference. Negligence of the defendants *dans locum injuriae,* essential to the plaintiff's success, is not merely not established by direct proof or reasonable inference; its existence is excluded by the facts that are proven.

For these reasons I concur in the judgment allowing this appeal.

MIGNAULT J.—This is an appeal from the judgment of the Appellate Divisional Court of Ontario, whereby the judgment of the trial judge giving effect to the verdict of the jury was sustained on an equal division. The case has been tried twice, a divisional court having ordered a new trial after the trial judge at the first trial had dismissed the action at the close of the plaintiff's case.

The material facts are as follows:

The respondent, on the evening of the 5th of November, 1921, was travelling with his wife on a Grand Trunk train from Chesley, Ont., to West Toronto. The last station before West Toronto is Weston, and after leaving the latter place, the brakeman passed through the car where the respondent and his wife were seated, calling out: "Next station West Toronto," or "Next stop West Toronto." Whichever it was, however, is not material, because the respondent says he understood that the call meant that West Toronto would be the next station. Before reaching the latter station the train had to cross St. Clair Avenue, where there is a tramway line and considerable traffic, and where also there are gates erected for the protection of the public. When these gates are closed to traffic the semaphore signals that the line is clear and trains cross the highway without stopping and

proceed to West Toronto station, a quarter of a mile distant. When, however, the gates are open to traffic on the avenue the signal from the semaphore stops the train before it reaches the crossing.

On the evening in question, at about 10 o'clock, this train arrived near the crossing and found that the signal was set against it. There was a conflict of evidence on the question whether the train actually stopped, or merely slowed down to a speed of about four miles an hour, but the jury, as they were entitled, found that it did stop, and that fact must be assumed to be conclusively established. We must therefore take it that the train stopped, certainly for a very short time, waiting for the signal to proceed. As it stopped, the respondent and his wife, who were in the car next to the rear car, rose from their seats, opened the car door and went out on the platform. The respondent looked from the steps leading from the platform of the car and saw lights ahead on the right side. His first intention was to alight on that side, but his wife having remarked that the station was on the left side, he got off on the left side, although it was dark there, and fell to the ground, suffering the injuries for which he now seeks compensation.

The jury were cautioned by the trial judge that, if they found that the defendant was guilty of negligence causing the accident, they should state in what the negligence consisted, and that any act of negligence not specified by them would be held to have been negatived.

Under these circumstances, the jury having found that the accident was caused by the negligence of the defendant, they had to answer the further question what was this negligence. The answer written down by them was:

> We believe that the defendant should, on occasions when compelled to stop trains, use precaution to guard passengers from alighting from trains so stopped.

They also found that the plaintiff could not have avoided the accident by the exercise of ordinary care, thus negativing any contributory negligence on his part.

We have now, on this very vital question, an extremely vague answer. When trains are compelled to stop before reaching a station—and they are compelled to stop whenever the signal is given them that the line is not clear—the

1923

GRAND TRUNK RY. CO. OF CANADA v. MURPHY.

Mignault J.

railway company must, in the opinion of the jury, use precaution to guard passengers from alighting from trains so stopped. What this precaution should be, the jury do not say. Had they been further questioned, as they should have been, the matter would have been clinched, and it is possible either that they would have specified a precaution which the appellant was not bound to take, or that they would have made some such answer as was considered insufficient in *Newberry* v. *Bristol Tramways Co.* (1). The vagueness of the jury's answer is now the difficulty with which the respondent must contend.

I will assume that the jury did not intend to go outside of what was properly their province, and lay down, perhaps as a counsel of perfection, a general rule for the guidance of railway companies when they are compelled to stop their trains between stations. Taking the answer of the jury in connection with the facts in evidence, they probably meant that the next station having been announced and the train being compelled to stop before reaching it, the railway company should have taken precautions to prevent passengers who had heard the announcement from assuming that the train had reached the station and alighting as this respondent did. This is the construction placed on the answer of the jury by Mr. Justice Middleton in the Appellate Division and I am willing to accept it although, with deference, I cannot but regret that the jury were not further questioned.

On the other hand, it is obvious that unless there is a breach of duty on the part of the railway company there is no negligence in law and there can be no liability. The duty of railway companies is to carry their passengers with due care to their destination. To insure the performance of this duty the Railway Act has formulated certain rules and there are also certain regulations of the Railway Commission which have statutory force. If these rules and regulations are not observed there is a breach of duty and consequent liability. And, there is also liability if the common law duty to carry the passengers with due care is not fulfilled.

(1) 107 L.T. 801.

In his factum, Mr. Scott says:—

> The defendants brought about a dangerous situation to the plaintiff by telling him that the next station or the next stopping place was the place where the plaintiff desired to alight and then stopped the train without warning him that his destination had not been reached.

This statement is made in the attempt to bring the case within the rule *res ipsa loquitur,* but it seems to me an impossible contention to say that the announcement of the next station, or of the next stopping place, created a dangerous situation to the passengers of the train. And then if the train did stop before the next station was reached in obedience to an order to stop which the company was compelled to obey, there was in so stopping no possible breach of the duty the company owed to its passengers, nor can it be fairly said that the company brought about a dangerous situation to them, assuming that they acted as reasonable beings should act.

If then a passenger, in the erroneous impression that the train has stopped at the station which had previously been announced, alights from the train and is injured in so alighting, is the railway company liable as for a breach of its duty to carry him with due care to his destination? No enactment of the Railway Act or regulation of the Railway Commission has been cited as imposing a duty on the company under such circumstances.

This is not the case of a servant of the company seeing the passenger in the act of alighting under this erroneous impression and not warning him that the train has not yet reached his station. Even in such a case, where the train was still running, when the passenger alighted, at a speed of from twenty to twenty-five miles an hour in approaching the station where it was to stop, this court held that the railway company was not liable. *Grand Trunk Ry. Co.* v. *Mayne* (1). See also *Canadian Pacific Ry. Co.* v. *Hay* (2).

There is no suggestion that this train was not properly equipped and manned. There were four baggage and six passenger cars, of which the two first were what are known as vestibule cars and the four last platform cars. There was a conductor and two brakesmen, one of the brakesmen

(1) 56 Can. S.C.R. 95. (2) 58 Can. S.C.R. 283.

1923

GRAND TRUNK RY. CO. OF CANADA v. MURPHY.

Mignault J.

being in charge of the three first cars, the other of the three last.

In case the train stopped between stations it was the duty of the company to have an employee go to the rear of the train to flag any approaching train and thus prevent a rear end collision. This is referred to by some of the learned judges as being a statutory duty, and it would be a statutory duty if it were required by the Railway Act or by an order of the Railway Commission. I have been unable to find in the Railway Act any mention of this duty and no orders of the Railway Commission have been put in evidence. I will however assume that it was the duty of the railway company to send a man to the rear of the train when it stopped to flag any approaching train, such action being imperative to insure the safety of the passengers. The rear end brakesman was in the third car from the rear when this train slowed down on approaching St. Clair Avenue, and says that he prepared to go to the rear to discharge this duty. He did not go because he says the train did not stop.

No law or regulation has been cited as requiring the train employees, when the train stops as this train did before reaching a station, to warn the passengers that the train is not yet at the station and that they should not attempt to get off. It would in most cases be impracticable to do so. This was a long train crowded with people going to Toronto for Thanksgiving day. Assuming as we must that the train really stopped for a moment, the rear end brakesman who was looking after the part of the train where the respondent was travelling, was obliged to go to the rear end of the train, as I have explained. The front end brakesman had three cars under his charge, and the conductor could not be everywhere. Moreover such a stop would ordinarily be a very short one and to go through six crowded cars to give a warning not to alight would require several minutes. If the answer of the jury be taken to mean that the company should have used vestibule cars, the exit door of which is opened only when the station is reached, it suffices to say that there was no such obligation incumbent on the appellant.

So far I can find no duty of the train employees to tell the respondent that the train had not yet reached the station, assuming they did not see him in the act of alighting, and they did not.

But it is said that there was here an invitation to leave the train. This, however, was merely an invitation to alight when the train reached West Toronto station, and not if perchance a semaphore signal stopped the train before it got there.

We are referred to several decisions where, the train having run beyond a station or stopped short of it, the passengers were held to have been invited to get off in a dangerous place and it was decided that the company was liable. There is nothing similar here, for the train was still a quarter of a mile from the station when it was held up at St. Clair Avenue.

It is also said that the platform at West Toronto station was a short one and that the passengers in the rear cars would have had to alight on the cinders before reaching the platform. While this circumstance may have excused the respondent in stepping off in the place he did, it is not material to fix any duty on the appellant when the train stopped before reaching the station, nor would it reasonably lead the appellant to expect that the respondent would have thus alighted a quarter of a mile from the station.

On the whole, and placing the most favourable construction on the answer of the jury, I do not think it discloses any breach of duty of this appellant rendering it liable towards the respondent. The case is a very important one and I have given it all possible consideration. My conclusion is that the accident which befell the respondent was a pure misfortune for which in law the appellant is not responsible.

I would therefore allow the appeal and dismiss the action. The appellant is entitled to its costs throughout if it sees fit to exact them from the respondent.

Appeal allowed with costs.

Solicitor for the appellant: *W. C. Chisholm.*

Solicitors for the respondent: *Millar, Ferguson & Hunter.*

1923
*Oct. 25, 26.
*Dec. 21.

THE MILE END MILLING COMPANY (DEFENDANT) ..... } APPELLANT;

AND

PETERBOROUGH CEREAL COMPANY (PLAINTIFF) ..... } RESPONDENT.

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

Sale—Breach of contract—Damages—Market price—Re-sale—Refusal by buyer—Acquiescence to late delivery—Arts. 1065, 1069, 1073, 1074, 1075, 1235 (4), 1544. C.C.

The appellant contracted to purchase from the respondent five car-loads of flour to be shipped in the month of November, 1920. On the 29th of November, the appellant notified the respondent that delivery of the goods would not be accepted, unless, in accordance with an alleged custom of trade, the contract price should be reduced to the market price at the time of delivery. The respondent refused to accede to the demand and had one car shipped on the 29th of November, two on the 30th of November and two on the 3rd of December. The appellant having definitely refused to take the flour on the 1st of December, the respondent held it in warehouse for a long time and re-sold it only on the 12th of January, 1921, on a falling market and at a price substantially lower than had been obtainable in the beginning of December. The respondent then brought an action against the appellant for breach of contract, claiming as damages the difference between the contract price and the price received on the re-sale.

Held that, in a contract of sale, if the buyer illegally refuses to accept the goods, the proper measure of damages arising from the breach of contract is the difference between the contract price and the market price on the date of the breach, and not the loss to the vendor on subsequent re-sale by him of the goods.

Held, also, that the refusal of the goods by the buyer for an unfounded reason did not, under the circumstances, prevent him from complaining, as to the goods shipped in December, that the shipment was too late.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, varying the judgment of the Superior Court and maintaining in full the respondent's action.

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

C. Rodier K.C. for the appellant.

Jos. Archambault K.C. and *Marcotte* for the respondent.

THE CHIEF JUSTICE.—I think this appeal should be allowed and the judgment of the trial judge restored.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

I concur with the reasons stated by my brothers Anglin and Mignault for allowing this appeal, but I cannot accept the suggestion of my brother Anglin that by way of indulgence a reference back to the Court of King's Bench might be granted conditionally for a new assessment of damages in respect of the three cars shipped in November.

IDINGTON J.—The appellant in Montreal bought through a broker there, from respondent, then carrying on business in Peterborough, in Ontario, five cars of flour on the terms set forth in its letter of the 3rd November, which reads as follows:—

Montreal, Nov. 3rd, 1920

CONTRACT No. 5100.

M. Peterborough Cereal Co., Ltd.,
Peterborough, Ont.

We confirm purchase from you to-day by J. L. Freeman & Co., of five cars each 600 bags Saskatoon Flour, $11.60.

Please make separate draft and invoice for each car.

Terms—10 days S.D.

Our brand.

Basis ..... Montreal..... Freight
Shipment ..... November.....
Destination.....
Via.....
Remarks 2831: (Sellers' bags; Buyers' Brand.)

Yours truly,
MILE END MILLING COMPANY, LIMITED.
Per J. S. Dumont.

In the course of a week or so later the parties concerned agreed to substitute two cars of Reindeer flour for two cars of said Saskatoon flour, at a price agreed upon.

The respondent failed to ship, without any excuse I can find in the evidence, two of said cars, one of Reindeer flour and the other of the Saskatoon brand, within the month of November. I think, therefore, the appellant is not responsible for anything in way of damages for or in respect of said two cars which I eliminate from further consideration herein.

The appellant, on the 25th of November aforesaid, wrote a letter clearly indicating it did not wish to carry out the contract, and asserting a local custom of agreeing to reduce the price in certain cases and asking respondent to do likewise.

1923

THE MILE END MILLING CO. v. PETERBOROUGH CEREAL CO.

Idington J.

I do not see proof of any general custom of the trade binding respondent to assent thereto and would therefore eliminate that from the consideration of this case further than to say that respondent should have inferred therefrom that it was quite unlikely to expect that appellant would accept any goods so bought and certainly was not justified in expecting it to extend the time for delivery.

The question is thus reduced to a question of damages for breach of contract in so far as regards the shipment made of three cars of flour in November.

So far I am quite in accord with the findings of the learned trial judge and inclined to hold that his judgment allowing $720, being the difference between the price agreed upon and the market price in Montreal on the 25th of November, 1920, must be the measure of damages.

I cannot understand on what basis the freight and damage and commission are allowed by the Court of King's Bench.

As I read the contract the flour was to be delivered in Montreal, and if the word "freight" was not intended to include that it was such an ambiguous term in above contract as to call for explanation from the respondent, claiming same as part of its damages.

I am more puzzled as to the question of whether interest on the damages from the date of the breach of the contract should not have been added by the learned trial judge to said sum allowed by him.

Subject thereto I would allow this appeal with costs and restore the judgment of the learned trial judge with whose reasoning I agree.

DUFF J.—I have come to the conclusion that this appeal should be allowed and the judgment of the trial judge restored. The point of substance appears to be whether the Court of King's Bench was right in holding that, the appellant having refused to accept the cars delivered on the 3rd December for the reasons given in its letter of the 25th November and repeated in its letter of the 1st December, in which the delay is not relied upon as respects the cars in question, it can now set up and rely on that delay in answer to the respondent's action.

I think there is nothing in the action of the respondent precluding the appellant from setting up in answer to the respondent's action non-performance of the contract on the respondent's part; consequently, for the purpose of determining the amount to which the respondent was entitled in the action, we may leave out of account the two cars sent on the 3rd December.

The case of *Braithwaite* v. *Foreign Hardwood Co.* (1) relied upon by Mr. Archambault cannot, in view of the comments upon it in the speeches of the Law Lords in *British and Bennington Ltd.* v. *N.W. Cachar Tea Co.* (2), be given effect to in the sense contended for.

As to the amount the respondent is entitled to recover, I concur in the reasons given by my brother Mignault for thinking that the view of the learned trial judge ought to prevail.

ANGLIN J.—The plaintiffs sue for damages for non-acceptance by the defendant of five car-loads of flour which it had contracted to purchase. The contract provided that the flour should be delivered at Montreal in November. One car was shipped from Peterborough on the 29th f November, two on the 30th of November and two on the 3rd of December. A change in the quality of two of the car-loads and a reduction in price of 30 cents a barrel on the entire contract by mutual consent arranged during November did not, in my opinion, postpone the date of delivery fixed by the contract. In a mercantile contract such a term is always of the essence of the vendor's obligation and upon the expiry of the time fixed the obligor is in default. Article 1069 C.C.

On the other hand I fully agree with the view of the learned trial judge that the buyer's attempt to establish a right of rejection because the vendors had refused to accede to its demand, based on an alleged custom of trade, that the price named in the contract should be further reduced to the market price at the time of delivery, involved a variation of the terms of a written contract which the law does not permit. Art. 1235 (4) C.C. The evidence of such a custom, even if admissible, was quite inadequate. More-

(1) [1905] 2 K.B. 543. (2) [1923] A.C. 48.

1923

THE MILE END MILLING CO. v. PETERBOROUGH CEREAL CO.

Anglin J.

over, the defence based on that contention is not now open, the defendant having accepted the judgment of the Superior Court condemning it to pay $720 damages in respect of the three cars shipped on the 29th and 30th of November, while holding it not liable in respect of the two cars shipped on the 3rd of December on the ground that delivery of them was too late to meet the requirement of the contract. The defendant by its acquiescence is also precluded from relying on this latter defence in respect to the three cars first shipped. Its appeal from the judgment of the Court of King's Bench, which awarded the respondents damages in respect to the whole five cars and for the full amount claimed, $4,495 ($3,450 loss on re-sale, plus $1,045 demurrage and expenses), is therefore restricted to two points, viz: that recovery should be had only in respect of the three cars shipped in November and that the measure of damages applied on appeal was erroneous. In fact the appellant asks that the judgment of the learned trial judge be restored.

Having elected not to treat the contract as terminated by the buyer's intimation of the 25th November that it should be cancelled if its demand for reduction in prices were refused, the vendors, insisting on the contract being carried out, were bound to observe its terms. *The Braithwaite case* (1), was relied on by Mr. Archambault in support of his contention to the contrary. As I read that case the Court of Appeal inferred an election by the buyers not to make the defence they sought to set up (p. 552). In so far as it may involve the proposition for which respondents' counsel cited it, I would, with respect, decline to follow it. Lord Sumner, who had been counsel in it, says in *British and Benington, Ltd.* v. *N.W. Cachar Tea Co.* (2), in my opinion the case as reported either does not lay down this proposition, or, if it does so, is wrong.

There can be no doubt that the two cars shipped on the 3rd of December were not delivered as contracted for. The Court of King's Bench does not suggest that the term of the contract requiring November delivery was ever varied. Its judgment is rested on "waiver" of the breach in this respect by the buyer said to arise from the facts that it

(1) [1905] 2 K.B. 543. (2) [1923] A.C. 48, at p. 70.

based its rejection of the flour on the vendors' refusal to accept for it the market price at the time of delivery and that its manager, in his testimony, stated that the only reason for rejection was that the market price had gone down when the flour reached Montreal.

With great respect, I cannot accede to that view. The ground of rejection assigned by the buyer may have been quite untenable. Yet if it had another good ground for refusing to accept, though it was not communicated at the time of rejection, it is not thereby debarred from setting it up as a ground of defence in answer to a claim for damages. The evidence of the buyer's manager amounts to no more than this, that the only ground of rejection present to the mind of the buyer when refusing to accept the flour was the vendors' refusal to take for it the then current market price—or perhaps merely that it had not stated any other ground in its letter of rejection. As to the two barrels shipped in December, the judgment of the learned trial judge, in my opinion, was right and should not have been disturbed. I find that the reasoning on which I have reached this conclusion has been fully stated by my brother Mignault. There is no object in my repeating it. There is no evidence, on which a finding of renunciation or acquiescence, such as would operate as a *fin de non recevoir* excluding the defence based on dilatoriness in delivery, can be supported.

The vendors' recovery must therefore be restricted to damages in respect to the three car-loads shipped in November. What should be the measure of such damages? The Court of King's Bench has said the loss on re-sale plus demurrage and expenses; the learned trial judge, the difference between the contract price and the market price at the date of breach.

Articles 1073 and 1074 C.C. declare that the debtor is liable for the amount of the loss sustained by the creditor and of the profit of which he has been deprived, so far as they have been, or might have been foreseen. Ordinarily the difference between the contract price and the market price (*Chouillou* v. *Johnson Co.* (1); *Genest* v. *Léger* (2)), plus

(1) [1920] Q.R. 60 S.C. 256. (2) [1921] 28 Rev. Leg. N.S. 155.

1923

THE MILE END MILLING CO. v. PETERBOROUGH CEREAL CO.

Anglin J.

any out-of-pocket expenses necessarily incurred is what is recoverable. *Chapman* v. *Larin* (1). Only in exceptional cases, as where there is no market for the goods, should any other basis of damages be considered. In such a case for the market price should be substituted the actual value of the goods at the date of the breach to be ascertained by the best means available. *Samuel* v. *Black Lake Asbestos and Chrome Co.* (2).

The vendor is not entitled to re-sell the goods on account of the purchaser and to charge him with the deficiency. His right is to recover damages. Article 1065 C.C. The price realized on a re-sale is at the most some proof of the market price or value of the goods at the time of the breach, provided it is shown that the price realized was the best obtainable, the sale being properly conducted and taking place as soon as reasonably possible after the breach. *Chapman* v. *Larin* (1), at p. 359.

The buyer definitely refused to take the flour on the 1st of December, 1920. Dissolution of the contract of sale in favour of the sellers immediately ensued. Article 1544 C.C. Yet they held the flour until January, 1921, without making any attempt to dispose of it and re-sold it only on the 12th of that month. Notwithstanding what is now urged as to the difficulty created by the special branding of the bags, there is not evidence that that fact affected the saleability of the flour (though it may perhaps be inferred that to some extent it did), and certainly none that it entailed the delay of six weeks in effecting the re-sale. The evidence rather indicates that the re-sale of January was made on a falling market and that the current prices of flour were then substantially lower than they had been in the beginning of December. The re-sale price on the 12th January therefore does not afford satisfactory evidence of the value of the flour in question at the date of the breach.

On the other hand, I am not satisfied that the full market prices of Reindeer Flour and Saskatoon Flour at that date could have been obtained for this shipment because of the special branding of the bags; and the learned trial judge should, I think, also have made some allowance to

(1) [1879] 4 Can. S.C.R. 349, at p. 359.

(2) [1921] 62 Can. S.C.R. 472.

cover such expenses as the respondents would necessarily have incurred in handling and effecting a re-sale of the flour with reasonable promptitude. The evidence does not enable me to determine what was the market value of the flour, branded as it was, on the 1st of December, or what price could with due diligence then have been obtained for it. If it could be sold to better advantage re-bagged, we are not informed as to the cost of re-bagging; neither does the record furnish the material requisite to fix a proper allowance for necessary expenses. The plaintiffs should have put in evidence all these matters, the burden being on them to prove their damages. Having failed to do so they cannot complain if this appeal be simply allowed with costs here and in the Court of King's Bench and the judgment of the trial judge restored.

While not dissenting from that disposition of the case, as an indulgence I would have been disposed, if the respondents should elect to take such an order within ten days, to direct that the action be remitted to the Superior Court for a new assessment, on the basis above indicated, of their damages in respect of the three cars shipped in November, the respondents to pay the costs of the appeal to this court to be set off *pro tanto* against the amount ultimately allowed for damages and their costs in the Superior Court and neither party to have costs in the Court of King's Bench; the costs of the new assessment of damages to be disposed of by the trial judge.

MIGNAULT J.—Il n'est question dans cet appel que du montant des dommages que l'appelante doit payer à l'intimée pour l'inexécution d'un contrat.

Le 3 novembre, 1920, l'appelante a acheté de l'intimée cinq " chars " de farine Saskatoon en sacs, à $11.60 le baril, chaque baril contenant deux sacs, les sacs devant porter l'étiquette ou marque de l'appelante conformément à une esquisse à être fournie par elle, et la farine devant être expédiée en novembre. Cette commande fut subséquemment changée de manière à comprendre deux " chars " de farine Reindeer coûtant cinquante cents de plus par baril et trois " chars " de farine Saskatoon, et le prix fut réduit à $11.80 pour la farine Reindeer et à $11.30 pour la farine Saskatoon. Le 25 novembre l'appelante écrivit à l'intimée

1923
THE MILE END MILLING CO. v. PETERBOROUGH CEREAL CO.
Mignault J.

lui demandant, en raison d'une baisse considérable du marché, de réduire le prix en conséquence, ou si elle ne voulait pas faire cette réduction, d'annuler la vente. L'intimée ne voulut pas consentir à cette réduction, et le 29 novembre envoya un " char " de farine Saskatoon et, le 30 novembre, deux " chars," l'un de farine Saskatoon et l'autre de farine Reindeer, à l'appelante qui refusa, par lettre du 1er décembre, de les accepter pour les raisons données en sa lettre du 25 novembre. Le 3 décembre, l'intimée expédia deux " chars," l'un de farine Saskatoon et l'autre de farine Reindeer, à l'appelante qui ne voulut pas les accepter.

L'intimée, prétendant avoir revendu les cinq " chars," le 12 janvier, 1921, au nommé Strachan, au prix de $9 le baril pour la farine Saskatoon et $9.50 pour la farine Reindeer, réclame de l'appelante à titre de dommages-intérêts la différence de prix, soit $3,450, et, pour le charroyage, les frais de surestarie payés au chemin de fer du Pacifique Canadien, les frais d'entrepôt et la commission sur la revente, la somme de $1,045, faisant en tout $4,494.

La cour supérieure accorda à l'intimée $720 de dommages-intérêts pour la différence entre le prix de vente et le prix du marché, à la date du refus de l'appelante, sur les trois " chars " expédiés en novembre. Quant aux deux " chars " envoyés le 3 décembre, elle décida que cet envoi était tardif et non conforme au contrat et que l'appelante n'était pas obligée de les accepter. Elle refusa de condamner l'appelante à payer les frais d'entrepôt et de surestarie jusqu'au 12 janvier, 1921, comme ayant été encourus sans nécessité.

La cour du Banc du Roi accorda à l'intimée le plein montant de sa réclamation, jugeant que le refus des deux " chars " expédiés en décembre avait eu pour motif non pas l'envoi tardif, mais la baisse dans le prix du marché, et qu'il y avait eu renonciation ou *waiver* à se plaindre du retard. Elle décida en outre que la seule base des dommages était la différence entre le prix du contrat et le prix obtenu sur la revente de la marchandise et que l'intimée avait usé de toute diligence voulue pour opérer cette revente. Elle accorda tous les frais accessoires réclamés.

De là l'appel. Il n'y a qu'à déterminer quelle est la base des dommages qui doivent être accordés à l'intimée et aussi à décider si cette dernière peut réclamer des dommages-intérêts sur les " chars " qu'elle a expédiés en dehors du délai du contrat.

Pour juger le différend, nous devons appliquer, quant au droit du créancier de réclamer des dommages lorsque le débiteur refuse d'exécuter son obligation et aussi quant à l'évaluation de ces dommages, les règles contenues dans le code civil de la province de Québec. Cependant, je regrette d'avoir à le dire, les avocats de l'intimée, lors de l'audition de la cause, ont persisté à ne citer, outre les articles du code, que des autorités tirées du *common law*. Ce n'est pas ainsi que l'on conservera dans toute son intégrité le droit civil dans la province de Québec. Et j'ajoute qu'il est grandement temps que l'on se convainque que ce droit est assez riche en doctrine et en jurisprudence pour fournir une solution conforme à son génie à toutes les difficultés qui se rencontrent dans la pratique.

Il n'est pas douteux que lorsque l'appelante écrivit à l'intimée, le 25 novembre, lui demandant de réduire le prix stipulé au contrat pour le faire correspondre au prix du marché, ou si elle ne le voulait pas, d'annuler le contrat, il y a eu de sa part contravention à l'obligation résultant du contrat. C'était une déclaration de l'appelante qu'elle ne remplirait pas son obligation contractuelle, et elle a donné effet à cette déclaration lorsqu'elle a refusé d'accepter la farine. Or l'article 1065 C.C. explique en ces termes les conséquences de cette contravention:

1065. Toute obligation rend le débiteur passible de dommages en cas de contravention de sa part; dans les cas qui le permettent, le créancier peut aussi demander l'exécution de l'obligation même, et l'autorisation de la faire exécuter aux dépens du débiteur, ou la résolution du contrat d'où naît l'obligation; sauf les exceptions contenues dans ce code et sans préjudice à son recours pour les dommages-intérêts dans tous les cas.

Cela veut dire que lorsqu'il y a eu contravention à l'obligation, le créancier a en principe, et sauf les exceptions qui ne nous intéressent pas ici, le choix ou bien de réclamer des dommages-intérêts au débiteur, en concluant à la résolution du contrat, ou bien de demander l'exécution de l'obligation même, sans préjudice à son droit de réclamer

1923

THE MILE END MILLING CO. v. PETERBOROUGH CEREAL CO.

Mignault J.

des dommages-intérêts à raison de la contravention du débiteur.

Il n'y a aucun doute à cet égard dans la doctrine. Nous lisons en effet dans Aubry et Rau, 5e édition, t. 4, p. 128:—

> La partie envers laquelle l'engagement n'a pas été tenu peut demander, à son choix, contre celle qui y a manqué, soit l'exécution, soit la résolution du contrat.

Dans l'espèce, sur réception de la lettre de l'appelante, qui était un refus d'exécuter le contrat, l'intimée décida d'exiger l'exécution du contrat et d'expédier la farine à l'appelante. Et sur le refus de l'appelante d'accepter cette farine et de la payer, l'intimée était en droit de traiter le contrat comme résolu de plein droit et de réclamer des dommages-intérêts. En effet, aux termes de l'article 1544 C.C.,

> dans la vente de choses mobilières, l'acheteur est tenu de les enlever au temps et au lieu où elles sont livrables. Si le prix n'en a pas été payé, la résolution de la vente a lieu de plein droit en faveur du vendeur, sans qu'il soit besoin d'une poursuite, après l'expiration du terme convenu pour l'enlèvement, et s'il n'y a pas de stipulation à cet égard, après que l'acheteur a été mis en demeure, en la manière portée au titre *Des Obligations;* sans préjudice au droit du vendeur de réclamer les dommages-intérêts.

Cependant, si l'intimée décidait d'exécuter le contrat elle devait suivre la loi de ce contrat et en observer toutes les conditions. Dans l'espèce, toute la farine achetée devait être expédiée en novembre, et l'intimée, choisissant d'exécuter le contrat, devait l'envoyer en novembre. Il y avait toutes les raisons de le faire ici, car le marché était en baisse. Et il a été jugé, et je crois à bon droit, que dans les marchés à livrer portant sur des marchandises dont le prix est sujet à de fréquentes variations, le délai convenu pour la livraison forme une partie essentielle du contrat (Besançon, 24 juin, 1919. Dalloz, 1921.2.115).

Mais le jugement dont est appel décide que l'appelante ayant refusé d'accepter l'envoi tardif pour les raisons qu'elle avait données dans sa lettre du 25 novembre et répétées dans sa lettre du 1er décembre,

> il y a eu renonciation ou *waiver* de la part de l'intimée (l'appelante devant cette cour) du retard dans l'expédition de ces deux chars, et qu'il était trop tard, partant, lors du procès, pour invoquer ce moyen.

Ecartons immédiatement la doctrine anglaise du *waiver,* qui est étrangère au droit civil, et demandons-nous si dans l'espèce il y a eu renonciation ou acquiescement, pour me servir du terme propre et bien français?

Si la cour d'appel, dans le passage de son jugement que j'ai cité, a entendu énoncer une règle de droit—ce que du reste elle n'appuie d'aucune autorité—je suis très respectueusement d'opinion qu'il n'y a pas de telle règle. Le fait qu'une partie à une action justifie son acte par un motif, et lorsqu'on démontre que ce motif manque de fondement, essaye de s'appuyer sur un autre motif qu'elle n'avait jamais invoqué, peut quelquefois faire douter de sa sincérité ou même de sa bonne foi. En certaines circonstances, on peut y voir une raison de fait pour repousser la prétention de la partie, mais encore une fois il n'y a pas là règle de droit. La véritable règle de droit, c'est qu'on n'est jamais censé renoncer à un droit, et alors que l'acquiescement peut être tacite, il doit être non-équivoque, c'est-à-dire l'intention d'acquiescer ou de renoncer doit être démontrée. Dans l'espèce, l'acheteur prétend à tort que le vendeur est obligé de réduire le prix stipulé au contrat, parce que le prix du marché a baissé, et il refuse d'accepter livraison. Est-ce que cela implique que l'acheteur consent à recevoir la marchandise en dehors des délais du contrat (car l'acquiescement est un consentement) même dans le cas où l'acheteur n'aurait donné aucune raison de son refus d'accepter livraison, sinon la raison mal fondée que le prix du contrat devrait être réduit? Il faudrait plus que cela pour dire qu'il y a eu acquiescement ou consentement à l'envoi tardif. Si l'acheteur avait accepté livraison de la marchandise en refusant de la payer plus que le prix du marché, je comprendrais qu'on pourrait dire qu'il avait acquiescé à l'envoi tardif. Mais lorsqu'il refuse absolument de la recevoir, en invoquant si on veut une mauvaise raison, cela implique-t-il qu'il consent quand même à la recevoir en dehors des délais du contrat? Je crois que non, car il n'y a aucun consentement, même tacite, à recevoir la marchandise, il n'y a qu'un refus de la recevoir.

D'ailleurs, je l'ai déjà dit, si l'intimée choisissait d'exiger l'exécution du contrat, elle devait, si elle voulait réclamer des dommages à raison de la contravention de l'appelante, suivre la loi de ce contrat et expédier la marchandise dans le délai convenu. Ce serait bien étrange qu'étant elle même en faute par son envoi tardif, elle pût encore s'autoriser de cette exécution fautive pour réclamer des dommages à

1923

THE MILE END MILLING CO. v. PETERBOROUGH CEREAL CO.

Mignault J.

l'intimée. Voy. Baudry-Lacantinerie et Saignat, Vente et Echange, no. 602; Aubry et Rau, 5e éd. tome 5, p. 143, note 4.

Je crois donc qu'on ne doit pas tenir compte des deux "chars" envoyés le 3 décembre dans le calcul des dommages-intérêts que l'appelante doit à l'intimée. En cela je suis de l'avis du premier juge.

Mais comment doit-on évaluer ces dommages? Ici encore il n'y a qu'à appliquer les articles 1073, 1074 et 1075 du code civil. Les dommages-intérêts dus au créancier sont en général le montant de la perte qu'il a faite et du gain dont il a été privé. Il importe peu que le débiteur ait agi ici par dol—mais il n'est pas nécessaire de décider si réellement il y a eu dol—car les dommages dont il s'agit ont pu être prévus et résultent directement de l'inexécution du contrat.

La cour supérieure dit que pour déterminer le montant des dommages il faut tenir compte de la différence entre le prix du marché au jour de la contravention et le prix du contrat.

Cette différence est sans aucun doute l'un des éléments que le juge doit envisager lorsqu'il fixe le montant des dommages qui proviennent de l'inexécution d'une vente, et surtout d'une vente commerciale. Les marchandises ou denrées ont ordinairement un cours ou une valeur qui varie suivant les circonstances, et surtout d'après les lois économiques de l'offre et de la demande. D'autre part, en vue du refus de l'acheteur d'accepter la marchandise vendue, le vendeur cherchera généralement un autre acheteur, et son gain ou sa perte se mesurera d'après le prix qu'il pourra en obtenir, c'est-à-dire par le prix courant au jour de la revente. De même l'acheteur, qui a acheté pour revendre et non pas pour garder la marchandise, se la procurera ordinairement ailleurs et son gain ou sa perte se mesurera également par le prix qu'il devra la payer, soit le prix du marché au jour de son nouvel achat. Dire donc que la différence entre le prix du marché et le prix du contrat en matière commerciale est la mesure de ces dommages, c'est énoncer une règle qui s'applique également au vendeur et à l'acheteur, et qui est conforme à l'intention de l'un et de l'autre puisque tous deux ils faisaient une opération com-

merciale. Sans doute, lorsqu'il n'y a pas de marché ou de cours pour la marchandise, le juge devra nécessairement chercher d'autres éléments de fixation des dommages, mais ordinairement la différence entre le prix du contrat et le prix du marché est le meilleur guide pour l'évaluation des dommages. Ceri me paraît si élémentaire que je me contente d'indiquer une solution tirée de la jurisprudence française et qui s'applique ici.

En matière de vente de denrées, les dommages-intérêts dus au vendeur, au cas de résolution pour défaut de retirement de la marchandise vendue, se règlent par la différence entre le prix de vente stipulé et celui du cours au jour fixé pour la livraison. Douai, 8 août, 1896. Dalloz, 1897, 2. 69.

On trouvera plusieurs décisions d'espèce dans le répertoire de Fuzier-Herman, vo. Dommages-intérêts, nos. 247 et suiv.

Je ne pense pas que la cour du Banc du Roi ait méconnu cette règle puisqu'elle a accordé à l'intimée la différence entre le prix de la revente et le prix du contrat. Je ne puis cependant m'empêcher de croire que l'application que le premier juge en a faite est plus conforme à la justice. Il appert en effet que l'intimée a attendu tout le mois de décembre et une partie de janvier avant de chercher à revendre la farine. Son agent, Freeman, dit qu'il a reçu ses premières instructions de vendre la farine à la fin de décembre ou au commencement de janvier. Et pendant tout ce temps le marché baissait.

Je ne crois pas que l'intimée ait démontré l'absence de marché ou de possibilité de revendre la farine. On a produit au dossier des listes de prix se rapportant à diverses dates en décembre et janvier, et le témoin Turgeon dit que la cote du marché de fleur paraissait journellement dans la "Gazette" de Montréal. L'agent de l'intimée, Freeman, ne nie pas l'existence d'un marché pour la fleur, mais il dit qu'en décembre et janvier ce marché était "brisky," mot d'argot américain que je crois signifier "incertain" ou "capricieux." S'il en était ainsi, c'était une raison de plus de presser la revente. L'intimée s'est adressée pour la revente à un courtier qui n'achetait pas pour le commerce, mais seulement pour Strachan, qui était boulanger. C'est elle qui avait la charge de la preuve, et elle ne me satisfait pas qu'elle était justifiable d'attendre un mois et demi avant

1923

THE MILE END MILLING CO. v. PETERBOROUGH CEREAL CO.

Mignault J.

de revendre, et surtout de charger à l'appelante la somme considérable qu'elle lui réclame pour frais d'entrepôt et de surestarie pendant ce long délai.

A l'audition l'intimée a prétendu que cette farine étant en sacs portant la marque et le nom de l'appelante, n'était pas aussi facile à vendre que si ces sacs n'étaient pas ainsi marqués. La preuve est silencieuse sur cette circonstance qu'on dit maintenant avoir été une entrave à la revente. Tout ce que je trouve c'est une remarque de Freeman:

we were stuck with that mark on it, it was somebody else's mark, so we had to dispose of it.

On ignore cependant si cette circonstance a influé sur le prix, et on ne sait pas non plus quel aurait été le coût du chargement de la farine dans d'autres sacs. L'intimée étant demanderesse avait la charge de cette preuve et elle ne l'a pas faite.

Sur le tout j'en suis arrivé à la conclusion de rétablir le premier jugement. Je puis ajouter que j'aurais beaucoup hésité à intervenir dans cette question de l'évaluation des dommages, si je n'étais convaincu que dans cette cause on n'a pas eu suffisamment égard au retard inexpliqué de l'intimée de faire la revente. Je ne vois du reste aucune justification au sujet de la condamnation de payer des frais d'entrepôt et de surestarie encourus par suite de ce retard.

Mon opinion est donc d'accorder l'appel et de rétablir le jugement de la cour supérieure avec les frais de cette cour et de la cour d'appel.

Appeal allowed with costs.

Solicitor for the appellant: *C. Rodier.*

Solicitors for the respondent: *Archambault & Marcotte.*

ANNIE REDICAN AND KATIE REDICAN (DEFENDANTS) ..... APPELLANTS;

AND

SADIE HARRISON NESBITT (PLAINTIFF) ..... RESPONDENT.

1923
*Nov. 7, 9.
*Dec. 12.

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

Vendor and purchaser—Contract for sale—Completion—Cheque for purchase money—Stoppage of payment—Fraudulent misrepresentation—Instructions to jury—Misdirection.

A contract for the purchase and sale of property is completed when the purchaser receives an executed conveyance and then gives a cheque for the purchase price which the vendor accepts as cash though payment by the bank is stopped before it is presented.

In an action for the purchase money under such contract to which the purchaser pleaded fraudulent misrepresentations in respect to the property the trial judge misdirects the jury in telling them that proof of intention to deceive is essential to support such plea and in refusing to submit to them the question of whether or not the vendor made the representations without caring whether they were true or not, to induce the contract. A new trial was therefore necessary.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario maintaining the verdict at the trial in favour of the respondent.

The material facts are stated in the above head-note.

D. L. McCarthy K.C. and *Fraser Grant* for the appellants. The cheque given by an appellant was at most a conditional payment and when payment was stopped it was as though it had never been given; *Elliott* v. *Crutchley* (1); *In re National Motor Co.* (2).

The doctrine of *caveat emptor* is not applicable. See *Redgrave* v. *Hurd* (3).

The appellants were not getting what they contracted for and the doctrine applied in *Kennedy* v. *Panama, etc. Mail Co.* (4) and *Freear* v. *Gilders* (5) is applicable.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1903] 2 K.B. 476; [1904] 1 K.B. 565.
(2) [1908] 2 Ch. 228.
(3) 20 Ch. D. 1.
(4) L.R. 2 Q.B. 580 at p. 587.
(5) 50 Ont. L.R. 217.

1923
REDICAN
v.
NESBITT.

In any event there should, at least, be a new trial. The trial judge should have left to the jury the question submitted by the counsel for appellants.

Sheard and *A. C. Reid* for the respondent. In this country the usual custom is to make payments by cheque and the appellants having followed that custom cannot afterwards claim that it was not payment. See *Johnston* v. *Boyes* (1); *Downey* v. *Hicks* (2).

An executed contract cannot be set aside for innocent misrepresentation. *Milch* v. *Coburn* (3). Nor for any reason except fraud. *Wilde* v. *Gibson* (4); *Brownlie* v. *Campbell* (5).

No objection was made of non-direction at the close of the trial and it cannot be argued now. *Neville* v. *Fine Arts* (6).

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin I am of the opinion that this appeal must be allowed and a new trial granted with costs here and in the Appellate Division, the costs in the abortive trial to abide the result.

IDINGTON J.—The appellants made an offer in writing to the respondent to buy from her "premises" so described as if trying to buy the fee simple of lands therein described, contents of house to be included, for $3,100, and paid therewith to respondent's agent a deposit of $100.

The loose and unbusinesslike ways of the parties concerned throughout the whole of the negotiations in question is well illustrated by the very erroneous description in said offer of what was being bargained for. It clearly was an offer intended (as appears from late evidence) for the purchase of an assignment of a lease, but how long that had to run, or what building rights acquired thereby, or indeed anything relative thereto, was not presented in evidence.

I may infer from what counsel tells us that both parties understood something of what rights they were bargaining about, dependent on the terms made with the city of To-

(1) [1899] 2 Ch. 73.
(2) 14 How. 240 per McLean J. at p. 249.
(3) 27 Times L.R. 170.
(4) 1 H.L. Cas. 605.
(5) 5 App. Cas. 925.
(6) [1897] A.C. 68 at p. 76.

ronto. We are not supposed to know all these things as if we resided on the Toronto Island.

The island, we may infer, is, generally speaking, a place for summer residence. Why should a court, even one having headquarters in Toronto, be expected to take judicial notice of all such matters when trying a case like this?

This offer which was accepted and then slightly amended by respondent, apparently with appellants' assent, or that of one of them, was made on the 26th of January, 1923, and to be accepted by the 29th of January, 1923, and the sale to be completed on or before the 15th of February, 1923, and time was declared to be of the essence of the contract.

The 15th of February had come and gone before it was capable of completion. The date of respondent's acceptance is left a complete blank unless we try A.D. 192 as the true date thereof.

> This offer, if accepted, shall with such acceptance constitute a binding contract of purchase and sale

is among the last of the provisions.

The foregoing presents enough of loose methods, but the appellants (the purchasers) never, until after the execution of the assignment of lease by respondent, according to the verbal evidence, got the keys to visit and inspect the premises. The excuse for not doing that earlier is the condition of the approach.

It is said that in course of time ice grew on the lake and formed easy means of approach, not so serviceable when negotiations began.

Again it is said on one side that the keys for inspection had been offered but refused, and on the other side that later they were asked for and refused until assignment executed, and then delivered therewith.

All these peculiarities of this case are recited in order that the final act in respect of this case upon which the decision herein must turn may be properly and as accurately as possible appreciated if justice is to be done according to law.

The assignment in question is not in evidence in this case and all we have in regard thereto is verbal allusion thereto in course of the oral evidence by different witnesses from which it has been inferred that the lease was duly

1923
REDICAN
v.
NESBITT.
Idington J.

assigned and consented to by the city counsel after the 15th of February and an adjustment made as to taxes and insurance.

Then, upon being told all was completed in these respects, one of the appellants gave the following cheque,

Account No.
Toronto, Ont., February 23, 1923. 12085.

THE DOMINION BANK
City Hall Branch
Savings Department

PAY to the order of Russell Nesbitt
The sum of twenty-nine hundred and sixty-nine.....74/100 Dollars.
$2,969.74.

Katie Redican

on a Friday when she got some papers, probably the assignment, and the keys of the house and, on the following Sunday, went over on the ice to inspect the house and contents.

She found much to disappoint the expectations she had entertained as result of the misrepresentations of the agent of respondent and on Monday morning stopped payment at the bank and telephoned the payee, who was the husband of respondent, what she had done and the reason therefor founded upon said misrepresentation.

The said Russell Nesbitt telephoned her that he would issue a writ in five minutes and seems to have lost no time in doing so as it was issued on the 26th of February, and she was handed the keys of said house along with the copy of writ served on her.

The indorsement of claim on the writ was as follows:—

The plaintiffs claim is against the defendants for the sum of two thousand nine hundred and sixty-nine dollars and eighty-four cents ($2,969.84) being the amount owing by the defendants to the plaintiff as balance of amount owing under an offer to purchase by the defendants from the plaintiff on lots 4 and 5, plan 336, in the city of Toronto.

The following are the particulars:—

The balance owing under a contract for the sale by the plaintiff to the defendants of lots 4 and 5, plan 336, in the city of Toronto, which said contract has been signed by the defendants.

At the opening of the trial after all the pleadings and usual proceedings in such a case had been taken, counsel for respondent asked the learned trial judge to allow the writ to be amended by adding to said particulars of claim the following

being the amount of a cheque given by the defendants to the plaintiff.

The appellants' counsel said he had no objection and supposed the like treatment would be afforded him in an amendment he desired, and then the matter was left to the learned trial judge to consider.

It is said now that the amendment never was made, yet it appears in the case before us.

All this would be quite immaterial but for the very narrow ground to be considered, as will presently appear upon which this case may have to be disposed of.

The trial proceeded and much evidence was given in presence of the jury hearing the case.

The learned trial judge at the close of this evidence and before counsel addressed the jury stated to counsel that he intended to submit to the jury questions which he then read to counsel. There ensued a long discussion but he could not agree with the counsel for appellant and persisted in presenting his own form of question, despite the protest of said counsel, in the course of his charge.

I most respectfully submit he should have adopted the amendment suggested by counsel and this case might have been much simplified.

The amended form of question suggested by appellants' counsel was as follows:—

Mr. Grant: I would suggest that you put it: Were there untrue statements made by Wing, whether intentional or not, which induced the making of the contract?

Were there any statements made by Wing that were untrue that he knew to be untrue, or which he made without caring whether they were true or false, to induce the contract?

Answers got to such questions would have solved both the question of simple misrepresentation vitiating or not, as the answers might have indicated, the contract if not completely executed, and alternatively if so executed, have determined the question of whether or not there was fraud or misrepresentation entitling appellants to rescission of the contract, even if completely executed.

Instead thereof we have got rather dubious results to deal with.

The questions actually submitted, and the answers returned by the jury thereto, are as follows:—

1. (a) Did Mrs. Nesbitt's agent, Wing, knowingly, make any untrue statement as to the house or its contents for the purpose of deceiving the

1923

REDICAN v. NESBITT.

Idington J.

defendants in any material way and inducing them to make the offer to purchase? and

(b) Did they make the offer relying upon such statements?

(a) A. No.

(b) A. Refer to question (a).

2. If you find there were any such statements, what were they?

A. (a) We find that there is no evidence that such statements were made knowingly.

3. Did Wing make any untrue statements without knowing they were untrue but relying upon which defendants signed, and without having such statements they would not have signed their offer to purchase?

A. Yes.

4. If so, what were such innocent misrepresentations?

A. (a) That the house was lighted by electricity.

(b) That there were five bedrooms.

Upon these answers the learned trial judge entered judgment for the plaintiff, against both defendants, for the sum of $3,005.53, and dismissed the counter-claim of the appellants, and ordered that they pay the respondent her costs of action and of the counter-claim.

From this judgment the defendants, now appellants, appealed to the Appellate Division of the Supreme Court of Ontario. That court dismissed said appeal with costs, the majority holding that the conveyance by the respondent herein having been executed there could be no rescission of the contract in the absence of actual fraud.

This was dissented from by Mr. Justice Magee who held that the action should be dismissed with costs upon defendants executing a reassignment of the property to the respondent herein.

The opinion of the majority of said court was written by the late lamented Chief Justice of Ontario, concurred in by Maclaren J.A. and Ferguson J.A. This appeal is taken therefrom and the argument has not been confined within the narrow limits upon which said judgment in appeal proceeded.

I will, however, deal with the latter first.

The cases cited by the late Chief Justice in support of said holding are, in not a single instance, on all fours with this case.

The case of *Wilde* v. *Gibson* (1), shews by the head-note, which does not misrepresent what follows, that the deed and payment of price had both preceded the suit seeking

(1) [1848] 1 H.L. Cas. 605.

to set aside same as based on fraud. Indeed the inference I draw is that such had been the case for many years.

The next case, *Brownlie* v. *Campbell* (1), turned upon features of that case none of which are apparent or possible of being so in this case.

Next is cited *Seddon* v. *North Eastern Salt Co.* (2), wherein payment would clearly seem to have been made, as well as execution of the deeds required, before the bill filed therein seeking relief. I submit that is not a case much like that in question herein and cannot help us.

The judgments in that case are well worth being perused to appreciate what is involved in such like cases.

The Irish case of *Lecky* v. *Walter* (3), is clearly the case of an executed contract, for the plaintiff was suing to recover the price he had paid for the bonds sold and delivered to him long before.

In the case of *Debenham* v. *Sawbridge* (4), the last cited in said judgment, to maintain same on the ground of the contract having been completely executed I find the sale was under the order of the court in 1897 and the purchase price paid in October following, of that year, and it was only in February, 1900, that the plaintiff commenced his action against the trustee.

Indeed, I most respectfully submit that, there is nothing in the decision of that case which should be held to support the dismissal of the appeal to the court below, though much worthy of consideration in other respects.

I am just now dealing with the single narrow point of whether or not a conveyance of property purchased, whether the purchase money had been paid or not, is a conclusive bar to relief founded upon the charge of misrepresentation made by the appellants under the circumstances herein.

If the purchase price had actually been received by the respondent from the appellants then the conveyance having been, I assume for argument's sake, duly made and received by appellants, though we are left in the dark as to much that should have been presented in evidence relative thereto, then the objection upon which the court below pro-

(1) [1880] 5 App. Cas. 925.
(2) [1905] 1 Ch. 326.
(3) [1914] 1 Ir. R. 378.
(4) [1901] 2 Ch. 98.

1923

REDICAN v. NESBITT.

Idington J.

ceeded might well have been maintained as insuperable for the appellants herein.

I have looked not only at all the cases cited herein but as well those cited below to find if there is any case wherein the execution of the deed of conveyance intending to carry out the contract has, in the absence of payment of the purchase price either in goods, lands or money, been held conclusively a bar to the vendee who has not paid, setting up other defences such as set up herein, and have been unable to find such a case.

When I consider that neat point herein it seems quite clear that it is because the purchase money has not been paid that the present action is brought, and it is founded on such fact.

How can a plaintiff so suing be heard to say the money price has been paid?

And again if she or her counsel had the courage to think so why did she not sue the party who made such cheque, instead of suing, as she has done, two people instead of one? Simply because Byles on Bills has taught counsel and us that only when a cheque is paid can it be said to be possible of being pleaded as payment. The form of this suit seems to me a most conclusive answer to all that is urged herein as to the contract being fully executed.

The attempt of the respondent to shift on to the cheque, calls for the remark that the suit and judgment are against two, and that the cheque was signed by one only. Another curiosity in a very queer case.

I have therefore reached the conclusion that this appeal must be allowed.

But is a new trial necessary? Thoroughly convinced, as I am, that appellants have much to complain of in the rulings and directions of the learned trial judge, I am inclined to hold that the answers to the questions submitted at the trial, read in light of the evidence in the case, furnish clear ground upon which this court can, as I submit most respectfully the learned trial judge should have done, proceed to enter judgment for the defendants, now appellants.

There is much in the way of misrepresentation vitiating the right to recover, though falling short of such fraud as must exist on which to found an action of deceit. And

within that class the findings of the jury, in answering questions three and four, seem to me to fall.

For the relevant law therein I may be permitted to refer those concerned to the 4th ed. of Leake on Contracts, pp. 229 *et seq.* and the cases cited therein. And illustrative of the law exemplified by cases therein, I may refer to the case of *Freear* v. *Gilders* (1), and cases cited therein.

I think a difference of a few acres, as therein, is no more important than the four rooms instead of five as misrepresented and electric light in this case to the appellants.

The only way in which the class of cases and legal propositions therein dealt with can escape from such findings of fact as made above, are by reason of the contract having been wholly executed and, as I have already said, I cannot so find in this case.

I may, in parting with this feature of the case and the exception thereby created, quote the following from Williams on Vendor and Purchaser, page 578:—

> Completion of the contract consists on the part of the vendor in conveying with a good title the estate contracted for in the land sold and delivering up the actual possession or enjoyment thereof; on the purchaser's part it lies in accepting such title, preparing and tendering a conveyance for the vendor's execution, accepting such conveyance, taking possession and paying the price.

I may also cite the disposition given in the case of *Kettlewell* v. *Refuge Assurance Co.* (2).

I would for the foregoing reasons allow the appeal with costs throughout and direct the action to be dismissed.

But if there is not a majority of the court holding this view I would allow the appeal with costs of this appeal and of the court of appeal below to the appellants in any event and direct a new trial, costs thereof to abide the event.

But in the event of a new trial, I submit that the holdings of the learned trial judge in refusing to frame the question relative to fraud in the way asked by counsel for the appellants at the trial there was grave error which ought to be avoided in any possible future trial, as there has, I fear, arisen much misapprehension of law and fact which has led, possibly, to unfortunate results arising from the jury not being properly instructed.

(1) 50 Ont. L.R. 217.

(2) [1908] 1 K.B. 545.

1923
REDICAN
v.
NESBITT.
Duff J.

DUFF J.—I shall first refer to the contention that the doctrine of *Redgrave* v. *Hurd* (1) applies and that consequently the appellants are entitled to rescission, even assuming the representations to have been innocent.

In the 14th edition of Sugden on Vendors and Purchasers, vol. 2, at p. 193, this passage appears:—

> If the conveyance has been actually executed by all the necessary parties and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase money either at law or in equity.

The principle appears to be that, save in exceptional cases to which reference will be made, the maxim *caveat emptor* applies, and that the purchaser, if he wishes to protect himself in respect of the absence of title or defect in the title or in the quantity or quality of the estate, must do so by covenants in the conveyance. *Legge* v. *Croker* (2); *Bree* v. *Holbech* (3); *Johnson* v. *Johnson* (4); *Clare* v. *Lambe* (5); *Seedon* v. *N.E. Salt Co.* (6); *Cole* v. *Pope* (7). The rule does not apply where there is error *in substantialibus*, where, for example, it turns out that the vendee has purchased his own property; nor does it apply where the transaction has been brought about by the fraud of the vendor. The law is summed up to that effect in the judgment of Lord Selburne in *Brownlee* v. *Campbell* (8).

The question whether the non-payment of the purchase money affects the operation of the rule is one upon which there is not very much explicit authority. The ratio of the rule being that the purchaser can and ought to protect himself except in the two cases mentioned by covenants in the conveyance, one naturally expects to find that the execution of the conveyance, the acceptance of it by the purchaser, and the vesting of the estate in him are in themselves sufficient to bring the rule into play. The payment of the purchase money and the preparation and settling of the conveyance, including the execution of the conveyance by some of the parties, are not in themselves

(1) 20 Ch. D. 1.
(2) 1 B. & B. 506.
(3) 1 Douglas 654 at p. 657.
(4) 3 B. & P. 162 at p. 170.
(5) L.R. 10 C.P. 334.
(6) [1905] 1 Ch. 326
(7) 29 Can. S.C.R. 291.
(8) 5 App. Cas. 925 at p. 937.

sufficient. *Cripps* v. *Reade* (1). This, however, is not logically decisive and it may be arguable on principle that until the purchase money is paid or secured by something which is accepted as the consideration for the transfer the transaction is still *in fieri*.

In *Hitchcock* v. *Giddings* (2), there was a grant of the supposed interest of the vendor in a remainder in fee expectant on an estate tail, of which it afterwards proved that the tenant in tail had suffered a recovery, both parties being ignorant of this until after the conveyance had been executed and a bond had been given for the payment of the purchase money. The Court of Exchequer, in exercise of its equitable jurisdiction, relieved the purchaser from the bond on the principle above mentioned that cases of error *in substantialibus* are outside the rule. Lord St. Leonards (Vendors and Purchasers, 14th edition, vol. 1, p. 376) expresses some doubt as to the validity of this decision, which, he says, was in a later case doubted by Lord Eldon thinking apparently that it was rather a simple case of absence of title. He observes, however, that there could be no distinction between the case in which the money is actually paid and that in which it is only secured. The decision, he says, must be the same in both cases. That is not the view which was taken by the Court of Common Pleas in *Clare* v. *Lambe* (3). Strangely enough, there, Mr. Justice Grove (p. 341) in discussing the case of *Hitchcock* v. *Giddings* (2) says that the vendor was there seeking to enforce performance of the contract by compelling the purchaser to pay for a thing that he had not got. But in fact the proceeding in *Hitchcock* v. *Giddings* (2) was a proceeding of a different character. The case arose on a bill for relief against a bond given by the vendee.

The interpretation of that case in *Clare* v. *Lambe* (3) must, I think, give way to the opinion expressed by Lord St. Leonards just referred to, and it must be taken, I think, that an executed conveyance containing covenants for payment of purchase money, for example, stands in precisely the same position as an executed conveyance where the

(1) 6 T.R. 606.
(2) 4 Price 135.
(3) L.P. 10 C.P. 339.

1923
REDICAN
v.
NESBITT.
Duff J.

money has been actually paid in cash or where it has been secured by a bond or by a mortgage. Indeed the doctrine has more than once been applied to a lease. *Legge* v. *Croker* (1); *Angel* v. *Jay* (2). The question of substance is, of course, whether at that stage the vendee on the ground of mistake or innocent misrepresentation is entitled to rescind. If he is entitled to rescind, then he is entitled, under the system established by the Judicature Act, to set up in answer to a claim by the vendor for the purchase money the facts which entitle him to rescind.

Nor can it, I think, in principle make any difference that the conveyance has been executed on faith of a promise made by the vendee that he will pay the purchase money, or in exchange, for example, for a promissory note. In the present case, the cheque was accepted as conditional payment. There was an implied promise to pay arising out of the delivery and acceptance of the transfer, and the delivery of the cheque was a conditional performance of this promise. I do not think the subsequent repudiation of the promise can take away from the transaction its character as an executed transaction.

The whole point is: At what stage does *caveat emptor* apply?

The vendee may rely after completion upon warranty, contractual condition, error *in substantialibus,* or fraud. Once the conveyance is settled and the estate has passed, it seems a reasonable application of the rule to hold that as to warranty or contractual condition resort must be had to the deed unless there has been a stipulation at an earlier stage which was not to be superseded by the deed, as in the case of a contract for compensation. *Bos* v. *Helsham* (3), Representation which is not fraudulent, and does not give rise to error *in substantialibus,* could only operate after completion as creating a contractual condition or a warranty. Finality and certainty in business affairs seem to require that as a rule, when there is a formal conveyance, such a condition or warranty should be therein expressed, and that the acceptance of the conveyance by the vendee as finally vesting the property in him is the act which for

(1) 1 B. & B. 506.
(2) [1911] 1 K.B. 666.
(3) L.R. 2 Ex. 72 at p. 76.

this purpose marks the transition from contract *in fieri* to contract executed; and this appears to fit in with the general reasoning of the authorities.

All this applies, I think, to a case like the present where the representation relates to the physical state of the property as well as to the case where the subject of the representation is the existence or non-existence of some encumbrance or legal burden, such as a right of way.

But I see no escape from granting the application for a new trial. The learned trial judge overlooked the settled doctrine based upon the plainest good sense that an affirmation of fact made for the purpose of influencing people in the transaction of business involves an affirmation of belief in the existence of the fact stated. If there is no belief, if the mind of the proponent has never been applied to the question and if he is in truth consciously ignorant upon the subject of his affirmation there is obviously a false statement and, if made with intent that it shall be acted upon in the way of business in a matter involving his own interests, a fraudulent statement. This ought to have been explained to the jury. Mr. Grant explicitly requested the learned trial judge to do so and his refusal was so decisive as to preclude the necessity of further reference to the matter. There should be the usual order as to costs.

ANGLIN J.—The defendants entered into a contract to purchase a leasehold property from the plaintiff represented by one Wing, her agent. In due course an assignment of lease executed by the plaintiff and assented to by the landlord (the city of Toronto) was delivered to the defendants' solicitor with the keys of the property, the cheque of one of the defendants for the purchase money being simultaneously handed to the plaintiff's solicitor. The defendants also took an assignment of insurance and paid some arrears of taxes. On inspecting the property two days later —which is said to have been their first opportunity of doing so—they discovered, as they allege, that it had been misrepresented to them by Wing in several particulars, which they claim are of such importance that, had they known the truth in regard to them, they would not have purchased. On learning of these matters they stopped payment of the cheque given for the purchase money having

1923
REDICAN
v.
NESBITT.
Anglin J.

first notified the vendor's husband that that would be done. An action by the vendor was at once begun, the writ bearing the following special indorsement:

> The plaintiff's claim is against the defendants for the sum of $2,969.84 being the amount owing by the defendants to the plaintiff as balance of account owing under an offer to purchase by the defendants from the plaintiff on lots 4 and 5, plan 336 in the city of Toronto.
>
> The following are the particulars:
>
> To balance owing under a contract for the sale by the plaintiff to the defendants of lots 4 and 5, plan 336, in the city of Toronto, which said contract has been signed by the defendants (being the amount of a cheque given by the defendants to the plaintiff), $2,969.84.

Under the Ontario practice this indorsement constituted the plaintiff's statement of claim. The words in brackets were added by amendment at the trial.

The action was tried by a jury. The judgment of the trial court, affirmed by the Appellate Division, upheld the plaintiff's claim. The defendants appeal to this court.

That this is not an action on the cheque referred to in the amendment of the special indorsement allowed at the trial, as the plaintiff now seeks to maintain, is made clear by the facts that the claim and the judgment are not against the maker of the cheque alone but are against her and her co-purchaser jointly. The amendment made at the trial should not therefore be regarded as having changed the cause of action as originally stated. It merely added an allegation facilitating proof of the amount of the plaintiff's claim as a sum liquidated. The action remained one for money due and owing upon the contract.

It is, however, equally clear that it is in no sense the equitable action for specific performance. The plaintiff asserted a purely common law claim for payment of a sum of money due under a contract, perfectly valid, *Rutherford* v. *Acton-Adams* (1), subject to any defence to which such a claim is open. He did not require the aid of a court of equity to be relieved of the leasehold with its burdens; the defendants by taking the conveyance had assumed them. For the recovery of the purchase money the common law remedy was adequate and there was no ground for the plaintiff invoking the interference of a court of equity. *Ord* v. *Johnston* (2); *Bagnell* v. *Edwards* (3). It follows

(1) [1915] A.C. 866, 868. (2) [1855] 1 Jur. N.S. 1063.
(3) [1876] I.R. 10 Eq. 215.

that the defendants will not necessarily succeed by establishing a case which would have disentitled the plaintiff to specific performance in a court of equity. That remedy is so distinctly discretionary that the court may withhold it although a case for rescission has not been made out.

But innocent misrepresentation, such as will support a demand for rescission in equity, though unavailing at common law, will serve as a good equitable defence to a claim for payment under the contract as well as afford ground for a counter-claim for rescission. Rescission is, of course, destructive of the basis of the plaintiff's claim; the right to rescission when established is an effective defence. But whether misrepresentation is set up by way of equitable defence or as the basis of a counter-claim for rescission, the burden on the defendant is the same. If the case made by him would not warrant a decree for rescission it will not avail as a defence to the claim for payment. In preferring this defence a defendant assumes the role of actor and a plea which, if established, would defeat a counter-claim for rescission is equally effective by way of reply to the defence of misrepresentation if set up by the plaintiff. 20 Hals. Laws of Eng., pp. 756, 746, 750.

In the present case the defendants plead misrepresentation as a ground both of defence and of counter-claim. They assert that it was fraudulent and, alternatively, that if innocent it was so material as to afford ground for rescission.

The jury negatived fraud and on this branch of the case, if they are not entitled to have the action dismissed on the other, the defendants ask for a new trial on the ground of misdirection and refusal by the learned trial judge to submit an essential element of it to the jury. I defer dealing with that aspect of the appeal.

The jury found that innocent misrepresentations inducing the contract had been made by the plaintiff's agent, and upon them the defendants maintain they are entitled to rescission. The trial judge rejected this claim on the ground that the contract for sale had been fully executed by the delivery of the deed and the acceptance of the cheque in payment, and that rescission of a contract after execution cannot be had for mere innocent misrepresenta-

1923
REDICAN
v.
NESBITT.
Anglin J.

tion unless it be such as renders the subject of sale different in substance from what was contracted for (*Kennedy* v. *Panama, etc.* (1)). The suggestion that the property differed so completely in substance from what the defendants intended to acquire that there was a failure of consideration is not borne out by the facts. Neither is there any foundation for a suggestion of mutual mistake as a basis for rescission. *Debenham* v. *Sawbridge* (2). The trial judge regarded the handing over of the cheque as absolute payment and as a completion of the contract by the defendants just as the delivery of the conveyance and possession constituted completion on the part of the plaintiff.

In the Appellate Divisional Court this judgment was sustained, the late Sir W. R. Meredith C.J.O. giving the judgment of the majority of the court, on the ground that the contract became " executed " upon delivery and acceptance of the conveyance, whether the giving and taking of the cheque should or should not be regarded as payment of the purchase money.

Although Mr. Pollock in his treatise on the Law of Contracts (9 ed. p. 593) would seem to imply the existence of some doubt as to the doctrine enunciated in Lord Campbell's dictum in *Wilde* v. *Gibson* (3), that

> where the conveyance has been executed * * * a Court of Equity will set aside the conveyance only on the ground of fraud,

pointing out that it has not been uniformly followed (see Fry on Specific Performance, 9th ed., p. 312) it is too well established to admit of controversy, assuming that his Lordship meant where the contract had been fully carried out. *Brownlie* v. *Campbell* (4); *Soper* v. *Arnold* (5); *Seddon* v. *North Eastern Salt Co.* (6); *Lecky* v. *Walter* (7).

But on the question when a contract will, for the purposes of this rule, be deemed to have ceased to be " executory " and to have become " executed " the authorities are not so clear. I have not found any reported case in which it has been determined whether or not after delivery and

(1) L.R. 2 Q.B. 580, at p. 587.
(2) [1901] 2 Ch. 98, 109.
(3) 1 H.L. Cas. 605, 633.
(4) 5 App. Cas. 925, 936-7.
(5) 37 Ch. D. 96, 102.
(6) [1905] 1 Ch. 326, 332-3.
(7) [1914] 1 Ir. Rep. 378.

acceptance of the conveyance and taking of possession a contract of sale remains "executory" until actual payment of the purchase money then due; nor indeed have I found any authority in which the contrary has been categorically determined. In many of the cases it is broadly stated, as it was by Lord Campbell, that after conveyance rescission will not be granted for innocent misrepresentation. But, on examination of the facts in such cases, it is clear either that payment of the purchase money had been made or as in the case of a contract for a lease, *Legge* v *Croker* (1); *Milch* v. *Coburn* (2), that all that the plaintiff seeking rescission was required by the contract to do had been done. On the other hand we find in the leading text books such statements as that

complete execution on both sides must be established—that the contract has been completely executed and exhausted on both sides;

17 Hals. Laws of Eng., p. 742 and note (*o*); that the doctrine of the court of equity is that a contract for the sale of land will not be set aside for innocent misrepresentation "after it has been completed by conveyance and payment of the purchase money;" Williams on Vendor and Purchaser (3rd ed.) p. 796; and again

completion of the contract consists, on the part of the vendor in conveying with a good title the land sold and delivering up the actual possession or enjoyment thereof; on the purchaser's part it lies in accepting such title, preparing and tendering the conveyance for the vendor's execution, accepting such conveyance, taking possession and paying the price. Ibid pp. 545, 546.

After a conveyance has been executed, the court will set aside a transaction only on the ground of actual fraud;

Kerr on Fraud, 5 ed., p. 407. Mr. Dart's statement of the rule, however, is that the principle on which courts of equity rescind contracts for innocent misrepresentation

could not be extended to the taking away after completion the price of the property, which at law had become absolutely the vendor's. * * * Misrepresentation is no ground for setting aside an executed contract.

Vendors and Purchasers (7 ed.) 808. Mr. Snell (Principles of Equity (18 ed.), p. 436) says

the contract cannot be avoided after conveyance of property has taken place thereunder.

Morrison in his work on Rescission says (p. 143), that

the term "executed contract" is properly applied only when what has been performed is what was agreed to be performed.

(1) 1 B. & B. 506.
(2) 27 Times L.R. 170, 372.

1923
REDICAN v. NESBITT.
Anglin J.

The foundation of the rule that an executed contract will not be rescinded for innocent misrepresentation appears to be somewhat obscure. In *Angel* v. *Jay* (1), Darling J. states, apparently without disapproval, the contention of counsel that " the foundation of the doctrine " is that

> when property has passed the persons concerned cannot be placed in the same position as they were in before the estate became vested.

In numerous cases the vesting of the property has been referred to as a serious obstacle to rescission. In other cases the supersession of the contract for sale by the executed conveyance accepted by the purchaser and the resultant restriction of his rights to those assured by the latter instrument appears to be the ground upon which rescission of the contract after acceptance of conveyance is refused. So far does the court go in maintaining this doctrine that, where under a court sale the purchase money was still in court, the purchaser who had accepted the title and taken his conveyance was refused relief in respect of subsequently discovered incumbrances. *Thomas* v. *Powell* (2); *McCulloch* v. *Gregory* (3).

In the case now before us it is probably unnecessary to determine the effect on the right of a purchaser to rescission of his acceptance of a conveyance and taking of possession without making payment. What might have been a formidable obstacle to the granting of rescission to the defendants was suggested by the trial judge, namely, the inability of the court to compel the landlord's assent to a re-assignment of the leasehold to the plaintiff. The effect of the acceptance of the conveyance assented to by the lessor and of the taking of possession of the property by the defendants may have been to give to the lessor rights against them as tenants the relinquishment of which the court could not exact.

Although the execution of the contract does not afford an answer to a claim for rescission in cases of fraudulent misrepresentation, inability to effect *restitutio in integrum,* unless that has become impossible owing to action of the wrong-doer, will ordinarily preclude rescission. Kerr on Fraud (5 ed.) 387-90. *A fortiori* is this the case where inno-

(1) [1911] 1 K.B. 666, 671. (2) [1794] 2 Cox 394.
(3) [1855] 1 K. & J. 286, 291.

cent misrepresentation only is relied upon. See, however, *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1) for an instance of circumstances under which the court will grant relief in a case of fraud which it would withhold if fraud were not established. But

> the court has full power to make all just allowances * * * the practice has always been for a Court of Equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.

Hulton v. *Hulton* (2).

Here, however, neither the impossibility of *restitutio in integrum* nor the intervention of a *jus tertii* has been pleaded by the plaintiff, as it should have been if she meant to rely upon it either by way of reply to the defence or of defence to the counter-claim. Had that issue been raised on the pleadings the defendants might have produced at the trial and tendered for the plaintiff's acceptance a reassignment of the lease duly assented to by the landlord or other satisfactory assurance that such assent would be forthcoming; or, if not, a judgment might have been pronounced in terms similar to those of the decree made in *Lindsay Petroleum Co.* v. *Hurd* (3); *Twigg* v. *Greenizen* (4).

But I strongly incline to the view that, while the acceptance of the cheque as payment was in this sense conditional that, if it should be dishonoured, the right to sue for the money due under the contract would revive, the transaction was, nevertheless, intended to be closed and the contract completely executed so far as the purchasers were concerned by their taking of the deed and the keys and handing over the cheque. They had obtained the full consideration for which they contracted and, if the vendor saw fit to accept the cheque they tendered in payment in lieu of cash, they should not be heard to say that the contract had not been fully executed. I cannot think that the vendor's right to have the contract treated as executed and completed can be defeated by the fact that she took a cheque as the equivalent of a cash payment, and still less by the accident that the cheque was not presented for pay-

(1) [1899] 2 Ch. 392, 433.
(2) [1917] 1 K.B. 813, 821.
(3) [1874] L.R. 5 P.C. 221, 245.
(4) [1922] 63 Can. S.C.R. 158.

1923
REDICAN
v.
NESBITT.
Anglin J.

ment during the two days which intervened between the closing of the sale and the stopping of payment. Bearing in mind the well established custom of solicitors with regard to the closing of sales of real estate, when delivery of conveyance and possession was given and accepted and a cheque (then good) for the purchase money was tendered and taken, what was performed was what the parties intended should be done when they contracted.

Without, therefore, necessarily affirming the position taken in the judgment of the majority of the learned judges of the Appellate Divisional Court, I am of the opinion that, under all the circumstances of this case, the contract for sale was executed and that, according to a well settled rule in equity, rescission for innocent misrepresentation is not an available remedy for the defendants.

I am clearly of the opinion, however, that a new trial must be directed because the issue of fraud was not properly presented to the jury. In substance the learned trial judge charged that, in order to establish fraud, the defendants must show that Wing actually knew his representations were false. He did not tell the jury that the representations would be fraudulent if they were false and were made without belief in their truth, or recklessly, careless whether they were true or false. *Derry* v. *Peek* (1); *Angus* v. *Clifford* (2). Wing denied having made the statement that the house was lighted by electricity and added that he "did not know how it was lighted." The jury found that he had made the statement. If adequately instructed, or if a properly framed question had been submitted to them, they might have found that it had been fraudulently made. The only questions put on this branch of the case read as follows:

> Did Mrs. Nesbitt's agent, Wing, knowingly make any untrue statements as to the house or its contents for the purpose of deceiving the defendants in any material way and inducing them to make the offer to purchase? And did they make the offer relying upon such statements?

In charging the jury the learned judge said to them

> was there a deliberate lie told by Wing? * * * You have to decide whether Wing deliberately told an untruth in order to earn a commission.

There was no qualification of this direction. He added,

(1) [1889] 14 App. Cas. 337, 374. (2) [1891] 2 Ch. 449, 464.

what the defendants are entitled to will depend on your answers to the questions as to whether there was deliberate intention to defraud or innocent misrepresentation. The word "innocent" is used in law to convey "not knowingly," and it may be that she should not be relieved from her bargain, but if there was intent, and an untrue statement made, there might be relief.

At the close of the charge to the question of a juror,

the one question we have to decide is whether the mis-statements that it is claimed were made, were made intentionally or not?

the learned judge replied "Yes."

The Appellate Divisional Court refused the defendants relief on this branch of the case because "no objection was made to the charge" on this ground, and because

the finding that the misrepresentations were innocent implies that they were not made recklessly careless of whether they were true or false.

Had the jury been properly instructed upon the distinction between innocent and fraudulent misrepresentation their finding that the misrepresentations had been innocent would, no doubt, cover the ground. But how can that be said in view of the explicit instruction given them that "the word 'innocent' is used in law to convey 'not knowingly'" and that only a deliberate and intentional lie would justify a finding that the misrepresentations had been fraudulent?

At the close of the evidence the trial judge handed to counsel the questions he proposed to submit to the jury. Thereupon the following discussion ensued, Mr. Grant representing the defendants:

Mr. Grant: They were made intentionally, my Lord, but whether they were intentionally fraudulent or wrong is another question.

His Lordship: I will leave out those words. I have divided the case first as to whether there was intention to deceive the defendants, and secondly, innocent misrepresentations, which may have the effect of giving the defendant what you want, or may not.

Mr. Grant: I would suggest that you put it: "Were there untrue statements made by Wing, whether intentional or not, which induced the making of the contract?"

Then: "Were there any statements made by Wing that were untrue, that he knew to be untrue, or which he made without caring whether they were true or false, to induce the contract?"

I think that would be a better form in which to put the questions, if I may so suggest, my Lord.

His Lordship: No; there must be intention in an action for deceit.

Mr. Grant: No, my Lord; there need not be intention. If he makes the statements recklessly, not caring whether they were true or false, it is as fraudulent as though he knew they were false. Perhaps after your Lordship has charged the jury on that point, we may have something to say.

1923

REDICAN v. NESBITT.

Anglin J.

His Lordship: In the meantime I think I have covered the case.

Mr. Grant: Your Lordship is putting the first question as to whether the statements were fraudulent or not?

His Lordship: Yes.

Mr. Grant: And, secondly, whether they were innocently made, although untrue?

His Lordship: I do not use the word "fraudulently" because the jury does not know the exact meaning of "fraudulently" but they do know the meaning of "intentionally."

The attention of the trial judge was thus pointedly drawn to the feature of fraudulent misrepresentation which his question did not cover. Counsel expressly asked that it should be covered. The learned judge distinctly stated his view that intention to deceive was essential and impliedly that a false statement made with reckless carelessness as to its truth or falsehood would not be fraudulent. He declined to amend the questions as suggested, stating that he had "covered" the case.

Counsel is not obliged to quarrel with the judge or to press an objection *ad nauseam*. Having stated his position and his request for the submission of a proper question having been refused Mr. Grant had, I think, sufficiently discharged his duty and was not called upon to renew the same objection at the close of the charge. The learned judge had definitely expressed his purpose to adhere to an adverse view of the law. *Lex neminem coget ad vana seu inutilia.* The refusal to put to the jury the question whether Wing's statements were made without caring whether they were true or false coupled with the instruction that, although so made, they were innocent and not fraudulent, unless there was an intention to deceive—to tell a deliberate lie—was clearly misdirection and entitles the defendants to a new trial. *Lynam* v. *Dublin United Tramways Co.* (1); *Brenner* v. *Toronto Railway* (2).

While the costs of the abortive trial may properly abide the result, I see no good reason why the appellants should not have their costs in this court and the Appellate Division.

MIGNAULT J.—I am of opinion that a new trial must be ordered in this case for the reasons fully stated by my

(1) [1919] 2 I.R. 445.

(2) 15 Ont. L. R. 195, 198.

brother Anglin, whose carefully prepared judgment I have had the advantage of reading.

The point to be determined in the new trial is whether Wing, the respondent's agent, was guilty of fraudulent misrepresentation of material facts in connection with the purchase by the appellants of the respondent's cottage on the island in Toronto bay. These misrepresentations would be fraudulent if made

> knowingly, or without belief in their truth, or recklessly, careless whether they be true or false.

Per Lord Herschell in *Derry* v. *Peek* (1). See also the distinction made by Lindley L.J., in *Angus* v. *Clifford* (2), between a representation made carelessly and a representation made recklessly.

Unfortunately the learned trial judge left the jury under the impression that to be fraudulent the misrepresentations had be to be made wilfully and without belief in their truth, in other words that Wing deliberately lied when he made them. Where misrepresentations are made recklessly, with indifference whether they be true or false, they are fraudulent and this was not explained to the jury. On the contrary, there was, if I may say so with great respect, a confusion between innocent and fraudulent misrepresentation, of a nature to mislead the jury, when the learned trial judge said to them:

> What the defendants are entitled to will depend upon your answer to the questions as to whether there was deliberate intention to defraud, or innocent misrepresentation. The word "innocent" is used in law to convey "not knowingly," and it may be that she should not be relieved from her bargain, but if there was intent, and an untrue statement made, there might be relief. However, that is not for you to say. We will deal with that problem when you return with your answers.

The questions put to the jury were also misleading. The first question was whether Wing had knowingly made an untrue statement as to the house and its contents, and the answer was no. The third question was whether Wing had made untrue statements without knowing that they were untrue, and the answer was yes. The fourth question was: "If so, *what were such innocent misrepresentations?*" This was assuming that unless Wing knowingly made an

(1) 14 App. Cas. 337 at p. 374. (2) [1891] 2 Ch. 449, at p. 465 *et seq.*

1923

REDICAN v. NESBITT.

Mignault J.

untrue statement as to the house and its contents, his misrepresentation was an innocent one.

In my opinion, the transaction was a fully completed one, and therefore rescission cannot be granted unless the misrepresentations were fraudulent, but the burden of the appellants was unduly increased when the jury were told that they must find that " there was a deliberate intention to defraud " to prevent the misrepresentations from being innocent. This was misleading because if the jury were of opinion that Wing had recklessly, that is to say with indifference to the truth or falsity of his statements, misrepresented the facts which the jury found were misrepresented, they could not answer that these misrepresentations were innocent.

I therefore conclude that the issue in the new trial must be whether Wing's misrepresentations were fraudulent in the sense I have explained. If, properly instructed, the jury still find that Wing's misrepresentations were innocent the appellants cannot succeed in their demand for rescission. If, on the contrary, the appellants succeed because the jury find that the misrepresentations were fraudulent they will have to reconvey the property and obtain the lessor's consent to the reconveyance.

I would allow the appeal with costs here and in the appellate court, the costs of the abortive trial to abide the event.

Appeal allowed with costs. New trial granted.

Solicitors for the appellant: *Johnston, Grant, Dods & Grant.*
Solicitor for the respondent: *D. W. Markham.*

O. DEPELTEAU (DEFENDANT) .....APPELLANT; 1923 *Nov. 19.

AND

DAME M. E. H. BERARD ES-QUAL, AND OTHERS (PLAINTIFFS) ..... RESPONDENTS. 1924 *Feb. 5.

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

Substitution—Property owned by several institutes—Undivided ownership Sale without consent of all—Arts. 297, 944, 1487, 1488, 1517, 1535 C.C.—Art. 1342 C.C.P.

A testator divided an immovable owned by him into six distinct portions which he bequeathed to each of his six sons with substitution in favour of the eldest son of each and a further substitution to the eldest son of each of the latter. He provided that upon the death of any one of his sons without male children, the share of the one so dying should accrue to his surviving sons in equal shares. This accretion, so called, was not ordered to be by distinct portions.

Held that the five surviving sons took the share of the predeceased son jointly and in undivided ownership and consequently, even with judicial authorization under Art. 953 C.C., four of the sons, without the consent of the fifth, could not sell four divided fifths of the share of the predeceased son, such a sale being equivalent to a partition to which the fifth institute had not assented. Idington J. dissenting.

Per Idington J. dissenting.—Any irregularity in the proceedings authorizing the sale has been rectified by subsequent ratification.

Judgment of the Court of King's Bench (Q.R. 34 K.B. 515) reversed, Idington J. dissenting.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court (1) and maintaining the respondents' action.

One Langelier was owner of a farm having a frontage of six acres by thirty acres deep. By his will a substitution was created, the property being bequeathed to his six sons as institutes, to take effect after the death of the mother to whom was left the usufruct of the property. The will also provided that each of the six sons would be owner as institute separately of one-sixth of the farm in frontage and that, in case of death of one of them without male children, his lot would accrue by equal portions to the other institutes. The father and then the mother having died, the property was divided according to the will between the six sons of the deceased. Later on, one of the sons having died without male children,

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1922] Q.R. 34 K.B. 515.

1923
DÉPELTEAU
v.
BÉRARD.

his lot became the property of the remaining five sons; and another son having also died but leaving a male child, the property was thus owned at the time of the sale to appellant by five institutes, to wit, four remaining sons and the minor child represented by his mother as tutrix. Four of the five institutes, including the minor, were duly authorized by the court under article 953*a*, C.C. to sell the four lots owned by them and the four-fifths of the other one, as the fifth institute did not consent to the sale; and the property was duly adjudicated to the appellant. It was then discovered that the proceedings were irregular as the tutrix had not been duly authorized to sell the property owned by the minor; but a resolution was passed by a family council representing the latter ratifying the sale and authorizing the tutrix to give title to the buyer. The appellant refused to pay the purchase price on the grounds that the proceedings authorizing the sale were void and that he had the right to delay payment as he could be disturbed by an action in revendication by the institute who had not assented to the sale (art. 1535 C.C.). The trial judge and the Court of King's Bench held that the minor alone had the right to invoke the nullity of the sale and that the subsequent ratification was valid. Before this court, the appellant further alleged that the sale of the four-fifths of the lot above mentioned was null, on the ground that the lot was owned jointly (*par indivis*) by the five institutes and could only be sold with the consent of all.

A. Régnier, for the appellant.

S. Poulin, for the respondent.

THE CHIEF JUSTICE.—I concur in the reasons for allowing this appeal stated by my brother Mignault as the judgment of Mr. Justice Anglin and himself.

IDINGTON J. (dissenting).—For the reasons respectively assigned by Chief Justice Lafontaine and Mr. Justice Greenshields speaking on behalf of the majority of the Court of King's Bench, now appealed from, I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—The transfer in this case virtually, if effective, produces a partition of part of the property sold. This result is accomplished without notice to the interested

parties and as the whole proceeding must therefore as to that part be invalid on that ground alone the action should be dismissed. The only doubt I have is a doubt concerning the question of costs, but on the whole I think the costs should follow the event throughout.

MIGNAULT J.—Le jugement qui suit est celui du juge Anglin et le mien.

Les intimés réclament de l'appelant la somme de $14,000, étant le prix d'adjudication de deux immeubles substitués, savoir les numéros 82 et 83 du cadastre de Saint-Jean, sauf une partie distraite de la vente, qu'il a achetés d'eux à une vente avec autorisation de justice, le 11 octobre 1920, avec de plus la somme de $700 pour intérêts depuis cette date jusqu'au jour de l'action. L'appelant se défend en alléguant que la vente est nulle parce que les formalités exigées par la loi n'ont pas été remplies, et il prétend de plus qu'il a juste sujet de craindre d'être troublé par une action en revendication, et qu'il peut différer le paiement du prix jusqu'à ce que les vendeurs fassent cesser ce trouble ou lui fournissent caution (art. 1535 C.C.). A l'audition devant cette cour, l'appellant a fait valoir un autre moyen de nullité de la vente, savoir que cette vente aurait compris certains droits d'un des grevés qui ne s'était pas joint à la vente et qui partant n'avait pas été autorisé à vendre, ces droits lui étant dévolus indivisément avec les autres grevés au décès sans enfants d'un des grevés originaires.

Les immeubles, nos 82 et 83, avaient été substitués par le testament de feu Charles Langelier, en date du 18 octobre, 1879, devant C. T. Charbonneau et son confrère, notaires, cette substitution devant s'étendre jusqu'aux arrière-petits-enfants du testateur. C'est une terre de six arpents de front par trente arpents de profondeur. Le testateur laissa deux filles, dont il n'est pas nécessaire de parler, et six fils: Charles, Joseph, Henri, Louis, Félix et Arthur, auxquels il légua cette terre à charge de substitution, à l'extinction de l'usufruit laissé à sa femme.

La substitution est créée dans les termes suivants:

A l'expiration de l'usufruit ci-dessus légué à mon épouse, je donne et lègue, sous la substitution ci-après exprimée, à mes six fils ci-dessus nommés, l'immeuble en premier lieu au long ci-dessus décrit; j'ordonne qu'ils en soient séparément propriétaires pour un sixième du tout, chacun, l'aîné devant prendre son lot du côté nord de la dite terre sur toute sa

1924

DÉPELTEAU v. BÉRARD.

Mignault J.

longueur, viendront ensuite les lots de chaque autre enfant, par préséance d'âge.

Cet immeuble ainsi divisé, mesdits fils en jouiront pendant leur vie, comme grevés de substitution et devant respectivement transmettre leur portion respective du dit immeuble à l'aîné de leurs enfants mâles vivants à l'époque de leur décès respectif; la dite substitution devant ainsi se continuer dans les mêmes conditions, au profit de l'aîné des enfants mâles de chacun des premiers appelés à la présente substitution, lesquels premiers appelés deviendront à leur tour grevés de la dite substitution.

Et dans le cas où l'un des dits grevés de substitution décéderait sans enfants mâles, la part de la dite propriété à lui ci-dessus léguée accroîtra à ceux des autres grevés alors vivants, pour être transférée au même titre de substitution, par portions égales, aux appelés à la présente substitution, jusqu'au dernier degré d'icelle;

Cependant si aucun des seconds grevés ayant recueilli en vertu de la présente substitution, mourait sans enfants mâles, sa portion du dit immeuble retournerait à son frère cadet, et en cas de décès de ce dernier, sans enfants mâles, à son autre frère, s'il en existe, et ainsi de suite pour ses autres frères, et en conséquence l'accroissement ci-dessus indiqué serait exclu.

Mon intention est que cet immeuble soit ainsi recueilli, à titre de substitution: 1° par mes dits fils, comme institués dans les proportions et sous les conditions ci-dessus mentionnées; 2° par l'aîné des enfants mâles de chacun d'eux dans le sens ci-dessus établi, et 3° l'aîné des enfants mâles des premiers appelés;

Je veux aussi que les grevés de la dite substitution soient conjointement tenus au paiement des taxes, réparations, cotisations et rentes seigneuriales auxquelles le dit immeuble sera assujetti.

Il résulte de cette disposition que chacun des six fils du testateur a recueilli de lui, à charge de substitution, une portion distincte de terre, savoir une lisière d'un arpent de largeur et de trente arpents de profondeur. La clause d'accroissement ou, pour parler plus exactement, de transmission, au décès d'un des premiers grevés sans enfants mâles, ne comporte pas semblable division du lot transmis, lequel ne peut être recueilli par les grevés survivants que par indivis.

Félix Langelier, un des premiers grevés, est décédé il y a plusieurs années sans enfants et son lot a été transmis aux cinq autres, par indivis, en vertu de la clause citée plus haut. Henri Langelier, un autre des fils du testateur, est également décédé, mais subséquemment au décès de Félix, laissant un fils, Alphonse Langelier, qui est encore mineur et qui est représenté par sa mère et tutrice, Dame Marie Eva Hénédine Bérard.

Il y a donc cinq grevés, y compris le mineur, Alphonse Langelier. Chacun d'eux a un lot entier et le cinquième indivis d'un autre lot. Mais les grevés qui ont prétendu

vendre leurs parts, en y comprenant le mineur Alphonse Langelier, ne sont que quatre des cinq grevés originaires. L'un des fils du testateur, Joseph Langelier, n'a pas voulu vendre sa part, et c'est cette part qu'on a prétendu distraire de la vente qui a été faite des lots 82 et 83.

Les autres grevés, au contraire, trouvant qu'il y avait avantage à vendre leurs parts, en ont demandé l'autorisation en invoquant les dispositions de l'article 953a du code civil, qui permet l'aliénation des biens substitués à certaines conditions quand c'est de l'avantage du grevé et de l'appelé que la vente ait lieu. Et à cette fin ils ont obtenu l'autorisation que l'appelant dit leur avoir été illégalement accordée.

Sans relater au long les procédures qui ont conduit à la vente, nous pouvons dire sommairement qu'on a commencé par faire nommer M. Georges Fortin, avocat de Saint-Jean, curateur à la substitution créée par le testament de feu Charles Langelier, père. Après cette nomination, le curateur et Louis Langelier, un des grevés, nommèrent chacun un expert pour visiter et évaluer les immeubles substitués, et ces experts évaluèrent en bloc la partie à vendre à la somme de $14,000. Il y eut alors conseil de famille pour aviser sur le nécessité de la vente, et l'avis étant favorable, le juge Monet de la cour supérieure à Saint-Jean, homologua l'avis du conseil de famille et autorisa Georges Fortin, curateur, et Louis Langelier, Arthur Langelier, Charles Langelier et Dame Marie Hénédine Eva Bérard, ès qualité de tutrice à Alphonse Langelier, grevés, à vendre; 1° le lot n° 82, ayant une largeur en front de 3 arpents et une profondeur de 30 arpents,

à distraire cependant du dit lot une lisière de terrain de 36 pieds de largeur en front sur toute la profondeur du dit lot, cette dite lisière comprenant le quatrième-cinquième de l'arpent du milieu, ou second arpent du dit lot n° 82, en allant du sud au nord, avec toutes les bâtisses dessus construites;

2° Le lot n° 83, comprenant 3 arpents de front sur 30 arpents de profondeur, à distraire cependant du dit lot l'arpent du milieu ou deuxième arpent, avec toutes les bâtisses dessus construites.

Ce qu'on prétendait ainsi distraire des deux lots, c'est le lot originaire légué à Joseph Langelier, qui ne prenait pas part à la vente, et de plus le cinquième du lot légué à Félix Langelier, lequel cinquième, au décès de Félix sans enfants, avait été transmis à Joseph Langelier. Nous nous con-

1924
DÉPELTEAU
v.
BÉRARD.
Mignault J.

tentons de faire cette constatation pour le moment, sauf à y revenir plus tard.

La mise à prix fut fixée à $14,000, le montant de l'estimation des experts, et le cahier des charges exigea de plus le paiement par l'adjudicataire de $1,000 en sus du prix d'adjudication pour les frais.

La vente fut faite le 11 octobre 1920, et l'appelant se porta adjudicataire au prix de $14,000. Il paya immédiatement $1,000 pour les frais de la vente.

Après cette adjudication on découvrit une grave irrégularité dans cette procédure. Dame Bérard, la tutrice du mineur Alphonse Langelier, n'avait pas été autorisée de la manière voulue par la loi à vendre la part dont son pupille était grevé, et ce mineur, qui était grevé, n'était pas représenté par le curateur. On voulut rectifier cette irrégularité après coup, et, le 4 novembre, le notaire Brosseau reçut à Mégantic, district de St-François, où Dame Bérard et son pupille étaient domiciliés, l'avis d'un conseil de famille convoqué devant lui, lequel conseil de famille déclara qu'il était d'avis.

qu'il était nécessaire de vendre les immeubles ci-dessus et de ratifier toutes les procédures qui ont été faites pour arriver à la vente et aliénation finale des dits immeubles, qu'il est de l'intérêt du mineur Alphonse Langelier que telle ratification ait lieu, et que la tutrice du dit Alphonse Langelier soit autorisée à conclure la vente et à passer titre.

Cet avis de parents mentionne que le rapport des experts de l'évaluation en bloc avait été lu au conseil de famille, mais aucune évaluation séparée de la part dont le mineur était grevé ne fut faite. L'avis de parents fut homologué par le protonotaire à Sherbrooke le 6 novembre.

A la suite de toutes ces procédures, Dame Bérard, la tutrice d'Alphonse Langelier, ainsi que Charles Langelier et Louis Langelier, grevés, et Georges Fortin, le curateur, prirent cette action pour forcer l'appelant à payer le prix d'adjudication. Arthur Langelier, l'un des grevés autorisés à vendre, est mort après la vente, mais avant l'action, et Louis Langelier prétend le représenter comme son légataire universel. Arthur Langelier était du reste lié par la vente faite, si elle était valide.

Etant d'avis que l'adjudication faite à l'appelant est nulle pour les raisons qui vont être exposées, il n'est pas nécessaire que nous nous prononcions sur la question de savoir si la délibération du conseil de famille de Mégantic,

homologuée par le protonotaire à Sherbrooke, peut valoir comme ratification de l'irrégularité de la vente de la part du mineur Alphonse Langelier, cette vente n'ayant pas été préalablement autorisée au désir de l'article 297 C.C., et aucune évaluation séparée de la part du mineur n'ayant été faite conformément à l'article 1342 C.P.C. Nous n'exprimons donc aucune opinion sur cette question importante.

Mais voici ce qui nous paraît entraîner la nullité de la vente.

Nous avons rapporté plus haut les termes par lesquels on distrait de la vente ce qu'on a supposé être la part de Joseph Langelier. C'est l'arpent du milieu ou deuxième arpent du lot n° 83, soit le lot originaire légué à Joseph Langelier, et de plus une lisière de terrain de 36 pieds de largeur en front sur toute la profondeur du lot n° 82,

comprenant le quatrième-cinquième de l'arpent du milieu ou second arpent du dit lot n° 82, en allant du sud au nord.

C'est cette dernière lisière de terrain qu'on suppose avoir été transmise à Joseph Langelier, au décès de Félix Langelier sans enfants, comme son cinquième du lot originaire de ce dernier. En d'autres termes, on a imaginé de diviser le lot originaire de Félix Langelier, ou l'arpent du milieu du lot n° 82, en cinq lisières de 36 pieds de largeur chacune, et le quatrième-cinquième, ou la quatrième lisière, en allant du sud au nord, on l'a pris comme étant la part de Joseph Langelier, et on l'a distrait de la vente. On a donc vendu à l'appelant les lisières 1, 2, 3 et 5 de cet arpent du milieu, les traitant comme appartenant divisément aux vendeurs.

Or le lot originaire de Félix Langelier est accru aux cinq autres grevés par indivis et non pas divisément. Le testateur, il est vrai, avait divisé sa terre, nos 82 et 83, qui avait six arpents de largeur et 30 arpents de profondeur, en six parties distinctes, en attribuant à chacun de ses fils un sixième du tout,

l'aîné devant prendre son lot du côté nord de la dite terre sur toute sa longueur, viendront ensuite les lots de chaque autre enfant, par préséance d'âge.

Mais il n'avait pas ordonné telle division séparée et distincte dans le cas où l'un de ses fils décéderait sans enfants mâles, auquel cas il déclarait que

1924

DÉFELTEAU v. BÉRARD.

Mignault J.

la part de la dite propriété à lui ci-dessus léguée accroîtra à ceux des autres grevés alors vivants, pour être transférée au même titre de substitution, par portions égales, aux appelés à la présente substitution jusqu'au dernier degré d'icelle.

L'indication de portions égales—si elle peut s'appliquer à l'accroissement (nous avons déjà dit que ce terme n'est pas exact) ordonné en faveur des grevés alors vivants—ne comporte pas la conséquence que ces portions seront séparées et distinctes. Cela veut dire que le lot sera transmis par parts égales aux cinq grevés survivants, c'est-à-dire que chacun de ceux-ci sera propriétaire grevé de substitution d'un cinquième indivis de ce lot. En d'autres termes, les cinq autres grevés ont recueilli le lot qui leur est accru au décès de Félix par indivis et non divisément.

La nature et les effets de l'indivision entre co-propriétaires, et le grevé de substitution est un propriétaire (art. 944 C.C.), sont bien connus. Chaque co-propriétaire a une quote-part idéale de la chose, et quant à cette quote-part, il jouit des droits inhérents à la propriété et peut aliéner cette quote-part et ses créanciers peuvent la faire saisir, avant tout partage. Cependant les quote-parts idéales des co-propriétaires ne constituent pas des corps certains et aucun des co-propriétaires ne peut, sans le concours des autres, exercer sur la totalité de la chose commune, ni même sur la moindre partie physiquement déterminée de cette chose, des actes matériels ou juridiques emportant exercice actuel et immédiat du droit de propriété (Voir Aubry et Rau, 5e éd., tome 2, s. 221, et pp. 578 et suiv., dont est emprunté autant que possible le langage même).

Or les intimés ont prétendu vendre à l'appelant des portions séparées et physiquement déterminées du deuxième arpent ou arpent du milieu du lot n° 82, dont ils étaient propriétaires grevés de substitution, par indivis seulement, avec leur co-propriétaire et co-grevé, Joseph Langelier. C'est une vente dont ce dernier peut ne tenir aucun compte, car c'est réellement à son égard la vente de la chose d'autrui, nulle aux termes de l'article 1487 C.C. Cette vente équivaudrait à un partage entre Joseph Langelier et ses co-propriétaires, et il n'a pas accepté ce partage et n'est pas lié par la vente. Sur les lisières vendues, Joseph Langelier a autant de droits qu'avaient les autres grevés, et ni lui, ni les autres, séparément, ne pouvaient disposer, même avec l'autorité de la justice, de la chose commune. C'est

le défaut capital de cette vente qui était impossible sans le concours de tous les propriétaires grevés et qui n'aurait pas dû être autorisée par le juge sans exiger le concours à la vente de Joseph Langelier.

Donc l'appellant n'a pas acquis à cette vente la propriété des lisières 1, 2, 3 et 5 de l'arpent du milieu du lot n° 82, et il se trouve sans titre de propriété pour près du tiers du lot n° 82. L'appelant est certainement bien fondé à dire que cette partie, dont il n'a pas acquis la propriété, est de telle conséquence relativement au tout qu'il n'eût pas acheté sans elle, et qu'il peut faire rescinder la vente. On trouve ce principe dans l'art. 1517 C.C. qui envisage le cas de l'éviction.

Ce ne serait pas une réponse de dire que s'il y a plus tard partage entre les grevés, cette partie non vendue pourrait être mise dans le lot des vendeurs et ainsi passer à l'appelant (art. 1488 C.C.). On ignore quel pourrait être le résultat d'un partage qui n'est pas encore fait, et ce sont des chances que l'appelant n'est pas obligé d'assumer. Ce n'est pas non plus une réponse que d'objecter que l'appelant a pour le moins acquis les droits indivis de ses vendeurs, car ce n'est pas cela qu'il a entendu acheter et qu'on a prétendu lui vendre. Et il y a en sus la circonstance décisive que l'autorisation judiciaire de vendre ne couvre aucune des lisières du deuxième arpent du lot n° 82 car Joseph Langelier, qui était co-propriétaire par indivis avec les quatre autres grevés, n'a pas demandé et obtenu cette autorisation, et sans son concours la vente de ces lisières était impossible.

Bien qu'apparemment l'appelant ne se soit pas rendu compte de l'importance du moyen de nullité que nous venons de discuter avant l'audition devant cette cour, on ne peut dire qu'il l'avait entièrement négligé devant les autres cours. Car sa défense, au paragraphe 22, disait qu'il avait juste sujet de crainte d'être troublé par une action en revendication

d'autant plus qu'un des grevés, soit Joseph Langelier, n'a pas voulu consentir à la dite vente en question.

C'est en effet le manque de concours de Joseph Langelier qui rendait la vente des lisières 1, 2, 3 et 5 de l'arpent du milieu du lot n° 82 impossible, et l'appelant s'en était certainement plaint dans sa défense. Du reste, on peut dire

1924
DÉPELTEAU
v.
BÉRARD.
Mignault J.

que le vice du titre qu'on veut imposer à l'appelant appert par les procédures mêmes que les intimés ont adoptées pour faire cette vente.

Nous en arrivons donc à la conclusion que la vente sur laquelle les intimés se basent est nulle, et que l'appel doit être accordé et leur action renvoyée avec dépens de toutes les cours contre eux. Nous réservons à l'appelant le droit de réclamer le remboursement du dépôt de $1,000 qu'il a fait lors de l'adjudication, ce dépôt ayant été fait sans cause.

Appeal allowed with costs.

Solicitor for the appellant: *André Régnier.*
Solicitor for the respondent: *Stanislas Poulin.*

---

*1923
Oct. 23, 24.
1924
Feb. 5.

THE SINCENNES-McNAUGHTON LINES, LTD. (DEFENDANT)..... APPELLANT;

AND

JOSEPH BRUNEAU (PLAINTIFF).....RESPONDENT.

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

Constitutional law—Legislative jurisdiction—Accident on vessel—Right of surviving consort—Workmen's Compensation Act, R.S.Q. (1909) Sections 7321 et seq.—Canada Shipping Act, R.S.C. (1906) c. 113, sections 915 to 921—B.N.A. Act, (1867) sections 91, 92—(Q) 9 Edw. VII, c. 66, s. 1—Arts. 1056, 2390 C.C.

Sections 7321 and 7323 of the Quebec Workmen's Compensation Act, in so far as they affect "workmen, apprentices and employees engaged * * * in any transportation business * * * by water" are *intra vires* the provincial legislatures, as they are not in their operation necessarily in conflict with the provisions of the Canada Shipping Act, contained in sections 915 to 921 nor, *per* Duff J., in their application to the circumstances of this case, with Article 2390 C.C. *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* ([1920] A.C. 184) and *McColl* v. *Canadian Pacific Ry. Co.* ([1923] A.C. 126) discussed.

The husband, *de facto* but not judicially separated from bed and board, has the right to claim indemnity as "surviving consort" under the provisions of clause A of section 7323 of the Quebec Workmen's Compensation Act.

Judgment of the Court of King's Bench (Q.R. 35 K.B. 247) affirmed.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judg-

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) Q.R. 35 K.B. 247.

ment of the Superior Court, maintaining the respondent's action.

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

Paul St. Germain K.C. for the appellant.

A. Chase-Casgrain K.C. for the respondent.

THE CHIEF JUSTICE.—The substantial question in this case is whether the "Workmen's Compensation Act" of the province of Quebec, so far as it relates to the liability of shipowners to their workmen employed in transportation by water, is *ultra vires* of the provincial legislature as being in conflict with the Canada "Shipping Act" and its provisions relating to such subject matter.

The contention of the appellant company is that the "British North America Act, 1867," had in its 91st section exclusively assigned the subject matter of "Shipping and Navigation" to the Parliament of Canada and that such Parliament had dealt fully in the Canada "Shipping Act" (R.S.C. c. 113) with the whole subject of the liability of ship-owners to their seamen (sections 916-921) and that the field being so covered the provincial legislation in question is *ultra vires.*

The trial judge rejected the contention of the defendant company and maintained the action of the plaintiff respondent for $1,820, which judgment was confirmed unanimously upon appeal to the Court of King's Bench.

At the conclusion of the argument at bar I felt grave doubts whether the company's contention was not well founded. Since then I have given the whole question much consideration and have had the advantage of reading the several judgments of my colleagues and of consulting personally with them. They are unanimously in favour of dismissing the appeal relying substantially on the ground that the "Workmen's Compensation Act" in question does not deal with the same subject matter as has been dealt with by the Canada "Shipping Act," and upon the two cases decided by the Judicial Committee: *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1); *McColl* v. *Canadian Pacific Ry. Co.* (2).

(1) [1920] A.C. 184. (2) [1923] A.C. 126.

1924

SINCENNES-MCNAUGHTON LINES, LTD. v. BRUNEAU.

The Chief Justice.

While my doubts on the question have not been entirely removed, I do not feel that they are sufficiently strong to justify me in reversing the judgment of the two courts below and allowing the appeal.

I will not, therefore, dissent from the judgment of my colleagues, dismissing this appeal.

IDINGTON J.—The appellant was the owner of a tug called *Spray* operating in the St. Lawrence river within the province of Quebec.

The late wife of the respondent was engaged as cook upon said tug when it collided with a steamer known as *Cairndhu* about three miles above Sorel on said river and, as a result of such accident, she and five other persons of the crew were drowned.

The respondent, her surviving husband, brought this action claiming, under the provisions of the Quebec "Workmen's Compensation Act," the damages allowed, under said Act and amendments thereto, to him under such circumstances.

That action was tried before Mr. Justice Loranger of the Superior Court of said province, who maintained same and awarded respondent the sum of $1,820.

On appeal therefrom to the appeal side of the Court of King's Bench, that court unanimously maintained the said judgment and dismissed said appeal with costs.

From that judgment this appeal is taken upon two grounds, first, that the said Act is *ultra vires* the legislature of the province of Quebec, so far as relevant, and secondly, that in any event the respondent and his late wife were *de facto* separate from bed and board.

There is no pretence that such separation had ever been judicially declared and but flimsy evidence of its existence *de facto*. Unless we are to hold that husband and wife by working in different places, without more, are so separate as to deprive the husband surviving of his otherwise legal rights as such under the provisions of said Act, there seems to me nothing in law to support such pretensions. I cannot maintain said appeal on any such ground.

The really important question raised herein is whether or not in view of the " British North America Act " assigning to the Parliament of the Dominion, by virtue of section

91 of said Act, and the enumerated items thereof 10. "Navigation and Shipping" and 29 such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned to the legislatures of the provinces.

Of those so excepted in such enumeration there are the following:—

92. Item 10. (*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:

(*b*) Lines of steamships between the province and any British or foreign country;

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.

I cannot put the latter on any higher basis than those falling under said item 10 of section 91, or *vice versa.*

I think they all stand on the same footing and hence the "Canada Shipping Act" invoked herein by the appellant, is not to be read as having any higher class than the incorporation, and all implied therein, for example, of the Canadian Pacific Railway Company.

Now I find that this court, by its decision in the case of *The Canada Southern Ry. Co.* v. *Jackson* (1), expressly decided in a case arising under the Ontario "Workmen's Compensation Act" wherein the same objection of *ultra vires* was taken as herein, that such legislation was not *ultra vires* the legislature of the province of Ontario. The Ontario "Workmen's Compensation Act" of that day was not our present Ontario Act, but one that in its general features was like unto the present Quebec "Workmen's Compensation Act," though the latter is said to have been taken from a French Act.

I cannot distinguish that case from this in principle.

The power to enact the "Canada Shipping Act" rests virtually upon the same basis as to deal with the subject matter whereupon the Canada Southern Railway Act rested all its powers.

I hold we are bound in principle to follow this decision though I am bound to say that I have been unable to find any report of the *Rowland Case,* upon which the learned

(1) [1890] 17 Can. S.C.R. 316.

1924

SINCENNES-MCNAUGHTON LINES, LTD. v. BRUNEAU.

Idington J.

judge (Taschereau J.) therein relied; unless perhaps it was the same case as referred to in 13 Ont. P.R. 93, which in a later stage as that report indicates highly probable, the question came before this court by way of seeking an appeal here.

Sir Elzear Taschereau, the late Chief Justice of this court, was at that date a puisne judge of this court.

I may also say that this decision in the *Jackson Case* (1), though traced by me from another case cited by counsel for appellant, and relied upon by me in the case of *The Canadian Pacific Railway Co.* v. *The King* (2) seems to have escaped the notice of counsel on each side herein.

I feel so clearly bound thereby that I need not follow the matter further, but may be permitted to rely also upon the decision of the court above in the case of *The Workmen's Compensation Board* v. *Canadian Pacific Railway Co.* (3), arising out of the application of the provisions of the British Columbia "Workmen's Compensation Act."

I admit that it is by no means decisive of this case but am reminded thereby of what we have been so often reminded especially in the interpretation and construction of the "British North America Act," that you cannot, under that, do that indirectly which you cannot do directly.

I submit that bearing that principle in mind this decision furnishes a strong argument in favour of maintaining that the Quebec "Workmen's Compensation Act" is *intra vires* when the "Canada Shipping Act" is closely analyzed, and we are confronted with the proposition of the court below, that it is with only a matter of tort and not of contract that it deals, and thus impliedly leaves all involved in the contractual relations of parties to be dealt with by the local legislature under either item 13 or 16 of the enumerated powers conferred by section 92 of the B.N.A. Act.

The case of *McColl* v. *Canadian Pacific Ry. Co.* (4), in which the judgment of the Judicial Committee was written by my brother Duff, also seems to me incidentally very helpful in supporting this respondent by following same line of thought.

(1) 17 Can. S.C.R. 316.
(2) [1907] 39 Can. S.C.R. 476.
(3) [1920] A.C. 184.
(4) [1923] A.C. 126.

1924

SINCENNES-McNAUGHTON LINES, LTD. v. BRUNEAU.

Idington J.

I am by no means presenting this case as a final disposition on such a subject, but as tending thereto and well worthy of consideration.

I repeat that I feel bound by the decision of this court, above cited, and which I cannot in principle distinguish from what is involved herein, and that these several other considerations just now mentioned tend to support said decision. The decision of the Judicial Committee in the *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1) should also be kept in view.

I must therefore conclude that this appeal should be dismissed with costs.

DUFF J.—By the decisions of the Lords of the Judicial Committee in *Workmen's Compensation Board* v. *Canadian Pacific Ry.* (2), and in *McColl* v. *Canadian Pacific Ry. Co.* (3), the proposition was settled beyond controversy that notwithstanding the terms of section 91 of the "British North America Act," by which exclusive legislative authority is reposed in the Dominion in respect of navigation and shipping and in respect of Dominion railways, the province has jurisdiction to provide for the payment of compensation to workmen injured by industrial accidents and to require railway companies and shipping companies to contribute to a fund provided for the purpose of furnishing the means of paying such compensation; and that such legislation may have full operation and impose binding obligations upon such companies so long as the Dominion does not in exercise of the authority mentioned enact legislation which conflicts with and overrides that of the province.

I think there is no sound distinction relevant to the point immediately under consideration to be drawn between the constitutional authority of a province as respects such legislation as that of Manitoba and British Columbia (considered in the decisions mentioned) and the enactment brought into force by the statute 9 Edw. VII, c. 66, sec. 1, passed by the legislature of Quebec. In substance this enactment provides that a duty shall rest upon the employer—a duty attached by law to the relation be-

(1) [1899] A.C. 367.
(2) [1920] A.C. 184.
(3) [1923] A.C. 126.

1924

SINCENNES-MCNAUGHTON LINES, LTD. v. BRUNEAU.

Duff J.

tween himself and his employees as a statutory term of the contract of employment, as it was put by Lord Haldane in the Case of the *Princess Sophia* (1)—entitling the injured employee or his representatives to compensation for injuries suffered by the employee in accidents happening by reason of or in the course of his work, where the accident is not brought about intentionally by the person injured. This obligation of the employer is qualified by a provision enabling the court to reduce the compensation where the accident is due to the "inexcusable fault" of the workman or to increase it where it is due to the "inexcusable fault" of the employer; but save in the case of "inexcusable fault" on the one side or the other, and in the case just mentioned of intentional misconduct by the employee, the Act requires the employer to insure his workmen against the consequences of industrial accidents by requiring him to pay compensation according to a definite scale fixed by the statute. Under the scheme of the British Columbia and Manitoba Acts, compensation is not, as a rule, paid by the employer directly, but out of a fund which is created by compulsory contributions levied against employers in accordance with certain principles laid down in the statutes. In neither case is the compensation paid to the employee a payment in the nature of damages as for a tort. The employee is entitled to receive it in the absence of any fault on part of the employer or his agents, and the amount recoverable is not determined by an estimate of the pecuniary loss suffered by the individual in the circumstances of the case, but according to a scale fixed by the statute. *Prima facie,* therefore, the provision of article 7321 of the Quebec statutes, conferring the right of compensation upon workmen engaged in any transportation business by land or by water is operative as a valid legislative enactment within the authority of the Quebec legislature.

The important question remains: Is there Dominion legislation in force applicable to the case presented by the respondent overriding this enactment and excluding his right of recovery? Secs. 915-917 inclusive of the Canada "Shipping Act" appear to apply only to damages arising through non-observance of the regulations in force under

part 14 of the Act, and so far as appears from this record, have no application to the circumstances out of which this litigation arose. I postpone for the moment the consideration of section 921. At the time of Confederation there was in force in the province of Quebec article 2390 of the Civil Code, which was in the following words:

> The owners are civilly responsible for the acts of the master in all matters which concern the ship and voyage and for damages caused by his fault or the fault of the crew. They are responsible in like manner for the acts and faults of any person lawfully substituted to the master.

The question whether after the passing of the "British North America Act" it was competent to the province of Quebec to amend this article by substituting therefor, in the case of injuries to employees, a right of compensation such as that given by the "Workmen's Compensation Act" of 1909 in lieu of all right of recovery of damages for fault except in the case of "inexcusable fault," is one which I do not think it is necessary to pass upon for the purposes of this appeal, and for this reason; Art. 2390 C.C., for reasons similar to those given in *McColl's Case* (1), conferred no right of action in respect of fault causing the death of the victim. In such a case resort must be had to article 1056 C.C. Now Article 1056 C.C. is an article strictly dealing, not with the subject of shipping or navigation, but with civil rights, and one which it is competent to the province of Quebec to amend without restriction. That article is unquestionably affected by the provisions of the "Workmen's Compensation Act," and ceases to have any operation in cases where death has arisen in circumstances giving a right to compensation under that Act. The case of the plaintiff is therefore not a case in respect of which Article 2390 C.C. could be invoked. The province was, I think, in the circumstances free to legislate with regard to such cases. Neither the province nor the Dominion was represented on the argument, and notwithstanding the ability with which the subject was discussed, I prefer to put my opinion on this branch of the appeal on this narrow ground, without passing upon or intimating any opinion upon the broader question.

(1) [1923] A.C. 126.

1924

SINCENNES-MCNAUGHTON LINES, LTD. v. BRUNEAU.

Duff J.

I now come to sec. 921 of the Canada "Shipping Act." The answer to the contention based upon that section is succinctly and sufficiently stated, I think, in the judgments of Tellier J. and Hall J. If the appellants' premises be correct and that section applies and overrides the provisions of the "Workmen's Compensation Act" in so far as it is inconsistent with those provisions, then it is to be observed that the section does not deal with the subject of the conditions of liability, but only with the quantum of "damages" recoverable where the conditions of liability exist. It was open to the appellants in answer to the action to show that the sum *prima facie* recoverable under the "Workmen's Compensation Act" could not consistently with the provisions of sec. 921 be awarded to the plaintiff. No attempt was made to show this, and I agree with the Court of King's Bench that there is no material before us upon which it can be affirmed that the plaintiff's right of recovery is affected by that section.

I express no opinion upon the question whether or not the decision in the case of the *Princess Sophia* (*Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1)), that the analogous provisions of the "Merchant Shipping Act" of 1894 had no application to a liability such as that imposed upon employers by the British Columbia statute to contribute to a fund to be administered by a Workmen's Compensation Board, for indemnifying workmen in respect of injuries in industrial accidents governs the question of the application of this section to an employer's obligation under the "Workmen's Compensation Act" of Quebec. The judgment in the case of the *Princess Sophia* (1) was not addressed to any such question, although some observations made in the course of the judgment may fairly be said to have not a little relevancy to it. I desire to intimate no opinion in either sense upon the point.

The appeal should be dismissed with costs.

ANGLIN J.—The applicability of the Quebec "Workmen's Compensation Act" to

workmen, apprentices and employees engaged * * * in any transportation business * * * by water

(unless where the navigation of the vessel is by means of sails, 8 Geo. V, c. 71, s. 1) is clear upon the face of the

(1) [1920] A.C. 184.

statute. That persons so engaged may be given the benefit of such provincial legislation is conclusively established by the decision of the Judicial Committee in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1). That the plaintiff, as the consort of a deceased employee of the defendant company who lost her life in the sinking of their tug-boat *Spray,* on which she worked, is a person entitled to compensation under the combined operation of Arts. 7321 and 7323 R.S.Q., is therefore apparent, subject to two contentions pressed by the defendant—

(*a*) That the plaintiff was "separated from bed and board" within the meaning of clause (*a*) of Art. 7323; and

(*b*) That Arts. 7321 and 7323, in so far as they affect workmen or employees engaged on a vessel to which the provisions of the Canada "Shipping Act" (R.S.C. [1906], c. 113) apply, as they did to the *Spray,* are *ultra vires* of the Quebec legislature.

I agree with the learned judges of the provincial courts that the exception made by Art. 7323 (*a*) and relied on by the appellants applies only to a consort judicially separated. The plaintiff was not so separated from his wife.

In determining the nature of the right to compensation conferred by the Quebec "Workmen's Compensation Act" I cannot think it material that that statute (in this respect unlike the British Columbia "Workmen's Compensation Act" dealt with in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1), and the Manitoba "Workmen's Compensation Act" considered in *McColl* v. *Canadian Pacific Ry. Co.* (2), does not provide for the creation of a fund under the control of a Board appointed by the Government out of which claims for compensation shall be paid, but imposes direct liability for such claims upon employers. The right to the compensation is none the less on that account

the result of a statutory condition of the contract of employment with a workman;

it arises in both cases alike

not out of tort but out of the workmen's statutory contract

and is

a civil right within the province to compensation

(1) [1920] A.C. 184. (2) [1923] A.C. 126.

1924

SINCENNES-MCNAUGHTON LINES, LTD. v. BRUNEAU.

Anglin J.

in the nature of "insurance against fortuitous accident." The competency of the Quebec legislature "to pass laws regulating the civil duties" of a company such as the defendant,

> which carried on business within the province and in the course of that business was engaging workmen whose civil rights under their contracts of employment had been placed by the Act of 1867 (the B.N.A. Act) within the jurisdiction of the province

cannot be controverted. These matters are concluded by the decision in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1), at pp. 191-2.

The decision in *McColl's Case* (2) also serves to make it clear that, at all events in cases of claims for damages resulting from personal injuries causing death, liability independently of the operation of the provincial law is not created by sec. 917 of the "Canada Shipping Act."

That it was competent for the Quebec legislature to enact, as it has done by Art. 7335, that in cases in which compensation under the "Workmen's Compensation Act" is recoverable (see Art. 7347a, 4 Geo. V, c. 57, s. 2) there shall be no other right of recovery under provincial law against the employer by the person injured or his representatives cannot, I think, be questioned.

But it is contended that there is a necessary conflict between the rights conferred by articles 7321 and 7323 of the Quebec statute and section 921 of the "Canada Shipping Act" limiting the liability of the ship-owner where, as in the case before us, he is not privy to the cause of the injury, loss or damage which forms the subject of claim, and that the Dominion legislation must prevail.

The view taken in the Court of King's Bench on this part of the case was that it could be disposed of on the ground that the evidence does not disclose any other claims against the defendant arising out of the sinking of its tugboat and that the recovery in this action is well within the limit prescribed by section 921. But, with respect, I do not think those facts afford an answer to the contention that articles 7321 and 7323 in so far as they give rights against owners of vessels subject to the "Canada Shipping Act" are *ultra vires*. To the extent that those rights might in any case conflict with the restriction imposed by section

(1) [1920] A.C. 184. (2) [1923] A.C. 126.

921 of the Canada Shipping Act the validity of articles 7321 and 7323 probably could not be upheld. It would seem necessary, therefore, to face the issue whether there may be such conflict.

Section 921 of the "Canada Shipping Act" deals with liability for damages—

> the owners * * shall not * * be answerable in damages * * .

I find in that section itself and in its collocation abundant evidence that it deals only with "damages" in the sense of indemnity for actionable injury or loss caused by tort for which the vessel owner is legally responsible.

> "*Dammages*"—*Damma* in the common law hath a speciall signification for the recompence that is given by the jury to the plaintife or defendant (qy. demandant? V. Ritso's Intr. 119), for the wrong the defendant hath done unto him.

Co. Litt. 257a: Vf. Jacob: 4 Encyc. 93-109; Stroud's Judicial Dictionary (2nd ed.), p. 459.

The damages recoverable from the ship-owner dealt with by s. 921 are, as Lord Haldane (1) said, in speaking of s. 503 of the Imperial Merchant Shipping Act (in part in *pari materia*)

> for injury arising out of what has not the less to be proved as a tort because it may have happened, in the language of s. 503, without his actual fault or privity.

It is upon the recovery of such damages that section 921 imposes a restriction in favour of the vessel owner. That section does not bear upon compensation claims arising solely out of contractual rights and in no wise dependent upon the establishment of some breach of duty for the consequences of which it is sought to make the vessel owner liable. The application of article 2434 of the R.S.Q. is obviously subject to the same restriction.

In *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1) the circumstance that an employer who has not fully contributed to the accident fund is required by the British Columbia "Workmen's Compensation Act" to make good the capitalized value of the compensation payable to an injured employee was regarded as not bringing that statute into conflict with the limitation upon liability provided for by section 503 of the "Merchant Shipping Act," 1894. Nor did it involve a departure from the scheme

(1) [1920] A.C. 184, at p. 192.

1924

SINCENNES-MCNAUGHTON LINES, LTD. v. BRUNEAU.

Anglin J.

of the Compensation Acts to provide "insurance against fortuitous injury." The fact that under the Quebec statute, as under the English "Workmen's Compensation Act," compensation is required to be made directly by his employer to the injured workman instead of by a Government Board out of a fund to which the employed is obliged to contribute does not afford a ground for distinguishing it in these respects from the British Columbia statute dealt with by the Judicial Committee (1). In my opinion there can be no conflict between section 921 and the "Canada Shipping Act" and the clauses of the Quebec "Workmen's Compensation Act" with which we are dealing. The sole subject matter of section 921 is the ship-owner's liability for actionable loss or damage arising from tort or breach of navigation regulations for which he is legally responsible. If in the opinion of Parliament it should be desirable that the restriction of liability for which that section provides should apply to claims of employees for compensation under "Workmen's Compensation Acts," its scope must be extended to embrace them. As it now stands such claims are outside the limitations which, in my opinion, cannot be enlarged by the courts upon such considerations as influenced the decision of the Supreme Court of the United States in *South Pacific Co.* v. *Jensen* (2).

Other objections to the validity of the provincial statute based on provisions of the "Canada Shipping Act" providing for the care of sick and disabled seamen (ss. 215 and 394) would seem to be met by the observation of Viscount Haldane (3), at page 193 that they do not cover the same field as the provisions of the "Workmen's Compensation Act."

The appeal, in my opinion, fails.

MIGNAULT J.—The appellant questions the validity, from the constitutional point of view, of the Quebec "Workmen's Compensation Act," sections 7321 and following, R.S.Q., 1909, on which the respondent's action is based. Its contention is that, in so far as compensation is claimed under this statute for the death of the respondent's wife by drowning in the foundering of the appellant's tug *Spray*,

(1) [1920] A.C. 184. (2) 244 U.S. 205 at pp. 215, 218.

the Act conflicts with the provisions of the " Canada Shipping Act," R.S.C. [1906] c. 113, and is therefore *ultra vires* of the Quebec legislature.

Without entering into a detailed examination of the Quebec " Workmen's Compensation Act," I may say, as to its general scope, that it grants compensation, not on the basis of a liability for fault or negligence, but of a legal obligation to compensate the injured workman or the dependents of the deceased workman, without it being necessary to prove any fault or negligence. Perhaps this legislation would be better described by saying that the right to compensation is made by the statute an incident to the contract of employment.

That such a general law is within the legislative jurisdiction of the province cannot be doubted, but it is urged that section 7321 R.S.Q., which *inter alia* applies to any transportation business by water, and that was the business carried on by the appellant, comes into conflict with " The Canada Shipping Act," with the consequence that the latter statute must prevail.

The question thus raised is not entirely a new one, but came before the Judicial Committee, it is true with respect to a " Workmen's Compensation Act " of a different character, in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1).

Both the British Columbia Act in question in that case and the Quebec statute have this in common that compensation for injuries or death is granted without proof of negligence. The scheme really is equivalent in its results to a species of insurance in favour of workmen, and, to quote the language of their Lordships in the *British Columbia Case* (p. 191), the right conferred

> is the result of a statutory condition of the contract of employment made with a workman resident in the province, for his personal benefit and for that of members of his family dependent on him. This right arises, not out of tort, but out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the province who so contracts should possess it as a benefit conferred on himself as a subject of the province.

The appellant singles out several provisions of the " Canada Shipping Act " which, it says, are inconsistent with the

(1) [1920] A.C. 184.

1924

SINCENNES-MCNAUGHTON LINES, LTD. v. BRUNEAU.

Mignault J.

Quebec "Workmen's Compensation Act" and should prevail against it.

Thus we are referred to sections 215 and following which provide for medical attendance to seamen injured in the service of their ship, or who are taken ill; but, as observed by their Lordships in the case above referred to (p. 193), these sections do not purport to cover the same field as the provincial statute.

Sections 381 and following of the "Canada Shipping Act" as to the care of sick and distressed mariners were also mentioned, and the same observation disposes of any contention that these provisions conflict with the Quebec law. This is true also of sections 394 *et seq.*, relied on by the appellant, and which are of the same character.

But the chief argument of the appellant is that there is a direct conflict between a limited liability under section 921 of the "Canada Shipping Act" and a liability such as is created by the "Workmen's Compensation Act" of Quebec. The latter liability is by no means an unlimited one, but it is conceivable that where several persons on a ship perish in the same accident, the total sum payable by the ship-owner may be greater under the Quebec statute than under section 921 of the "Canada Shipping Act."

I think it should first be observed that section 921 does not create a liability, but leaves the existence of liability to be determined by the law of the province where the accident occurs. It is a defence to, or rather a limitation on, a liability assumed to exist by virtue of the provincial law. It is concerned with damages, while the Quebec statute fixes a scale of compensation irrespective of the real damages. Moreover, the Quebec "Workmen's Compensation Act" deals with the relations *inter se* of employers and workmen, while section 921 limits the legal liability in favour of the owner of the ship, who is not necessarily the employer of the injured seaman.

It may be added that the field covered by section 921 is much wider than that of the Quebec statute since it would apply to a claim for damages suffered not only by a seaman, but by a passenger on a ship, as well as to a claim for damages to goods carried on the ship.

Whether or not section 921 may be resorted to in the case of several claims arising out of the same accident under the Quebec "Workmen's Compensation Act," and the appellant has not made out in evidence such a case here, there is no necessary conflict between the two statutes, and consequently I would not be justified in adopting the appellant's conclusion that the Quebec statute is *ultra vires* in so far as it applies to contracts of employment made by a person carrying on a transportation business by water. The same remark can be made in connection with section 918 of the "Canada Shipping Act" which applies the admiralty rule of division of damages where a collision occurs through the common fault of two colliding vessels.

On the whole case, I come to the conclusion that the appellant's attack on the Quebec statute fails.

There was another ground on which the appellant relied in the courts below, but which was not strongly pressed in this court, and that is that a state of separation existed between the plaintiff and his wife. The only separation, under the Quebec "Workmen's Compensation Act," which would serve as a bar to an action by the consort is a judicial separation from bed and board. Here the separation was purely voluntary and the plaintiff's right of action was not taken away.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Germain, Guérin & Raymond.*

Solicitors for the respondent: *Robichon & Méthot.*

1924
*Feb. 11.
*Feb. 12.

J. A. OUELLET (PLAINTIFF).....APPELLANT;

AND

LEVESQUE & GUENARD, LTEE.
(DEFENDANT);

AND

L. P. DESBIENS AND OTHERS (OPPOSANTS) ..... } RESPONDENTS.

ADELARD TREMBLAY (PLAINTIFF)..... APPELLANT;

AND

LEVESQUE & GUENARD, LTEE.
(DEFENDANT);

AND

L. P. DESBIENS AND OTHERS (OPPOSANTS) ..... } RESPONDENTS.

Appeal—Jurisdiction—Opposition afin de conserver—Amount in controversy—"Supreme Court Act," s. 39 (a) as enacted by 10-11 Geo. V, c. 32, s. 2.

The plaintiffs contested an opposition *afin de conserver* for $18,580 filed by the respondents on the proceeds of a sale of property upon the execution by the plaintiffs against the defendant of judgments obtained in each case for an amount less than $2,000. The plaintiffs appealed from the judgments dismissing their contestation.

Held that, "the amount or value of the matter in controversy in the appeal" being under $2,000, these cases were not appealable under section 39 (a) of the Supreme Court Act as enacted by 10-11 Geo. V, c. 32. *Kinghorn* v. *Larue* (22 Can. S.C.R. 347) followed.

Coté v. *Richardson* (38 Can. S.C.R. 41) and *Pulos* v. *Lazanis* (57 Can. S.C.R. 337) are no longer applicable as section 46 of the Supreme Court Act (R.S.C., c. 139), has been repealed by the above-mentioned statute.

MOTIONS to quash for want of jurisdiction appeals from the judgments of the Court of King's Bench, appeal side, province of Quebec, affirming the judgments of the Superior Court, District of Roberval, and maintaining the respondents' oppositions *afin de conserver*.

Simon Lapointe K.C. for the motion.

Belcourt K.C. for the appellant Ouellet and *Auguste Lemieux K.C.* for the appellant Tremblay, *contra*.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—In each of these cases the appellant, who had recovered a judgment against the debtor Lévesque & Guénard, Ltée, seized the property of the

*PRESENT: Sir Louis Davies C.J. and Idington, Duff, Mignault and Malouin JJ.

debtor, consisting of a quantity of pulpwood, and the respondents Desbiens, et al., to whom the property had been pledged, by way of *opposition afin de conserver,* set up a claim to be paid by preference out of the proceeds. In each case the amount of the plaintiff's claim was much less than $2,000, the combined claims of both amounting to less than $1,000.

The respondents move to quash the appeals on the ground that the amount involved is less than $2,000 and the question thus raised is the point to be decided.

The relevant provision of the "Supreme Court Act" is sec. 39 (a) as enacted by 10-11 Geo. V, c. 32, s. 2. It will be observed that this provision contains nothing corresponding to s.s. 2 of sec. 46 of c. 139 R.S.C., that the "amount in dispute" shall be

understood to be that demanded and not that recovered if they are different,

sec. 46 having been expressly repealed by sec. 2 of the Act of 1920. Since the amendment the amount or value of the matter in controversy in the appeal must exceed $2,000, unless special leave to appeal is obtained.

The decision of this question, we think is governed by the judgment of this court in *Kinghorn* vs. *Larue* (1).

On facts indistinguishable in any pertinent sense it was there held conformably to the principle of *Macfarlane* vs. *Leclaire* (2), that the "amount in controversy" was the amount claimed by the appellant plaintiff and not the amount or value of the claim of the respondent opposant.

Mr. Belcourt relies upon the subsequent decisions in *Coté* vs. *Richardson* (3), and *Pulos* vs. *Lazanis* (4). The first of these decisions is expressly based upon the provision above mentioned of sec. 46 (2). That provision, it was considered, required the court to resort to the demand in the intervention to determine the "amount in controversy"; and the later decision proceeded upon the authority of the earlier.

We have come to the conclusion that the provision in question having been repealed the last-mentioned decisions are no longer applicable; that the decision in *Kinghorn* vs.

(1) [1893] 22 Can. S.C.R. 347.
(2) 15 Moore P.C. 181.
(3) [1906] 38 Can. S.C.R. 41.
(4) [1918] 57 Can. S.C.R. 337.

1924

OUELLET v. DESBIENS AND TREMBLAY v. DESBIENS

The Chief Justice.

Larue (1) ought to be followed in passing upon questions arising under sec. 39 (a); and accordingly that the "amount in controversy" on the present appeals is, within the meaning of that subsection, less than $2,000.

The appeals should be quashed with costs of the motions.

Motions granted with costs.

(1) 22 Can. S.C.R. 347.

1923

*Oct. 24, 25.

1924

*Feb. 5.

JOSEPH Z. COTE AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CORPORATION OF THE COUNTY OF DRUMMOND AND OTHERS (DEFENDANTS) .....

AND

THE CORPORATION OF THE TOWNSHIPS OF WENDOVER & SIMPSON (MISE-EN-CAUSE)..... } RESPONDENTS.

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

Municipal corporation—Action to set aside by-law or procès verbal—Statutory means of relief—Supervising control of Superior Court—Art. 50 C.C.P.—Art. 430, 433 M.C.

The right of appeal to the Circuit Court (Art. 430 M.C.) in order to set aside a municipal by-law or *procès verbal* does not exclude an action *en nullité* taken before the Superior Court under Art. 50 C.C.P., this right of action being expressly reserved by the Municipal Code (Art. 100 former M.C.; Art. 433 new M.C.) Idington and Duff JJ. expressing no opinion.

Shannon Realties Limited v. *La Ville St. Michel* ([1924] A.C. 185) distinguished.

APPEAL from the judgment of the Court of King's Bench, Appeal, Side, province of Quebec, affirming the judgment of the Superior Court and dismissing the appellants' action.

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

J. E. Perrault K.C. and *Nap. Garceau K.C.* for the appellants.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

C. H. Lalonde for the defendant respondent.
Joseph Marier for the mise-en-cause respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin with which I fully concur, I would dismiss this appeal.

IDINGTON J.—This appeal arises out of an action six years or more after the homologation of a *procès verbal* of the respondent relative to the drainage of a large area within said county seeking to have said *procès verbal* quashed.

The appellants failed to go to the Circuit Court as they, or some of them, might have done, with various complaints such as I imagine might have been open to some of them.

On the broader ground now taken the law in question does not seem to me difficult to apprehend and, so far as I can see, was correctly apprehended. Whether correctly applied or not is chiefly a question of fact upon which two courts have passed adversely to the appellants.

A book might be written on all that appellants' factum touches.

I am not convinced that they are right in fact or in law, and cannot reverse the judgments of two courts supported by the reasons given, and now therefore hold that this appeal should be dismissed with costs.

DUFF J.—This appeal should be dismissed with costs.

ANGLIN J.—At the conclusion of his judgment in the Superior Court Mr. Justice Pouliot assigns as one of the reasons for dismissing this action that it was begun almost six years after the homologation of the report which it attacks. No allusion is made to this circumstance by Mr. Justice Letourneau, who delivered the unanimous judgment of the Court of King's Bench, and I do not find any reference to it in the plea either of the defendant, the county of Drummond, or of the mise-en-cause, although acquiescence on other grounds, held to be ill-founded, is suggested by the defendant. The only prescription to which an action brought under Art. 50 C.C.P. is subject is the general prescription of thirty years declared by Art. 2242 C.C. To hold that the present action is barred merely

1924
CÔTÉ
v.
CORPORATION OF COUNTY OF DRUMMOND.
Anglin J.

because of the delay in bringing it would be to impose a prescription not found in the law. It may be that the remedy under Art. 50 C.C.P. is so special and extraordinary that the granting of it is a matter of sound judicial discretion and that in certain cases it should not be accorded where there has been great delay, though short of thirty years, in bringing action. *Thériault* v. *Notre Dame du Lac* (1). But where a defendant intends to rely upon dilatoriness in bringing the action as a defence it should at least be pleaded and the plaintiff given an opportunity to explain or excuse it. Where no such issue has been discussed at the trial effect should not, in my opinion, be given to a suggestion that the action, though not prescribed, was begun too late.

Having regard to the explicit reservation by Art. 433 (2) of the Municipal Code (new) of the right to invoke the jurisdiction conferred on the Superior Court by Art. 50 C.C.P., the plaintiff's failure to resort to the Circuit Court under Art. 430 M.C. (new) does not afford an answer to this action. The applicability of the recent decision of the Privy Council in *Shannon Realties* v. *La Ville St. Michel* (2) would seem to be thereby excluded.

Not only are the applicants persons whose lands are drained by the two water-courses, the La Loutre and the Généreux or Grande Décharge, but, upon evidence that may possibly be regarded as somewhat conflicting, the Superior Court has found that they have aggravated the servitude imposed by law on the owners of land at a lower level along these two water-courses, in contravention of Art. 501 C.C., as the result of drainage work done on their lands in excess of what would fall within the description "ordinary works of cultivation." That finding has been unanimously affirmed by the Court of King's Bench. The question is one of fact. After careful consideration of the evidence in the light of the elaborate factum of the appellants, I am satisfied that the concurrent finding of the two provincial courts is not so clearly wrong that we would be justified in reversing it here. On the contrary, there seems to be evidence, quite sufficient if believed, to support the finding of aggravation of servitude. It follows that the

(1) [1903] 9 Rev. de J. 326, at p. 346. (2) [1924] A.C. 185.

appellants, as parties interested, may properly be made liable under Art. 887 M.C. (old) (515, new) for work on the lower stretches of the water-courses in question.

They also complain, however, that they are required by the *procès-verbal* to do on the portions of those water-courses which pass through their own lands work that is quite unnecessary for the drainage of them in direct contravention of Art. 881 M.C. (old) (511, new). The evidence of Joseph Ruel, a witness called for the defence, is:

Q. A présent ces deux ruisseaux "La Loutre" et "Généreux" sont suffisants pour prendre toute l'eau de ces terres-là en haut?
R. Ah! oui.

The *procès-verbal* requires that the two water-courses in question should be *"faits, ouverts et entretenus"* of certain defined widths and depths where they pass through the appellants' lands. The evidence does not disclose the present widths and depths of the water-courses in these stretches. But counsel for the mise-en-cause, when pressed upon this point, admitted that a literal enforcement of the *procès-verbal* would be illegal, adding, however, that it has never been enforced and that nobody has any interest to enforce it. He stated that the purpose of the "verbalisation," so far as it affects these stretches of the water-courses, was merely the re-enactment of a by-law which was rendered necessary by the erection of the new municipality of Wendover and Simpson and that it was not intended to require the appellants to do more than to maintain in their existing condition the stretches of the two water-courses passing through their lands—in fact, that all that was contemplated as to these stretches was the cleaning out of the existing water-courses and the putting of them in a proper state of repair.

While I doubt, if it has been shown that the widths and depths prescribed by the *procès-verbal* exceed those of the existing water-courses through the appellants' lands, that the answer made by counsel for the mise-en-cause would be sufficient, on the other hand in the absence of definite proof of those facts and of evidence making it reasonably clear that allowing the *procès-verbal* to remain in force will expose the appellants to serious and palpable injustice, there being no suggestion of fraud or indirect motive or

1924
CÔTÉ
v.
CORPORATION OF COUNTY OF DRUMMOND.
Anglin J.

want of good faith on the part of the municipal council, I incline to the view that we should not in this court exercise the special jurisdiction conferred by Art. 50 C.C.P., the Superior Court and Court of King's Bench of the province having already declined to do so. The stretches of the two water-courses which pass through the appellants' lands are comparatively of trifling importance in the extensive drainage scheme dealt with by the *procès-verbal*. Although the point appears to be covered by paragraph 9 of the declaration, insistence by the appellants that the *procès-verbal* involves a distinct violation of Art. 881 M.C. (old) would seem to be an after thought, no allusion being made to it either in the judgment of Mr. Justice Pouliot or in that of Mr. Justice Letourneau. I am not satisfied that the case falls within the limitations to which the courts have declared the exercise of the jurisdiction conferred by Art. 50 C.C.P. to be subject. *Mercier* v. *County of Bellechasse* (1); *La Corporation de Ste. Julie* v. *Massue* (2). Had the appellants' case been rested upon Art. 881 M.C. at the trial we probably should have had definite evidence as to the present widths and depths of the stretches of the two water-courses which pass through the appellants' lands. Had the objection based on this article been brought to the attention of the municipal council at an early date the *procès-verbal* could, if necessary, readily have been amended to meet it, or, if that relief were denied, the difficulty could have been satisfactorily dealt with at comparatively small expense by an application to the Circuit Court under Art. 430 M.C. (new).

Under all the circumstances I am, for these reasons, of the opinion that the appeal fails.

MIGNAULT J.—Les appelants, alléguant être propriétaires contribuables de la municipalité des cantons de Wendover et Simpson, attaquent un procès-verbal verbalisant, entr'autres cours d'eau, le cours d'eau "Généreux," aussi connu sous le nom de "Grande Décharge" ou "Cours d'eau de la Fromagerie," et que j'appellerai ci-après la "Grande Décharge," et le cours d'eau "La Loutre," qui est un tributaire de la "Grande Décharge." Ce procès-verbal fut homologué le 14 septembre, 1914, par le bureau

(1) [1907] Q.R. 31 S.C. 247. (2) [1904] Q.R. 13 K.B. 228 at p. 234.

des délégués des comtés de Drummond et d'Yamaska, mais les appelants attendirent près de six ans après cette homologation avant de porter leur action, qui a été instituée le 2 septembre, 1920.

Il convient d'ajouter que ce procès-verbal règlemente un grand système d'irrigation et d'écoulement d'eau, comprenant pas moins de dix-huit cours d'eau, dont la principale artère est la "Grande Décharge" et les autres, "La Loutre" comprise, sont des tributaires.

A l'audition devant cette cour, les intimées ont prétendu que, les appelants ne s'étant pas pourvus par appel à la cour de circuit dans les trente jours de l'homologation du procès-verbal, comme le permettaient les articles 1062 et suivants de l'ancien code municipal, tout droit d'action sous l'article 50 C.P.C. est maintenant prescrit. Et ils invoquent la décision de cette cour dans *Ville Saint-Michel* v. *Shannon Realties, Limited* (1), confirmée depuis par le conseil privé (2).

Cette décision a été rendue sous l'empire de l'"Acte des Cités et Villes" qui ne contient pas de disposition semblable à l'art. 100 de l'ancien code municipal (voy. maintenant les art. 430 à 433 inclusivement du nouveau code). Malgré le droit d'appel ou d'action à la cour de circuit ou à la cour de magistrat et la prescription de ce droit, ces articles conservent l'action en nullité devant la cour supérieure en vertu de l'article 50 C.P.C. La prescription de ce que l'art. 433 nouv. C. M. appelle "le recours spécial" ne paraît donc pas entraîner la prescription de l'action en nullité devant la cour supérieure.

Je me hâte d'ajouter, cependant, que si l'on ne peut dire qu'il y ait à l'égard de l'action en nullité à la cour supérieure d'autre prescription proprement dite que celle du droit commun, trente ans, la cour supérieure, exerçant une juridiction extraordinaire sous l'art. 50 C.P.C., dont l'opportunité est laissée à sa discrétion, peut très bien refuser d'intervenir lorsqu'on a laissé s'écouler un long délai avant de demander la cassation d'un acte municipal. (Voy. *le dictum* du juge Andrews dans *Thériault* v. *Notre-Dame-du-Lac* (3)). Sans faire état de la distinction que faisait la juris-

(1) [1922] 64 Can. S.C.R. 420. (2) [1924] A.C. 185.
(3) 9 Rev. de J. 326, at p. 346.

1924
CÔTÉ
v.
CORPORATION OF COUNTY OF DRUMMOND.
Mignault J.

prudence de la province de Québec entre le recours pour irrégularités devant la cour de circuit et l'action en nullité à la cour supérieure, dont j'ai parlé dans mon opinion dissidente dans *Ville Saint-Michel* v. *Shannon Realties, Limited* (1), je ne vois rien qui empêcherait la cour supérieure de prendre en considération le fait que le demandeur avait un recours facile par voie d'appel ou d'action devant la cour de circuit ou la cour de magistrat et qu'il n'en a pas profité. Je ne dis pas que cette circonstance est décisive, mais lorsqu'elle se complique, comme dans le cas actuel, d'un long délai, totalement inexpliqué depuis la mise en vigueur de l'acte municipal, je suis d'opinion que la cour supérieure peut très bien refuser d'exercer son droit de surveillance et de contrôle.

J'en viens maintenant au mérite de l'action des appelants et aux griefs qu'ils invoquent. Le procès-verbal a été fait sous l'empire de l'ancien code municipal et ce sont les articles de ce code que je vais citer, en indiquant toutefois les articles correspondants du nouveau code, qui n'est entré en vigueur que le ler novembre 1916.

Les appelants se plaignent qu'on les ait assujettis aux travaux de construction et d'entretien des cours d'eau " Grande Décharge " et " La Loutre," malgré que leurs terrains, à raison de leur élévation, puissent s'égoutter par ces cours d'eau sans travaux d'art. Ils disent qu'il y a eu en cela violation de la servitude légale qu'ils possèdent en vertu de l'art. 501 C.C., la pente de leurs terrains étant telle que l'eau s'en écoule naturellement sur les fonds inférieurs au bénéfice desquels le procès-verbal a été fait. Ils prétendent que ces deux cours d'eau sont des cours d'eau naturels, qu'ils sont suffisants pour leurs besoins et que, s'il est nécessaire de les creuser ou élargir, les appelants ne doivent pas être appelés à contribuer aux travaux.

Quant à cette dernière prétention, je puis dire que dans l'origine tout ce territoire était couvert de bois. Il y avait avait alors des coulées ou fossés naturels peu profonds par lesquels l'eau s'écoulait. Le défrichement de cette région a augmenté le volume des eaux et les coulées se sont creusées graduellement. Il est certain d'après la preuve qu'on a travaillé de main d'homme à la "Grande Décharge,"

(1) 64 Can. S.C.R. 420.

mais il n'est pas démontré qu'on ait fait des travaux dans le lit de "La Loutre." Ce qui est clair cependant, c'est que ces cours d'eau sont bien plus larges et profonds qu'autrefois, car il faut maintenant des ponts pour les traverser. Ce qui me paraît encore démontré, c'est que les appelants ont creusé sur leurs terrains des fossés très profonds sans l'aide desquels une partie seulement des eaux de surface parviendrait aux cours d'eau, car s'il y a une pente générale vers le nord, cette pente n'excède pas un pied par arpent et elle est interrompue par des plateaux de six à huit cents pieds de largeur où il n'y a aucune déclivité. Il faut donc chez les appelants des fossés très profonds pour drainer leurs terrains. Il est clair que de tels fossés n'auraient pas été nécessaires pour les fins ordinaires de la culture, s'il ne s'était agi d'amener artificiellement le surplus d'eau jusqu'aux cours d'eau, et en cela il y a eu aggravation de la servitude de l'art. 501 C.C.

Devant cette cour, les appelants se sont surtout plaints de la prétendue violation de l'art. 881 C.M. (art. 511 nouveau code) qui dit que nul n'est tenu de faire ou d'aider à faire, en aucune manière, sur son propre terrain, un cours d'eau d'une profondeur plus grande que celle qui lui est nécessaire pour l'égout de ce terrain.

Le procès-verbal donne à la "Grande Décharge" six pieds de largeur dans le fond depuis sa source jusqu'à sa jonction avec le cours d'eau "Elie Chartrand," de là dix pieds de largeur dans le fond jusqu'à la route entre les cantons de Wendover et Simpson qui est plus bas que les propriétés des appelants. Le cours d'eau "La Loutre" aurait, d'après le procès-verbal, huit pieds de large dans le fond depuis sa source jusqu'au centre du lot de terre n° 7 du troisième rang de Simpson et dix pieds de large depuis ce dernier point jusqu'à la route entre Wendover et Simpson.

Ce que la preuve a négligé de démontrer, c'est en quoi ces dimensions diffèrent de la grandeur actuelle de ces deux cours d'eau. On sait que ces cours d'eau existent depuis mémoire d'homme et ont été continuellement en s'agrandissant, ce qui s'explique par l'effet du déboisement qui y amenait une plus grande quantité d'eau et aussi par la

1924
CÔTÉ
v.
CORPORATION OF COUNTY OF DRUMMOND.
Mignault J.

nature du terrain qui est sablonneux et partant se désagrège facilement. Les témoins qui les ont vus il y a environ quarante ans ne les reconnaissent pas et trouvent qu'ils sont bien changés. Parlant de la " Grand Décharge," Hilas Larivière, un des anciens, dit qu'elle a dix pieds de large, et plus encore à quelques endroits. Les cours d'eau en question sont aussi très profonds.

Sans l'admission faite à l'audition devant cette cour par M. Marier, avocat de la mise en cause, la corporation des cantons de Wendover et Simpson, que si on exécutait à la lettre le procès-verbal il y aurait illégalité, je serais d'avis que la prétention des appelants qu'on a violé l'art. 881 C.M. en les astreignant à faire un cours d'eau d'une profondeur plus grande que celle qui leur est nécessaire pour l'égout de leurs terrains, est entièrement insoutenable en l'absence de preuve des dimensions actuelles des cours d'eau. Si j'ai éprouvé quelques hésitations, c'est uniquement à raison de cette admission, car après avoir lu bien attentivement toute la preuve je suis fermement d'avis qu'il n'y a rien dans cette preuve qui fasse voir qu'on ait violé en fait l'article 881. Et après avoir tout pesé je ne crois pas devoir m'arrêter à cette déclaration de M. Marier, car il est prouvé qu'il y a eu de la part des appelants aggravation de la servitude légale, et je ne trouve nulle part qu'il y ait eu soit injustice flagrante, soit oppression, soit fraude, de la part des autorités municipales.

Du reste, le jugement très complet et très bien raisonné de l'honorable juge Létourneau démontre que c'est une toute autre cause que les appelants ont soumise à la cour d'appel. Ils cherchaient alors à établir un état de faits qui amènerait l'application des principes posés dans la décision de la cour d'appel dans *Comtois* v. *Dumontier* (1), décision qui a fait jurisprudence. L'honorable juge Létourneau discute longuement l'article 501 C.C., mais il ne mentionne même pas l'article 881 C.M., et il m'est impossible de croire que si les appelants s'étaient appuyés sur ce dernier article en cour d'appel, comme ils l'ont fait devant cette cour, le juge Létourneau ne l'aurait pas discuté lui-même. Je rejette donc la prétention des appelants qu'il y a eu violation de l'art. 881,

(1) [1898] Q.R. 8 K.B. 293.

Le juge Létourneau démontre que la cause de *Comtois* v. *Dumontier* (1) ne s'applique pas dans l'espèce. Je concours entièrement dans ce qu'il dit à ce sujet.

Et je crois aussi que l'honorable juge Pouliot en cour supérieure a eu raison de dire à la fin de son jugement que cette action intentée près de six ans après l'homologation du procès-verbal ne devait pas être accueillie. Un des appelants, le nommé Joseph Côté, avait déjà pris une action pour faire annuler le procès-verbal, et il perdit sa cause en cour supérieure et en cour de revision. Il s'est alors joint aux autres appelants pour instituer cette action qui vient à cette cour après avoir été rejetée à l'unanimité des juges par la cour supérieure et la cour d'appel. Tous ces frais ont été encourus par les appelants afin de tâcher d'échapper à l'obligation de fournir quelques heures d'ouvrage aux travaux de ces cours d'eau. Dans ces circonstances, je ne puis dire que leur action n'aurait pas dû être renvoyée.

Je rejetterais l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for appellants: *Garceau & Ringuet.*
Solicitor for defendant respondent: *C. H. Lalonde.*
Solicitor for mise-en-cause respondent: *Joseph Marier.*

THE COUNTY OF HASTINGS (DEFENDANT) ..... APPELLANT;

AND

GEORGE CLINTON AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

1923
*Nov. 6, 7.
*Dec. 21.

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

Municipal corporation—Highway—Repair—Dangerous place—Warning to travellers—Negligence.

The failure of a municipal corporation to provide an adequate guard for the approach to a bridge at a place where the narrowing of the road and other conditions make such approach dangerous is a breach of its statutory duty to keep the highway in repair and makes it liable to compensate a person injured for want of such guard. *Raymond* v. *Bosanquet* (59 Can. S.C.R. 452) dist.

Judgment of the Appellate Division (53 Ont. L.R. 266) affirmed.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1898] Q.R. 8 K.B. 293.

1923

COUNTY OF HASTINGS v. CLINTON.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming with a variation as to the damages, the judgment at the trial in favour of the respondents.

Just after dusk on the 18th day of September, A.D. 1921, the respondents, Dr. George Clinton, his wife Lillie M. Clinton, and their daughter Jean M. Clinton, travelling in a Ford coupe driven by the doctor, fell into a small gully or ditch over which was a culvert or bridge, on a road maintained by the County of Hastings, and under its jurisdiction. The culvert or bridge has a length of about 11 feet, and a driving width of about 12 feet, being about the same width as the via trita adjoining it on either end.

The culvert rests on stone abutments built up from the bottom of the ditch upon which are placed beams or stringers, and on these is laid a plank floor with a second plank floor on top. On each side of the culvert floor are secured wheel guards consisting of beams 6 inches by 6 inches, between which is the driving space. The perpendicular bank of the gully was concealed by small shrubs growing at the edge and from the bottom of the gully.

The doctor was driving very cautiously and when he was a short distance west of the culvert he saw by their lights that cars were coming towards him from around the slight bend in the road. He thereupon turned off the travelled portion of the road almost entirely on to the level grass and proceeded very slowly until the two cars passed him. At this point he was about 30 feet, or a little more, from the culvert. He was proceeding slowly and very cautiously back to the roadway when he came to the culvert or bridge, which he did not see and of which he was entirely unaware. The wheels on the right side of the coupe failed to gain the floor of the culvert securely, if at all, and the car dropped flat on its right side to the bottom of the gully, about five feet below, and lay parallel with the culvert, the left wheels being approximately at the south edge of the culvert.

The occupants of the car were all badly injured, the daughter especially so. Separate actions were brought against the county and each plaintiff was given damages.

(1) 53 Ont. L.R. 266.

The Appellate Division sustained the judgment and increased the amount awarded to the daughter.

Tilley K.C. and *Mikel K.C.* for the appellant. The municipality cannot be expected to keep all its roads in the same state of repair. The nature of the country, the character of the roads and various other matters must be taken into account. *Castor* v. *Uxbridge* (1) per Harrison C. J. And see *Delaney* v. *City of Toronto* (2); *Wilson* v. *Lambton* (3).

D. L. McCarthy K.C. and *F. E. O'Flynn* for the respondent referred to *Foley* v. *Township of Flamborough* (4); *Kelly* v. *Township of Carrick* (5); *Homewood* v. *City of Hamilton* (6).

THE CHIEF JUSTICE.—At the close of the argument in this appeal I entertained grave doubts of the appellant's liability. A subsequent reading of the evidence and the record did not result in the removal of my doubts.

I do not feel, however, that the judgment appealed from is so clearly wrong that I would be justified in reversing it, and for this reason I will not dissent from the judgment dismissing the appeal.

IDINGTON J.—The respondents sued the appellant county, which had for forty years or more assumed jurisdiction over the road in question, and was, at the time here in question, responsible therefor, to recover damages they respectively had suffered by reason of the motor car in which they were driving having capsized over the side of a bridge on said road five or six feet above the bottom of the creek or gully it crossed. It was a running brook but dry at seasons. The bridge was about sixteen feet in length, and in width of roadway over it about twelve to fourteen feet. There never had been erected thereon at either side thereof any hand railing, such as an engineer of long experience testifies it should have had, two or three feet high with projecting wings on the sides of the road beyond the bridge to warn and protect travellers.

(1) 39 U.C.Q.B. 113 at p. 122.
(2) 49 Ont. L.R. 245 at p. 251.
(3) 22 Ont. W.N. 474 at p. 476.
(4) 29 O.R. 139.
(5) 2 Ont. W.N. 1429.
(6) 1 Ont. L.R. 266.

1923

COUNTY OF HASTINGS v. CLINTON.

Idington J.

Indeed common sense alone, and what it usually dictates, would seem to me to have required appellant to furnish such protection. Calling this bridge, five to six feet high, a culvert, I respectfully submit, cannot change its real character.

The only pretence of such a guard was what appellant's counsel call a " wheel guard," consisting of a scantling six inches by four, nailed to the planks on top of the bridge, about a foot on either side thereof, and about a foot from the end of the planks covering the bridge. This six by four-inch scantling was probably nailed with the six-inch side to the floor of the bridge.

There was thus left about twelve feet of road to travel upon across the said bridge.

Mr. Justice Mowat the learned trial judge, on the invitation of counsel for the parties concerned, after the evidence was all in went with them to see and inspect said bridge and all relative thereto that could enable him to appreciate, correctly, the said evidence.

The immense advantage he thereby had, I respectfully submit, is, or ought to be held, hard to overcome.

In a full and able judgment dealing with all the points raised before him, and here, the learned trial judge concluded that there was no evidence of negligence on the part of the respondents, or either of them, and that there was evidence, as given by said engineer, of negligence on the part of the appellant, and gave judgment for each of the respondents and assessed their respective damages.

On appeal to the Appellate Division of the Supreme Court of Ontario that judgment was maintained save as to the assessment of damages to be allowed a daughter of the other respondents which were increased by adding $6,000 to what the learned trial judge allowed.

From this finding Mr. Justice Masten dissented as to the question of the responsibility of the appellant but, if responsible at all, agreeing with the majority of the court that the increased damages to the daughter should be allowed.

In his dissenting judgment he cites a large number of Ontario cases having little resemblance to this and of

which but two came to this court and would bind us, one being *Raymond* v. *Bosanquet* (1).

In regard thereto the circumstances there in question were quite distinguishable from those in question herein, and turned largely on the contributory negligence of those for whom the appellant there was responsible. Indeed it turned largely, if not entirely, upon questions of fact and I assented with much doubt, and I see two of my brother judges did also.

We must be sure of our facts before overruling a court below.

In the other case of *Magill* v. *Township of Moore* (2), which came here and is relied upon by Mr. Justice Masten, I dissented here, but the circumstances in evidence, I respectfully submit, as any one reading the case must see, did not turn upon anything like what is involved herein, but were complicated by the actions of a local telephone company.

I agree with the finding of facts by the learned trial judge save as to those bearing upon the assessment of damages due the daughter respondent herein, and with the reasoning of Mr. Justice Rose, writing the chief judgment of the majority in the court of appeal below, relevant to the facts in question herein and the increasing of damages already referred to.

I must therefore hold that this appeal should be dismissed with costs.

DUFF J.—I concur in the result.

ANGLIN J.—The very fact that the accident which occurred befell a careful driver almost establishes a case of *res ipsa loquitur* in regard to the necessity for a wing fence or railing on the approach to the bridge where it happened and consequent negligence on the part of the county in failing to provide that safeguard. That such a guard would have prevented the accident seems reasonably clear. That it could have been provided at a comparatively small expense is conceded, although it is claimed that the expendi-

(1) 43 Ont. L.R. 434; 45 Ont. L.R. 28; and 59 Can. S.C.R. 452.

(2) [1918] 43 Ont. L.R. 372; 59 Can. S.C.R. 9.

1923

COUNTY OF HASTINGS v. CLINTON.

Anglin J.

ture involved in placing such fences at all places in the county where similar conditions exist would be considerable. Assuming that to be the case, however, the county cannot, on that account, be relieved if it was its duty to have furnished the guard suggested at the bridge in question.

The facts are fully and accurately stated by Mr. Justice Rose in delivering the judgment of the majority in the Appellate Divisional Court and it is quite needless to repeat them here. There is no ground for doubting that Dr. Clinton drove cautiously in approaching the bridge. It is certainly unquestionable that he did not see the 5-inch or 6-inch timber wheel-guard or kerb which lay along the outside. He could scarcely have failed to see a whitened wing fence or railing if placed along the approach to the bridge to mark the narrowing of the highway to the width of the bridge.

On the whole evidence I am of the opinion that the danger of some such accident as befell the plaintiffs would have been manifest to the officials in charge of the maintenance of the road had they given the situation such attention as it should have received. Fences along the sides of country highways at dangerous places are very familiar. Railings to mark any sharp narrowing of the travelable portion of the road are quite common where there is risk of vehicles passing from it to rough or dangerous ground. Wing fences guarding the approaches to bridges, especially where they are narrow, can be seen on almost any highway. After giving to all the facts in evidence much thought and consideration I am of the opinion that the approach to the bridge in question was not

> in such a reasonable state of repair that those requiring to use the road (might), using ordinary care, pass to and fro upon it in safety. *Foley* v. *Township of East Flamborough* (1);

that, on the contrary, a condition existed dangerous for persons travelling by night, which proper attention on the part of the overseers would have discovered and against which reasonable diligence on the part of the county authorities would have provided. The following language of Mr. Justice Teetzel in *Kelly* v. *Township of Carrick* (2),

(1) [1898] 29 O.R. 139. (2) 2 Ont. W.N. 1429, at pp. 1430-1.

cited by counsel for the respondent, correctly states the law and is much in point:—

While it is difficult to define by any general proposition the exact extent of the obligation of municipal corporations to erect railings along their highways, a practical test is, whether there is a dangerous object or place so near to the line of travel as to make the use of the highway itself unsafe in the absence of a railing. If there is such an object or place so located, the municipality is bound to maintain sufficient guards to protect travellers from the dangers incident to it. Williams on Municipal Liability, pp. 190-194. In other words, a corporation is bound to erect barriers or railings where a dangerous place is in such close proximity to the travelled part of the highway as to make travelling upon it unsafe, whether by day or by night, in sunshine or storm.

It is not possible to define at what distance in feet or inches a dangerous place must be from the travelled part in order that it should be held to be in such close proximity that it must be guarded. It is in every case a practical question, to be determined by the good sense of the trial court, in the light of the evidence and of the principles of law applicable, whether the highway is or is not reasonably safe for public travel.

* * * *

With a quiet horse and in daylight, a traveller using ordinary care would not be in any peril from the unguarded embankment in question; but at night time, with a storm raging, the ground covered with snow, and the tracks obliterated, as they were on this occasion, I think a traveller would be in serious danger of driving over the embankment.

If the highway is dangerous under the above conditions, which are to be expected in this country—and I think it is, although it may be free from danger in broad daylight, the corporation has failed in its duty.

As put by Mr. Justice Rose:—

Too much must have been taken for granted; too little consideration must have been given to the needs of travellers.

I agree with that learned judge that

the trial judge who heard the witnesses and inspected the road was quite warranted in finding as he did, that the defendants were negligent, and that their negligence was the cause of the disaster.

Raymond v. *Bosanquet* (1), much relied on by the appellants is clearly distinguishable on its facts. The accident there happened by day. Had that been the case here it would have been very difficult for the respondents to maintain that neglect of duty by the appellants was the cause of the injuries they sustained.

I see no ground for interfering with the assessment of the damages made in the Divisional Court, which unanimously increased the amount awarded by the trial judge to Miss Jean Clinton, in whose case that learned judge had entirely omitted to take into account a most important element of loss.

(1) 59 Can. S.C.R. 452; 45 Ont. L.R. 28.

1923

COUNTY OF HASTINGS v. CLINTON.

Mignault J.

MIGNAULT J.—The locus where the accident occurred can be briefly described.

A country road leads up to a wooden bridge or culvert which spans a small ditch, five and a half feet deep. The road is practically level, including the part covered by grass on either side of the travelled portion. It is about forty feet wide, and the bridge is twelve feet in width, which is practically the width of the travelled part of the road or the *via trita*. The ditch, often dried up, has walls or abutments on both sides made of rough stones on which the bridge rests, and which extend a small distance on either side of the bridge. The result is that the roadway, including the grassy portion, narrows down at the bridge from about forty feet to twelve feet. There was at the time of the accident a piece of scantling four by six inches on each side of the platform of the bridge. There was no railing on the bridge nor were there wing rails or fences along the side of the ditch. The advantage of having such wing rails or fences, especially when whitewashed so as to be visible at night, is obvious; and when as here a roadway crossed by a ditch is narrowed down where the ditch intersects to the width of a narrow bridge or culvert, and nothing shows that it is so narrowed, there is at night a danger that the driver of a carriage or automobile, unaware of the narrowing of the road, and unable to see the bridge and ditch on account of the darkness, may drive into the ditch and sustain injury. This danger is increased where, as is shown in this case, the bed and sides of the ditch are covered with bushes or shrubbery so that a person approaching the ditch, especially at night, might be unable to see the break in the roadway.

Such was the situation when on the evening of September 18th, 1921, between 7 and 8 o'clock, the respondents, Dr. George Clinton, his wife, Lily Clinton, and his daughter, Miss Jean M. Clinton, approached this bridge in a Ford motor car which Dr. Clinton drove, the three sitting on the same seat and Dr. Clinton being to the left. Earlier in the day they had passed over this same road, which for some time had been used as a detour on account of repairs being made on the main highway. They had gone to Madoc and were returning from Madoc to Belleville where they resided. None of them knew that they were

approaching a place where the roadway narrowed and where they had to cross a bridge. Their car lights were burning because it was almost dark, and they were proceeding cautiously, being on the look-out for a defective bridge which they had observed on the way to Madoc. When near the bridge, of the position of which he was unaware, Dr. Clinton saw the lights of two motor cars approaching from the direction of Belleville. Being a timid driver, instead of keeping to his half of the travelled portion of the road as was his right he drove partially on to the grassy part which, as I have said, was on the same level as the travelled part, and moving slowly he allowed the two cars to pass him. When they had gone he moved in a slanting direction so as to gradually come back on the *via trita,* but in so doing, not knowing that there was a bridge there, his right front wheel failed to get on to the bridge, or if it did it got outside the scantling and the car fell into the ditch, its right side down. All three respondents were badly injured, the greatest sufferer being Miss Clinton who was on the right side of the car.

The learned trial judge found that the bridge itself was in good condition but that it should have been guarded by a wing rail, indicating the narrowing of the roadway and the approach to the bridge. He therefore condemned the appellant to pay as damages $1,000 to Dr. Clinton, $600 to Mrs. Clinton, and $4,000 to Miss Clinton. It is proper here to state that Miss Clinton's claim was much the largest for, as the learned trial judge finds, she sustained a permanent injury to her right shoulder causing it to sink. This was a disfigurement and, as Miss Clinton had received a very expensive musical education and proposed to go on the concert stage, it was claimed that the accident would prevent her from following her chosen career.

The Appellate Divisional Court, Mr. Justice Masten dissenting, confirmed the award of damages as to Dr. and Mrs. Clinton, but increased the amount given to Miss Clinton from $4,000 to $10,000. Mr. Justice Masten, who dissented on the question of liability, agreed with the other members of the court that, if the appellant was liable, Miss Clinton was entitled to $10,000 for the injuries she suffered.

1923

COUNTY OF HASTINGS v. CLINTON.

Mignault J.

It is from this judgment that the appellant appeals to this court on the ground, first, that there was no legal liability on its part for the accident, and secondly, that assuming liability existed Miss Clinton's damages should not have been increased.

The whole case was exhaustively and very ably argued, and we were furnished plans and photographs so that the contentions of the parties could be easily followed.

It is urged that Dr. Clinton and his co-plaintiffs are not entitled to succeed by reason of their contributory negligence. I need not consider whether Dr. Clinton's alleged contributory negligence would be an answer to the action of his wife and daughter, because I am of the opinion that Dr. Clinton was guilty of no such negligence. If anything he was too prudent, and as he was unaware of his proximity to the bridge, and as the learned trial judge believed him when he said he did not know there was a bridge there, although the car lights were burning I must hold that the plea of contributory negligence is not made out. He was within his rights in driving on to the grassy portion of the road to avoid an accident.

On the question of the liability of the appellant I have no hesitation in agreeing with the judgments of the two courts below. Notwithstanding the good condition of the bridge, as found by the learned trial judge, my opinion is that the situation where the road narrowed was a dangerous one at night, and that the appellant should have guarded against this danger by placing wing rails or a fence on the side of the ditch and leading up to the bridge, which being painted white or coloured white would have been visible at night and would have served as a warning of the approach to the bridge. This is very frequently done on country roads, and its necessity is illustrated by the present case.

The decision of this court in *Raymond* v. *Township of Bosanquet* (1), has been referred to.

There is, however, a difference between the two cases. In the *Raymond Case* (1) the accident happened in broad daylight, and the driver of the car saw the turn in the road when several hundred yards away from the narrow bridge.

(1) 59 Can. S.C.R. 452; 45 Ont. L.R. 28.

It was shewn that a large number of cars crossed the bridge every day in perfect safety, and there was some ground for suspecting that the driver had approached what he knew to be a sharp turn in the road at an unreasonable rate of speed under the circumstances.

In this case it is quite possible that a person driving along this road during the daytime and seeing the bridge ahead would have no recourse against the county municipality had he failed to so drive his vehicle as to cross the bridge in safety. To such an accident the decision in the *Raymond Case* (1) could well be applied. But the situation is different at night. It does not follow that because a narrow bridge and a narrowing highway as it approaches a bridge may be perfectly safe for a reasonably careful driver in the daytime, they would not be dangerous during the night time to the same driver not seeing them in time to avoid an accident. I think that liability can be predicated here because the situation was a dangerous one after dark and the danger could have been easily guarded against by erecting a whitened railing or fence along the edge of the ditch leading up to the bridge. It is true that there might not have been a danger to a person travelling along the *via trita* even at night, but the situation was dangerous for a driver who, like Dr. Clinton, left the *via trita* to avoid a collision with crossing cars and in returning to it fell into the unguarded ditch. The expense of guarding such places would seem a trifling one when compared to the liability the appellant has incurred in this case, and without such a guard my opinion is that this road was not reasonably safe for travel at night.

I am therefore of opinion that the judgments below should be affirmed on the question of liability.

As to the increased amount awarded to Miss Clinton by the appellate court, on the ground that the damages claimed by her for the loss of the career she proposed to follow were not too remote to be considered in an action of this kind, without in any way dissenting from the proposition laid down by Mr. Justice Rose in the appellate court it appears to me sufficient to say that no reason exists

(1) 59 Can. S.C.R. 452.

1923

COUNTY OF HASTINGS v. CLINTON.

Mignault J.

in the present case for departing from the practice of this court not to entertain appeals questioning the quantum of damages.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mikel & Alford.*

Solicitors for the respondents: *O'Flynn, Diamond & O'Flynn.*

HIS MAJESTY THE KING.....APPELLANT;

AND

CALEDONIAN INSURANCE COMPANY.RESPONDENT.

1924

*Feb. 5, 6.
*Mar. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Statute—Succession duty—Probate—Surety bond—Lien—"Succession Duty Act"—R.S.B.C., c. 217, ss. 20, 50.

When under the "Succession Duty Act" of British Columbia, as a condition of granting probate, a surety bond in favour of the Crown for payment of the succession duty has been obtained by the executor and accepted by the Crown, the executor *virtute officii* is clothed with authority to distribute the estate and to receive and give a good discharge for moneys payable to it and the estate is thus freed from any claim for a lien by the Crown in respect of succession duty.

Judgment of the Court of Appeal (33 B.C. Rep. 29) affirmed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of McDonald J. and granting a petition by the respondent under the "Land Registry Act" for an order upon the registrar to register a title to certain land.

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

J. A. Ritchie K.C. for the appellant.

Eug. Lafleur K.C. for the respondent.

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

IDINGTON J.—The land in question herein being owned by the late Sheriff Higginson, was sold by him by virtue of an agreement in writing before his death, which occurred on or about the 15th of September, 1911, to Stonehouse and Carlow for the sum of $6,000, of which there was due at his death $1,207.84, including accrued interest.

On the 29th November, 1911, William Burdis, the executor of the last will and testament of said Higginson, who had meantime obtained probate of said will, conveyed said lands to said vendees.

By several mesne conveyances pursuant to respective purchases the said lands were conveyed for respective good

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Mignault and Malouin JJ.

(1) 33 B.C. Rep. 29; sub. nom. *Minister of Finance* v. *Caledonian Ins. Co.* *Ins. Co.*

1924
THE KING
v.
CALEDONIAN INS. CO.
Idington J.

and valuable consideration until thereby the land became vested in one Arbuthnot, who mortgaged same to respondent and then conveyed the equity of redemption to Maud Peck. And respondent thereafter foreclosed said mortgage and got final order therefor on the 29th of May, 1922, and on the 5th of June, 1922, made an application to the registrar of titles in Vancouver to have said final order duly registered, as all said previously mentioned conveyances had been.

On the 27th of November, 1922, said registrar declined to do so, except subject to a lien for succession duties payable in respect of the estate of said Higginson.

Hence the petition of respondent praying for an order directing the said registrar to register said final order of foreclosure clear of all encumbrances and especially the lien claimed by appellant for the said succession duties.

The registrar had received for registration, at 10 a.m. of the 5th of June, 1922, from the Minister of Finance of the Crown, on behalf of British Columbia, a caution claimed to have been so tendered pursuant to section 50 of the "Succession Duty Act" of British Columbia enacted in 1907.

That section provides

> and any subsequent dealing with such land, mortgage or charge shall be subject to the lien for such duty.

I fail to see how that can help the appellant under the facts in question herein whereby the registered title of the many prior grantees had become under the provisions of the "Land Registry Act," absolute.

There had also been registered in the said Registry Office, prior thereto, on the 1st of August, 1921, a certificate of *lis pendens* in said foreclosure action.

True the said section 50 ends by saying

> but nothing herein contained shall effect the rights of the Crown to claim a lien independently of the said caution.

That does not in itself give any lien.

But had the Crown any lien under the said Act under the circumstances in question herein? I am presently about to shew why I think it had not, but if it had any such effective lien why was this enacted?

The lien, if any, is given by section 20 of the "Succession Duty Act," and I must look to the purview of the

whole Act to realize how far and how and when it really was intended to become operative.

There are parts of the Act providing for the valuation of the property of the deceased, and a list thereof in detail to be made, and how it is to be dealt with in way of execution thereof.

Then it is only after all that has been done that a grant of probate or of letters of administration can be made by the proper court, but not until ample security, fixed by the order of the Minister of the Crown having charge of finance, and aided by his officers, has been given by the executor or administrator for the payment of the succession duties. The security may be given by the executor and sufficient sureties, or an approved corporate company having power to give same.

There is no distinction made between real estate and personal property in all this.

Are we then to assume that this statutory provision for the realization of the assets is to be read as if a lien existed also on each and every item of the said assets although by section 20 of the Act which gives such lien it is clearly contemplated by the provision for interest being only to run after two years from the death, that such length of time shall elapse before the assets are realized?

I submit not, for it is clear to my mind that the security alone is looked to and substituted for any lien existent prior thereto.

How could the executor effectively dispose of much of some estates, especially those largely composed of personal chattels which may have to be sold advantageously by carrying on the business of the deceased?

Is each purchaser of such articles to be supposed to investigate the title of each item he so buys? I submit not, and that such a scheme never was contemplated by the legislature. On the contrary the whole scheme is to enable the executor, or administrator, to realize the assets and then, as he does so, pay thereout from each item the succession duties payable in respect thereof.

From the moment the grant of probate is given—which must be preceded by the giving of ample security as was given in this case at the cost, no doubt, of a heavy premium,

1924

THE KING
v.
CALEDONIAN INS. CO.

Idington J.

the executor is entitled to proceed to realize by sale the several assets of the estate.

The same view must also be taken as to the collection of debts due the testator, as was the small item for balance of purchase money in question herein.

When the executor realized, as he did, the sum of $1,207.84, including accrued interest for the balance of the purchase money in question, the right to claim any lien thereon was gone, unless upon that which the executor had in his hands as the result of such realization. There are several later provisions in the Act for enforcing payment by application to a judge as against those liable, but nothing, I submit, justifying such pretension as set up herein.

Unless we actually realize by applying a little common sense to what people are about, the legislators especially, we are apt to misinterpret and misconstrue their real purpose.

There are many sections in this Act, of which the learned Chief Justice of the Court of Appeal below has selected section 28, and the respondent's factum has selected many more, as indicating the true interpretation and construction of the Act, including the references to liens of the Crown.

I submit that interpretation gives no encouragement to the pretensions set up by the appellant herein.

The claim that each item of the estate of a testator is liable to bear the burden of the entire succession duty and the rights of the parties concerned be blotted out thereby, when clearly it is contemplated that it is only the aliquot part thereof according to a great variety of ratios that the Act provides, which have to be considered, seems to me, with great respect, hardly arguable.

My brother Duff, in his opinion which I have had the opportunity of reading, points out in cogent reasoning, which I need not repeat here, why the subject matter in question herein cannot be held the subject of a lien such as claimed by appellant.

I agree in the main with the reasoning of the learned Chief Justice of the court below and am of the opinion that this appeal should be dismissed with costs.

DUFF J.—This appeal raises a question as to the construction of the "Succession Duty Act" of British Columbia, R.S.B.C., c. 217. The question arises in these circumstances: Thomas Sheriff Higginson, who died in September, 1911, and whose will was proved in November of that year by one Burdis, who was named one of his executors, had, before his death, sold to William H. Stonehouse and Frederick G. Carlaw for the sum of $6,000 certain real estate, the identity of which is of no importance, under an agreement for sale which, at the time of his death, was still *in fieri;* and under which there was owing at that date the sum of $1,207.84 for principal and interest. The purchase having been completed by payment of the purchase money and conveyance of the land to the purchasers, the title passed by several further conveyances to one George Allan Arbuthnot, who became the registered owner in indefeasible fee. Arbuthnot having mortgaged the land to the respondent, the Caledonian Insurance Company, foreclosure proceedings were ultimately taken by the respondent, and, a final order for foreclosure having been obtained by the 29th May, 1922, an application was made to the registrar of titles for the registration of the respondent as owner in fee simple. It then appeared that on the 5th June, 1922, after the final order for foreclosure had been obtained, a caution had been filed by the Minister of Finance, professing to act under the authority of section 50 of the "Succession Duty Act," in which it was declared that succession duty was claimed by the Minister in respect of the lands which were the subject of the respondent's application.

The statute enacts that on any application for probate or for letters of administration, the amount of the succession duty payable shall be determined in the manner thereby directed, and immediate payment made or a bond given by the applicant or applicants, with surety or sureties, for the payment of the duty; and by s. 5 of c. 60 of the British Columbia Statutes of 1917, the issuing of letters probate or letters of administration is prohibited unless and until the duty is paid or security given.

1924

THE KING v. CALEDONIAN INS. CO.

Duff J.

By section 7,

all property situate within the province, or so much as passes,

either by will or intestacy (as the case may be), is made liable to duty; and by section 2, the "interpretation" section, "property" includes,

real and personal property of every description and every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives;

and by section 20, the duties imposed by the Act are made payable at the death of the deceased and "shall," it is declared,

be and remain a lien upon the property in respect of which they are payable until the same are paid.

By section 50, it is enacted that

in case it is claimed that any land or money secured by any mortgage or charge upon land is subject to duty, the Minister, or the solicitor acting in his behalf, may, when deemed necessary, cause to be registered in the proper registry office a caution stating that succession duty is claimed by the Minister in respect of the said land, mortgage, or charge on account of the death of the deceased, naming him, and any subsequent dealing with such land, mortgage, or charge shall be subject to the lien for such duty; but nothing herein contained shall affect the rights of the Crown to claim a lien independently of the said caution.

On behalf of the Crown it is contended that a lien, the quantum of which was measured by the total amount of the duty which might ultimately prove to be payable, attached, upon the death of the testator, the deceased Thomas Sheriff Higginson, upon his interest in the lands which had been sold under the agreement for sale mentioned, and that the lien still attaches as security for the residue of the duty still unpaid. The amount involved is small, but leave to appeal was granted by the Court of Appeal for British Columbia on the 8th November, 1923.

On behalf of the respondent, it is contended that the acceptance of the bond, which was duly given by the executor, effects a discharge of any lien arising by virtue of section 20, and, in the alternative, that the whole of the duty payable by the estate is not charged upon each particular parcel of property, but only an aliquot part of it, measured by the ratio which the value of that part bears to the value of the estate as a whole.

The former view is that which prevailed with the Chief Justice in the court below. I do not think it necessary to pass upon the questions raised by these contentions of the

respondent. At the death of the testator the purchase moneys under the agreement of sale became moneys to which his legal personal representative would be entitled as legal assets, *virtute officii,* and the executor, upon the grant of probate, became entitled to them by virtue of the probate; *Attorney General* v. *Brunning* (1). The effect of the agreement of sale in the events which occurred may be stated in the terms of the following passage, taken from the judgment of Lord Justice James in *Rayner* v. *Preston* (2):

> I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of the trustee and *cestui que trust*.. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in every thing but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*.

This passage is entirely consistent with the judgment of Lord Parker in *Howard* v. *Miller* (3), delivered on behalf of the Judicial Committee of the Privy Council, and the principle is not affected by the fact that the interest of the purchaser under the real property law of British Columbia is technically a charge upon the real estate. This is involved in the reasoning of Lord Parker's judgment, as well as in the decision of this court in *Church* v. *Hill* (4). It follows that it was upon this interest of the testator, the purchase money, that the lien, if lien there was, attached. Assuming that the purchasers were bound to see to the application of the purchase money in payment of the duty, then their responsibility was a personal responsibility which did not in any way attach to the property, and the burden of it did not pass to their grantees. This alone would be

(1) [1860] 8 H.L.Cas. 243.
(2) [1881] 18 Ch. D. 1, at p. 13.
(3) [1915] A.C. 318.
(4) [1923] S.C.R. 642.

1924

THE KING
v.
CALEDONIAN INS. CO.

Duff J.

sufficient to dispose of the appeal, but it is sufficiently clear to me that the statute cannot be held to impose upon debts payable to the executor, recoverable by him *virtute officii*, a charge while still in the hands of the debtor in such fashion that the debtor must ascertain at his peril, before paying his debt to the executor, that the duty has been paid. The statute contemplates the payment of the duty or the giving of a bond as security for the payment of the duty as the condition of granting probate. *Prima facie* the executor, upon a grant of probate, is clothed with authority to receive and give a good discharge for moneys payable to him in his capacity as executor, and it can, I think, never have been contemplated that in addition to the authority conferred by probate or letters of administration, the legal personal representative must receive from the Crown some additional authority enabling him as agent of the Crown to give a discharge to persons indebted to the estate for the moneys which it is his official duty to get in.

During the argument, I was inclined to think that the language of section 50 was a serious obstacle for the respondent. Further consideration, however, convinced me that, rightly construed, that section is not at all inconsistent with the view I have expressed. The effect, no doubt, is that where land or money secured by a mortgage, or a charge upon land is subject to a lien for the duty, then the proceedings therein specified may take place. This, as pointed out by the learned Chief Justice of the Court of Appeal in his judgment, is not necessarily inconsistent with the idea that where probate or letters of administration have been granted, the legal personal representative may be entitled to get in the property of the estate and to perform other acts of administration *virtute officii* without encountering the lien as a hindrance at every stage of his proceedings. If the foregoing reasoning be correct, then as a rule money secured by a mortgage or charge upon land in favour of the testator would be an asset which it would be the duty of the executor to realize; and land, if subject to an agreement for sale executed by the testator in his lifetime, which the vendee was able and willing to carry out, and in respect of which he desired to pay the purchase

money to the executor, would not be an asset which could be affected by proceedings under this section.

The appeal should be dismissed with costs.

ANGLIN J.—Taking into consideration all the provisions of the British Columbia Succession Duty Act, I am of the opinion that the better construction is that put on the statute by the learned Chief Justice of the Court of Appeal, namely, that upon the taking of the prescribed security for succession duties the lien of the Crown therefor is superseded. The implication of section 37 that that is the case seems to me to outweigh any contrary inference that might be drawn from the provisions of section 50. For the purposes of the grant of probate or administration and of the right of the personal representative to deal with and make title to the property of the decedent free from succession duty the taking of the prescribed security and actual payment of the duties seem to be put on the same footing.

Anglin J.

I also agree that the succession duties imposed by the statute are chargeable distributively upon the several properties of the estate made subject to them and not as one entirety, or collectively, upon the whole estate and every part of it.

MIGNAULT J.—I would dismiss the appeal with costs for the reasons stated by my brother Duff.

MALOUIN J.—I concur with Mr. Justice Duff. I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Dugald Donaghy.*
Solicitors for the respondent: *Tupper, Bull and Tupper.*

1924
*Feb. 12, 13.
*Mar. 21.

WORKMEN'S COMPENSATION BOARD (DEFENDANT) ..... APPELLANT;

AND

THE BATHURST COMPANY (PLAINTIFF) ..... RESPONDENT.

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

Statute—Construction—Workmen's Compensation Act, 8 Geo. V, c. 37, ss. 48, 57 (2) and 61 (N.B.)—Industry under Part I—Failure to furnish statements to Board—Transfer to operation of Part II—Continuance of default—Operation of s. 48.

By section 48 of the Workmen's Compensation Act of New Brunswick every employer shall, on or before the first of January in each year, furnish the Workmen's Compensation Board with a statement giving an estimate of the pay-roll for that year of each of its industries within the scope of Part I and by section 57 (1) the Board may levy upon each employer a provisional amount based upon such estimate and other information obtained and collect the same, the money thus obtained to furnish a fund out of which compensation may be paid to any employee injured by negligence of his employer or in consequence of a defective system. If an industry falls only under the operation of Part II of the Act the compensation must be paid by the employer.

Section 57 also provides (s.s. 2) that if the estimate required by section 48 is not furnished the Board may itself estimate the amount due from the employer and collect same, and section 48 (2) prescribes a penalty for such default. Then section 61 provides that (1) Any industry in respect of which the employer neglects or refuses to furnish any estimate * * * shall, during the continuance of such default, be deemed to be an industry within Part II * * * and except as provided in subsection (3) no compensation shall be payable under Part I during the continuance of such default; (2) Notwithstanding subsection (1) such employer shall be liable to pay to the Board the full amount or capital value of any compensation to which any workman would be entitled under Part I * * * (3) If, and to the extent, that such employer shall pay to the Board such amount or capital value he shall cease to be liable under subsection (1) and such workman shall be entitled to compensation under Part I." Subsection (4) provides for relief where the default is excusable.

Held, that section 61 does not, in case of default, place the employer permanently under the operation of Part II; nor does it give him a right of election as to which Part he will be subject; notwithstanding the terms of this section the Board may proceed to assess the employer as provided in section 57 (2).

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

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Mignault and Malouin JJ.

The question for decision on this appeal is whether or not the respondent company is subject to assessment under Part I of the Workmen's Compensation Act or is only within the operation of Part II. The material sections of the Act and the circumstances under which the question arose are set out in the head-note. The court below held, White J. dissenting, that the respondent only came under Part II.

Lafleur K.C. and *W. B. Wallace K.C.* for the appellant.

Teed K.C. and *Geoffrion K.C.*, (*George Gilbert K.C.* with them) for the respondent.

THE CHIEF JUSTICE.—I am of the opinion that this appeal must be allowed and the action dismissed with costs, for the reasons stated by my brother Duff.

IDINGTON J.—This appeal arises out of an action brought against appellant by the respondent, an incorporated company carrying on at Bathurst in New Brunswick the business of logging, lumbering, manufacturing lumber and pulp and other wood products, and other kinds of industries, and in its said work and operations employs large numbers of workmen.

The respondent, therefore, clearly falls within the category of those to whom the scope of Part I of the Workmen's Compensation Act, 1918, and according to section three, and amendments since, apply.

Section thirty of said Act reads as follows:—

30. (1) The Board shall have jurisdiction to inquire into, hear and determine all matters and questions of fact and law necessary to be determined in connection with compensation payments under this Part and the administration thereof, and the collection and management of the funds therefor; provided that no decision or ruling of the Board shall be binding upon it as a precedent for any other decision or ruling, the intent of this proviso being that each case shall be decided upon its own merits.

That is followed by section 31, giving appellant the like powers of the Supreme Court of New Brunswick for compelling the attendance of witnesses and production of books; and by section 32, enabling it to act upon the report of any of its officers, or other person it appoints to make any inquiry.

And by section 33, it was enacted that except as provided in sections 35 and 66, the decisions and findings of the

1924

WORKMEN'S COMPENSATION BOARD v. THE BATHURST CO.

Idington J.

Board upon all questions of law and fact should be final and conclusive.

The only restriction thereon would seem to be as provided in said sections 35 and 66, and anything falling thereunder would not seem to me to justify such a suit as this, which turns upon the interpretation and construction of section 61 of the Act, which reads as follows:—

61. (1) Any industry in respect of which the employer neglects or refuses to furnish any estimate or information as required by section 48 shall, during the continuance of such default, be deemed to be an industry within Part II, and such employer shall be liable for damages as provided in Part II, and except as provided in subsection (3) no compensation shall be payable under Part I during the continuance of such default;

(2) Notwithstanding subsection (1) such employer shall be liable to pay to the Board the full amount or capital value of any compensation payments to which any workman would be entitled under Part I, by reason of any accident occurring during the continuance of such default and such amount or capital value may be assessed against and collected from, such employer by like process and means as in the case of other assessments under Part I.

(3) If, and to the extent that, such employer shall pay to the Board such amount or capital value he shall cease to be liable under subsection (1) and such workman shall be entitled to compensation under Part I.

(4) If satisfied that such default was excusable, the Board may relieve such employer in whole or in part from liability under subsection (1) or subsection (2), or both, on such terms as the Board may deem just.

The courts below give such a comprehensive meaning to the words " shall be deemed to be an industry within Part II " as, if correct, to eliminate any defaulter from coming within the substantial feature of the Act as a Workmen's Compensation Act, as such Acts are, in recent years, usually understood.

I cannot understand any draftsman of such an Act as this, or legislature enacting, having such serious intention.

If such had been the intention of the legislature, they surely would have started with declaring that they desired to enable such captains of industries as chose voluntarily to form an association for producing a scheme to compensate workmen employed by any of them for injuries suffered in the course of their respective employments; or in some such like phraseology suitable for such purpose, and elaborated a scheme in harmony therewith.

For the net result of maintaining the judgment appealed from must simply reduce the operation of the Act to serve the wishes of the employers of labour or to absolutely

nothing but what they can produce by a voluntary association.

As each may see fit he or it can according to said judgment simply make default and then, upon having done so is to be only liable, as at common law or as amended by a few enactments in Part II of this Act, and give a right of action to each employee coming within said law and its said several amendments.

That of course would restore all the evils of costly and worrying litigation, which would impose a burden upon suffering workmen that they cannot bear, and enable their masters to give them only such inadequate compensation as to each seemed fit.

I cannot conceive that any Canadian Provincial Legislature in recent years could have had any such purpose in view in enacting a statute such as now presented for serious consideration.

I submit that such evils as this statute was clearly enacted to remedy were those arising from such causes as I have just mentioned.

To nullify such an attempt at reform on the part of the legislature seems, I respectfully submit, the entire object of this litigation.

There are so many enactments therein tending to demonstrate that the purview which the legislature had in view was entirely inconsistent with such an interpretation and construction as the courts below have put upon said section 61, subsection (1) of the Act, that I cannot accept said interpretation and construction as correct.

That due and obvious purview can easily be observed, and a rational interpretation in accord therewith be given said subsection, which obviously to my mind was intended to give possible sufferers from their employer's default (tending to hinder the main operations of the Act) the right of action given by the Part II, and temporarily ameliorate the condition of those suffering from such default pending the action to be taken by the appellant to enforce the observance by such defaulters of their legal obligations under Part I of the Act.

Alternatively as tending to help to induce by the probable result of enforcing such enactments in said Part I

1924
WORKMEN'S COMPENSATION BOARD v. THE BATHURST CO.
Idington J.

there appears in harmony therewith subsections (2), (3) and (4).

The enactment in subsection (1), read in light of said subsection, is easily understood and has to be given a very narrow range of operation. Call it penalizing if you will, it certainly is intended to check such obstructive tactics as this action of appellant shews may be expected and exceptional cases of a like kind arising therefrom.

In harmony with such purpose we have in section 48, subsection (2), the enactment imposing penalties for the defaulter.

I am glad to find that Mr. Justice White's judgment, dissenting from the majority in the Appeal Division, has set forth many other enactments which, as well as those I have above referred to, present the purview I find in the legislative mind bearing upon the question in a way to strengthen same.

I agree in the view presented by that great master of our law, Lord Cairns, in the case of *Atkinson* v. *Newcastle Waterworks Co.* (1), where he had to deal with another kind of statute than that now presented but which like it required the consideration of what was the proper way to look at some statutes.

A single sentence thereof from page 448 shews we must grasp, if we can, the purview of the legislature relative to the enactment as a whole:—

> I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works.

I am of the opinion that this appeal should be allowed with costs and the action dismissed with costs throughout.

DUFF J.—The question raised by this appeal in its substance may be put concisely; it is whether an employer, carrying on an industry assigned by the Board to one of the classes under the Act, and having failed to furnish to the Board the estimate or estimates required by section 48 or any of the other information demanded by the Board

(1) 2 Ex. D. 441.

under that section, is subject, so long as his default continues, to be assessed pursuant to section 57 of the Act; or whether, on the contrary, by force of section 61, the employer and the industry cease to be subject to assessment under Part I. An alternative point, which must not be overlooked, made by Mr. Geoffrion, is to the effect that any "default" under section 48 comes to an end and ceases to be a "default" within the meaning of section 61 when the Board, acting upon its own estimate under subsection (2) of section 57 has levied the amount assessable in virtue of that estimate. I think there is no serious obstacle in point of interpretation in the way of giving effect to the provisions of section 57 and those of section 61 according to what appears to be the natural meaning of both of them. It is quite true that section 61, in declaring that any industry, during the continuance of the "default" of the employer in respect of his duty to furnish any estimate or information as required by section 48, shall be

> deemed to be an industry within Part II, and such employer shall be liable for damages as provided in Part II,

if these words be read literally and without regard to the context, would appear to be inconsistent with the provisions of section 57. When the language of section 61, however, is read as a whole, one sees that section 61 is a section which is primarily concerned with protecting the interests of the workman. Subsection (4) shews, of course, that it is, in part at least, designed to be punitive and deterrent, but the subject to which it is mainly directed is the position of the workman in respect of compensation in a case in which an employer has neglected or refused to provide estimates and information in compliance with section 48 as the necessary basis for determining the amount of his contribution under the normal operation of Part I. In that event section 61 provides very clearly that the workman shall be entitled to recover damages under Part II, and while he is not entitled to be paid compensation by the Board out of the general fund, he is entitled to recover compensation out of a fund to be provided by the employer himself. Subsection (2) requires the employer to pay to the Board the capital value of any compensation payments to which any of his workmen would be entitled under Part I, a sum which can be

1924
WORKMEN'S COMPENSATION BOARD
v.
THE BATHURST CO.
Duff J.

ascertained by the Board by the ordinary methods established for determining compensation; and such compensation shall by subsection 3 be paid by the Board to the workman; and to that extent the employer is "relieved" from liability under the first subsection to pay damages under Part II. It may seem to savour of harshness that an employer, whose responsibilities are governed by section 61, responsibilities which, under that section alone, are assuredly onerous, can, at the same time, be subjected to an assessment on an estimate made by the Board itself under section 57 for a contribution to the general fund. Two points, however, may be observed. One is that the delinquency of the employer consists in failing to furnish information simply, a course of action prompted, it may be assumed, in most cases by a determination to refuse his co-operation with other employers in working the scheme set up by the Act. The legislature may have been advised that rigorous measures were necessary for the purpose, in such circumstances, of disciplining recalcitrants. Moreover, by subsection (4) of section 61, a very wide authority is given to the Board, if satisfied that the default was excusable, to relieve the employer from the burden of the obligations imposed by the provisions of section 61.

The argument most strongly pressed upon us was that a presumption, and a rather weighty presumption, arises against the existence of an intention on part of the legislature to impose a double liability, which the Act, upon this construction, does seem to impose; and the alternative view is suggested that the legislature really intended that employers should have the right to elect between two courses: First, to come under the liabilities and obligations imposed upon employers who participate in the general scheme provided by Part I; or, secondly, to come under the exceptional scheme provided by section 61.

There is, however, nothing in the language of the Act that points to such a construction as giving effect to the deliberate intention of the legislature. The language of section 61, on the contrary, speaking, as it does, of "default" in failing to furnish estimates and information under section 48 and of such "default" being in some cir-

cumstances "excusable," seems to imply that during the whole of the period while the "refusal" or the "neglect" continues, the employer is still under an obligation under section 48 to provide such estimates and information. And subsection (4) of section 61, in providing for relief against the rigours of subsections 1 and 2, seems almost conclusively to indicate an intention on the part of the legislature inconsistent with the view that the section was setting up an alternative system to which the employer might properly, that is to say, as of right, resort at his option. In this view it seems to follow, inevitably almost, that under section 57 (2) the Board is entitled to proceed as it is proceeding in this case. As to the alternative point, I have great difficulty in finding any justification in the words of the Act for limiting the scope of the word "default" in the manner suggested. So long as the duty imposed by section 48 remains unfulfilled, it would appear that the default continues.

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

MIGNAULT J.—The New Brunswick Workmen's Compensation Act, 1918, the construction of which is in issue between the parties, is divided into two parts.

Part I is a general Workmen's Compensation law applicable to employer and workmen in a large number of specified industries, with a Workmen's Compensation Board empowered to levy an annual assessment upon the industries subject to this part of the Act and with the obligation of employers to furnish to the Board, on or before the 1st of January in each year, a statement of their estimated pay-roll for the year (section 48). The provisions of Part I are in lieu of all claims and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer for, or by reason of, any accident in respect of which compensation is payable under this part (section 12). I may add that a fund for the payment of compensation to workmen is formed by means of the assessments which the Board is empowered to levy on employers subject to Part I.

Part II applies to industries to which Part I does not apply. Briefly it gives an action of damages to the work-

1924

WORKMEN'S COMPENSATION BOARD v. THE BATHURST CO.

Mignault J.

man for personal injury, and to his legal representatives in case of his death, by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises of the employer, or by reason of the negligence of the employer, or of any person in his service acting within the scope of his employment. The doctrine of contributory negligence and common employment does not constitute a bar to the right of recovery. Compensation cannot exceed the sum of $3,500, but contributory negligence is taken into account in assessing the damages (sections 82, 83).

The difficulty between the parties has arisen in connection with the construction and effect of section 61 of Part I of the Act. Whatever may have been the intention of the draughtsman, he has succeeded in rendering it extremely obscure, and the legislature would be well advised should it redraft this provision so as to remove it from the class of legislative puzzles. I do not propose to place a construction on it any further than is necessary to determine whether the contention which the respondent bases on this section is well founded.

Section 61 reads as follows:—

61. (1) Any industry in respect of which the employer neglects or refuses to furnish any estimate or information as required by section 48 shall, during the continuance of such default, be deemed to be an industry within Part II, and such employer shall be liable for damages as provided in Part II, and except as provided in subsection (3) no compensation shall be payable under Part I during the continuance of such default;

(2) Notwithstanding subsection (1) such employer shall be liable to pay to the Board the full amount or capital value of any compensation payments to which any workman would be entitled under Part I by reason of any accident occurring during the continuance of such default, and such amount or capital value may be assessed against, and collected from, such employer by like process and means as in the case of other assessments under Part I.

(3) If, and to the extent that, such employer shall pay to the Board such amount or capital value he shall cease to be liable under subsection (1) and such workman shall be entitled to compensation under Part I.

(4) If satisfied that such default was excusable, the Board may relieve such employer in whole or in part from liability under subsection (1) or subsection (2), or both, on such terms as the Board may deem just.

The respondent contends that this section allows any employer subject to Part I to free himself from the obligations imposed upon him by this part, and to place himself

under Part II, by his mere neglect or refusal to furnish any estimate or information as required by section 48. To my mind such a construction would nullify the whole policy of the Act, and cannot in any event be reconciled with subsection (2) of section 57, which empowers the Board, when the employer has refused or neglected to furnish any estimate or information as required by section 48, to make its own estimate of the amount due by the employer and to levy and collect such amount. I think the object of section 61 is to protect the workman notwithstanding the default of the employer. It gives the workman, by subsection (1), a right to claim damages from the employer as provided in Part II; subsection (2), notwithstanding subsection (1), obliges the employer to pay to the Board the full amount or capital value of any compensation payment to which the workman would be entitled under Part I by reason of any accident occurring during the employer's default; and by subsection (3), when the employer has paid to the Board such amount or capital value, he ceases to be liable under subsection (1), and the workman is entitled to compensation under Part I. Finally it is provided by section 4 that if the Board is satisfied that the employer's default was excusable, it may relieve him in whole or in part from liability under subsections (1) or (2), or both, on such terms as it may deem just.

I cannot think that the intention of the legislature was to give to the employer an easy means to escape by his mere inaction from the obligations imposed on him by the other provisions of Part I of the Act. It is sufficient to hold, and I do not intend to go any further, that the contention of the respondent that it can thus relieve itself from its liability for the assessments imposed by the Board, is without foundation.

The respondent has proved that it paid during the year of assessment $2,878 as compensation to its workmen entitled to claim compensation under the Act. I think this sum should be taken into account by the Board in making its assessment, for to that extent the fund was relieved from liability.

I would allow the appeal and dismiss the respondent's action with costs throughout.

1924

WORKMEN'S COMPENSATION BOARD v. THE BATHURST CO.

Malouin J.

MALOUIN J.—For the reasons stated by Mr. Justice Duff, with which I concur, I would allow this appeal and dismiss the action with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. B. Wallace.*

Solicitor for the respondent: *George Gilbert.*

WESTERN ASSURANCE COMPANY (DEFENDANT) ..... APPELLANT.

AND

DAVID CAPLAN (PLAINTIFF) ..... RESPONDENT.

1923
*Nov. 16.
*Dec. 21.

1924
*Mar. 3. 4.
*April 22.

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

Automobile insurance—Fire and theft—Insurance Act, R.S.O. [1914] c. 183—Application of ss. 194 and 195—Special condition in policy—Representation—Materiality to risk.

Section 194 of the Ontario Insurance Act, notwithstanding its position among a group of sections under the heading "Contracts of Fire Insurance" applies to all kinds of insurance and requires the statutory conditions to be printed on every policy insuring against fire and other causes of loss.

Qu. Should they be printed on a policy that does not insure against loss by fire?

In an action on a policy insuring, on payment of a single premium, an automobile against loss by fire or theft in which action loss by theft is alleged, the insurer cannot invoke breach of a special condition restricting the use of the automobile when such condition is not printed in the form required by section 195 of the Act.

If the insured, on applying for the insurance, in answer to a question asked by the company's agent states that the car was paid for when he had given a promissory note for part of the price which was paid at maturity he is not guilty of omitting to disclose a circumstance material to the risk which would avoid the policy.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the respondent.

The respondent brought action on a policy insuring his automobile against loss by fire or theft alleging that it had been stolen. The main defence of the appellant was that the insured had violated a condition indorsed on the policy prohibiting the use of the automobile in carrying passengers for hire. The other defence was that the insured had suppressed a fact material to the risk, namely, that the car was not fully paid, a note having been given for part of the price. The trial judge held against the insurers on both grounds and his judgment was affirmed by the Appellate Division.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff and Mignault JJ.

1924

WESTERN ASSURANCE COMPANY v. CAPLAN.

The Chief Justice.

J. H. Fraser for the appellant referred to *In re Keet* (1) on the question of non-disclosure.

H. J. Scott K.C. for the respondent relied on *Rockmaker* v. *Motor Union Ins. Co.* (2) as to the application of section 194 of the Insurance Act.

THE CHIEF JUSTICE.—After the argument of this appeal, and during it, I entertained some doubts as to its proper disposition. After giving the facts a very thorough investigation, I am still somewhat doubtful, though inclined on the whole to dismiss the appeal. Since I have had the opportunity of reading the judgment of my brother Duff, my doubts have been very largely removed and my conclusion is to dismiss the appeal, concurring with the reasons stated by him.

IDINGTON J.—This appeal arises out of an action by the respondent to recover from appellant insurance under and by virtue of a policy of insurance issued by said appellant to respondent upon his automobile, and covenanting thereby to indemnify him against loss or damage to said automobile, by fire, or by stranding, or by burglary, pilferage or theft.

The learned trial judge held defendant, now appellant, liable and directed a reference to determine the amount of damage suffered by reason of the said automobile having been stolen in Detroit.

The defences set up were that the auto had, contrary to the condition in said policy, been used as a taxi on some horse-racing days in Windsor, and that the respondent had represented the car to have been paid for when bought.

It turned out that the purchase price was $3,700, of which $2,675 had been paid in cash, and the balance by a promissory note, paid when due, within two months after the insurance in question. And some other trivial suggestions, not taken seriously below, seem to have been made.

There is no pretence that there was any lien or charge against the auto for the said promissory note. And as there was no written application for the policy, but merely a note or memorandum by the appellant's agent of the material features in question, I think the answer made to him

(1) [1905] 2 K.B. 666. (2) 52 Ont. L.R. 553.

in this regard was quite justifiable and the attempted defence in that connection not a thing to be entertained here.

The condition, or so-called warranty, relative to the payment indicates, I submit, nothing more than an assurance that there was no lien or mortgage or other charge against the auto.

The appellant, on appeal to the Appellate Division of the Supreme Court of Ontario, had the satisfaction of that court dividing equally, and hence this appeal here in which the only important question raised is whether or not the policy of insurance in question falls within the provisions of section 194, and subsequent sections, of the Ontario Insurance Act.

The learned trial judge held that it does and in support thereof pointed out subsection 14 of section 2 of the said Insurance Act, defining " Contract of Insurance " as therein used.

I would add thereto the due consideration of subsection 32 of said section 2 of said Act, and the further subsections (*a*) to (*g*) inclusive, of said subsection 32.

And I beg to call attention to subsection 45 of said section 2 defining " Policy " as follows:—

> " Policy " shall include any contract of insurance within the meaning of this Act.

I submit that there are many other features of the said interpretative section 2 aforesaid, which may also be referred to, if we are to decide correctly the issue of law that turns upon the application of sections 194, 195 and 196 to the policy in question herein.

And moreover the entire scope and purview of said Act must be considered.

These statutory conditions no doubt originated half a century ago when fire insurance and the conduct of those carrying on the business gave rise to a rather acute situation needing remedy.

The legislature has made many changes since (as the business of insurance has grown in many directions) but they have ended in grouping all in one Act, and continuing amendments thereof.

1924

WESTERN ASSURANCE COMPANY v. CAPLAN.

Idington J.

The policy in question herein covers fire insurance as well as theft, yet the appellant has paid no regard to the provisions of the Act and therefore I agree with the learned trial judge and those supporting him in the Appellate Division below, that the conditions in this policy upon which appellant relies are null.

The foregoing was written shortly after the first argument and before the second argument being ordered.

This second argument does not present anything to change my opinion relative to the result. I may be permitted, however, to add that the references to the evidence of the respondent's use of the car as a taxi cab are far from being conclusive and go no further than to suggest a possible suspicion. The occasions on which said use was alleged were of the kind when the respondent may have merely been helping friends. As read to us I could not find any proof of payment for the carriage of passengers, and against that there is the oath of respondent.

Again as to the case of *Curtis's & Harvey* v. *North British & Mercantile Ins. Co.* (1), I may remark that that arose under Quebec law, whereas this policy was issued under the entirely different Ontario Act as it now stands. And I may add that if *Citizens Ins. Co.* v. *Parsons* (2), could ever have been circumvented by means of joining a trifling item of other insurance than as against fire, it is remarkable that no one ever was ingenious enough to suggest and apply such a method as presented in argument herein to frustrate the operation of the Act. I may remark in that connection that there was only one premium for a named sum paid or thought of. It turns out that such total single sum covered separate rates. When that is considered without any explanation on the face of the contract, I fail to see how appellant can be helped herein especially in view of the fact that more than half of the total premium entitled respondent to have the statutory conditions observed.

I think it is conceivable that one policy might, if so expressed, as this is not, be made to cover two substantially different contracts, but this is not of that character.

Hence I would dismiss this appeal with costs here and in the Appellate Division below.

(1) [1921] 1 A.C. 303.

(2) 7 App. Cas. 96.

DUFF J.—The appellants, the Western Assurance Company, on the 19th June, 1920, delivered to the respondent, David Caplan, a policy of insurance upon an automobile, the property of the respondent. The perils insured against are described in Articles I and II of the policy, in the following words:—

Art. 1. Against direct loss or damage to the automobile hereby insured caused by fire arising from any cause whatsoever, including explosion, self-ignition and lightning; also while being transported in any conveyance by land or water, against loss or damage caused by stranding, sinking, collision, burning or derailment of such conveyance; also against general average and salvage charges for which the assured is legally liable; and

Art. 2. Against loss or damage by burglary, pilferage or theft of automobile or accessories or spare parts in or on same belonging to assured and described in said declaration, by persons not in the employment, service or household of the assured, excluding, however, other than in case of total loss of the automobile described herein, the theft, robbery or pilferage of tools and repair equipment.

Among the conditions to which the policy is expressly declared to be subject is Condition "K," in these words:—

It is a condition of this policy that the automobile hereby insured shall not be used for carrying passengers for compensation, nor rented, nor leased, nor operated in any race or speed contest during the term of this policy, unless assented to by the company in writing.

Whether this condition is operative as part of the contract is the important question on the appeal, and strictly it turns upon the view to be taken of section 194 of the Ontario Insurance Act. If that section applies to this contract, as it does *ex facie*, then condition "K" is not operative as part of the insurance contract. On the contrary, if that section has no application to this contract in so far forth as the contract creates an obligation on the part of the company to indemnify the respondent in respect of loss arising from the perils insured against other than fire—from theft, to be precise—then effect must be given to the condition in accordance with its terms.

The introductory words of section 194 are these:

The conditions set forth in this section shall as against the insurer be deemed to be part of every contract in force in Ontario with respect to any property therein or in transit therefrom or thereto, and shall be printed on every policy with the heading *Statutory Conditions*, and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the assured unless evidenced in the manner prescribed by sections 195 and 196;

and it will be observed that the section by its express terms

1924
WESTERN ASSURANCE COMPANY v. CAPLAN.
Duff J.

applies to "every contract in force in Ontario," which *prima facie* means every contract of insurance. *Prima facie,* therefore, the policy under consideration comes within the sweep of this enactment, and the rights of the parties must be governed by the enactment, unless there be something in the section itself—that is to say in the Statutory Conditions, which are set out as part of the section—or in the context, pointing to a different conclusion.

As to the context, section 194 is one of a group of sections, beginning with section 191, which are all brought together under the heading, "Contracts of Fire Insurance"; and sections 191, 192 and 193, by their terms or by necessary implication, are limited in their application to fire insurance. Moreover, the plan of bringing together provisions relating to a particular class of insurance in a group under an appropriate heading seems to have been contemplated by the authors of the Act, although in practice this plan does not appear to have been carried out with any great exactitude. Compare, for example, section 154 with section 159. As to the Statutory Conditions, the terms of them, no doubt, do suggest in a pointed way that they are framed as stipulations of a contract which is, in part at least, a contract of fire insurance.

The position of section 194 as part of a group of sections labelled "Contracts of Fire Insurance," the character of the provisions with which this section is grouped, as well as the terms of some of the Statutory Conditions, afford some grounds for reading section 194 as relating exclusively to contracts of fire insurance in the sense of contracts providing for indemnity against loss arising from fire, as defined by the conditions.

When the history of the legislation, however, is considered, these considerations appear to lose much of their force. In the Revised Statutes of 1897 the section corresponding to the present section 194 was numbered 168, and the operation of that section was limited in express terms to contracts of the insurance. Section 168 read: "The conditions set forth * * * shall * * * be deemed to be part of every contract *of fire insurance* in force in Ontario." In 1914, the words, "of fire insurance," were struck out. This change of language cannot be disregarded as without

significance, but still more significant are the changes in the Statutory Conditions themselves.

By Condition 13, as it appears in section 168, R.S.C. 1897, it was stipulated that the assured with his proofs of loss should furnish a statutory declaration declaring, among other things,

> when and how the fire originated, so far as the declarant knows or believes, (and) that the fire was not caused through his wilful act or neglect.

In the revision of 1914, the corresponding condition is numbered 18, and there the paragraphs prescribing the contents of the statutory declaration in relation to the matters dealt with by the paragraphs just quoted from the Act of 1897 assume a different form. They read thus:

> When and how the loss occurred, and if caused by fire, how the fire originated, (and) that the loss did not occur, or if caused by fire, that the fire was not caused through any wilful act or neglect * * * of the assured.

These changes, first in the form of the enactment prescribing the Statutory Conditions (section 194), and then in the form of the conditions themselves, seem to imply a deliberate intention that the operation of the enactment shall not be limited to policies of insurance in which fire, as defined by the conditions, is the only peril insured against. It is not necessary to pass upon the question now whether or not section 194 applies to policies of insurance in which loss by fire is not one of the subjects of indemnity. As already indicated, arguments of some plausibility may be derived from the conditions themselves in opposition to that view; but I see no reason to doubt that section 194 in its present form does contemplate the application of the conditions to policies of insurance in which the perils insured against are not limited exclusively to fire, and in which there is a single, indivisible contract of indemnity in consideration of the payment of a single premium. That appears to be the view of the Court of Appeal as expressed in *Rockmaker* v. *Motor Union Ins. Co.* (1), and I think on the whole it is the preferable view. The contract of insurance in question being governed by section 194, it follows that section 195 applies also, and that Condition "K," not being evidenced in the manner thereby prescribed, is not operative as part of the contract.

(1) 52 Ont. L.R. 553.

1924
WESTERN ASSURANCE COMPANY
v.
CAPLAN.
Duff J.

Mr. Fraser argued that the policy was a policy containing several contracts of insurance; in other words, that the contract of insurance against loss by theft is severable from the contract providing for indemnity for loss by fire. I cannot agree with that view. The so-called application upon which Mr. Fraser relies—it is described on its face as a Daily Report—does, it is true, profess to apportion the total premium, ascribing to part the office of premium for fire insurance and to the remainder that of premium for theft insurance; but the evidence is conclusive that the assured had nothing to do with this so-called application, which he never saw, of the contents of which he was ignorant, and which he did not in any way authorize. The evidence of the responsible agent, Mr. Morton, leaves no doubt upon the point.

Two questions remain: The first arises from the contention of the appellant that the first statutory condition was violated in the statement of the assured that the automobile had been "fully paid for by the assured." It appears that at the time the policy was issued the vendor of the automobile, from whom the respondent purchased it, held the respondent's promissory note, which had been given in part payment of the purchase money. In the autumn of 1921 the obligation under this note was discharged by payment. In these circumstances it cannot be seriously disputed that the statement of fact attributed to the respondent was strictly correct. *Marreco* v. *Richardson* (1); *Hadley* v. *Hadley* (2). The appellants argue, however, that the respondent's representation ought to be construed in a popular sense and given a larger meaning than the words themselves strictly express. I can see no justification for this. The appellants must establish their case. They do not prove a misdescription under the first condition by giving evidence of a representation which, strictly and accurately construed, is no misdescription. The appellants further suggest that there was within the meaning of the first condition an omission to communicate a circumstance material to the risk, the circumstance being that the automobile, though fully paid for, had been in part paid for by a promissory note, which was still current.

(1) [1908] 2 K.B. 584. (2) [1898] 2 Ch. 680.

This contention must also be rejected. The respondent's statement was elicited by a question put by the appellants' agent. The question was fully answered: it was answered correctly. If the mode of payment—in cash or by promissory note—had been regarded by the company as material to the risk, we may fairly assume that a further question would have been directed to the elucidation of that point. In the absence of any such inquiry, I think the circumstance relied upon must be treated as immaterial.

The other point arises out of a contention based upon the second of the Statutory Conditions, which provides that any

change material to the risk within the control or knowledge of the assured shall avoid the policy as to the part affected thereby.

There was, it is said, a breach of this condition in the fact that the respondent, as it is alleged, used his automobile on one or two occasions during the currency of the policy for the purpose of carrying passengers for hire; and in support of their contention the appellants rely upon a statement in the policy that

the uses to which the automobile described are and will be put are private and business calls, excluding commercial delivery.

The requirements of section 195 not having been complied with, this statement cannot take effect as an addition to or variation of the Statutory Conditions; and assuming that as against the assured this must be taken as a correct description of the uses to which the automobile was put at the date of the policy, and assuming further that the adoption of a new practice in this respect might be a "change material to the risk" within the second Statutory Condition, the appellants must fail on this point, for the reason that there is no evidence of any such change of practice as could fairly be held to fall within the words of the condition.

The appeal should be dismissed with costs.

MIGNAULT J.—I am of opinion that this appeal should be dismissed with costs for the reasons stated by my brother Duff.

Appeal dismissed with costs.

Solicitor for the appellant: *W. M. Cox.*
Solicitors for the respondent: *Millar, Ferguson & Hunter.*

1924
*Mar. 19, 20, 21.
*April 22.

WARNER QUINLAN ASPHALT COMPANY (CLAIMANT) ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Charter party—Demise—War Measures Act, 5 Geo. V, c. 2 (D)—Appropriation by Crown of ship—Compensation—Indirect injury.

Though some provisions of a charter party and expressions used therein may indicate an intention to demise the ship to the charterers if other provisions and the purview of the whole document shew a contrary intention the shipowners do not lose possession.

By section 7 of the War Measures Act "Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act * * * and compensation is to be made therefor and has not been agreed upon the claim shall be referred by the Minister of Justice to the Exchequer Court or to a Superior or County Court of the province within which the claim arises or to a judge of any such court."

Held, affirming the judgment of the Exchequer Court ([1923] Ex. C.R. 195) that the charterer of a ship which is not demised, is not entitled to compensation under this section for loss of his rights and profits under the charter party.

Per Mignault J. Section 7 of the War Measures Act does not create a liability but only provides a mode of ascertaining the amount of compensation when the right to receive it is admitted.

Held, per Idington J., that the court or judge to which a claim is referred is *curia designata* whose decision is final.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the appellants' claim.

In 1916 the appellant company chartered the SS. *G. R. Crowe* from the owners for a period of five years and used it in their business for a few months when it was requisitioned by the Dominion Government for the use of the British Admiralty. In 1919 the ship was returned to the owners who received compensation from the respondent. The appellant claimed to be entitled to compensation also and its claim was referred to the Exchequer Court under the provisions of section 7 of the War Measures Act, 1914.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Mignault and Malouin JJ.

(1) [1923] Ex. C.R. 195.

The two questions raised on this appeal was, as stated in the head-note, first, was there a demise of the ship, and secondly, if not could the charterers claim compensation? The first depends on the terms of the charter party, the material provisions of which will be found in the judgment of Mr. Justice Duff and need not be stated here. The second is a question of the law of shipping.

Belcourt K.C. for the appellant. The provisions of the charter party clearly indicate a demise of the ship which was under the absolute control of the charterers and the captain and crew subject to their orders only. See *Baumwoll* v. *Furness* (1), Scrutton on charter parties (9 ed.), pages 4 and 5.

The master was manifestly the servant of the charterers. *Admiralty Commissioners* v. *Page* (2).

The appellant was deprived of the use of the ship from the date of the requisition by the Crown and is entitled to recompense therefor and for the higher prices paid to replace it. *Gaston Williams* v. *The King* (3).

Newcombe K.C. and *J. Philip Bill* for the respondent. The Government of Canada is under no responsibility for compensation in respect to the *G. R. Crowe* which was requisitioned on behalf and for the use of the British Admiralty which caused it to be employed all the time until its restoration to the owners. Moreover, compensation is not to be made as a matter of course in every case but has to be agreed upon.

This claim is not within the meaning of section 7 of the War Measures Act and the Exchequer Court had no jurisdiction.

The charter party does not effect a demise of the ship and the charterer has no claim for loss of contractual rights. See *Omoa & Cleland Iron Co.* v. *Huntley* (4).

THE CHIEF JUSTICE.—For the reasons stated by my brother Duff I would dismiss this appeal with costs.

IDINGTON J.—This is an appeal from the judgment of Mr. Justice Audette of the Exchequer Court upon a reference to that court under section 7 of the War Measures Act, 1914.

(1) [1893] A.C. 8.
(2) 87 L.J.K.B. 1000.
(3) 21 Ex. C.R. 370.
(4) 2 C.P.D. 464.

1924

WARNER QUINLAN ASPHALT CO. v. THE KING.

Idington J.

I am inclined to hold that the peculiar order of reference in question does not permit of any right to appeal from said judgment to this court.

Certainly the rights of appeal given by the Exchequer Court Act do not apply hereto.

The reference does not profess to be made under the Exchequer Court Act and, therefore, its ordinary jurisdiction cannot be relied upon.

The words with which said section 7 of the War Measures Act, 1914, end, are

> the claim shall be referred by the Minister of Justice to the Exchequer Court or to a superior or county court of the province within which the claim arises or to a judge of any such court.

Could it for a moment be contended that if the reference had been made to any of the judges of the said courts that an appeal would lie, by either party, from his disposition of the claim? I submit not.

And I cannot think that any more extensive rights, in way of appeal, were conferred upon either party in the event of the Exchequer Court being selected.

The said section simply enumerated a number of possible authorities from whom a *curia designata* might be selected to finally dispose of the question of right to any damages and, if any, determine the measure thereof.

The cases of *Gosnell* v. *Minister of Mines* and *Wigle* v. *The Corporation of the Township of Gosfield* (1), seem to me to dispose of the question of jurisdiction.

But fortunately after hearing a very elaborate argument on the merits of this case and considering same, I have come to the conclusion for the reasons assigned by the learned trial judge, with which I quite agree, that his judgment is right and is well supported by many other decisions than those he relies upon cited to us herein and hence that this appeal should be dismissed with costs.

DUFF J.—This is an appeal from a judgment of the Exchequer Court in which that court purported to exercise the jurisdiction given by section 7 of the War Measures Act. The Minister of Justice in the reference reserved the right to deny the existence of any legal right or title to compensation and to assert the absence of jurisdiction in

(1) 2 Cam. S. C. Prac., pages 21 and 23.

the Exchequer Court to take cognizance of the claim and his own authority to refer the claim for adjudication.

In this court Mr. Newcombe advanced the further contention that section 7 of the War Measures Act contemplates a determination by the court to which the claim is referred that is to be final and non-appealable.

The questions raised by these exceptions are questions of some little difficulty, and as I have come to a clear opinion upon the merits of the claim advanced by the appellant I do not propose to consider them. The points of controversy divide themselves into two. The first of these is the question whether by the charter party of the 16th of May, 1916, the appellants acquired possession of the tank steamer *G. R. Crowe.*

The question whether a charter party operates as a demise of the ship is one which is to be determined by the construction of the terms of the charter party. As a rule and for the purposes of this case the question may be put in the terms in which it is stated by Mr. Carver, p. 173 of his book on "Carriage by Sea":

> On each charter party the question is who, on the whole instrument taken together, was intended to have the possession of and to work the vessel? Whose servants were those in charge of her to be? Where they are the shipowner's, then generally he acts as a carrier of goods for the charterer; while if they are to be servants of the charterer, the shipowner generally ceases to be a carrier and the contract is really one of hiring.

The distinction, so far as pertinent, between a charter which effects a demise and one that does not is very lucidly stated in the judgment of Cockburn C.J., speaking on behalf of the Court of Queen's Bench in *Sandeman* v. *Scurr* (1), in these words:—

> In the first case (that in which a demise is created) the charterer becomes for the time the owner of the vessel; the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second (that in which no demise is created) notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners and through the master and the crew, who continue to be their servants, the possession of the ship also.

In *Baumwoll Manufactur* v. *Furness* (2), Lord Herschell, at pp. 14 and 18, uses language of much the same purport. Where there is no demise, he says, the master and crew remain truly the servants of the owner, and where

(1) L.R. 2 Q.B. 86 at p. 96. (2) [1893] A.C. 8.

1924
WARNER QUINLAN ASPHALT CO. v. THE KING.
Duff J.

there is a demise, or where there is the equivalent of a demise, the vessel is put altogether out of the power and control of the then owners, power and control over her being vested in the charterers, so that during the period of the hiring she must be regarded as the vessel of the charterers and not the vessel of the owners. In *Manchester Trust* v. *Furness* (1), the test laid down by Lord Herschell was adopted and applied by the Court of Appeal; and in the course of his judgment Lindley L.J., uses the following language at p. 546:—

> Although there is a great difficulty in reconciling all the earlier cases about demises of ships and so on, the test in each case is that which was applied by the House of Lords in the case of *Baumwoll Manufactur* v. *Furness* (2)—Whose servant is the master?

Mr. Belcourt mainly relies upon three paragraphs in the charter: The first paragraph, in which the owner "agrees to let," and the charterer "agrees to hire," for a period commencing from the date of "the delivery of the steamer," and it is provided that the steamer "is to be delivered by the owner" at Montreal on the date mentioned; paragraph 8, which provides that the captain, although appointed by the owner, shall be under the orders and direction of the charterers as respects employment agency or other arrangements; as well as par. 20, which explicitly gives the charterer the option of "subletting" the steamer. If these phrases in the first and twentieth paragraphs were the only significant phrases of the charter, they would, no doubt, lend a great deal of force to the argument. The authorities shew, however, that the use of such words is far from decisive. Such phrases as "let" and "deliver," it is pointed out, in Scrutton and Mackinnon on Charter Parties, at p. 5 (Note U), are due to the "influence of the older system of demise." Such words must yield to the intention of the parties to be gathered from the instrument as a whole. *Omao* v. *Huntley* (4); *Manchester Trust* v. *Furness* (1); *Weir* v. *Union S.S. Co.* (6). It is to be noticed that by clause 8, upon which Mr. Belcourt relies, the control of navigation is retained by the owners, a circumstance noted in the last case mentioned, as indicating that responsibility

(1) [1895] 2 Q.B. 539.
(2) [1893] A.C. 8.
(3) 2 C.P.D. 464.
(4) [1900] A.C. 525.

for the safe navigation of the vessel was still to rest upon the owners. It is to be noticed, too, that by clause 2, the owners are to provide and pay the wages of the captain, officers, engineers, firemen and crew; and by clause 10, if the charterers are dissatisfied with the conduct of the captain, officers or engineers, the owners engage to investigate any complaint, and if necessary make a change in the appointments. The appointment, that is to say, of the captain, officers and engineers, remains with the owners, together with the power of dismissal. There are, moreover, provisions of the charter party which would appear to be quite unnecessary if the charterers were to be in possession of the vessel through the captain and crew as their agents. By section 7, for example, the owners undertake that the captain shall prosecute his voyages with the utmost despatch, and render all possible assistance with the ship's crew and boats; and by article 9, the captain is to attend daily, if required by the officers of the charterers and their agents, to sign bills of lading, and the charterers agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or other documents. The significance of such terms is adverted to in the judgment of Denman J., in *Omoa* v. *Huntley* (1). The learned judge observes, referring to similar provisions, that

> these provisions are quite inconsistent with the contention of the defendant that the navigation of the vessel was to be committed to the control of the plaintiffs; for if the master and crew had been their servants, these stipulations would have been useless.

And lastly, there is the language of article 13, in which the master and mariner are explicitly designated as "servants of the shipowners." These provisions all point to the conclusion that the instrument envisages the relation of the master and the crew to the owners as that of servant and master, while the rights of the charterers in respect to the conduct of the master and crew are treated as contractual rights arising from contractual stipulations with the owners.

The appellants therefore acquired under the charter contractual rights entitling them to have the ship employed

(1) 2 C.P.D. 464, at p. 467.

1924

WARNER QUINLAN ASPHALT CO. v. THE KING.

Duff J.

for their benefit and according to their directions during the currency of the charter, but no possession of the ship and no interest in the ship as a thing.

The second question is whether, such being the character of the charter party, the appellants are entitled to compensation. Section 7 of the War Measures Act is in these words:—

> 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court or to a Superior or County Court of the province within which the claim arises, or to a judge of any such court.

Assuming this section gives a right of compensation, it is a right of compensation where property or the use of property has been appropriated, and the compensation to be made is compensation for such appropriation. The effect of the requisition was undoubtedly to appropriate the use of the ship for the period during which the requisition was operative, with the consequence, assuming there was no suspension of the contractual rights aforesaid resulting from that exercise of sovereign authority, of depriving the appellants of the advantage of having the contractual obligations undertaken by the owners specifically executed. The question is: In such circumstances is the possessor of such rights entitled to compensation under section 7? I think Mr. Newcombe's contention is well founded, that such a case does not fall within the scope of that section. True, the section does not specify the conditions under which the right of compensation arises or the persons or classes of persons to whom it is given. Obviously, however, the enactment cannot be supposed to contemplate reparation in respect of pecuniary loss of every description which anybody may suffer in consequence of the fact that property or the use of it is appropriated for public purposes and thereby withdrawn from the power of its owner or possessor, who may in consequence be disabled from applying it in the fulfilment of contracts and other obligations arising out of his business or other private relations. I think the reasoning by which the courts have been constrained to hold that a wrongdoer, whose wrongful act

causes damage to a chattel, is not answerable to everybody who indirectly may have suffered loss in consequence of that injury, is apposite.

It is worth while, perhaps, to refer to the authorities in some detail. There is the well-known judgment of Lord Blackburn (then Blackburn J.), in *Cattle* v. *Stockton* (1), in which the eminent judge had to deal with a claim by a contractor who had a contract for constructing certain works which had been delayed by an inundation in respect of which the defendants would be responsible to the owner of the land on the principle of *Fletcher* v. *Rylands* (2). Blackburn J., having pointed out the consequences of admitting the validity of such claims, proceeded:—

> In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so we should establish an authority for saying that, in such a case as that of *Fletcher* v. *Rylands* (3) the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect Perhaps it may be so. But, as was pointed out by Coleridge J. in *Lumley* v. *Gye* (3), courts of justice should not allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself of redressing only the proximate and direct consequences of wrongful acts. In this we quite agree. No authority in favour of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there was none that could have been cited.

Then there is the passage in the judgment of Lord Penzance in *Simpson* v. *Thomson* (4), beginning at p. 289:—

> The principle involved seems to me to be this—that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damages done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.

(1) L.R. 10 Q.B. 453.
(2) L.R. 1 Ex. 265; 3 H.L. 330.
(3) 2 E. & B. 216 at p. 252; 22 L.J. Q.B. 463 at p. 479.
(4) 3 App. Cas. 279.

1924

WARNER QUINLAN ASPHALT CO. v. THE KING.

Duff J.

This, I say, is the principle involved in the respondents' contention. If it be a sound one, it would seem to follow that if, by the negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction.

But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.

The reasoning of these passages was applied by Lord Sumner (then Hamilton J.), in *Remorquage* v. *Bennetts* (1), in which he held that the owner of a tug was not entitled to sue a wrongdoer who had sunk his tow, although thereby he lost the benefit of his contract of towage; and the principle was acted upon by Scrutton L.J., in *Elliott* v. *The Shipping Controller* (2), where he held that a charterer, under a charter not creating a demise of the ship, would have had no right of action at common law against a person depriving him of the opportunity of earning profits through the exercise of his contractual rights by taking away the ship which was the subject of the charter. The judgment of the majority, who held that the plaintiff under the statutory provisions governing the case was entitled to compensation, is not in conflict with this view. In *McColl* v. *Canadian Pacific Ry. Co.* (3), the same principle was followed in the construction of section 385 of the Railway Act, 9-10 Geo. V, c. 68, which imposes upon railway companies acting contrary to orders of the Railway Board,

liability to any person injured * * * for the full amount of the damages sustained thereby.

The phrase " person injured " was there held, on the same reasoning, not to include persons who are injured in their pecuniary interests only by reason of being deprived of

(1) [1911] 1 K.B. 243. (2) [1922] 1 K.B. 127, at pages 139, 140.
(3) [1923] A.C. 126 at pages 130, 131.

advantages which they might reasonably have expected to enjoy if the person directly injured had not thereby been disabled from performing his contractual obligations or carrying out his business or professional engagements or making provision in the usual way for his family.

The appeal should be dismissed with costs.

MIGNAULT J.—I have had the advantage of fully considering the carefully prepared reasons for judgment of my brother Duff and I entirely concur therein.

That the charter party relied on by the appellant was not a demise of the ship is made clear by the provisions whereby it was agreed that the owners should pay the wages of the captain, officers, engineers, firemen and crew, and that if the charterers were dissatisfied with the conduct of the captain, officers, or engineers, the owners would investigate the complaint, and if necessary make a change in the appointments. This shews that during the charter party, the captain, officers and crew were to be the servants of the shipowner and not of the charterer. They were appointed by the former and could not be dismissed by the latter. The right of the charterer was a mere contractual one, and notwithstanding the use of the terms "let" and "hire" as applied to the ship, the whole instrument indicates that the agreement of the shipowner was to navigate his ship for the benefit of the charterer, and for the carriage of his goods. The owner therefore retained the possession of the ship during the life of the charter party.

If the special provisions of the War Measures Act, 1914, sections 6 and 7 of which were relied on by Mr. Belcourt, give to the owner of property a right of action for compensation against the Crown for the appropriation of such property or of the use thereof—a point which it is unnecessary to determine in this case—they certainly do not give an action to a person, not the owner, who may suffer damage merely by reason of a contract which he has made with the owner. Section 7 deals with the case where compensation is to be made but the amount has not been agreed upon. It does not create the right to compensation but provides a mode whereby the amount, where the right to compensation is admitted, may be determined. Otherwise,

1924
WARNER QUINLAN ASPHALT Co. v. THE KING.
Mignault J.

the imperative provision, requiring the Minister of Justice to refer the claim to the Exchequer Court or to a Superior or County Court, would not be easily comprehensible. Such a requirement, on the contrary, is quite conceivable where the Crown admits that the claimant is entitled to compensation but disputes the amount of his claim.

These are really the two vital questions in the case, and as to both I find myself unable to accept Mr. Belcourt's contentions.

The appeal should be dismissed with costs.

MALOUIN J.—I concur with Mr. Justice Duff and would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Belcourt, Leduc & Genest.*
Solicitor for the respondent: *E. L. Newcombe.*

1924
*Feb. 13, 14.
*April 22.

THE CITY OF MONTREAL.....APPELLANT;

AND

J. E. DUPRE .....RESPONDENT.

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

Municipal corporation—Exemption of taxes—Resolution of council—By-law—Approval of electors—Existing industry—(Q.) 34 Vict., c. 18—(Q.) 34 Vict., c. 68, s. 943—(Q.) 40 Vict., c. 29, ss. 229, 231, 366—(Q.) 44-45 Vict., c. 20, (Q.) 62 Vict., c. 39, s. 1—R.S.Q. (1888) ss. 4004, 4005, 4006, 4559, 4642, 4643—R.S.Q. (1909) s. 5775—Charter of Maisonneuve, 61 Vict., c. 57, s. 65; 63 Vict., c. 53, s. 19.

A town corporation governed by the provisions of the "Cities and Towns Act" (R.S.Q. (1888) Title XI) cannot by a mere resolution of its council exempt from the payment of municipal taxes a party not actually carrying on an industry within its limits; but such exemption must be granted by a by-law brought before the council at two different meetings. Duff and Maclean JJ. *contra. Corporation of Chambly* v. *Lamoureux* (19 Rev. Leg. 312) discussed.

Per Idington and Mignault JJ.—Such a by-law does not require the approval of the municipal electors who are proprietors. Malouin J. *contra.*

Judgment of the Court of King's Bench (Q.R. 35 K.B. 43) reversed, Duff and Maclean JJ. dissenting.

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc.*

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1) reversing the judgment of the Superior Court (1) and maintaining the respondent's opposition to a seizure of immovables made by the appellant.

The respondent, in 1911, obtained from the town of Maisonneuve, then a suburb of Montreal and now a part of the city, a ten years' exemption from taxation for a manufactory which he proposed to establish therein. After being granted this exemption, he fulfilled all its conditions, and as between the town of Maisonneuve and himself the alleged contract was faithfully observed. But the city of Montreal, having in 1918 annexed the town of Maisonneuve, disputed the legality of this exemption, which, at the time the proceedings were initiated, had almost run out. There were, however, some years of taxation unpaid since the date of the annexation, and it is as to this liability that the contest arose. The trial judge decided the case in favour of the city, but his judgment was reversed by the Court of King's Bench, Mr. Justice Rivard dissenting. The city now appeals.

The exemption was granted in April, 1911, by a mere resolution adopted by the town council. It is urged that a by-law was necessary and further that such a by-law required the approval of the municipal electors who were proprietors.

Laurendeau K.C. and *Parent* for the appellant.
Geoffrion K.C. and *Jalbert K.C.* for the respondent.

IDINGTON J.—Having, after I had perused and considered the several judgments of the respective judges in the courts below, availed myself of the opportunity of perusing the judgment of my brother Mignault, I have come to the conclusion that the reasoning adopted by him is correct and, agreeing therewith, I think this appeal should be allowed with costs herein and in the court appealed from, and the formal judgment of the Superior Court be restored.

(1) Q.R. 35 K.B. 43.

1924
CITY OF MONTREAL
v.
DUPRÉ
Duff J.

DUFF J. (dissenting).—This is an appeal from a judgment of the Court of King's Bench reversing a judgment of Mr. Justice Mercier. The point in controversy concerns the validity of a resolution of the town of Maisonneuve of the 19th April, 1911, purporting to exempt from taxes for ten years the property of the Dominion Die Company on certain specified conditions. "The Dominion Die Company" was a trade name under which the respondent carried on business, in which he alone was interested. At the time of the passing of the resolution the respondent was not carrying on any business in Maisonneuve. The sole question for consideration on the appeal is the validity of the resolution mentioned.

Maisonneuve, by 8 Geo. V, c. 84, was annexed to Montreal, but by paragraph (*b*) of section 1 of that statute it was provided that the resolutions of the annexed municipality should remain in force, notwithstanding the annexation. It is admitted that the resolution in dispute was, down to the time of the annexation, recognized as valid by Maisonneuve. The charter of the town was consolidated in 1898, previous to the granting of the exemption, by 61 Vict., c. 57, and subject to special provisions of the charter the municipality came under the operation of the "Cities and Towns Act."

The respondent invokes in support of the resolution sections 4559, 4642 and 4643, R.S.Q., 1888. On behalf of the appellant municipality it is contended that the first mentioned section authorizes exemptions only in favour of persons who at the time of the passing of the resolution are carrying on the industry, trade or enterprise in respect of which the exemption or commutation authorized by the section is granted; and as regards the two last mentioned of these sections, it is said that by force of other enactments of the Revised Statutes, and especially of sections 4404 and 4406, the exemption thereby authorized can only be effectively granted after the submission to the ratepayers of a by-law creating such exemption; and subsidiarily, that by the express terms of sections 4642 and 4643, the exemption must be embodied in a by-law which before the passing of it has been twice considered at separate meetings of the council. The attempt, it is therefore

argued, to execute the power given by these two sections by a simple resolution was merely inoperative.

The language of section 4559, read without reference to other provisions of the Revised Statutes, seems to be sufficiently clear; the relevant paragraph is in these words:

> 4559. The council may, by a resolution exempt from the payment of municipal taxes, for a period not exceeding twenty years, any person who carries on any industry, trade or enterprise whatsoever, as well as the land used for such industry, trade or enterprise.

The adjectival clauses,

> who carries on any industry, trade or enterprise whatsoever

and

> used for such industry, trade or enterprise,

contemplate the state of affairs to exist during the currency of the exemption granted, and import the conditions upon which the grantee is to be relieved from taxation, which relief is to be operative, obviously, only while the conditions are fulfilled.

That is the natural reading of the language, which is not ambiguous, and the authority conferred seems to be exerciseable in favour of persons who are about to establish a business or industry, as well as in favour of those who are carrying on an established one. The distinction now made between established industries and industries to be established is not to be found in the language which the legislature has employed in this section to express its meaning.

The appellant municipality advances the view that notwithstanding the language of section 4559, an inference is to be drawn from sections 4404 and 4642 making this construction of section 4559 inadmissible. When these sections are read together, the legislative policy said to be revealed is that two separate and mutually exclusive systems of relief from taxation are to be in operation side by side, the one system being operative for the benefit of newly established industries, and the other for the benefit of existing industries alone.

For the purpose of examining this argument it is more convenient, I think, to deal with these sections historically; and it is well to observe at the outset that it is of cardinal importance to notice that the statute bringing in force the Revised Statutes of 1888 contains this clause (50 Vict., c. 5):

1924

CITY OF MONTREAL v. DUPRÉ

Duff J.

8. The said Revised Statutes shall not be held to operate as new law, 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.

Sections 4559 and 4642 were both originally enacted in the year 1870: they are found in separate statutes. Section 4559 reproduces in slightly modified form (and with an extension of the period of exemption from five to twenty years) section 943 of c. 68 of the statutes of that year, which brought into force for the first time the Municipal Code of the province. Section 943 applies to local municipalities, and local municipalities include parishes, villages, and towns to which the Municipal Code applies; that is to say, towns not incorporated by special charter. Towns so incorporated, and all cities, are excluded from the ambit of the code. The code is what its name imports a code of the laws governing the municipalities, as municipalities, to which the enactment applies. Effect must therefore be given to the enactments of section 943 according to their terms, in the absence of any qualifying context in the provisions of the code itself and of any clearly expressed overriding enactment to be found elsewhere. Section 943, in so far as material, is in these words:

943. The council of every local municipality may, by a resolution, exempt from the payment of municipal taxes, for a period not exceeding five years, any person who carries on any business, trade or mining or manufacturing enterprise whatsoever, as well as the land used for such enterprise * * *.

There is nothing in the code itself which is referred to as a qualifying context, and there can, I think, be little room for controversy that this provision, considered in itself, was sufficient to authorize (for the period of five years) such an exemption as was granted to the respondent by the town of Maisonneuve.

In the same year the statute was passed which appears later as sections 4642 and 4643 R.S.Q., 1888. That enactment was entitled, "An Act to encourage the introduction and establishment of new manufactories in the province." It was stated in the recitals that the introduction and establishment of such manufactories would tend to develop the productive resources of the province and increase its prosperity; and the enactment proceeded to authorize

municipal corporations, including cities, towns and villages, to grant exemptions for ten years from taxation. The contention advanced on behalf of the appellant is that the enactment of this legislation involved by necessary implication a qualification of the language of section 943 of the Municipal Code enacted in the same year, by which section 943 was restricted in its scope to businesses, trades and enterprises already existing at the time of the passing of the resolution.

Section 943 and chapter 18 are, it is said, complementary enactments; the one providing for the exemption of industries to be established, and the other for the exemption of something already established.

This argument fails when the two enactments, in point of scope and practical effect, are considered and compared. The Municipal Code applies to townships, villages and towns not incorporated by special charter; while chapter 18 applies to all cities and all towns, as well as to villages. The Municipal Code authorizes exemptions for five years; chapter 18 authorizes exemptions for ten years. Chapter 18, moreover, by section 3, makes special provision for granting exemptions to established industries, indicating, and this was probably the fact, that the municipalities which were considered most likely to avail themselves of its provisions were municipalities of a class to which the Municipal Code did not apply; that is to say, cities and towns incorporated by special Act. To all this may be added a distinction of great significance, which seems to have been overlooked in the argument on behalf of the appellant, that chapter 18 authorizes the exemption of manufactories only, while under the provisions of the Municipal Code the exemptions granted may affect any business, trade or mining or manufacturing enterprise.

It is indeed difficult to perceive any good reason for ascribing to the legislature by a non-natural reading of the words of section 943 the intention to limit the operation of that section to businesses and enterprises already established and to exclude from its ambit those to be established in the future. As already observed, chapter 18 authorizes the exemption of manufactories only, and on the construction contended for, no business, trade or enter-

1924

CITY OF MONTREAL v. DUPRÉ

Duff J.

prise not a manufactory could be exempted by any municipality, unless it was already established at the time of the passing of the resolution creating the exemption. If exemption of such establishments was to be permitted, it seems singular, to say the least, that a municipality should be disabled from creating an exemption for the purpose of encouraging new trades and industries as well as assisting those already in operation; and I can think of no justification for departing from the normal reading of section 943 for the purpose of giving it such effect.

It is difficult to think of any definite policy in relation to manufactories which could be supposed to have inspired the enactments of c. 18 as well as that of section 943 of the Municipal Code; in truth we seem to have here two independent chapters of legislation which accidentally overlap, an occurrence neither startling nor uncommon.

The next stage in the history of the legislation is the enactment in 1876 of the "Town Corporations General Clauses Act," which was chapter 29 of the statutes of that year, 40 Vict. By sections 1 and 2, the provisions of that Act were made applicable to every town corporation or municipality to be thereafter established by the legislature of the province; and it was declared that they should constitute part of the special Act unless expressly excluded by the terms of that Act. By section 366 of the Act of 1876 the provision of section 943, slightly changed (but *ipsissimis verbis* in so far as pertinent to the questions in controversy on this appeal), was re-enacted, the changes being that for "business, trade, mining or manufacturing enterprise," were substituted "industry, trade or enterprise," and the period of five years was replaced by twenty years. Here, again, it is to be observed that this statute of 1876 is in form and effect a municipal code for the municipalities governed by it; and *prima facie* its provisions are to take effect according to the proper construction of the words in which they are expressed, read in light of other parts of the code and without regard to the provisions of other statutes. This statute contains nothing which qualifies the language of section 366.

The next stage in the progress of the law is marked by the enactment of the Revised Statutes of Quebec of 1888,

in which the provisions under discussion are, as already mentioned, reproduced, section 366 of the Act of 1876 appearing as section 4559 and c. 18 of 1870 as sections 4642 and 4643; and in construing them they are, by the express direction quoted above, to be read precisely as they should have been read before they were brought into the revision.

The next step, and it is one of very considerable importance, is a decision of the Court of Queen's Bench affirming the decision of the Circuit Court in 1890, in *Chambly* v. *Lamoureux* (1). The controversy arose in respect of a resolution passed by the council of the appellant municipality on the 3rd January, 1881. The resolution is expressed to be in conformity with section 943 of the Municipal Code, and it provides that one Samuel T. Willett should be exempt for a period of twenty years on his new factory and outbuildings, and then proceeded to grant a general exemption, not only to Willett and his legal representatives, but to others, on " all buildings to be erected " within the limits of the municipality, for the purpose of industry or trade, and for the land used for such purposes; the exemption to be granted from the date the factory and outbuildings should be put into operation. The defendants, who were sued for taxes, had after the passing of the resolution established and put into operation a brewery, and in respect of this brewery they claimed exemption under the terms of the resolution. Taschereau J., in the Circuit Court, held that the exemption was not *ultra vires*. The municipality appealed to the Court of Queen's Bench, and the argument as reported is in substance the same as the argument addressed to us on this appeal, with the additional contention that the resolution, in so far as it purported to grant a general exemption to persons establishing industries after the passing of the resolution, was beyond the intendment of section 943, which had contemplated not a general regulation on the subject, but resolutions dealing with particular cases. This argument was rejected and the judgment of the Circuit Court was unanimously confirmed by the Court of Queen's Bench. The decision of the Court of Queen's Bench is necessarily a decision on the points raised on behalf of the appellant

(1) 19 R.L. 312.

1924
CITY OF MONTREAL v. DUPRÉ
Duff J.

municipality which, as I have already said, were in substance points now urged in criticism of the judgment appealed from. There can be no doubt that the Court of Queen's Bench (Dorion C.J., Tessier, Cross, Bossé, Doherty JJ.) dealt with the merits of the question of the validity of the resolution, although according to the report an argument seems to have been advanced on behalf of the respondent touching the competency of the appeal. This is made quite plain by the formal judgment, a certified copy of which has been furnished us.

By the judgment of the Circuit Court it was, as I have mentioned, formally declared that

le dit règlement n'est pas *ultra vires;*

and the judgment of the Court of Queen's Bench is in these words:

> La cour, après avoir entendu les parties, par leurs avocats, sur le mérite, examiné le dossier de la procédure en cour de première instance, le requête d'appel et sur le tout mûrement délibéré: Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour de Circuit pour le Bas Canada, siégeant à Montréal, le dix-huitième jour de février mil huit cent quatre-vingt-neuf et dont est appel, confirme le dit jugement avec dépens contre l'appelante en faveur des dits intimés.

The series of reports in which this case is reported was edited by Mr. Justice Mathieu of the Superior Court, and the case itself is cited in that learned judge's edition of the Municipal Code published in 1894, in these terms:

> Une corporation municipale peut, sous les dispositions de cet article, exempter des taxes municipales, non seulement les manufactures spécialement mentionnées dans une résolution passée à cet effet, mais encore toutes les industries nouvelles, qui s'établiront à l'avenir dans les limites de la municipalité, et cette exemption comprend les taxes spéciales imposées pour aider à la construction d'un chemin de fer. (*La corporation de village du canton de Chambly* et *Lamoureux et al,* C.B.R., Montreal, 23 mai 1890, Dorion J. en C. Tessier J., Cross J., Bossé J., et Doherty J., confirmant le jugement de C.S., Montréal, 18 février, 1889, Taschereau J., 19 R.L., p. 312.)

In 1898 the decision is cited by Mr. Bédard K.C., in the first edition of his book on the Municipal Code published in that year, and again in the second edition, published in 1905, as authority for the same proposition. The Municipal Code continued unamended in this respect down to 1916, when it was re-enacted in amended form, and the authority to grant exemptions of every description was abrogated.

The next step to be noticed is the re-enactment of the "Towns Corporations Act," in 1909. Section 4559 of the revision of 1888 is reproduced as section 5775, which is in form identical with the earlier section except in this, that it is expressed to be subject to sections 5929 and following. Now it is important to observe that section 5929 deals with bonuses to manufactories to be established, as distinguished from manufactories already established. As the distinction seems to be clearly drawn throughout these statutes between exemption from taxation and bonuses, although in effect exemption from taxation is necessarily a subsidy, it is difficult to say what application these sections can have to the subject dealt with by section 5775. The reference to section 5929, however, which deals only with industries to be established, certainly gives no countenance to the construction contended for on behalf of the appellant municipality. Subject to that, the legislation is re-enacted in the form in which it appeared in the "Towns Corporations Act" of 1876, and in substance in the same words as those which were the subject of the judgment of the Court of Queen's Bench in *Chambly* v. *Lamoureux* (1).

The authority of decided cases, it is needless to say, in the province of Quebec stands upon a footing which is not the same as that upon which it is based in the law of England. Nevertheless, the central idea of *stare decisis* has not often been better expressed than in the sentence of Paul:

Minime sunt mutanda ea quae interpretationem certam semper habuerunt. D. 1.3.23;

and the importance of adhering to an interpretation of a statute given in an authoritative decision which has been accepted for many years without challenge is recognized by writers on the French law; for example, 1 B.L., section 261. It is impossible to suppose that the legal advisers of municipalities governed by the "Towns Act" and of municipalities governed by the Municipal Code have not been familiar, since the appearance of the report, with the decision in *Chambly* v. *Lamoureux* (1), or that they have failed to treat it as an authoritative exposition of section 943 in the sense ascribed to the decision by Mr. Justice Mathieu in the note quoted above; I cannot doubt that it must have

(1)19 R.L. 312.

1924
CITY OF MONTREAL v. DUPRÉ
Duff J.

been acted upon in this sense. Certainly the municipality of Maisonneuve assumed, in passing the resolution now in dispute, the existence of the authority under section 4559 which municipalities were held by the Court of Queen's Bench to possess under section 943 of the Municipal Code; and I cannot suppose that this was an isolated case. This, taken together with the circumstance that in 1909 section 4559 was re-enacted without material alteration in the Revised Statutes of that year, convinces me that the decision in 1890 is a decision which ought not now to be departed from, even if there were better reasons than have been adduced on this appeal for disagreeing with the decision in so far as it is relevant here.

As to section 4404, that section in the main is a reproduction of section 229 of the "Towns Corporation General Clauses Act," 40 Vict., c. 29, which provided for aiding in certain ways, not including exemption from taxation, the construction of public works by incorporated companies and by the provincial government. Later this was amended by adding industrial undertakings to the enterprises to which aid might be granted under that section, but still authority was withheld to give aid in the form of exemption from taxation. It was not until the revision of 1888 that a sub-paragraph was added—sub-paragraph (4)—which authorizes aid,

> by exemption from the payment of municipal taxes, assessments and dues, certain industrial establishments, according to the provisions of

section 4642 of the Revised Statutes and following. This reference, which was introduced into section 4404 by the revisers to the provisions of sections 4642 and following cannot legitimately be regarded as affecting the construction of section 4559 when the provision of the statute under which the revision took place is kept in view, which has already been referred to, that the Revised Statutes

> shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law

in the statutes for which the Revised Statutes are substituted.

Counsel for the respondent also supports the resolution under the authority of section 4642. Two answers to this contention are put forward: First, it is said that by force of section 4643 an exemption under section 4642 can only

take effect when embodied in a by-law passed after consideration at two meetings of the council; and second, it is said that by force of section 4406 the by-law is inoperative unless sanctioned by the approval of a vote of ratepayers. The first of these answers is met by the respondent with a reference to section 65 of the Charter of Maisonneuve, 61 Vict., c. 57, which provides that except as regards by-laws other than those which must be submitted for the approval of the electors, the town council may exercise its powers by by-law or resolution. It is answered that this is a general provision, which can have no application to special powers given by special enactment, which in explicit terms require that they shall be exercised by by-law. Now it is to be noted that this provision does except the particular case of by-laws which must be submitted for the approval of the electors, an exception which, apart from special mention, would naturally be implied if any exception was to be implied; and I find it a little difficult, in face of this explicit exception, to imply an exception merely because it is required that a given power shall be exercised by a by-law passed after it has been considered at two separate meetings of the council. On the whole I think this objection fails.

As to the second objection, I am inclined to think it may fairly be affirmed that a by-law passed under the authority given by section 4642 is not a by-law passed in virtue of section 4404, and therefore that section 4406 does not apply to it.

The appeal should be dismissed with costs.

MIGNAULT J.—Were it not for the rather unskillful draftsmanship of the Quebec Revised Statutes of 1888, this case would give rise to but little difficulty. But the compilers of the revision introduced therein overlapping and what at first sight might appear irreconcileable provisions, and the dispute between the parties is as to which set of enactments should be applied. In my consideration of this question, I have not been a little aided by the memorandum of statutes filed by the parties at our request.

The respondent, in 1911, obtained from the town of Maisonneuve, then a suburb of Montreal and now a part of the city, a ten years exemption from taxation for a manu-

1924
CITY OF MONTREAL v. DUPRÉ
Mignault J.

factory which he proposed to establish therein, employing sixty or seventy hands. After being granted this exemption, he fulfilled all its conditions, and as between the town and himself the alleged contract was faithfully observed. But the city of Montreal having, in 1918, annexed the town of Maisonneuve, and with it its many liabilities, disputes the legality of this exemption, which, at the time the proceedings were initiated, had almost run out. There were, however, some years of taxation unpaid since the date of the annexation, and it is as to this liability that the contest arose. The trial judge decided the case in favour of the city, but his judgment was reversed by the Court of King's Bench, Mr. Justice Rivard dissenting. The city now appeals.

The exemption was granted in April, 1911, by a mere resolution adopted by the town council. It is urged that a by-law was necessary and further that such a by-law required the approval of the municipal electors who were proprietors.

We have been referred to no less than three sets of enactments as to exemption from municipal taxation in the Revised Statutes of 1888 by which this case is governed.

First there is article 4559, the first paragraph of which reads as follows:

> The council may, by a resolution, exempt from the payment of municipal taxes, for a period not exceeding twenty years, any person who carries on any industry, trade or enterprise whatsoever, as well as the land used for such industry, trade or enterprise, or agree with such person for a fixed sum of money payable annually for any period not exceeding twenty years, in commutation of all municipal taxes.

This article allows the granting of the exemption by a resolution of the municipal council. It is, however, argued that it applies only to an existing industry, not to one to be established, and this is said to result from the words "who carries on any industry," etc., in the French version "qui exerce une industrie." As to new manufactories, it is contended, resort must be had to other provisions. This brings us to the second and third sets of enactments which must be considered together.

Taking them in their order, I will first give the text of articles 4404, 4405 and 4406 of the same Revised Statutes.

These sections are among those which deal with the powers of the town council exerciseable by by-law.

4404. To aid in the construction of any bridge, causeway, pier, wharf, slide, macadamized or paved road, railroad, or other public works, or any manufacturing establishments situated in whole or in part within the municipality or in its vicinity, undertaken and built by any incorporated company, or by the Provincial Government:

1. By taking and subscribing for shares in any company formed for such purpose;

2. By giving or lending money to such company or to the Provincial Government;

3. By guaranteeing by endorsation or otherwise any sum of money borrowed by such company;

4. By exempting from the payment of municipal taxes, assessments and dues certain industrial establishments according to the provisions of section sixth of chapter second of this title.

4405. To subscribe for or hold stock in any company formed for the purpose of constructing electric telegraph lines.

4406. Every by-law, passed in virtue of the two preceding articles, before coming into force and effect, shall be approved by the electors of the municipality who are proprietors, in the manner prescribed in articles 4531 and following to article 4535 inclusively.

The reference in the last paragraph of article 4404 to "section sixth of chapter second of this title" brings us to the third set of enactments which we find in articles 4642 and 4643.

These latter articles, preceded by the title "Exemption of new manufactories from municipal taxes," are as follows:—

4642. For the purpose of encouraging the introduction and establishment of new manufactories within their limits, it is lawful for any city, town, or village municipality to exempt from all taxes, assessments and municipal imposts whatsoever, for a space of time not exceeding ten years, any manufactory, not being a flour-mill, gas-works, or distillery, which any individual, commercial firm, or corporation may have undertaken, or may undertake to establish.

2. Such exemption shall extend, not only to the buildings and grounds used by such manufactory, but also to all the moveables and machines employed in such manufactory, as well as to all articles manufactured therein.

3. In any case in which the exemption from taxes as hereinabove mentioned, in favour of a new manufactory, would prejudice the interests of any manufactory already established, or would create an undue privilege against the latter, it shall be lawful for the municipal authorities to grant the same, or a proportionate exemption to every such pre-existing manufactory.

4643. Any person, desiring to establish a manufactory as aforesaid, is obliged to ask the permission of the municipal council and state the nature of the manufacture, its locality, the extent of the intended site, and whether he intends to use steam power.

1924

CITY OF MONTREAL v. DUPRÉ

Mignault J.

Such permission shall not be given unless previous notice be given by the person applying therefor to the council, and the council may make a by-law for the purpose, which by-law must be brought before the council at two different meetings thereof, and when the by-law is agreed to, it shall be equivalent to a contract in favor of the proprietors of the manufactory therein mentioned, their heirs and assigns, for all the time specified in such resolution.

The first point to be considered in connection with all these enactments is the distinction between *existing* and *new* manufactories. It is argued that the language of article 4559 is wide enough to comprise both, but the special provisions of the second and third sets of enactments cannot be ignored, and both refer to industries to be established or new industries.

To test whether the distinction is a real one, it will be useful to consider the history of this legislation, and for this purpose the memorandum of statutes to which I have referred is most helpful.

Going back to the consolidated statutes of Lower Canada of 1860, chapter 24, section 57, we see that it was provided that the municipal council might by agreement

with any person carrying on, or proposing to undertake any mining or manufacturing business,

wholly exempt any such business from assessment during a period of not more than five years.

The distinction between an existing and a proposed business is expressed here, but the same rule is applied to each. We will find however that, while maintaining this distinction, each class was afterwards differently dealt with. This brings us to the legislation adopted in 1870.

In that year, the legislature adopted, by chapter 68 of 34 Victoria, the municipal code of the province of Quebec which came into force by proclamation on the 2nd of November 1871. On the day it was sanctioned, 24th of December, 1870, Royal assent was given to the statute, 34 Victoria, chapter 18, intituled "An Act to encourage the introduction and establishment of new manufactories in this province," and which in substance was to the same effect as articles 4642 and 4643 above quoted, the exemption period being also ten years.

And article 943 of the municipal code adopted at the same session allowed the exemption from municipal taxes

for a period not exceeding five years (subsequently extended to twenty years) of any person

who carries on any business, trade, or manufacturing enterprise whatsoever, etc.

The municipal code applied to all the territory of the province, excepting cities and towns incorporated by special statutes, and 34 Victoria, chapter 18, was made applicable to any incorporated city, town or village. It would, therefore, seem that at least as to the latter—and it is not necessary to consider any other municipalities—and as to the scope of article 943 of the municipal code, the distinction between existing and new enterprises was preserved, the exemption period however not being the same in both cases.

We now come to the enactment, in 1876, by 40 Victoria, c. 29, of the Town Corporations General Clauses Act.

In section 366 of this statute we find a provision to the same effect as article 943 of the municipal code, as amended. The exemption period is twenty years, the mode of granting it is by a resolution and the exemption can be made in favour of

any person who carries on any industry, trade, or enterprise whatsoever.

This section was included in the revision of 1888 as article 4559 above quoted.

Section 229 of the same statute empowered the town corporation

to aid in the construction of any bridge, causeway, pier, wharf, slide, macadamized or paved road, railroad or other public work situated in whole or in part within the municipality or in its vicinity, undertaken and built by any incorporated company, or by the provincial government:—

1. By taking and subscribing for shares in any company formed for such purpose;

2. By giving or lending money to such company or to the provincial government;

3. By guaranteeing by endorsation or otherwise any sum of money borrowed by such company.

By section 230 the council was authorized to subscribe for or hold stock in any company formed for the purpose of constructing electric telegraph lines.

Finally section 231 provided that every by-law passed in virtue of the two preceding sections, before coming into force and effect, should be approved by the electors of the municipality who are proprietors in the manner prescribed

1924

CITY OF MONTREAL v. DUPRÉ

Mignault J.

in sections 356 and the following to section 360 inclusive.

In 1881, by 44-45 Victoria, chapter 20, section 229 was amended by adding after the words "public work" in the first paragraph the words "or any manufacturing establishment."

With this amendment, the council could by by-law—for section 229 was among the sections describing the powers of the council exerciseable by by-law (section 223)—aid in the construction of any manufacturing establishment by the means enumerated in subparagraphs 1, 2 and 3 above mentioned.

It seems clear that to aid in the construction of any manufacturing establishment means to aid a new or not yet established industry, so that we find here the same distinction between existing and new establishments which is further emphasized by article 4642 cited above.

When the revision of 1888 was effected, a new and fourth paragraph was added to section 229 which became article 4404 of the Revised Statutes. There was no warrant for this addition in previous legislation, and it is difficult to say why the Commissioners who prepared the revision inserted it here, for they had provided for the exemption from taxation in article 4559 and articles 4642 and 4643 of the revision, to the latter of which indeed they refer. This fourth paragraph, the principal cause of the controversy which has arisen in this case, reads as follows:—

> 4. By exempting from the payment of municipal taxes, assessments and dues certain industrial establishments, *according to the provisions of section sixth of chapter second of this title.*

The words I have italicized refer to articles 4642 and 4643, the text of which I have given above. It is to be remarked that under articles 4642 and 4643 a by-law is sufficient, provided it be brought before the council at two different meetings, to form a contract in favour of the proprietor of the manufactory therein mentioned, his heirs and assigns, for all the time specified in such by-law. The addition of paragraph 4 to article 4404, the appellant argues, shews that not only must the exemption by-law be thus brought before the council at two different meetings, but that it must also, before coming into force and effect, be approved by the electors of the municipality who are proprietors. I will examine this contention in a moment.

To complete the review of the pertinent enactments, I may say that, in 1899, by 62 Victoria, chapter 39, section 1, the first paragraph of article 4404 was amended so as to permit the council to grant the contemplated aid to a person as well as to a company or to the provincial government.

Before attempting to place a construction on these articles, reference must be made to some provisions of the charter of the town of Maisonneuve, 61 Victoria, chapter 57, passed in 1898.

Section 60 states that notwithstanding article 4404 of the Revised Statutes and in the spirit of that article, permission is granted to the town to grant aid to any railway, manufactory, brewery, distillery, or other industrial or commercial establishment now established or which may wish to establish themselves within the limits of the town by giving or undertaking to give them land for their buildings and operations. And some bonuses and privileges already granted are confirmed.

By section 65 of the same statute it is stated that with the exception of the by-laws which must be submitted to the approval of the proprietors who are municipal electors, the town council may exercise its powers by by-law or resolution.

Finally in 1900 the charter of Maisonneuve was further amended by 63 Victoria, chapter 53, section 19, by adding thereto section 60*a* which declares that the town may exercise all the powers contained in articles 4402, 4403, 4404 and 4405 as well as in article 60 of 61 Victoria, chapter 57, in favour of any person, partnership, corporation or public body, and that it may exercise such powers in the form of a sale, loan, donation, exchange, lease, subscription * * * exemption from taxation, or in any other way it may deem expedient.

In his factum the respondent calls attention to section 26 of the same statute which states that, among others, articles 4531, 4532 and 4533 shall not apply to the town of Maisonneuve, these articles being precisely among those referred to by article 4406 as prescribing the mode whereby the approval of the municipal electors may be obtained. This enactment would possibly complicate the situation were

1924

CITY OF MONTREAL v. DUPRÉ

Mignault J.

it not that the same section 26 declares that all the provisions of the municipal code that are not inconsistent with the Act or with the town corporations general clauses shall apply thereto and form part thereof, so far as the same is possible, *mutatis mutandis*. At that time, the municipal code fully provided for the mode of submitting by-laws for the approval of the municipal electors (article 671 *et seq.*).

Having now cited all the pertinent statutory enactments, my opinion is first that the distinction between existing and new industries, in so far as the exemption from municipal taxes is concerned, has been maintained throughout, and that consequently article 4559 of the Revised Statutes of 1888 and article 943 of the municipal code do not apply to the case of the respondent.

We are thus restricted to what I have called the second and third sets of enactments, that is to say to articles 4404 to 4406 and articles 4642 and 4643 of the Revised Statutes.

Paragraph 4 of article 4404 in connection with article 4406 furnishes the whole difficulty of construction. After serious reflection, I have come to the conclusion that paragraph 4 is less an enabling provision than a mere reference to the really enabling provisions of section 6 of chapter 2 of this title, that is to say a reference to articles 4642 and 4643. Such references (*dispositions de renvoi*) are not unfamiliar in statutory enactments and the Quebec Civil Code contains a number of them. If this construction be adopted it will be possible to harmonize articles 4404 to 4406 with articles 4642 and 4643, and the rule governing exemptions as to new industries will be found in the latter articles. It follows that the approval of the municipal electors who are proprietors is not necessary for the exemption is not granted in virtue of article 4404 but of articles 4642 and 4643.

This construction being adopted, it remains to be seen whether the respondent's exemption was legally granted. There was no by-law brought before the council at two different meetings, but merely a resolution submitted and voted upon at one meeting. Consequently the conditions of articles 4642 and 4643 were not satisfied. The respondent however relies on section 65 of the Maisonneuve charter the substance of which I have given above. But assuming that a mere resolution was sufficient, it should have been

considered at two meetings of the council, for this is not an idle formality but one destined to ensure due deliberation. And in my opinion there must be strict compliance with all the conditions laid down for the granting of an exemption from taxation so that, even giving full effect to section 65, these conditions were not fulfilled. I do not think that the saving provision of article 4186 of the Revised Statutes can avail the respondent, for these requirements are not mere formalities but are conditions going to the jurisdiction of the town council to grant an exemption from municipal taxation. I cannot therefore think that this exemption was validly granted to the respondent.

The respondent relies on the decision of the Court of King's Bench in *Corporation du Village de Chambly* v. *Lamoureux* (1).

The report of this case is most unsatisfactory. No reasons for the judgment of the Court of King's Bench are given; it is merely stated that the judgment of the first court was unanimously confirmed, and all we find in the report is a statement of the arguments of the parties. The judgment of the first court is extremely short and it refers to a by-law granting the respondent the exemption he invoked. The head-note speaks of a resolution, not a by-law, and in a foot-note a resolution is cited granting an exemption from taxation to Samuel T. Willett and to anybody else who would erect buildings for manufacturing purposes. It would not seem possible to contend that under the statute 34 Victoria, chapter 18, or articles 4642 and 4643 R.S.Q., 1888, a mere resolution could grant an exemption from taxation to any unnamed person who might in the future erect a building in the municipality for manufacturing purposes. Such an exemption would be void under this statute and these articles, and yet the head-note asserts that the council could grant it by a resolution passed under article 943 of the municipal code. That the Court of Queen's Bench did so decide seems very questionable, for the judgment of the first court, which was confirmed, speaks of

> le *règlement* invoqué par les défendeurs * * * les exemptant de payer toutes les taxes qui leur sont réclamées par cette action.

(1) 19 Rev. Lég., 312.

1924

CITY OF MONTREAL v. DUPRÉ

Mignault J.

If it had been shewn that this decision, as reported, had been followed in spite of its obvious error, I would hesitate to disturb a jurisprudence founded on it, but no such jurisprudence is shewn to exist. I, therefore, feel that I cannot accept this decision as an authority against the enactments I have mentioned.

I regret to have to come to a decision adverse to the respondent who observed in good faith the conditions of an exemption which was respected by the town of Maisonneuve until it became a part of the city of Montreal. But I must hold that the respondent has not shewn that the exemption from taxation was validly granted to him by the resolution which he invokes.

Since writing the above opinion I have had the advantage of reading and fully considering the reasons for judgment of my brother Duff. Perhaps I may be permitted to say that the fact that my learned brother has arrived at a different conclusion after an able and exhaustive study, in its different stages of development, of all this legislation, shews the difficulty of the problem which we have to solve. And while I have been unable to place, on article 4559 of the revision of 1888, a wide construction which would comprise even the manufactories mentioned in articles 4642 and 4643 of the same revision, with the result that an exemption from municipal taxation of a new manufactory could be supported under article 4559, although not granted in the manner specified by articles 4642 and 4643, I think, if I may say so with great respect, that the legislature of the province of Quebec would be well advised should it place the matter beyond any possible controversy by redrafting all these provisions which appear in a scarcely modified form, in so far as tax exemptions are concerned, in the revision of 1909 (articles 5685, 5686, 5687, 5775, 5922 and 5923). There is moreover no conceivable reason why the exemption period should not be the same in all cases.

I would therefore allow the appeal with costs here and in the Court of King's Bench and restore the judgment of the learned trial judge.

MALOUIN J.—L'intimé a obtenu du conseil municipal de Maisonneuve en 1911 une exemption de taxes pour dix ans sur une manufacture qu'il se proposait d'établir dans les limites de cette municipalité. Cette exemption de taxes lui a été accordée par une simple résolution du conseil. L'intimé a établi sa manufacture dans les limites de la municipalité en conformité de la résolution.

En 1918, la ville de Maisonneuve a été annexée à la cité de Montréal. Jusqu'à l'annexion, l'intimé n'a pas payé de taxes; mais après l'annexion l'appelante, prétendant que l'exemption de taxes accordée à l'intimé était illégale, en a exigé le paiement. Sur son refus de payer, elle a fait saisir les biens de l'intimé pour la somme de $2,197.19, montant de taxes que ce dernier est censé devoir pour l'année 1918-19.

L'intimé a fait une opposition aux fins d'annuler à cette saisie, invoquant l'exemption de taxes que la ville de Maisonneuve lui a accordée.

L'appelante prétend que cette exemption de taxes est nulle parce qu'elle a été accordée par simple résolution, tandis que le conseil municipal aurait dû procéder par règlement à être soumis à l'approbation des électeurs propriétaires de la municipalité.

La cour supérieure a donné gain de cause à l'appelante; mais ce jugement a été infirmé par la cour d'appel, le juge Rivard étant dissident.

La seule question que nous avons à décider en est une d'interprétation de statuts. Il s'agit de savoir quel est l'article de la loi en vertu duquel le conseil municipal de Maisonneuve devait procéder pour accorder à l'intimé l'exemption de taxes sollicitée. Les parties ont admis que les statuts refondus de la province de Québec de 1888 s'appliquent à l'espèce.

Le conseil municipal paraît avoir procédé en vertu de l'article 4559 des statuts refondus de Québec de 1888. Je le reproduis en partie:

> Le conseil peut par une résolution exempter des taxes municipales pour une période de vingt ans au plus toute personne qui exerce une industrie, un métier, ou se livre à une exploitation quelconque, ainsi que le terrain occupé par cette industrie, ce métier, cette exploitation, etc.

L'appelante prétend que cet article du statut ne s'applique qu'aux personnes exerçant une industrie dans les

1924

CITY OF MONTREAL v. DUPRÉ

Malouin J.

limites de la municipalité au moment où l'exemption est accordée et non aux personnes exerçant leur industrie en dehors de la municipalité. C'est, je crois, l'interprétation juridique et littérale du texte même. L'exemption de taxes est de droit strict, et l'interprète ne peut l'étendre au delà du cadre fixé par ce texte.

L'intimé a beaucoup insisté sur un précédent (1) où la cour d'appel paraît avoir décidé le contraire. Cette décision n'est pas motivée et ne peut nous aider dans la solution du présent litige.

La majorité des juges de la cour d'appel paraît s'être basée sur les articles 4642 et 4643 des statuts refondus de Québec de 1888 pour donner gain de cause à l'intimé. Je cite l'article 4642 en partie et l'article 4643 en entier:

4642. Dans le but d'encourager l'introduction et l'établissement de nouvelles manufactures dans leurs limites, il est loisible aux municipalités de cité, de ville et de village, d'exempter des taxes, cotisations et impôts, pour un temps n'excédant pas dix années, les manufactures autres que les moulins à farine, usines à gaz et distilleries, que des individus, des sociétés commerciales ou corps politiques et corporations ont entrepris et entreprennent d'y établir.

4643. Quiconque désire établir une manufacture, comme ci-dessus, est tenu de demander au conseil municipal le privilège de l'établir, de spécifier le genre de manufacture le lieu, l'étendue du terrain requis, et s'il entend se servir d'engins à vapeur.

Ce privilège ne peut être accordé sans avis pealable adressé et donné au conseil; sur ce, le conseil peut passer à cet effet un règlement qui doit être soumis à sa délibération à deux assemblées différentes; une fois adopté, le règlement a force de contrat en faveur des propriétaires de la manufacture y mentionée, leurs hoirs et ayants cause, pour tout le temps spécifié dans ce règlement.

Je reproduis aussi au long les articles 4404 et 4406 de la loi des cités et villes qui s'appliquaient à la ville de Maisonneuve, car le texte de ces articles est essentiel à la décision du présent litige. Ils se lisent comme suit:

4404. Aider à l'établissement de ponts, chaussées, jetées, quais, glissoires, chemins macadamisés ou pavés, chemins de fer ou autres ouvrages publics ou tout établissement industriel situés en tout ou en partie dans la municipalité ou dans les environs, entrepris et construits par des compagnies constituées en corporation, ou par le gouvernement provincial:

1. En prenant et souscrivant des actions d'une compagnie formée ces objets;

2. En donnant ou en prêtant de l'argent à telle compagnie ou au gouvernement provincial;

3. En garantissant par endossement ou autrement, toute somme d'argent empruntée par telle compagnie;

(1) 19 R.L. 312.

4. En exemptant du paiement de taxes, cotisations et impôts municipaux, certains établissements industriels, conformément aux dispositions de la section sixième, du chapitre deuxième du présent titre.

4406. Tout règlement passé en vertu des deux articles précédents, doit, avant d'avoir vigueur et effet, avoir été approuvé par les électeurs municipaux propriétaires, en la manière prescrite aux articles 4531 et suivants jusqu'à l'article 4535 inclusivement.

Dans mon opinion, l'article 4404-4 et l'article 4406 exigent que le règlement passé en vertu des articles 4642 et 4643 soit approuvé par les électeurs propriétaires de la municipalité avant d'entrer en vigueur. Ces deux derniers articles sont ceux qui se trouvent dans " la section sixième du chapitre deuxième du présent titre " et auxquels réfère le numéro 4 de l'article 4404.

La résolution exemptant l'intimé du paiement des taxes municipales n'a pas été soumise à l'approbation des électeurs.

De plus, le deuxième paragraphe de l'article 4643 exige qu'un règlement passé en vertu de l'article 4642 soit soumis aux délibérations du conseil à deux assemblées différentes, ce qui n'a pas été fait. Le conseil a procédé par résolution qui n'a été soumise qu'à une seule assemblée du conseil. Cette condition ne peut être considérée comme une simple formalité sans importance. C'est, dans mon opinion, une condition impérative et essentielle à la validité du règlement, qui n'entre en vigueur que lorsqu'il a été soumis une deuxième fois aux délibérations du conseil municipal.

Pour ces raisons, je suis d'avis que la résolution exemptant de taxes l'intimé est illégale. J'infirmerais le jugement dont est appel et je renverrais l'opposition de l'intimé avec dépens dans toutes les cours.

MACLEAN J. (dissenting).—The question involved in this appeal is the validity of a resolution of the council of the town of Maisonneuve, passed on April 11, 1911, exempting from taxation for the period of ten years the business of the respondent, carried on in that municipality under the name of The Dominion Die Company. Since the passage of this resolution the town of Maisonneuve has become a part of the city of Montreal, but that fact in no respect affects the issue. During the period which the corporation of Maisonneuve maintained its separate existence the tax exemption granted by the resolution was observed, but the

1924

CITY OF MONTREAL v. DUPRÉ

Maclean J.

city of Montreal, after its absorption of Maisonneuve, in 1918, questioned the validity of the exemption granted by the resolution, and by steps which need not be mentioned, the issue reached the courts, and is now before this court on appeal, from the judgment of the Court of King's Bench, which appellate court reversed the trial judge, who found the resolution in question invalid.

Any difficulty in resolving the issue is due chiefly to the existence of three separate groups of articles to be found in the statutes of Quebec, 1888, all of which it is admitted were applicable to the corporation of Maisonneuve at the time the exemption was granted, and each of which enabled the corporation in certain events to grant exemptions from taxation.

The charter of the town of Maisonneuve, c. 57 Q.S. 1898, provides that the council of the town shall have all the powers, rights and privileges granted by the Revised Statutes of Quebec, 1888, and by the Municipal Code to municipal councils. The provisions of the Revised Statutes referred to are the articles referable to town corporations, title XI, chapter first. The first clause enacts that every provision of that chapter applies to every town and corporation established by the legislature of Quebec unless expressly modified or amended, and becomes part of its charter. The next clause enacts that in order to exclude any of the provisions of this chapter from the charter of the town, they must be expressly excluded; and the excluded provisions must be specified by their numbers. The charter of the town of Maisonneuve, expressly and by numbers, declared certain of such provisions as not being applicable to that town; but in the enumerated articles are not to be found the important ones hereinafter mentioned. The charter also provides that the provisions of the Municipal Code shall apply to the town, except such provisions as are inconsistent with the charter itself, or the Town Corporation General Clauses Act.

It is agreed that articles 4404, 4405, 4406, 4559, 4642 and 4643 as they read in the Revised Statutes of Quebec, 1888, applied to the town of Maisonneuve at the time the exemption in question was granted, the two last mentioned articles being part of chapter two of the Town Corporation

General Clauses Act, the remainder being part of chapter one. At the time of the granting of the tax exemption now in question, there was not, I think, any provision in the Municipal Code applicable to Maisonneuve upon the subject of tax exemption.

It would perhaps be convenient to here set forth the important parts of such articles, upon which this case turns:

CHAPTER FIRST

1. Article 4559.—The council may, by a resolution, exempt from the payment of municipal taxes, for a period not exceeding twenty years, any person who carries on any industry, trade or enterprise whatsoever, as well as the land used for such industry, trade or enterprise, etc.

CHAPTER SECOND

2. Article 4642.—For the purpose of encouraging the introduction and establishment of new manufactories within their limits, it is lawful for any city, town, or village municipality to exempt from all taxes, assessments and municipal imposts whatsoever, for a space of time not exceeding ten years, any manufactory, not being a flour-mill, gas-works or distillery, which any individual, commercial firm or corporation may have undertaken or may undertake to establish.

Article 4643.—Any person, desiring to establish a manufactory as aforesaid, is obliged to ask the permission of the municipal council and state the nature of the manufacture, its locality, the extent of the intended site, and whether he intends to use steam power. Such permission shall not be given unless previous notice be given by the person applying therefor to the council, and the council may make a by-law for the purpose, which by-law must be brought before the council at two different meetings thereof, and when the by-law is agreed to, etc.

CHAPTER FIRST

3. Article 4404.—To aid in the construction of any bridge, causeway, pier, wharf, slide, macadamized or paved road, railroad, or other public works, or any manufacturing establishment situated in whole or in part within the municipality or in its vicinity, undertaken and built by any incorporated company, or by the Provincial Government:

1. By taking and subscribing for shares in any company formed for such purpose;

2. By giving or lending money to such company or to the Provincial Government;

3. By guaranteeing by endorsation or otherwise any sum of money borrowed by such company;

4. By exempting from the payment of municipal taxes, assessments and dues certain industrial establishments according to the provisions of section sixth of chapter second of this title;

Article 4406.—Every by-law, passed by virtue of the two preceding articles, before coming into force and effect shall be approved by the electors of the municipality who are proprietors, in the manner prescribed in articles 4531 and following to article 4535 inclusively.

1924

CITY OF MONTREAL v. DUPRÉ

Maclean J.

The respondent claims that the resolution granting his exemption was authorized by article 4559, while the appellant contends that the power granted to town councils under this article only extended to persons "carrying on any industry, trade or enterprise" prior to, or at the time of, the passage of the resolution. This article is very general indeed, and were it not for articles 4642 and 4643, one should find little difficulty in adopting the respondent's view.

Chapter second, within which are to be found articles 4642 and 4643 is entitled "Special provisions applicable to cities, towns and other corporations," while the heading of the articles themselves is "Exemption of new manufactories from municipal taxes." I therefore think that these articles are in the nature of special legislation, and I find it impossible to resist the conclusion that they supersede or qualify the general enactment contained in article 4559. These articles employ language that is quite clear, and the object of the legislation, namely, the encouragement of the establishment of new manufactories, is quite obvious. Where a general intention is expressed and also a particular intention which is incompatible with the general one, the particular intention should, I think, be considered an exception to the general one. Alternatively, the respondent relies upon these articles. Subject to a later consideration of the validity of the exemption as to the form and procedure adopted in its enactment, which also is contested, I am of the opinion that it was within the power of the municipality of Maisonneuve to grant the exemption which it did in this instance, under these articles.

The appellant urges that the exempting resolution is invalid under the articles I have above just referred to, and that articles 4404 to 4406 supply the test which the exemption must undergo before its validity is established. Upon their face these articles appear to be partially in conflict with articles 4642 and 4643 and attempt in some degree to invade the same area of legislation. It is particularly to be observed that article 4406 introduces the reference of a tax exempting by-law to the electors for approval, before becoming effective. It might later on be helpful to now point out that as originally enacted in 1876, article 4404 con-

tained no reference to "any manufacturing establishments," and these words were added by amendment in 1881. In 1899 also were added to the end of the first part of article 4404 the words "or by any person whatsoever," which words do not appear in article 4404, as appearing in the Revised Statutes. It should also be stated that subsection 4 of article 4404 was first enacted in 1881.

Before attempting to construe the effect of the last mentioned group of articles, it might be well now to revert to the second group of enactments, articles 4642 and 4643, to inquire if, standing by themselves, anything further was required to be done by the Town Council to make the resolution and the exemption effective as against the corporation and in favour of the respondent.

Article 4642 clearly gives the corporation the power to exempt from taxation some one intending to start a new manufactory. Article 4643 requires that any person desiring to establish a manufactory shall ask permission to do so and shall state the nature of the manufactory, etc. The reason for such requirements are obvious. While the municipality at this period in its history was evidently very solicitous about the establishment of new industries within its bounds, still other considerations prompted reservations and restrictions. For instance, flour-mills, gas-works, and distilleries were disqualified from tax exemption. Again, it was desirable to learn if any proposed manufactory seeking tax exemption was to engage in the same line of industry as a pre-existing one, when the latter might become entitled to similar treatment. Further, some proposed manufactory might be desirable in one location but objectionable in another, or conceivably, altogether objectionable in its character and objects. For these, and possibly other reasons, permission of the council was first required before establishing any new manufactory. More importance seems to be attached to securing this "permission" than to the formal declaration of tax exemption by the council. However the respondent made application for permission to establish a new manufactory at a specific location, which was granted along with tax exemption. The second part of 4643 requires that such permission must be expressed in the form of a by-law. Nothing

1924
CITY OF MONTREAL v. DUPRÉ
Maclean J.

is expressly said about the passage of a by-law with respect to tax exemption and much is to be said in support of the view of Mr. Justice Greenshields of the appellate court below in this respect. However, a resolution of council was passed in terms exempting the respondents' proposed manufactory, to be located on specified lots of lands, from taxation for the period of ten years. Is the passage of a resolution a compliance with this empowering statute? The article requires that the by-law must be considered by the council at two separate meetings before adoption. Section 65 of the charter of the town of Maisonneuve provides that

> with the exception of the by-laws which must be submitted to the approval of the proprietors who are municipal electors, the town council may exercise its power by by-law or resolution.

This statutory enactment (1898) qualifies the article under consideration, and I am of the opinion that a resolution is, so far as this case is concerned, the equivalent of a by-law.

Is the resolution incomplete by reason of the fact that it was once only considered by the council? I think this question must be answered in the negative. It seems to me quite clear that section 65 of the charter was intended to so amend or qualify article 4398 of the Town Corporation Clauses that the town of Maisonneuve could legislate within its powers by by-law or by resolution, except in the case of by-laws that required the approval of the ratepayers. Under article 4643, a proposed by-law was not an effective by-law unless considered twice by the council, but a resolution when passed by the council of Maisonneuve was effective when passed. In this group of articles there is nothing to suggest that the tax exemption required the approval of the ratepayers. Maisonneuve, it will be found on reference to its charter, was continually cutting down by enactments of the legislature the Town Corporation Clauses and extending its own exclusive powers, and the power acquired enabling it to legislate by resolution, instead of by-law, was not at all unusual.

It is urged by the appellant, that article 4404 is the only legislation under which the tax exemption might have been granted and that in order to make the same effective and valid it should receive the approval of the municipal electors as prescribed by 4406. It is contended that these articles are in direct conflict with and control the second group of

articles, 4642, etc., as to the procedure making effective any resolution or by-law, and of course this requires consideration. As originally enacted in 1876, article 4404 was intended merely to authorize the municipality to grant unusual aids to undertakings in the nature of public works, by way of loans, guarantees and even by becoming a shareholder, and no mention was made of tax exemption whatever. As these suggested subventions involved direct money payments from the municipal treasury, or the assumption of liabilities by way of guarantee, it was sound policy to require ratification of the same by the electors before any by-law authorizing the same became effective. The wisdom of a different procedure in such cases as compared with exemption from taxation only, is obvious. Later, the added and unusual power to aid in the construction of "manufacturing establishments" by purchase of shares, loans or guarantees, was granted to municipalities. In 1888 the commissioners appointed to revise and consolidate the public statutes (Revised Statutes of Quebec, 1888), inserted what is now paragraph 4 of article 4404. That is, they added the power to grant exemption from taxation to the other three enumerated methods by which the municipality might "aid in the construction of bridges, etc., and any manufacturing establishments" and which required reference to the electors. Subsection four says the exemption from taxation may be granted

according to the provisions of section sixth of chapter second of this title,

being articles 4642 and 4643. Altogether the legislation enabled municipalities to commit themselves to extensive and unusual subventions, and it is fairly to be presumed that it was intended they should apply to unusual undertakings, requiring for special reasons assistance beyond the one of simple exemption from taxation. A careful reading of article 4404 clearly reveals this. For instance, under this article, assistance might be given to manufacturing establishments partly without the municipality, or in its vicinity, while under article 4642 the manufactory was to be within the limits of the municipality.

To construe paragraph four of article 4404 in the manner urged by the appellant, as a modification of articles 4642 and 4643, is to suggest that the legislature intended

1924

CITY OF MONTREAL v. DUPRÉ

Maclean J.

to amend article 4643 by requiring a reference to the electors instead of merely passing a by-law or resolution. I do not think it was intended to amend articles 4642 and 4643 at all, which was in the nature of special legislation. Any intention to so amend was so simple of accomplishment that one must conclude something else was intended. Article 4404, before paragraph four was added, did not deal with tax exemptions, but was legislation upon an entirely different subject. However, as the article now stands with this paragraph added, I construe it to mean that a municipal council might

aid in the construction of any manufacturing establishment,

by (*a*) subscribing for shares; (*b*) a loan of money; (*c*) a guarantee; (*d*) exemption from taxation. The council might grant aid by employing any one or more, or even all of the four methods. If any persons intending to construct a manufacturing establishment required aid by way of a loan, or guarantee, or purchase of shares, it may safely be presumed that the same persons in their financial infirmities would seek tax exemption as well. In that event legislation already existed (article 4642) empowering the latter to be given and prescribing the procedure (article 4643), and accordingly the scope of the powers for granting tax exemption, and the procedure to accomplish that end, already existing, they were here incorporated by way of reference. I construe articles 4404 and 4406 to mean that if any manufacturing establishment was to be aided under any one or all of the methods prescribed by subsections 1, 2 or 3, the approval of the electors was required, but if in addition it was to have exemption from taxation, that portion of the by-law need not be submitted to the electors, but was to be enacted according to the provisions of article 4643.

If the true construction of articles 4404 to 4406 upon this point is in doubt, or my construction of them untenable in respect of the tax exemption clause, I am still of the opinion that the tax exemption in question is valid under articles 4642 and 4643. If the legislature expresses its mind clearly in one place, it ought to be presumed that it is of the same mind still, unless it clearly appears that it has changed it. It did very clearly express itself in articles

4642 and 4643, and the statute seems to say what the legislature meant, and neither directly or by implication does the legislature appear to have intended any modification whatever. Before the express words of a statute can be changed so as to have a different meaning that alteration ought to be clearly expressed. Articles 4404 and 4406 hardly suggest such an inconsistency with 4642 and 4643 as to indicate modification by implication. It is also a reasonable presumption that the legislature did not intend to keep contradictory enactments on the statute book, or to amend a statute without saying so, and such an interpretation is not to be adopted unless it is inevitable. The language of each should be restricted to its own object or subject, and a reading of each indicates they were intended for different purposes. Articles 4404 to 4406 empower municipal councils to grant unusual aids to certain undertakings which involved payments from its revenues, as in the cases of loans, and subscription of and payment for shares, and the assumption of liabilities as in the case of guarantees. Basically, that is the policy of the legislation. The policy of the legislation involved in articles 4642 and 4643 is clearly another thing. I do not think that a bylaw or resolution passed in virtue of article 4642 is a bylaw passed under the authority of article 4404 and that article 4406 does not apply to it. I am of the opinion that the tax exemption in question is valid under articles 4642 and 4643, and I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Jarry, Damphousse, Butler & St. Pierre.*

Solicitor for the respondent: *J. W. Jalbert.*

1924
*Feb. 29.
*April 22.

DAME LEONIE LAPORTE (PLAINTIFF) ... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY CO. (DEFENDANT) ..... RESPONDENT.

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

Negligence—Railway—Injury—Jury trial—Evidence—Question for jury. Where there is conflicting evidence on a question of fact, whatever may be the opinion of the judges of an appellate court as to the value of that evidence, the verdict of the jury should not be disturbed.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec, reversing the judgment of the trial judge with a jury and dismissing the appellant's action.

The action was taken by the appellant against the respondent company for damages arising from the death of her husband, which occurred as the result of a collision between a motor truck which he was driving across the respondent company's track and one of the respondent company's locomotive engines. The jury found that the accident was the result of the combined negligence of the appellant's husband, in heedlessly crossing the line without taking proper precautions, and of the servants of the respondent company in failing to give the statutory signal. The jury having assessed the damages at $12,000 and reduced them to $8,000 in consequence of the fault of the victim, judgment was given for the last mentioned sum; but the appellate court reversed this judgment and dismissed the action, being of the opinion that the verdict was contrary to the evidence.

Lafleur K.C. and *Lamothe K.C.* for the appellant.

Wells K.C. and *Chassé K.C.* for the respondent.

IDINGTON J.—The jury before whom this case was tried answered a number of questions submitted to it by the learned trial judge in such a manner as to demonstrate that according to the view of the jury each of these parties was to blame for the accident.

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc*.

The learned trial judge entered judgment accordingly and, according to Quebec law, both parties being to blame the relative proportion of blame must be assessed by the jury as was done herein.

The answers of a jury to questions submitted to them by the learned trial judge must be read in light of the charge he has given the jury.

The jury in this case answered questions four and five as follows:—

4. Was the accident due only to the fault and negligence of the said late Oliva Paradis, and if so state in what consisted this fault and this negligence?

No. Nine for, three against.

5. Was the said accident due to the common fault of the said Oliva Paradis and the defendant or of persons under its control and for whom it is responsible, and if so state in what consisted, respectively, this common fault?

Y. The Canadian Pacific at fault by not whistling in time for the crossing. Paradis, for neglect for not looking before crossing the railroad track. Nine for, three against.

The turning point of this appeal is the answer to question number five from which it clearly appears, if we have regard to law and common sense, that the jury did not believe that part of the evidence of the respondent's servants that the required whistling took place at the exact point the law required, but took place after that had been passed and hence not legally in time for the crossing at which the accident herein in question took place.

There was evidence clear and convincing, that the whistling took place after the whistling post had been passed; especially if regard is had to the absolute oath of respondent's servants that only one whistling took place.

In such case the evidence of others (having no interest either way) indicates a whistling did take place quite close to the crossing if not actually upon it. Which is to be credited, in such a case of conflict, the interested or the disinterested set of witnesses?

A jury has not only a perfect right, but an absolute duty, to believe and accept one part of a witness's statement, and discard another part thereof which it does not believe. And that is evidently what this jury did in this case.

Counsel for respondent so persistently insisted upon arguing that the whole evidence of these servants of re-

1924
LAPORTE
v.
CAN. PAC. RY. CO.
Idington J.

spondent should be accepted as final and conclusive that I am quite convinced they had no other case to rely upon. The evidence on both sides in any case must all be considered and the true story contained therein as it is found in and by the minds of the jury or of the majority of nine, as Quebec law provides, is that upon which, when reported to the judge, he must act.

Unless the findings are clearly such as no nine reasonable men in Quebec can reach, they are final and conclusive and should not be interfered with by any court of appeal.

With great respect the appellate court below departed from this clear and absolute rule of law.

The opinions of the learned trial judge and Mr. Justice Guerin, dissenting, in the Court of King's Bench, were overruled.

I am therefore of the opinion that this appeal should be allowed with costs here and in the Court of King's Bench and the judgment of the learned trial judge restored.

DUFF J.—The appellant recovered judgment for $8,000 in an action against the respondent company under Art. 1056 of the Civil Code for damages arising from the death of her husband, which occurred as the result of a collision between a motor truck which he was driving across the respondent company's track and one of the respondent company's locomotive engines. The negligence alleged by the appellant was the failure to give the statutory crossing signal by whistling. The jury found that the accident was the result of the combined negligence of the appellant's husband, in heedlessly crossing the line without taking proper precautions, and of the servants of the company in failing to give the statutory signal. The jury having assessed the damages at $12,000 and reduced them to $8,000 in consequence of the fault of the victim, judgment was given for the last mentioned sum. From this judgment the respondent company appealed, and the Court of King's Bench reversed the judgment of the trial judge and dismissed the action. The grounds upon which the Court of King's Bench proceeded are set out in the formal judgment in these words:—

Attendu que la seule faute reprochée à la compagnie appelante est que ses employés n'auraient pas fait crier le sifflet de la locomotive à temps;

Considérant qu'il appartenait à la poursuite de prouver cette faute et qu'il est au contraire établi que les employés de la compagnie ont fait entendre plusieurs fois, et à temps, le sifflet de la locomotive, spécialement qu'ils ont donné des coups de sifflet réglementaires avant le passage à niveau où la collision s'est produite, et à la distance requise de cet endroit;

Considérant que la preuve ne justifie pas le verdict du jury;

Considérant qu'aucune faute imputable à l'appelant n'a été prouvée, que le verdict rendu est contraire à la preuve et qu'il appert d'une manière évidente que nul jury ne serait fondé à rendre un verdict autre qu'en faveur de l'appelante.

The sole question on this appeal is whether there was evidence from which the jury could reasonably find that the negligence charged against them was properly imputable to the respondent company's servants. The crossing signal is a well-understood signal, and consists of two long and two short blasts. Another signal is spoken of in the evidence, called the "alarm," or the "danger" signal, and the difference between the two signals is very clearly explained by Parmelee, the locomotive engineer. The alarm, or danger signal, consists in a series of rapidly repeated short whistles.

There is little conflict between the witnesses called on behalf of the appellant and those of the respondent company upon the point that only one signal was given. The point in dispute is whether that signal was the alarm signal given at the moment of the impact, just as the engine was about to strike the truck, or whether it was the usual crossing signal given some seconds before, at the whistling post. Parmelee, the engineer, is perfectly explicit upon the point that the usual crossing signal was given some seven or eight seconds before he actually reached the crossing, and that it was the last signal before the collision occurred. According to his statement, the signal was the usual one, two long and two short blasts. Other witnesses called on behalf of the respondent company are equally explicit, and their evidence is quite unshaken in cross-examination. But as against that there is evidence, which is quite as positive, quite as unequivocal, given by witnesses who, if they are to be believed, were in a position to speak, that the only signal given was a signal consisting of three sharp blasts in rapid succession, just at the moment of impact. One of these witnesses was Rev. Father Lavigne, who was travelling in the train. Another

1924
LAPORTE
v.
CAN. PAC. RY. CO.
Duff J.

was Leduc, an employee of the Post Office, who was standing on the platform at the Rang-Double de St. Grégoire, a distance of twenty arpents from the Kemp crossing, watching the train, which he says he could see distinctly, and in a position in which, as he says, he could have heard the crossing signal, had it been given. His evidence may usefully be quoted:—

Q. Lorsque vous regardiez le train qui s'en venait, avez-vous entendu quelque chose de la locomotive?
R. J'ai entendu crier trois cris de sifflet.
Q. A quel endroit?
R. A l'endroit où ils ont frappé.
Q. A l'endroit où ils ont frappé quoi, ou qui?
R. Le camion.
Q. Quel camion?
R. Le camion de M. Paradis.
Q. Quelle sorte de coups de sifflets avez-vous entendus?
R. J'ai entendu trois cris, trois cris d'alarme, comme on dirait.
Q. Est-ce que ces cris-là étaient longs ou courts?
R. Courts.
Q. Quel était l'intervalle entre les cris? La longueur de temps entre deux cris?
R. Toute de suite.
Q. Avez-vous entendu d'autres cris de sifflet avant ceux-là
R. Non, monsieur.
Q. Aviez-vous entendu la cloche sonner avant cela?
R. Non.
Q. Pouviez-vous entendre de l'endroit où vous étiez, à la station? —Entendre la cloche?
—De l'endroit où vous étiez, à la station, pouviez-vous entendre les cris de sifflet et la cloche?
R. Je pouvais entendre le sifflet.
Q. Combien de temps après les coups de sifflet la collision s'est-elle produite?
R. En même temps j'ai vu monter la poussière.
Q. Et cette proussière d'où venait-elle?
R. Ç'était de la marchandise qu'il avait dans le truck.
Q. Ca venait du camion?
R. Oui.

I am unable to concur in the conclusion of the Court of King's Bench that the verdict of the jury, who had such evidence before it, can be set aside as an unreasonable verdict. There was the sharpest contradiction between the two sets of witnesses, and it may be that there were powerful reasons which ought to have influenced the jury to accept the evidence produced by the respondent company in preference to that produced on behalf of the appellant; but the question of credibility in all its phases was entirely

a question for the jury. It was for them to judge whether Allard and Leduc were worthy of credit when they stated that if the crossing signal had been given they would have heard it. It was for them to say whether the Rev. Father Lavigne was to be credited when he stated that the alarm signal—a signal, that is to say, which he recognized as the usual alarm signal—was given just at the moment of the impact. It was for them to accept or reject the evidence of Leduc that the alarm signal was given just at that moment. If this evidence was believed by the jury, it involved the rejection of the testimony given by the witnesses called on behalf of the respondent company, who were quite positive that only one signal was given, the usual crossing signal, consisting, as above mentioned, of two long and two short blasts.

I have already mentioned that there was little or no conflict upon the point that only one signal was given. On this there was such a degree of unanimity that the jury could not consistently with the evidence have taken the view that there was more than one. Starting from that point, if they believed the evidence of Allard, Leduc and Lavigne, for example, the case for the respondent was conclusively established. Whatever the jury might have thought of the likelihood that the attention of the witnesses called for the appellant would be directed to the subject of the crossing signal (so that if given they would probably have heard it) it was entirely for the jury to say how much of the evidence given by witnesses called for the respondent company they should accept and how much they should reject. It was within their province to decide whether, having accepted their evidence upon the point that only one signal was given, they should reject it in so far as it bore upon the issue whether that signal was the usual crossing signal or an alarm signal given just at the moment of impact. *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (1).

The appeal should be allowed with costs here and in the court below, and the judgment of the trial judge restored.

MIGNAULT J.—The photographs which were put in evidence at the trial graphically depict a railway crossing which

(1) [1878] 3 App. Cas. 1155, at p. 1201.

1924
LAPORTE
v.
CAN. PAC. RY. CO.
Mignault J.

no one would imagine a dangerous one. The highway, called the Kempt road, crosses the railway line at an angle in an open country, while the railway itself runs along an embankment making it a conspicuous object for a considerable distance. At the time of the accident the sun was about setting, but there was still light enough to dim the glare of the locomotive's head lights which were burning. The appellant's husband, who was killed, was driving an automobile truck along the highway with two companions, one of whom lost his life and the other saved himself by jumping. The respondent's train was running at a speed of forty-five miles an hour and struck the automobile on the further track of a double tracked line. The only evidence we have of the speed of the motor truck is that when it mounted the incline leading to the railway crossing it was going at about ten miles an hour, a speed which is said to have been reduced as it crossed the nearer track.

The jury found that the railway company and the driver of the car were both in fault, the former by not whistling in time for the crossing, the latter for not looking before crossing the railroad track. They reduced the assessed damages, $12,000, to $8,000 by reason of the negligence of the appellant's husband. Judgment having been rendered in accordance with the verdict, the appellate court reversed this judgment and dismissed the action being of the opinion that the verdict was contrary to the evidence.

The question now is whether the verdict should have been disturbed. In other words, was the Court of King's Bench justified in disregarding the verdict of the jury on the facts in evidence?

It seems unnecessary to say at this late date that it is wholly within the province of the jury, properly directed as to the law, to find the facts. The Court of King's Bench set the verdict aside on the ground that it was not justified by the evidence. It is true that a verdict clearly contrary to the weight of evidence cannot stand, but the Quebec code of civil procedure (art. 501) states that a verdict is not considered against the weight of evidence unless it is one which the jury, viewing the whole of the evidence, could not reasonably find, and article 508 adds that a judgment different from that rendered by the trial judge may be

rendered when it is absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the party moving or inscribing.

The weight of the evidence adduced and the credibility of the witnesses are also matters for the jury alone. As long ago as 1878, Lord Blackburn in an often quoted passage, *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (1), said:—

> The jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any witness. They may believe that part of a witness's evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission that the whole of his account is to be taken as accurate.

I do not apprehend that there is any difference between the Quebec law under the articles of the code which I have cited and the opinion expressed by Lord Blackburn. It may be epitomized by saying that the jurors are the sole judges of the facts.

Here the crucial point is as to the fault found by the jury against the respondent, for there has been no attack on the finding of negligence against the driver of the truck. This fault is that the train did not whistle in time for the crossing.

The Railway Act (9-10 Geo. V, ch. 68), section 308, when a train is approaching a highway crossing at rail level, requires that the engine whistle be sounded at least eighty rods before reaching such crossing and that the bell be rung continuously from the time of the sounding of the whistle until the engine has crossed the highway. There was a post eighty rods from this crossing known as the whistling post, and it was there that the whistle should have been sounded and from that point to the crossing the bell should have been rung.

The jury's finding was as to the whistling, there was no mention of the bell not having been rung. At the speed the train was travelling, it would take twenty seconds to cover the distance from the whistling post to the crossing, a quarter of a mile.

As might have been expected, the testimony was contradictory as to this whistling, but the jury found, not that the

(1) 3 App. Cas. 1155 at p. 1201.

1924
LAPORTE
v.
CAN. PAC. RY. CO.
Mignault J.

whistle was not sounded, but that it was not done in time. It might have been desirable to put a further question to the jury in order to determine whether the train whistled at the statutory distance from the highway, for if it did there would have been ample time for the car to stop, and the respondent could not be said to have been in fault.

There was however evidence that the train whistled immediately before the collision and therefore not at the whistling post. Probably the testimony which the jury considered the most impressive was that of a mail carrier, Ernest Leduc, who from the station of St. Grégoire, three quarters of a mile from the crossing, watched the train as it approached the station. He swore that he heard three short blasts of the whistle at the place where the collision occurred and immediately he saw a cloud of dust, for the truck was laden with bags of flour. He heard no other whistle before the three short blasts.

The engineer and the fireman testified that the engine whistled but once and then at the whistling post. But the jury could disbelieve their evidence in so far as they stated that the whistle was sounded at the whistling post, and believe that of Leduc who said that the whistling, as he heard it, was at the moment of the collision. If that story was true, and its truth or falsity was entirely a matter for the jury, then the whistle was not sounded in time for the crossing and therefore not at the whistling post.

The construction of the jury's answer that the train did not whistle in time for the crossing at first gave me some difficulty, but I think that, taken in connection with Leduc's statement, what the jury meant was that the whistle was sounded immediately before the accident, or practically at the same time as it would appear to an observer placed at a distance of three-quarters of a mile who heard the whistling at the same time as he saw the cloud of dust, sound travelling much slower than light.

If therefore the finding means that the train did not whistle at the whistling post, there is a finding that the respondent committed a breach of its statutory duty, and therefore that it was in fault. The jury could infer that if the regulation signal had been given it would have been heard by the appellant's husband and the accident might have

been averted. It was for them to say whether the failure to give the statutory signal was a contributing cause of the accident.

There is just a further remark which I venture to make. Several cases, closely resembling the present one, have been referred to where, under the doctrine governing contributory negligence, damage actions have been dismissed by reason of the negligence of the injured party. But in the province of Quebec negligence of the plaintiff contributing to, but not being the sole cause of, the accident is not a bar to the right of recovery, but only a reason for reducing the damages that the negligent plaintiff has suffered by reason of his injury. It is for the jury to say whether the plaintiff's negligence was the sole cause of the accident or merely a cause contributing thereto with the negligence of the defendant, and the verdict will stand if there be evidence in support of it. This will serve to distinguish the case under consideration from the decision of this court in *Canadian Pacific Ry. Co.* v. *Smith* (1) strongly relied on by the respondent. The decision of the Privy Council in *Canadian Pacific Ry. Co.* v. *Fréchette* (2), also cited by the respondent, is an instance of a case where an appellate court may come to the conclusion that there was no evidence to justify the verdict of the jury, but the facts in that case show that the plaintiff had done something he was forbidden to do and had thereby assumed the risk of injury. Also in *Grand Trunk Ry. Co.* v. *Labrèche* (3) referred to, the verdict was set aside because the alleged fault found against the railway company was no fault in law. In no subject perhaps in the whole realm of jurisprudence is reference to cases which turn on particular facts more apt to prove delusive. It is the rule which has been applied to the facts which should be followed, and not the conclusion which consideration of the facts themselves led the court to adopt. Were it otherwise, there would be no guiding principle in a matter where facts vary *ad infinitum.*

With great deference therefore it appears to me that the Court of King's Bench had not sufficient ground for disregarding the verdict of the jury. The question for the

(1) 62 Can. S.C.R. 134.
(2) [1915] A.C. 871.
(3) 64 Can. S.C.R. 15.

1924
LAPORTE
v.
CAN. PAC. RY. CO.
Mignault J.

appellate court was whether there was any evidence upon which the jury, if they believed it, could come to the conclusion that the regulation signals were not given or, as they put it, not given in time. It was not whether the appellate court itself found the evidence sufficient to establish fault on the part of the respondent. That again was a question for the jury and the jury alone, and as there was some evidence, as I have shewn, that the whistle was sounded practically at the time of the accident, the verdict must stand.

This does not mean that I believe that the jury should have come to the conclusion it did. The circumstances I have mentioned at the beginning of my opinion show to my mind that the driver of the car was guilty of almost incredible carelessness and brought on his own misfortune. But an appellate court is not entitled to substitute its opinion on the facts for that of the jury. Its duty is to accept the verdict if there be evidence to support it, however much it may disagree with the conclusion arrived at by the jury.

My opinion is therefore to allow the appeal with costs here and in the Court of King's Bench and to restore the judgment on the verdict.

MALOUIN J.—L'appelante réclame de la compagnie défenderesse, tant en son nom personnel qu'en sa qualité de tutrice à ses deux enfants mineurs, la somme de $26,200 à titre de dommages résultant de la mort de son mari, Oliva Paradis, tué accidentellement le 27 septembre 1922 dans une collision survenue à un passage à niveau entre le camion automobile qu'il conduisait et un train de la compagnie intimée.

Le procès a eu lieu devant un juge assisté d'un jury. Le jury étant arrivé à la conclusion que l'accident était dû à la faute commune des employés de la défenderesse et de Paradis rapporta un verdict en faveur de la demanderesse. Le jury reproche à Paradis de n'avoir pas regardé avant de traverser le passage à niveau et aux employés de la défenderesse de n'avoir pas fait crier à temps le sifflet de la locomotive.

Le jury a évalué les dommages à $12,000, mais les a réduits à $8,000, vu la faute commune des parties, accordant $4,000 à la demanderesse personnellement et $4,000 en sa

qualité de tutrice à ses deux enfants mineurs. Le juge qui a présidé au procès a accordé jugement conformément au verdict. Sur appel devant la cour du Banc du Roi, juridiction d'appel, le jugement a été infirmé et l'action renvoyée avec dépens, M. le Juge Guerin étant dissident.

Le motif donné pour infirmer le jugement est que le verdict est contraire à la preuve.

L'article 508 du code de procédure civile édicte qu'un jugement différent de celui rendu par le juge présidant au procès ou au verdict dans une cause réservée peut être rendu lorsqu'il appert d'une manière évidente de toute la preuve que nul jury ne serait fondé à rendre un verdict autre qu'en faveur de la partie qui fait la motion ou qui inscrit. En d'autres termes, cet article de la loi n'autorise le tribunal ou la cour d'appel à casser un verdict ou à infirmer un jugement basé sur un verdict que dans le cas où il n'y a aucune preuve quelconque au dossier pour le justifier.

Je soumets respectueusement que lorsqu'il y a au dossier une preuve suffisante pour créer un doute, cette preuve doit être soumise à l'appréciation du jury et son verdict doit être respecté.

Après le verdict, la demanderesse a fait motion pour jugement suivant le verdict; et la défenderesse a fait motion pour jugement nonobstant le verdict. Le président du tribunal a accordé la motion de la demanderesse et a rejeté celle de la défenderesse. Il est à présumer que si le juge présidant au procès avait été d'opinion qu'il n'y avait aucune preuve pour justifier le verdict, il aurait accordé cette dernière motion au lieu de la rejeter.

Je suis d'opinion qu'il y a suffisamment de preuve au dossier à l'appui du verdict pour empêcher le tribunal de substituer son appréciation à celle du jury sur les faits.

M. le juge Duff, dans ses notes préparées dans la présente cause, cite des extraits de la preuve qui justifient cette opinion. Il est inutile pour moi de les reproduire ici. J'y réfère.

J'infirmerais le jugement dont est appel et je rétablirais le jugement de première instance avec dépens dans les trois cours.

1924

LAPORTE v. CAN. PAC. RY. CO.

Maclean J.

MACLEAN J.— For the reasons given by Mr. Justice Duff, and Mr. Justice Mignault, I am of the opinion that the appeal should be allowed with costs here and in the court below, and the judgment of the trial court restored.

Appeal allowed with costs.

Solicitors for the appellant: *Lamothe, Gadbois & Charbonneau.*

Solicitor for the respondent: *P. C. Chassé.*

1924

*Mar. 31.
*April 22.

ABRAHAM GOLDHAMER .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Appeal—Jurisdiction—Criminal law—Conviction—Appeal by the Attorney General—Addition to sentence—Art. 1013 Cr. C. as amended by 13-14 Geo. V, c. 41, s. 9—Art. 1024 Cr. C.

The appellant was found guilty of a criminal offence and sentenced to pay a fine of $400, or to be imprisoned during three months in default of payment. After the fine had been paid, the Attorney General appealed against the sentence under Art. 1013 Cr. C., as amended by 13-14 Geo. V, c. 41, s. 9; and by judgment of the appellate court, in addition to the fine the appellant was condemned to be imprisoned for a period of six months.

Held that there is no jurisdiction in the Supreme Court of Canada to entertain an appeal, as, under section 1024 Cr. C., the right of appeal is restricted to an appeal against the affirmance of a conviction. Idington J. *dubitante.*

APPEAL from a decision of the Court of King's Bench, Appeal Side, province of Quebec, increasing the sentence imposed on the appellant upon an appeal to that court by the Attorney General for Quebec under article 1013 Cr. C. as amended by 13-14 Geo. V, c. 41, s. 9.

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

Cohen for the appellant.

Bertrand for the respondent.

---

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc.*

1924

GOLDHAMER v. THE KING.

Idington J.

IDINGTON J.—The appellant was found guilty by one of the judges of the Sessions of the Peace for the District of Montreal of having fraudulently concealed and parted with much of his properties previous to his insolvency, and other like charges, and said learned judge sentenced him to pay a fine of $400 and, on default of payment thereof, to imprisonment for six months.

The appellant immediately paid said fine. Thereupon, within what seems to me to have been a reasonable time, the Attorney General for Quebec, or the counsel for the Crown at the trial with his consent and direction, appealed to the Court of King's Bench for Quebec, under section 1013 of the Criminal Code, as amended by chapter 41 of 13-14 Geo. V, sec. 9, repealing the said section and others and substituting therefor in part section 1013 of said statute, of which subsection 2 thereof reads as follows:—

(2) A person convicted on indictment, or the Attorney General, or the counsel for the Crown at the trial, may with leave of a judge of the court of appeal, appeal to that court against the sentence passed by the trial court, unless that sentence is one fixed by law.

The Court of King's Bench having heard the case added to said sentence, imprisonment for six months.

Mr. Justice Bernier alone dissented but gave no reasons for said dissent.

Thereupon the appellant, so convicted and condemned to imprisonment, appealed from the said judgment of the Court of King's Bench to this court. Upon said appeal coming on for hearing herein, some members of our court took the objection that we had no jurisdiction.

I suggested to counsel for appellant, who was thereby taken by surprise, that he better urge anything he had to say on the merits, and take a few days to submit a further factum, answering the point of want of jurisdiction.

A week has elapsed but nothing further submitted, possibly because I had submitted to him that I could see no merits in the appeal, including the objection upon which he chiefly relied, that the fine having been paid there could be no appeal to the Court of King's Bench.

The only foundation for appeal here is the enactment in section 1024 of the Criminal Code, of which the first subsection reads as follows:—

1924

GOLDHAMER v. THE KING.

Idington J.

1024. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the court of appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

Section 1013 of the Code, as it stood until repealed as above stated, had to be read in connection with said section 1024, to clearly understand same.

But I do not see in the section or sections substituted therefor any help for us in regard to the interpretation and construction of said section 1024.

In the initial words thereof

Any person convicted of an indictable offence, whose conviction has been affirmed

I find some doubt and difficulty.

In the common use of the words "convicted" and "conviction" a man found guilty is, even before sentence, referred to as having been convicted and the finding of him as guilty a conviction.

But is that to be our legal interpretation of these words, or proper legal use thereof, unless and until he has been sentenced, and only then inclusive of the actual sentence, and thus read in this section as necessarily including the sentence, and that as determined by the Court of King's Bench, sitting in appeal.

In this latter sense of these words it is fairly arguable that there is a right of appeal.

Turning to Stroud's Judicial Dictionary I find the following:—

CONVICTED.—The word "convicted," or the "conviction" of a person accused, is equivocal. "In common parlance no doubt it is taken to mean, the verdict at the time of trial; but in strict legal sense, it is used to denote the judgment of the court" (per Tindal C.J., *Burgess* v. *Boetefeur*, cited Acquittal), and, accordingly, it was there held that a person who pleaded guilty to keeping a brothel, on an indictment instituted under s. 5, 25 G. 2, c. 36, and who at a subsequent Sessions came up for judgment, was not "convicted" when he pleaded, but when judgment was pronounced.

That is followed by citations of many decisions which may or may not be read as qualifying this dictum of Tindal C.J. I cannot therefore confidently assert and hold

that there is no appeal possible under such circumstances as involved herein.

I, however, having come to the conclusion that even if there is jurisdiction there is no case submitted herein entitling us to exercise it, and would therefore dismiss the appeal.

DUFF J.—As my brother Idington points out, the word " conviction " cannot, perhaps, be said to be capable of only one necessarily exclusive meaning, and it may be capable of being employed with a signification including the sentence. Section 1013 does, however, I think, distinguish very clearly between the conviction and the sentence for the purposes of appeal, and the Act of 13-14 Geo. V, by which the present section was brought into force, made no change in section 1024. Accordingly, I think the word " conviction " in the last mentioned section should be read in its less technical sense, and consequently that there is no right of appeal to the Supreme Court of Canada from the judgment given by a court of appeal on an appeal under subsection (2) of section 1013.

The appeal should be dismissed.

MIGNAULT J.—The appellant was found guilty of an offence under " The Bankruptcy Act " by a judge of the Sessions of the Peace in Montreal, and was sentenced to pay a fine of $400 or to be imprisoned during three months in default of payment. The fine was paid.

Under article 1013 of the Criminal Code as amended by 13-14 Geo. V, c. 41, s. 9 (1923), the Attorney General appealed against this sentence, and by judgment of the Court of King's Bench, sitting in appeal, in addition to the fine, the appellant was condemned to be imprisoned in the common gaol for the period of six months. He now appeals to this court against this judgment.

Our jurisdiction is governed by article 1024 of the Criminal Code, which states, with a proviso which need not be mentioned here, that any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under article 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction.

As now amended, article 1013 gives a right of appeal against a conviction, and against a sentence pronounced

1924
GOLDHAMER
v.
THE KING.
Mignault J.

by the trial court against a person convicted on indictment. Article 1024 was not amended by the 1923 statute and under it the right of appeal is restricted to an appeal against the affirmance of the conviction. Reading it with article 1013, as amended, the appeal from the sentence under paragraph 2 of article 1013 cannot be brought before this court.

I would therefore quash the appeal.

MALOUIN J.—Je suis d'opinion qu'il n'y a pas d'appel à cette cour du jugement rendu par la cour du Banc du Roi, juridiction d'appel, pour les raisons données par le juge Mignault.

MACLEAN J.—I concur.

Appeal dismissed.

1924
*Feb. 28.
*April 22.

THE T. H. VAN DYKE COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE LAURENTIDE COMPANY (DEFENDANT) ..... RESPONDENT.

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

Contract—Sale—Pulpwood—"1920 cut"—"About 4,000 cords"—Construction.

The appellant sold to the respondent a certain quantity of pulpwood described as follows: "All our rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords, 4,000 cords * * *."

Held, Idington J. dissenting, that in the circumstances of this case the subject matter of the sale was the entire cut of 1920, the words "about 4,000 cords" being mere words of estimate as to quantity.

Judgment of the Court of King's Bench (Q.R. 34 K.B. 565) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming the judgment of the Superior Court (1) and dismissing the appellant's action.

---

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc*.

(1) [1923] Q.R. 34 K.B. 565.

The appellant's action was brought against the respondent company upon an agreement for the sale of pulpwood, the terms of which were contained in a letter by the appellant dated December 23, 1920, confirming a verbal understanding, as follows: "We beg to confirm sale of all our rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords (4,000 cords) * * *." The appellant contends that under the contract the respondent was obliged to take the whole of its 1920 cut of rough pulpwood and claims $10,342.03 as the balance due. The respondent refused to accept and pay for more than 4,400 cords, adding to the 4,000 cords specified in the contract the usual ten percentage.

Lafleur K.C. and *A. Langlais K.C.* for the appellant.
St. Laurent K.C. for the respondent.

IDINGTON J. (dissenting).—The appellant is a lumber company operating timber limits in the county of Montmagny in the province of Quebec and makes pulpwood thereon.

The respondent is a pulp and paper company in that business at Grand'Mère, and in course thereof using pulpwood as its raw material.

In the years 1918 and 1919 respectively the respondents had by verbal contract in each of said years bought rough pulpwood from appellant.

The verbal contract for the first of said years was based on an estimate of 600 to 700 cords, but it turned out appellant was able to produce, by including purchases from small farmers in the district, and supply respondent therewith, 1,162 cords.

And for the next year the verbal contract was based on an estimate of 2,500 cords, but it turned out that by including not only its own product, but that got from farmers, as in the previous year, it was able to turn over to respondent 3,121 cords.

When the time came for dealing with the product, 1920-21, a verbal discussion took place between the respective managers of appellant and respondent at some meeting in Quebec and something was said about the possibility of 4,000 cords being supplied at same price as previous years.

1924
VAN DYKE Co. v. LAURENTIDE Co.
Idington J.

There was nothing definite reached and as the price was likely to go down the respondent's manager had issued orders that no new contracts were to be taken for purchase of rough pulpwood.

This gave rise to the following correspondence between said respective managers of the appellant and the respondent, which constitutes the only contract between said parties now in question herein.

Hamilton, the respondent's manager, wrote as follows:—

Grand'Mère, December 20, 1920.

Gordon McLeod, Esq.,
c/o Van Dyke Land Company,
56 Palace Hill,
Quebec, P.Q.

Dear sir,—It will be necessary for you to confirm sale of rough pulpwood sold me verbally when last in Quebec by letter to enable me to protect your price for this wood, as at present we are not in the market and are reducing our purchases as much as possible.

Your prompt attention to this will greatly oblige.

Yours very truly,
H. F. Hamilton,
Pulpwood Division.

and appellant replied as follows:—

Quebec, December 23, 1920.

Mr. H. J. Hamilton,
Laurentide Company, Limited,
Grand'Mère, Quebec.

Dear sir,—Replying to your letter of the 20th inst, and confirming verbal agreement made with you in Quebec a short time ago.

We beg to confirm sale of all rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords, 4,000 cords, at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

We will send you a letter from Mr. Langlois as promised very shortly.

Wishing you the compliments of the season, and with all good wishes for the new year.

Yours very truly,
T. H. VAN DYKE & Co.,
C. MacLeod,
Agent.

and respondent's manager replied:—

Grand'Mère, April 28, 1921.

T. Van Dyke Company,
58 Palace Hill, Quebec, P.Q.,
Attention Mr. G. McLeod.

Dear sirs,—I have made arrangements to permit you to start loading your pulpwood after the 1st of May at the rate of two carloads per day.

As soon as we are able to increase this, we will advise you.

Yours truly,
LAURENTIDE Co., LTD.,
H. F. Hamilton,
Logging Division.

The question raised herein is whether or not the appellant is entitled to recover for more than 4,400 cords. And that must turn upon the meaning to be attached to the words "about four thousand (4,000) cords" in said letter of 23rd December, 1920, when interpreted in light of all the surrounding circumstances and especially the evidently urgent need of accuracy.

The learned trial judge, Sir F. X. Lemieux, decided against the plaintiff, now appellant, allowing nothing beyond the price for 4,400 cords adding thereby the usual ten percentage added when a contract is made for a named specific quantity and that is accompanied by words such as "about" or "more or less" or such facts and circumstances as to indicate that such ten per cent of the named quantity as the parties concerned could be reasonably held to have had in their mutual view when contracting.

The reasons pointed out by respondent's letter above quoted clearly indicate that there was urgent need for knowing what the respondent could rely upon, and beyond which it would not be expected to go. The result shews the appellant's guess was not such as the respondent was entitled to expect and rely upon, and hence is not entitled to claim further than the learned trial judge has allowed.

The appellant was the only one to know. The respondent knew nothing of appellant's situation and facilities for production.

I need not dwell further upon the very many details and requirements upon which the argument for appellant is founded. The necessity of appellant's situation created by itself cannot justify going so far.

Contracts such as that in question cannot be interpreted properly if we disregard the peculiar surrounding facts and circumstances which led to the use of the term "about." Sometimes the circumstances may justify discarding entirely the word "about" but not here.

I agree in the main with the reasoning of the learned judges in the Court of King's Bench who concluded that the appeal from the learned trial judge should be dismissed.

The very peculiar circumstances I have alluded to which evoked the contract herein in question are such as to leave

1924

VAN DYKE Co. v. LAURENTIDE Co.

Duff J.

little room for the application of decisions cited to us and which were not founded on such peculiar circumstances as gave rise to what we are concerned with.

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

DUFF J.—The action out of which this appeal arises was brought by the appellants against the respondents upon an agreement for the sale and purchase of pulpwood, the terms of which are admittedly stated in a letter addressed by the appellants to the respondents, dated the 23rd December, 1920, in these words:

December 23, 1920.

Dear sir,—Replying to your letter of the 20th inst, and confirming verbal agreement made with you in Quebec a short time ago.

We beg to confirm sale of all rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords, 4,000 cords, at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

We will send you a letter from Mr. Langlois as promised very shortly.

Wishing you the compliments of the season, and with all good wishes for the new year.

Yours very truly,
T. H. VAN DYKE & Co.,
G. MacLeod.

It is not seriously open to dispute that the appellants' rough pulpwood now hauled and being hauled (1920 cut) amounted to approximately 5,000 cords. The price of pulpwood having fallen the respondents declined to accept more than 4,400 cords, being the quantity indicated by the figure mentioned, 4,000 cords, with the addition of ten per cent of that quantity as an allowance for inaccuracy of estimate, as admittedly contemplated by the letter.

The appellants contend that the agreement as expressed is an agreement for the sale and purchase of the whole of their rough pulpwood answering the description in the letter, and that this designation of the subject matter of the contract is not qualified by the words of quantity, "about four thousand cords." On behalf of the respondents two alternative constructions are put forward: The first of these is, that the quantity mentioned, "about four thousand cords," is the governing element of the description of the subject matter, and that the vendor was not bound to deliver more and the purchaser not bound to

accept more than that quantity. The alternative view advanced by the respondents as to the effect of the contract is that while the vendor bound himself to sell and deliver the whole of his " rough pulpwood," as described, the words of quantity import a contractual representation that the pulpwood described would not exceed in quantity 4,000 cords or thereabout.

I do not think myself that there is any difficulty in construing the language of the letter. The subject matter of the contract seems to be plainly described, and I do not think that the words of quantity introduce any qualification. If they have any effect at all they can, I think, more naturally be read as indicating the minimum quantity of rough pulpwood which may be expected to be embraced by the description. At the lowest, the effect of the words appears to be altogether too disputable to treat them as qualifying the description of the subject matter in the manner contended for by the respondents.

The majority of the court below have taken another view, and the judgments, in this sense, appear to rest upon two principal grounds. First, it is said that according to the rule in French law such a phrase as that which is here the subject of controversy imports a warranty; that the words of quantity form the governing element in the description. But the citations in support of this view appear to be far from conclusive, and the passage quoted by Mr. Justice Greenshields from 6 Marcadé, par. 2, is quite in accord with the view just indicated. As observed by Sir Montague Smith in delivering the judgment of the Judicial Committee in *McConnell* v. *Murphy* (1).

> It is seldom, in mercantile contracts, that any technical or artificial rule of law can be brought to bear upon their construction. The question really is the meaning of language, and must be the same everywhere.

The courts in England, as well as in the United States, have as a rule treated such phrases as being words of expectation and estimate only, and not amounting to warranty or to a qualification of the description of the subject matter. This is very plainly brought out in the speeches of the Law Lords in *Tancred, Arrol & Co.* v. *The Steel Company of Scotland,*

(1) [1873] L.R. 5 P.C. 203, at p. 219.

1924

VAN DYKE CO. v. LAURENTIDE CO.

Duff J.

Ltd. (1), cited by Mr. Justice Greenshields in his judgment, as well as in the judgment of Lindley L.J., in *McLay* v. *Perry* (2), and in the judgment of the Privy Council just referred to.

Then it is argued that the case comes within the scope of the rule of the French law by which, in cases of ambiguity, a contract of sale is to be read in the sense least favourable to the vendor. An argument is presented in the factum of the respondent based upon the omission from the *Code Civil* of the province of Quebec of arts. 1586, 1587 and 1602 of the *Code Napoléon;* that this rule has not formed part of the law of Quebec since the promulgation of the *Code.* Whatever significance may properly be attached to the omission mentioned, for the purposes of this case it is, I think, sufficient to refer to the judgment of Sir Montague Smith above mentioned, in which these words are found:

> * * * in cases of doubt, it may be that the interpretation should be against the vendor, but that must be understood of cases of doubt which cannot be otherwise solved. It would follow from these rules, that where a stipulation is capable of two meanings equally consistent with the language employed, that shall be taken which is most against the stipulator and in favour of the other party. But their lordships think that this contract is not properly capable of two meanings. In questions of difficult interpretation, not only two, but frequently many constructions may be suggested; and if that true construction can be arrived at with reasonable certainty, although with difficulty, then it cannot properly be said that there are two meanings to the contract.

In the case before us it is impossible, I think, to say, even admitting ambiguity, that the ambiguity is one which can be solved only by the application of the rather artificial maxim so invoked. Where ambiguity does occur in commercial contracts, it is a rule supported by good sense as well as by judicial practice to look to the previous dealings of the parties, if there have been such dealings, for assistance in ascertaining the sense in which the language of the contract has been employed by them. Now it so happens that contracts admittedly in virtually the same terms, that is to say, the same in all pertinent respects, had been made between the same parties in each of the two preceding years, and executed. In a letter dated the 16th September, addressed by the appellants to the respondents, it is asserted

(1) [1890] 15 A.C. 125. (2) [1881] 44 L.T. 152.

by the appellants that in each of these years, although the market price had risen above the contract price in the meantime, the appellants had delivered to the respondents pulpwood far in excess of the estimated quantities mentioned; the excess being in one case over twenty-five per cent, and in the other nearly one hundred per cent. This statement of fact is not disputed in the correspondence, although it is true that Mr. Hamilton, in his oral evidence, while admitting that the market price rose above the contract price in one of these years, denied that this occurred in both. I think it may be taken as established that the construction which both parties placed deliberately in one, at least, of the two preceding years upon a contract between them not sensibly different in language from that now in question, was the construction now contended for by the appellants.

The appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the trial judge be set aside and judgment entered for the plaintiff with costs of the action. The precise amount which the appellant is entitled to recover depends to some extent upon the amount of his undelivered cut for 1920 and if the parties cannot agree as to this it should be spoken to on the settlement of the minutes.

MIGNAULT J.—The difficulty here has arisen in connection with the construction and effect of a contract whereby the appellant sold to the respondent

all our rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords, 4,000 cords, at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

The contract was verbal but was reduced to writing in the above terms in a letter written by the appellant company to the respondent, at the latter's request, on the 23rd of December, 1920. The price was subsequently reduced to $15 per cord f.o.b. loading point, and the appellant's letter to the respondent, dated the 28th of January, 1921, confirming the reduction, referred to the

sale of all our rough pulpwood cut during 1920.

This letter was accepted by the respondent's representative, Mr. H. J. Hamilton, the latter states in his testimony.

The whole question now is whether the sale was of all the appellant's rough pulpwood cut during the 1920 season,

1924

VAN DYKE CO. v. LAURENTIDE CO.

Mignault J.

or merely of "about 4,000 cords" of this pulpwood. The two courts below placed the latter construction on the contract, and consequently decided that the respondent having taken and paid for 4,400 cords had fulfilled its entire obligation under the contract. They considered that an addition of 10 per cent to the 4,000 cords would give full effect to the word "about." The appellant appeals and contends that under the contract the respondent was obliged to take the whole of its 1920 cut of rough pulpwood, and claims the sum of $10,342.03 as the balance due.

There being here merely a question of construction, I do not think it necessary to look for similar cases in order to place a meaning on the language of the contract. The judgments of the learned judges of the Court of King's Bench have moreover almost exhausted the possibility of further research and they have dealt both with English and French sources of authority. I do not think it necessary to follow their example and were I to do so I would restrict my inquiry to civil law authorities, the question arising under the civil and not under the common law. But, with great deference, I think that the language of the contract is clear and cannot give rise to any doubt as to its meaning.

What the appellant sold to the respondent was

all our rough pulpwood now hauled and being hauled (1920 cut).

And in its letter of January 28 to the respondent, it again refers to the "sale of all our rough pulpwood cut during 1920." It is true that in the appellant's letter of December 23rd there is an estimate of quantity, "about 4,000 cords." But these are obviously words of estimate, and not a description of the thing sold. This is not a case where a contract is attacked because of an error induced by an estimate made by one of the parties. Both the appellant and the respondent adhere to the contract and the question is what did the former sell and the latter buy? On my construction of the appellant's letter, the sale was of all its rough pulpwood cut of 1920 then hauled and being hauled, and not of a quantity of rough pulpwood estimated at about 4,000 cords.

The only remaining question is what amount is due to the appellant on this contract? The total quantity of rough

pulpwood actually shipped by the appellant to the respondent, according to a statement filed by the appellant was, after correcting an error in addition, 4917·61 cords. The appellant had on hand 509·21 cords, and this was not shipped on account of the respondent's refusal to accept any more. Mr. Hamilton, the respondent's representative, in his testimony, stated that on the pulpwood actually shipped to the respondent by the appellant, in excess of the quantity paid for, there would be due to the appellant, at contract prices, $2,841.11.

The state of accounts between the parties, according to exhibit P. 6, and to Mr. Hamilton's statement, would be then as follows:

Balance due on rough pulpwood actually shipped	$2,841 11
509·21 cords in hand at $15	7,638 15
	$10,479 26

It would appear, however, that out of the pulpwood in hand a certain quantity was made up of pulpwood purchased by the appellant from farmers, which would not come within the description of all the pulpwood cut by the appellant which alone was comprised in the sale it made to the respondent. By the copy of the appellant's books it purchased 302 cords of rough pulpwood from farmers. This wood, at $15 per cord, would amount to $4,530, and should not be charged to the respondent.

Deducting this sum of $4,530 from the above amount of $10,479.26, the balance due by the respondent to the appellant would be $5,949.26, and the appellant must deliver to the respondent 207·21 cords of rough pulpwood of the 1920 cut, this figure representing the residue of 509·21 cords after deducting the 302 cords purchased from farmers.

I would, therefore, with great respect, allow the appeal with costs throughout and give judgment to the appellant for $5,949.26 with interest from the service of the action upon the appellant shipping to the respondent 207·21 cords of rough pulpwood of the 1920 cut in accordance with the terms of the contract.

The above figures of the undelivered balance of the pulpwood, after deduction of wood bought from the farmers,

1924
VAN DYKE CO. v. LAURENTIDE CO.
Malouin J.

I have taken from the appellant's books. But the judgment of the court gives the parties the opportunity of coming to an agreement as to the balance due on the undelivered pulpwood, the matter, if they fail to agree, to be spoken to on the settlement of the minutes.

MALOUIN J.—L'appelante poursuit l'intimée pour une somme de $10,342.03, balance de prix d'un contrat de vente de bois de pulpe non écorcé.

Le contrat intervenu entre les parties est verbal; mais il a été confirmé le 23 décembre 1920 dans une lettre adressée par l'appelante à l'intimée dans les termes suivants:

> We beg to confirm sale of all rough pulpwood now hauled and being hauled (1920 cut) about 4,000 cords, at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

Ce prix fut plus tard réduit à $15 par corde, de consentement mutuel.

L'appelante a expédié à l'intimé 4,967.61 cordes et elle veut encore lui livrer 509.21 cordes.

L'intimée prétend qu'en vertu de son contrat elle n'est pas tenue d'accepter plus de 4,400 cordes et se refuse d'accepter la différence.

La cour supérieure a décidé que l'intimée n'était pas tenue d'accepter plus de 4,000 cordes de bois avec en plus une marge de 10 pour 100.

La cour d'appel a confirmé le jugement de première instance, le Juge Greenshields étant dissident. C'est ce jugement qui nous est soumis.

Pour décider la question en litige, il faut se demander quel a été l'objet de la vente, quelle est la chose que l'appelante a vendue et qu'elle a promis de livrer et que l'intimée a promis d'accepter.

La réponse à cette question se trouve dans le contrat même. L'appelante a vendu toute sa coupe de bois de pulpe non écorcé de 1920. Je soumets avec toute la déférence possible que la coupe de 1920 est l'objet de la vente. Les mots "4,000 cordes environ" qui ont été ajoutés dans le contrat ne sont là que comme estimation probable du nombre de cordes de bois qui se trouvait dans le lot vendu, ne liant en aucune manière la partie qui l'a faite.

Le rôle ou la fonction du mot *environ* varie avec les circonstances. Si ce mot est ajouté à l'objet du contrat, il a sa

valeur et il faut en tenir compte; mais s'il est ajouté à une chose accessoire il est sans importance.

Je reproduis ci-dessous un passage de l'*American and English Encyclopedia of Law*, absolument au point, que je lis au mot "about":

> The Supreme Court of the United States has laid down three rules for the construction of the terms "about" or "more or less" in executory contracts of sale, and the cases set out in the notes will be found in accord with these rules:
>
> First. Where the goods are identified by reference to independent circumstances, e.g., all the goods deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or to be shipped in certain vessels, and the quantity is named with the qualification of "about," or "more or less," or words of like import, the contract applies to the specific goods, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.
>
> Second. Where no such independent circumstances are referred to, and the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, in such cases, only provides against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.
>
> Third. But the qualifying words may be supplemented by other stipulations or conditions, e.g., "as much as the seller shall manufacture or the buyer shall require," and they will then govern the contract.

Je cite ce passage comme autorité de raison. Les règles qui y sont posées sont raisonnables et peuvent être appliquées utilement dans les contrats passés dans la province de Québec comme partout ailleurs. Au reste, elles sont conformes aux décisions rendues par le conseil privé dans les causes citées par M. le juge Greenshields en cour d'appel et celles citées par M. le juge Duff dans ses notes préparées dans la présente cause. Ces règles sont aussi conformes à celles posées par Marcadé, vol. VI, en commentant les articles 1585 et 1586 du Code Napoléon cités par M. le juge Greenshields en cour d'appel.

Par ces motifs, j'infirmerais le jugement de la cour supérieure et de la cour d'appel et je condamnerais la défenderesse-intimée à payer à la demanderesse la somme de $2,841.11 avec intérêt, étant la balance du prix du bois livré, avec en outre le prix à $15 la corde du bois non livré de sa coupe de 1920 (mais non celui acheté des fermiers) payable sur livraison de bois, avec dépens des trois cours.

1924
VAN DYKE CO. v. LAURENTIDE CO.
Maclean J.

MACLEAN J.—This appeal arises out of an action brought by the appellant against the respondent, under a contract for the purchase and sale of pulpwood, the appellant being a producer of pulpwood, and the respondent a manufacturer of pulp and paper. The material part of the agreement is contained in a letter dated the 23rd December, 1920, written by the appellant, and in response to a letter from a representative of the respondent, asking confirmation of an oral agreement previously made respecting the same subject matter. The important part of the letter reads as follows:

> We beg to confirm sale of all our rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords (4,000 cords) at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

All the relevant facts are fully set forth in the judgments given in the court below, and I need not repeat them here, nor are they seriously in dispute. Neither is the good faith of the parties in the action in question.

The question is whether on the true construction of the contract, the respondent is liable to take delivery of the remainder of the appellant's entire cut of rough pulpwood for 1920, about 5,000 cords, and the point for our determination is whether, under the contract, there was a sale of about 5,000 cords of pulpwood, and whether the quantity, "*about four thousand cords*" are mere words of estimate, the subject matter of the sale being "all our rough pulpwood now hauled and being hauled (1920 cut)."

I am of the opinion that the subject matter of the sale was all the rough pulpwood cut by the appellant in 1920. The appellant was on the one hand contracting to sell, and the respondent on the other hand contracting to buy, the appellant's 1920 cut of rough pulpwood, whatever that might happen to be. The estimate of 4,000 cords was substantially exceeded, but nevertheless the buyer is bound to take the excess whatever it turns out to be. In the course of previous dealings between the parties, in respect of the same subject matter and under contracts of substantially the same terms, the respondent accepted deliveries in excess of quantities estimated.

The respondent bargained for the 1920 cut of rough pulpwood, and it was that he purchased. The words "about 4,000 cords" are used merely as an estimate. In *McLay*

& Company v. *Perry & Company* (1), the parties were dealing with a heap of scrap iron in a yard. The estimate was much greater than the heap turned out to be but inasmuch as it was held that what the parties bargained about was the heap, the fact that the estimate of what was in the heap was incorrect, was immaterial. In cases in which the bargaining was about "cargo" or "remainder of cargo" of some commodity, followed by estimates of quantity, it has been held that effect must be given to these words without reference to the quantity specified; *Levi* v. *Berk* (2); *Borrowman* v. *Drayton* (3). The offer to supply "all the steel required by you for the Forth bridge" was held to be the subject matter of the contract and not to be affected by words estimating the probable quantity required, *Tancred Arrol & Co.* v. *The Steel Company of Scotland* (4). This rule of construction is affirmed in *McConnell* v. *Murphy* (5).

In all these cases one must look to the particular contract and construe it. It is perhaps difficult to lay down a general rule, but one must apply the ordinary rules of construction and endeavour to give to the words their reasonable and ordinary meaning. I think it is quite clear that in this case the appellant sold and the respondent purchased, the 1920 cut of rough pulpwood. The language used, and which is quite plain, permits only of this meaning. That was the subject matter of the contract, and it is not to be affected by any estimate of quantity. In my view the correct interpretation of this contract requires the acceptance of delivery by the respondent, of the quantity of pulpwood tendered by the appellant.

I would allow the appeal with costs here and in the Court of Appeal, and the judgment of the trial judge should be set aside and judgment entered for the plaintiff with costs. The amount of the undelivered pulpwood belonging to the cut of 1920 has not been precisely fixed. If the parties can-

(1) 44 L.T. 152.
(2) [1885] 2 Times L.R. 898, at p. 899.
(3) [1876] 2 Ex. D. 15.
(4) 15 App. Cas. 125.
(5) L.R. 5 P.C. 203 at p. 219.

1924
VAN DYKE CO. v. LAURENTIDE CO.
Maclean J.

not agree upon this the point may be spoken to on the settlement of the minutes.

Appeal allowed with costs.

Solicitors for the appellant: *Roy, Langlais, Langlais & Godbout.*

Solicitors for the respondent: *St. Laurent, Gagné, Devlin & Taschereau.*

1924
*Mar. 25, 26.
*April 22.

DAVID DIAMOND (PLAINTIFF).....APPELLANT.

AND

THE WESTERN REALTY COMPANY AND OTHERS (DEFENDANT)..... } RESPONDENT.

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

Judgment—Interlocutory—Res judicata—Appeal—Final judgment—Discretion.

An interlocutory judgment which definitely decides a question of law and from which no appeal is taken may be *res judicata* when the question is raised between the same parties even in the same action.

On appeal to the Appellate Division from a decision of a judge refusing to grant an application for payment out of court of the applicant of over $6,000 the appeal court granted the application to the extent of $800 but refused any order as to the residue until rights of other parties had been determined.

Held, Idington J. dissenting, that the judgment of the Appellate Division was not a "final judgment" as that term is defined in the Supreme Court Act and was non-appealable on the further ground that it is discretionary in its nature. Supreme Court Act, section 37.

The judgment appealed against was affirmed as to the question of damages.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming with a variation the judgment of a judge on appeal from a referee's report and on an application for payment of money out of court.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff and Malouin JJ. and Maclean J. *ad hoc.*

In 1914 the appellant agreed to purchase certain lands from the respondent company on terms and conditions set out in the agreement and went into possession and sold some lots. In 1916 respondent purported to cancel the agreement, took possession of the land and cancelled the agreements for sale made by appellant and made new ones with the same parties. Appellant then brought action to have his agreement declared to be in force and for an accounting and damages. In this action the Supreme Court of Canada directed a reference to ascertain the damages suffered on matters specified. The referee reported over $6,000 due to appellant which was paid into court and a further sum due which was struck out by the judge in chambers who also refused an application by appellant for payment to him of the money in court. The appellant appealed to the Appellate Division to obtain the amount so struck out of the report and for payment of the money in court. The appeal was dismissed but the judgment was varied by allowing $800 of the money in court to be paid to appellant, no order being made as to the residue until the rights of the mortgage of the land originally purchased were determined. The appellant then took this appeal.

Christopher Robinson K.C. and *Cohen* for the appellant.

H. J. Scott K.C. and *Newman* for the respondents.

THE CHIEF JUSTICE.—For the reasons stated by my brother Duff, I would dismiss this appeal with costs.

IDINGTON J. (dissenting).—The appellant entered into an agreement on the 6th day of November, 1914, with the respondents the Western Realty Company, Limited, and Davidson and one Hunter, whereby the said respondent company agreed to sell a large number of lots in the subdivision of part of lot no. 114 and lot no. 125, in the township of Stamford, known at Lundy Park, according to registered plan no. 44, and except lots coloured on the blueprint attached to said agreement.

The prices of each of said lots were named and the terms of payment set forth in said agreement.

The moving causes of the agreement evidently were that the respondent company had not been very successful in

1924
DIAMOND v. THE WESTERN REALTY CO.
Idington J.

their venture to sell and hoped that the appellant, an experienced hand at the business, might, if encouraged by a liberal profit, do very much better than it had done.

The surplus over the prices named for each class or number was to become the property of the appellant.

The prices named, so far as necessary to entitle the appellant's sub-purchasers to get conveyances clear of encumbrances, were to be paid to the mortgagees, Davidson (now one of the respondents) and one Hunter—the latter being no longer one.

The sales were to be made at a rate or rates of progress set forth in the agreement and, in default thereof, the further operation of the agreement was to cease upon notice to the now appellant.

He seems to have been very successful at first but later on rather slower than strictly entitled to be and, on the 19th of July, 1916, the said Western Realty Company gave notice pretending to cancel the said agreement as of said date, and took possession of the property.

The present appellant thereupon, on the 6th August, 1916, brought this action against the respondents and was unsuccessful at the trial and on appeal until reaching this court, when we found that the conduct of respondents herein had been such as to waive the right of either to give the notice of cancellation above referred to, and awarded him damages for the gross breach of the contract by not only dispossessing him of the property, but also advertising the fact.

The respondent Davidson was also held liable personally for damages for enticing away from his employment said Charles Bettal.

And we directed there should be a reference to a referee to assess said respective claims for damages, and made several other directions.

The Official Referee made his first report on the 8th June, 1920.

Upon appeal to Mr. Justice Middleton he made a number of changes in that report and sent it back to the referee, when he, as directed, went into many new features and reported finally on the 21st June, 1921.

By that report he found damages under the direction

of our judgment to something over $6,000, which does not surprise me but seems to have appalled Mr. Justice Middleton who disallowed any damages.

From that judgment appeal was taken by the appellant herein to the Appellate Division of the Supreme Court of Ontario.

On the 7th September, 1918, an order was made appointing Davidson receiver of moneys payable by sub-purchasers of the appellant herein but as he had failed to account therefor Mr. Justice Middleton made an order that he should pass his accounts as such receiver before the said referee having in charge the other reference under the said judgment of this court.

It would seem as if after some difficulty he was got to do so and the referee reported the sum of $6,619.27 as having been got by him from sub-purchasers of the appellant.

Again that sum was reduced by order of Mr. Justice Middleton to $6,393.27, and that forms an item which came up for consideration by the said Appellate Division and that court refused to direct the payment out to the appellant of said sum.

Hence the appeal here as to the said damages and said moneys in court.

In the result the appellant's money is withheld apparently to meet some claim of the respondents, or either of them.

According to my interpretation of the contract neither respondent had any right to collect said moneys or meddle with same but having done so merely as custodian under the direction of the court they are, I submit, in the hands of the court merely for the appellant.

As I understood whilst considering this appeal that the majority of this court were taking another view and holding that the appeal should be dismissed I concluded it would be entirely useless labour to go further into details and verify some of the items of the allowance for damages as I had intended to do, and the accuracy of the figures of what appellant is entitled to have paid out of court.

I desire now only to present my reasons for dissenting from the judgment of the majority.

1924

DIAMOND v. THE WESTERN REALTY CO.

Idington J.

The question of the case not being ripe for judgment seems to me answered by what I have just said.

And as to the suggestion, only very mildly or faintly put forward in argument, that the appellant should have appealed from Mr. Justice Middleton's first ruling that the report of the referee exceeded his jurisdiction, with that ruling I agree and clauses 12 and 13 were properly stricken out.

I fail to see how there could have been any legitimate appeal. And I fail to see how, under Mr. Justice Middleton's direction, the damages should not be stated in figures by the referee and properly assessed, and the items of interest and taxes the appellant might have been freed from by prosecuting and possibly finishing the work had he not been improperly meddled with, are clearly, to my mind, deserving of the most serious consideration both directly and indirectly.

To say that there is no evidence of any damages therein or any other aspect of the wrongful dealing by respondent with appellant's rights from the 19th July, 1918, to 17th February, 1919, seems beyond my comprehension after much reading of the evidence herein.

Who knowing of the world and its affairs would like to take that as a guide to his chances in a deal such as in question?

I would allow the appeal subject possibly to some modification of the figures.

DUFF J.—Effect must, I think, be given to Mr. Scott's objection that sub-paragraph (*b*) of the fourth paragraph of the judgment appealed from, in which the court refuses to make any order in respect of the residue of the moneys paid into court until the rights of the mortgagees have been ascertained, and without notice to purchasers who have not been received releases from the mortgagees, is not appealable. The judgment, in this part of it, does not determine " in whole or in part any substantive right " of the parties (3-4 Geo. V, c. 51, s. 2 (*e*); moreover, in this respect the judgment is discretionary in its nature within the meaning of R.S.C., c. 139, s. 45.

The other question concerns the appellant's right to damages under clause 5 (*b*) of the judgment of this court on the 17th February, 1919, under which a reference is ordered to determine

what damages have been suffered by the appellant by reason of the breaches by the respondent company of the said agreement dated the 6th of November, 1914, and of the wrongful interference by the respondent company with the rights of the appellant under said last mentioned agreements made by the appellant for the sale of lots

in the subdivision in question. The referee, by his report of the 8th June 1920, directed (clauses 12 and 13 of the report), in purporting to deal with the matters referred under this head, that the date from which interest was payable by the appellant under the agreement of the 6th November, 1914, should be postponed for fifteen months and eighteen days, and the date from which taxes were payable should be postponed for seventeen months and twelve days respectively, after the confirmation of the final report. These clauses of the report (clauses 12 and 13) were struck out by Middleton J., on appeal, and the report was referred back to the referee to consider whether the appellant was entitled, under clause 5 (*b*) of the judgment, to any damages "in lieu of the matters dealt with" by those clauses. On this subject Middleton J., says:—

This, as I understand it, covers two inquiries: first, as to damages by reason of breach of the agreement; and secondly, damages by reason of wrongful interference by the respondents with Diamond's sub-purchasers; and, thirdly, the Master is to find and report the damages suffered by the appellant by reason of the tampering with Bettel.

1. By paragraph 12 of the Master's report he finds that the date from which interest is payable by the plaintiff should be postponed for a period of fifteen months and eighteen days after the date on which the final report is confirmed.

By the agreement it is provided that no interest shall be payable by the purchaser of a period three years from the 6th of November, 1914, but after the expiration of that period the purchaser shall pay on the unpaid purchase money, interest at the rate of six per cent per annum, payable half-yearly. The Supreme Court has declared that this agreement, in its entirety is a valid and subsisting agreement, and I do not think that the Master had any jurisdiction to make the direction given.

2. By paragraph 13 of the report the Master has found that the date from which taxes are payable as provided by the agreement is to be postponed for a period of seventeen months and twelve days after the date on which the final report is confirmed. The agreement provides that the vendor shall pay the taxes upon the whole of the property up to and inclusive of the year 1917, and, for the reasons given in dealing with the question of taxes, I can find no jurisdiction upon the reference to make the direction complained of.

1924

DIAMOND v. THE WESTERN REALTY CO.

Duff J.

The referee, by his second report, dated 21st June, 1921, found that the appellant was entitled against the respondent company under clause 5 (*b*) of the judgment to the sum of $6,763.38 as damages. But this sum allowed by the referee as damages is made up of a series of items considered by him to be the equivalent, in a pecuniary sense, of the postponements allowed by his previous report and disallowed by the judgment of Middleton J. On appeal from this second report, Middleton J. discusses this feature of the report thus:—

> The next matter is the finding of the Master as to the damages to be allowed by reason of the wrongful cancellation of the agreements. This, I think, has been dealt with by the Master in an entirely erroneous way. In an earlier report he had followed, substantially, the same course and I allowed the appeal referring it back to the Master to allot damages upon a proper footing and my judgment was not appealed from. The present report is a reiteration of what was then deemed to be erroneous. What the Master has done is to allow to Diamond, by way of damages, a sum equivalent to interest on the amount of unpaid purchase money from November, 1917, to the 30th of June, 1921, which he estimates as the date upon which his report would become confirmed, and interest over a further period of six months thereafter, and a third sum as representing six months' interest on the price of 50 lots at $65 per lot, a fourth sum representing the interest on the price of 100 lots at $65 per lot for three months, and a fifth sum, representing taxes from 1st January, 1918, to the 30th June, 1921, and a sixth sum representing the assumed charge of the taxes for 17 months and 12 days up to the 1st July, 1921, these sums amounting to something over $6,000. It is manifestly inconceivable that this is the proper measure of damages. The theory is that because the agreement was cancelled when Diamond comes to purchase the remaining lots he may have to pay interest upon his purchase money, and he may have to pay taxes. But he has not paid this interest and he may never have to pay it; he may never carry out his purchase or pay the purchase price. What the Supreme Court no doubt thought was that damages should be paid by the company by reason of its wrongful interference with Diamond's right to purchase and sell to sub-purchasers. If it could be shewn that he had some organized scheme on hand for the selling of this land, and he had lost purchasers by reason of the wrongful cancellation, there would be some foundation for such a claim. He had already recovered damages for what was actually done. The company took over his organization, retained his agent and sold lots wherever a purchaser could be found, and it is not suggested in the evidence that any sale could have been made other than those that were made. Five hundred dollars has been fixed, and paid, in discharge of the claim for wrongful interference, and it has not been shewn that outside of this any damage whatever has been sustained. There was a period from the date of the cancellation to the date of the Supreme Court Judgment, that is, from 19th July, 1916, to 7th February, 1919, in which the company appeared as vendor instead of Diamond, but Diamond has taken over all those agreements, he has, on the accounting received credit for nine

thousand odd dollars paid under them, and there is a further sum of about four thousand dollars to be paid by sub-purchasers of which he will have the benefit. All these accounts have been obtained for $900 allowed by way of commission, which is much less than the actual outlay for agent's commission and advertising. I think that this claim for damages is entirely unfounded and should be disallowed. As the company is in liquidation and has no assets, this matter is not one of importance, for clearly no such liability for damages could be allowed to interfere with the rights of the mortgagees whose claim will overtop the balance due for purchase money if the contract is carried out in its entirety.

On appeal to the Court of Appeal the judgment of Middleton J. was on this point affirmed.

I agree with the view of Middleton J. Virtually there is a finding of fact by him that the appellant, having had the advantage of the efforts put forth and the moneys expended by the Western Realty Company for the purpose of selling the land in which the appellant was interested, had not in fact suffered any loss (within the categories of damages the referee was directed to consider) other than that for which compensation had been made by the allowance ($300) mentioned. That finding of fact cannot be successfully impeached.

In truth, in the argument addressed to us by Mr. Robinson it was hardly contended that there was evidence which could justify a finding that damages had in fact been sustained by the appellant to the amount found by the referee. The real point of his argument was that Diamond having been prevented from performing his contract by the vendor, he was in point of law relieved from his obligation to pay interest and taxes accruing during the interregnum or for a period corresponding with the interregnum.

Now to this argument there appears to be one conclusive answer. The point raised by it was decided against Diamond in the judgment given by Mr. Justice Middleton on the appeal from the first report. The claim thus advanced was one he held which the referee, under the terms of the reference, had no jurisdiction to examine. This judgment of the learned judge was a definite decision upon a definite point of law. From that decision no appeal was taken, and it seems to put an end to the controversy.

It is true that in a sense the decision was interlocutory; that is to say, the proceeding in which it was given was an

1924
DIAMOND v. THE WESTERN REALTY CO.
Duff J.

interlocutory proceeding; but it was nevertheless a final decision in the sense that in the absence of appeal it became binding upon all parties to it.

As Lord Macnaghten said, in *Badar Bee* v. *Habib Merican Noordin* (1):—

> In the words of the Digest, lib. xliv, t. 2, s. 7 "*exceptio rei judicatae obstat quotiens eadem quaestio inter easdem personas revocatur.*" It is not competent for the court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time.

The application of the principle is not affected, it is, perhaps, needless to say, by the circumstance that the first decision is pronounced in course of the same action; *Badar Bee* v. *Habib* (1); *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (2); *Hesseltine* v. *Nelles* (3); nor is it material that the reasons for judgment, as distinguished from the formal judgment itself, must be examined in order to ascertain the scope of that decision. *Hook* v. *Administrator General of Bengal* (4); *Ramachandra Rao* v. *Ramachandra Rao* (5).

The appeal should be dismissed with costs.

MALOUIN J.—I would dismiss this appeal with costs for the reasons assigned by Mr. Justice Duff.

MACLEAN J.—I concur in the judgment which has been prepared by Mr. Justice Duff and think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cohen & Cohen.*

Solicitor for the respondent Davidson: *George E. Newman.*

Solicitors for the respondent Western Realty Co.: *McMaster, Montgomery, Fleury & Co.*

(1) [1909] A.C. 615 at page 623.
(2) [1883] 11 Ind. App. 37.
(3) [1912] 47 Can. S.C.R. 230.
(4) [1921] 48 Ind. App. 187, at pp. 192-4.
(5) [1922] 49 Ind. App. 129 at pp. 137-8.

IN THE MATTER OF THE VALIDITY OF THE MANITOBA ACT, 13 GEORGE V, CHAPTER 17, INTITULED: "AN ACT TO PROVIDE FOR THE COLLECTION OF A TAX FROM PERSONS SELLING GRAIN FOR FUTURE DELIVERY."

1924
*Feb. 5.
*May 13.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

Constitutional law—Statute—Validity—Grain Futures Taxation Act, 13 Geo. V, c. 17 (Man.)

The Grain Futures Taxation Act, of Manitoba, purporting to impose a tax upon every person whether broker, agent or principal, entering into a contract for the sale of grain for future delivery, is *ultra vires* of the legislature.

Reference by the Governor General in Council referring to the Supreme Court of Canada for hearing and consideration the following questions:—

1. Had the legislature of Manitoba authority to enact chapter 17 of its statutes of 1923, intituled "An Act to provide for the collection of a Tax from persons selling grain for Future Delivery?"

2. If the said Act be, in the opinion of the Court, *ultra vires* in part only, then in what particulars is it *ultra vires?*

Lafleur K.C. for the provinces of Saskatchewan and Alberta attacked the said Act as *ultra vires.*

Newcombe K.C. for the Dominion of Canada.

Hudson K.C. for the province of Manitoba supported the Act.

Geoffrion K.C. for the province of Quebec.

Lafleur K.C. is heard. The Act provides for indirect taxation of the ultimate purchaser. The legislature cannot alter the nature of it by styling it direct. See *Barthe* v. *Alleyn Sharples* (1); *Cotton* v. *The King* (2). The cases relied on by counsel for Manitoba are easily distinguishable.

Newcombe K.C. is heard for the Dominion of Canada.

Hudson K.C. for Manitoba. The decisions of the Judicial Committee of the Privy Council show that, judged by the course of dealing in the grain business, this tax is direct

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Mignault and Malouin JJ.

(The Chief Justice presided at the hearing but died before judgment was given.)

(1) [1919] 60 Can. S.C.R. 1. (2) [1914] A.C. 176.

1924

IN THE MATTER OF VALIDITY OF MANITOBA ACT.

Idington J.

according to Mill's definition. *Bank of Toronto* v. *Lambe* (1); *Brewers and Malsters Assoc. of Ontario* v. *Attorney General of Ontario* (2).

The validity of the Act will be presumed. *Macleod* v. *Attorney General of New South Wales* (3).

IDINGTON J.—This reference submits two questions as follows:—

1. Had the legislature of Manitoba authority to enact chapter 17 of its statutes of 1923, intituled "An Act to provide for the collection of a Tax from persons selling grain for Future Delivery?"

2. If the said Act be, in the opinion of the Court, *ultra vires* in part only, then in what particulars is it *ultra vires?*

Section 3 of said Act enacts as follows:—

3. Upon every contract of sale of grain for future delivery made at, on or in any exchange, or similar institution or place of business in Manitoba, except as hereinafter provided, the seller or his broker or agent shall pay to His Majesty for the public use of the province a tax computed upon the gross quantities of grain sold or agreed to be sold, as follows: Upon every thousand bushels of flaxseed, twelve cents; upon every thousand bushels of wheat, six cents; upon every thousand bushels of oats, barley or rye, three cents.

The chief question argued herein was whether this enactment is within the power of the Provincial Legislature which admittedly is confined to item no. 2 of section 92 of the B.N.A. Act, 1867, for the power to impose the tax.

And the old-time dispute as to what may fall within the words therein "Direct taxation within the province" is started again, under some rather curious conditions peculiar to the city of Winnipeg and the province of Manitoba.

The tax is specific upon the respective quantities named of each kind of grain in question. It cannot, therefore, find any support for the maintenance and enforcement of a tax by way of licence fee for permission to carry on business as was upheld in the case of *Brewers and Malsters Association of Ontario* v. *The Attorney General of Ontario* (4).

It is therefore quite open for the provinces objecting to this legislation to argue, as they have done, not only that it is quite within the right of the broker or agent buying to add to the price current this tax, but that it is the inevitable result of his being human that he will do so. Hence it is argued that it cannot be said to be direct taxation that is imposed. I must say that there is in the cases cited much to support such contention.

(1) [1887] 12 App. Cas. 575.
(2) [1897] A.C. 231.
(3) [1891] A.C. 455.
(4) [1897] A.C. 231.

Indeed the clear and obvious result in fact inevitably leads me to the conclusion that there is involved in the enforcement of such legislation a clear violation, as regards grain coming from Saskatchewan or Alberta, of section 121 of the B.N.A. Act, 1867, which reads as follows:—

> 121. All articles of the Growth, Produce, or Manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces.

Why the objection taken in the letter of complaint from the Attorney General of Saskatchewan to the Minister of Justice for Canada seems to have been dropped I cannot say.

To me it seems an invitation to legislatures disposed to violate or ignore said enactment—as some have been known to do—to await such recognition as a means of entitling them to enact similar statutes, and by degrees get rid of such express prohibition.

In this case it will become all the more offensive, if the Act now in question be upheld, as it leads to the favouring of the province of Manitoba, which surrounds Winnipeg, the centre of the grain trade of the West, getting by virtue of the exceptions in section 4 of the said Act a very serious advantage over more remote provinces.

It would be easy for these grain growers, within a day's drive of Winnipeg, to take advantage of the exceptions, whilst almost impossible for those in Alberta and Saskatchewan to do so, in ways I need not dwell upon but obvious to any one giving the exceptions and surrounding circumstances careful study.

I am of the opinion that, for the foregoing reasons alone, the Act in question is *ultra vires*.

I can see no useful purpose that any part of it can serve if I am right in the views I have expressed.

We must recognize the well known facts that crossing Manitoba is, for grain growers west thereof, almost an absolute necessity in order to get to their best market, whether we call it Liverpool or Fort William, and all important therefore that no impediment be thrown in their way.

And the grain dealers in either of said western provinces having bought from the farmers therein their crops of grain grown there, or part thereof, are entitled to enter Mani-

1924

IN THE MATTER OF VALIDITY OF MANITOBA ACT.

Duff J.

toba, and even Winnipeg, and sell such crop there free of any tax, if said section 121 is to mean anything.

It is quite clear that under the Act in question said grain dealers in doing so will have to pay said tax.

And that, without touching or playing upon the old question of direct or indirect tax, renders the Act *ultra vires*.

DUFF J.—This reference raises again the question of the construction of head no. 2 of section 92 of the British North America Act. The legislation in dispute is an Act of the Legislature of Manitoba, c. 3, passed in the session of 1923, entitled An Act to Provide for the Collection of a Tax from Persons Selling Grain for Future Delivery. The important sections are sections 3, 4 and 5, and they are in these terms:

3. Upon every contract of sale of grain for future delivery made at, on or in any exchange, or similar institution or place of business in Manitoba, except as hereinafter provided, the seller or his broker or agent shall pay to His Majesty for the public use of the province a tax computed upon the gross quantities of grain sold or agreed to be sold, as follows: Upon every thousand bushels of flaxseed, twelve cents; upon every thousand bushels of wheat, six cents; upon every thousand bushels of oats, barley or rye, three cents.

4. No such tax shall be payable in any case in which:

(*a*) the seller is the grower of the grain, or

(*b*) either party to the contract is the owner or tenant of the land upon which the grain is to be grown, or

(*c*) the sales are cash sales of grain or other products or merchandise which in good faith are actually intended for immediate or deferred delivery (such transactions for the purposes of this Act to be evidenced by the actual transfer of the tickets, storage or warehouse receipts, bills of lading or lake shippers' clearance receipts, or other documents of title for grain transferring actual ownership from the vendor to the purchaser in exchange for the price at the maturity of the contract), or

(*d*) the sales are "transfer" or "scratch sales" or "pass-outs," provided that the purchase and sale are made at the same exchange, on the same day, at the same price, and for the accounts of the same person, or

(*e*) the sales are made by a broker on account of a principal, and the name of the principal is not disclosed to the buyer, provided the principal sells to the broker the same quantity and the same grade and kind of grain at the same price, on the same day, on the same exchange, the only tax in this case being the tax payable by the principal.

5. The tax imposed by this Act shall be a direct tax upon the person actually entering into the contract of sale, whether such person is the principal in the contract or is acting only in the capacity of a broker or agent for some other person and is imposed solely in order to supplement the revenues of this province.

Against this legislation the governments of Saskatchewan and Alberta protested and petitioned the government of the Dominion to put into effect the power of disallowance;

and the question of the validity of the statute was referred to this court by an order of the Governor in Council. The grounds of attack are set out very clearly in the correspondence which has been put before us, and an agreed statement of facts placed in our hands by counsel indicates the course of business in connection with dealings in western grain. As a rule a sale of grain, whether by the farmer graingrower or the country warehouseman or the lake terminal dealer, is accompanied by a "hedge" by the purchaser, who sells an equivalent quantity for future delivery, which sale he in turn cancels as a rule by a purchase for future delivery when the grain to which he has actually acquired the title is sold. These transactions by grain dealing firms or companies—elevator companies, milling companies and exporters—are effected in most, though by no means in all, cases on the Winnipeg Grain Exchange, and constitute a large part of the dealings in futures. Then a good many transactions take place through the medium of brokers, and dealers, members of the Exchange, acting as brokers, who act for persons who are not members of the Exchange, and receive a commission for their services. Then again, members of the Exchange buy and sell future rights on their own account, usually by way of speculation. The price in these transactions is that fixed in the international market, and the price received by the farmer is governed by that which the dealer expects to get or knows he will get. The argument on behalf of Alberta and Saskatchewan is that in its normal operation the tax is ultimately borne by the farmer, who receives a price which is the dealer's price less profit and the costs of the transaction; and these costs, it is contended, must include the tax. It may be assumed that the tendency would be to throw this tax, as a part of the costs of the transaction, upon the seller, but many circumstances may combine to determine the actual practice, and where the tax is very small, as in this case, it may well be that dealers would prefer to bear the incidence of it themselves; and according to the statement of facts so far as known that is the practice. If this were the only point to consider in connection with this legislation, I should be disposed to think there was little doubt that this was the expected and intended operation of the

1924

IN THE MATTER OF VALIDITY OF MANITOBA ACT.

Duff J.

law, and that the legislature had desired to levy a tax which should be paid by the person actually entering into the contract and borne by him; and that as the tax in its actual operation does fall upon the dealer, who is called upon to pay it, it is one which is within the competence of the legislature.

The point is of some little importance because it raises the question whether, in controversies arising upon item number 2 of section 92, we are entitled to proceed by relating the tax whose legality is impeached to the class—as direct or indirect—to which as a rule taxes of its general nature would be referred, and to uphold or condemn it accordingly. A tax on the sale of commodities, for example, would, as an excise duty or a customs duty, be regarded according to this procedure as an indirect tax and outside the powers of the provinces. But a tax on production or upon sale may have, and in special circumstances undoubtedly has, no effect upon price. Where, for example, the ultimate price at which a commodity from time to time is sold is determined in an international market, and is known to everybody concerned through daily quotations, an annually recurring tax will have no effect, even in determining the price so fixed, unless it be of such magnitude and levied in such circumstances as to reach the marginal supply. And obviously the ultimate price, once fixed in such circumstances, will govern the terms of transactions throughout the entire series, from the initial seller to the ultimate buyer. Again, to take another example, a tax levied on sales by western farmers of grain grown by themselves would be in fact, as well as in intention, a tax to be borne by the very person who is called upon to pay it.

I think counsel for Manitoba is right in his contention that the actual, normal operation of the tax, as the legislature may be assumed to know it, must be considered.

The statute, therefore, in so far as it levies a tax upon principals in the transactions to which it applies, would, if the legislation were so limited, be in my opinion valid. I am unable, however, to perceive how, consistently with the decisions upon the subject, it is possible to sustain the tax upon brokers and agents as a legitimate exercise of the

authority of the provinces in relation to direct taxation. Insignificant in amount as the impost is, one is not surprised to find that in practice, as a rule, the broker charges the sum paid on account of it to his principal. The aggregate of such sums paid by any broker in the course of the year would, no doubt, be considerable. In this respect the statute must, I think, on the authority of *Cotton's Case* (1) as explained and applied in the subsequent decisions, be held to be obnoxious to the restrictions imposed upon the provincial authority. Section 5 makes it impossible to treat the broker as " agent " of the principal for collection.

The question which has given me most concern is whether the illegal part of the statute can be severed from the legal part. Not without some hesitation I have come to the conclusion that section 5 precludes this. As I read that section it is the person, whether as broker, agent or principal, who does the act by which the principal is bound as seller, who incurs legal liability to pay under the statute, and only he. The effect, therefore, of eliminating from section 3 the words " or his broker or agent," would be to remove from the operation of the statute all those transactions which are effected by brokers or agents. I am by no means confident that an enactment expressed in such terms would be an enactment which the legislature intended to pass, but however that may be I am unable to discover in the language of these sections any sufficient expression or evidence of intention to pass such an enactment.

ANGLIN J. takes no part in the judgment.

MIGNAULT J.—The point submitted for the opinion of the court is whether the Legislature of Manitoba had the right to pass chapter 17 of the statutes of 1923, being an Act imposing a tax on persons selling grain for future delivery. There are two questions. The first is whether the legislature had authority to enact this statute, and the second, in the event of the court being of opinion that the Act is *ultra vires* in part only, asks in what particulars it is *ultra vires*.

The taxing provision of this statute is section 3, which is in the following terms:—

(1) [1914] A.C. 176.

1924

IN THE MATTER OF VALIDITY OF MANITOBA ACT.

Mignault J.

3. Upon every contract of sale of grain for future delivery made at, on or in any exchange, or similar institution or place of business in Manitoba, except as hereinafter provided, the seller or his broker or agent shall pay to His Majesty for the public use of the province a tax computed upon the gross quantities of grain sold or agreed to be sold, as follows: Upon every thousand bushels of flaxseed, twelve cents; upon every thousand bushels of wheat, six cents; upon every thousand bushels of oats, barley or rye, three cents.

Section 4 contains certain exceptions which cut down the generality of section 3. It is as follows:—

4. No such tax shall be payable in any case in which:

(*a*) the seller is the grower of the grain, or

(*b*) either party to the contract is the owner or tenant of the land upon which the grain is to be grown, or

(*c*) the sales are cash sales of grain or other products or merchandise which in good faith are actually intended for immediate or deferred delivery (such transactions for the purposes of this Act to be evidenced by the actual transfer of the tickets, storage or warehouse receipts, bills of lading or lake shippers' clearance receipts, or other documents of title for grain transferring actual ownership from the vendor to the purchaser in exchange for the price at the maturity of the contract), or

(*d*) the sales are "transfer" or "scratch sales" or "pass-outs," provided that the purchase and sale are made at the same exchange, on the same day, at the same price, and for the account of the same person, or

(*e*) the sales are made by a broker on account of a principal, and the name of the principal is not disclosed to the buyer, provided the principal sells to the broker the same quantity and the same grade and kind of grain at the same price, on the same day, on the same exchange, the only tax in this case being the tax payable by the principal.

Section 5 declares that the tax shall be a direct tax upon the person actually entering into the contract of sale, whether such person is the principal in the contract or is acting only in the capacity of a broker or agent for some other person. Of course, stating that the tax is a direct tax will not make it one, but this section is not without importance in determining what was the intention of the legislature when it imposed the tax.

The parties heard on this reference have agreed upon a statement of facts explaining the course of business in the sale of grain from its point of origin to its final destination. It is apparent from this statement that the grain produced in the grain growing areas of the West is the subject of several transactions, many of them of a speculative character, although it must be assumed that the legislature had in view real and not fictitious or gambling dealings, for the latter would be illegal. By the process of "hedging," the same quantity of grain may be sold and

bought several times, and one "hedge" may be offset against another, so that, in the final analysis, with the "hedging" transactions balancing or offsetting each other, there may well be but one sale and one purchase really carried into effect in each step as the grain passes from the producer, through one or more middlemen, until it reaches the consumer. The complication of this situation is further enhanced by the fact that the producer may sell the same quantity of grain to a country elevator, the country elevator to a terminal elevator, and the latter to the exporter who in turn will sell it on the foreign market, and on each of these transactions there will probably be "hedging" purchases and sales with the object of protecting the seller or the purchaser. This is clearly shewn by the statement of facts to which I need not further refer.

The exceptions to the taxing rule enumerated in section 4, in so far as they concern the producer, free him from the obligation to pay a tax on the sale of grain grown by him, and where either party to the contract is owner or tenant of the land upon which the grain is to be grown no tax is payable. Also free from the taxing rule are cash sales of grain which in good faith are actually intended for immediate or deferred delivery, and are evidenced by the actual transfer of the documents of title representing the grain.

This shews that the sales which are subject to the tax will often, but of course not necessarily, be speculative sales, and it is when they are effected on or in any exchange or similar place of business in Manitoba that they become taxable under the Act. By speculative sales I mean those that are real as opposed to fictitious or gambling transactions. This I have already said must be assumed.

We are told that the price of grain is determined by the conditions of the world market in Liverpool, England. There are several grain producing countries outside of Canada. In the selling market at Liverpool the economic rule of supply and demand determine the price at which the grain can be sold. And the selling price at Liverpool for grain to be delivered at the time contemplated, regulates the price which the intermediate purchasers, the terminal elevator and the country elevator, will pay to the pro-

1924

IN THE MATTER OF VALIDITY OF MANITOBA ACT.

Mignault J.

ducer. It is therefore argued by the attorney generals of Saskatchewan and Alberta that this tax really falls on the producer of the grain, for it must be deducted, with all other expenses, from the price which will be paid for his grain, the selling price at Liverpool remaining the same.

It is conceivable that it could also be said that this tax will fall upon the purchaser at Liverpool, for producers of grain in the grain growing countries of the world will not sell their grain at a loss, and they will consider, and the purchaser at Liverpool must expect that they will consider, what it will cost to bring their grain to the Liverpool market. Any withholding of the grain by the producers of the world would very conceivably tend to enhance the price which the purchaser at Liverpool would have to pay.

In either case the tax in question would come within John Stuart Mill's definition of an indirect tax which the Judicial Committee in *Cotton* v. *The King* (1), accepted as authoritative, for it is a tax which is demanded

> from one person in the expectation and intention that he shall indemnify himself at the expense of another.

That this is the character of the tax imposed by the Manitoba statute I cannot doubt. It is exacted from the seller or his broker or agent (section 3), and section 5 states that it is a tax

> upon the person actually entering into the contract of sale, whether such person is the principal in the contract or is acting only in the capacity of a broker or agent for some other person.

Surely where the actual sale is by a broker on account of a principal—and sales on a grain exchange will in the vast majority of cases be sales effected by a broker or agent for principals—and the broker pays the tax, he will charge it to his principal. This must have been in the contemplation of the Legislature of Manitoba when it imposed the tax on the person actually entering into a contract of sale in the capacity of a broker or agent for some other person. The tax is none the less an indirect tax because conceivably sales may sometimes be effected by the principal himself without any broker, if indeed a principal can sell upon an exchange which does not recognize him as a member, and even then the seller would have regard to the amount of the tax in determining the price at which he will sell his

(1) [1914] A.C. 176.

grain. I might add that although the amount of the tax in respect of the unit of one thousand bushels may appear small, it would be much more considerable on large transactions, so it would be vain to expect that the broker would absorb the tax among his expenses and not charge it to his principal.

Some of the decisions of the Judicial Committee may be referred to as shewing where taxes on account of their incidence have been held to be indirect.

Attorney General for Quebec v. *Queens Ins. Co.* (1). A statute of the province of Quebec had imposed a tax upon certain policies of insurance and renewal receipts, computed at a certain percentage of the premium charged to the insured, and payable by means of adhesive stamps affixed by the insured on the policy or receipt at the time of the delivery thereof. This was held to be indirect taxation.

Attorney General for Quebec v. *Reed* (2). The statute here under consideration imposed a duty of ten cents upon every exhibit filed in court in any action therein pending. This also was held to be indirect taxation.

In *Bank of Toronto* v. *Lambe* (3), the tax was upon certain commercial corporations, including banks, carrying on business within the province, and varied in amount with the paid-up capital and number of offices of the corporation. This was decided to be direct taxation, their Lordships observing (p. 584):—

> It is not a tax upon any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business.

The tax on the grain futures in question here is not a tax on the business carried on, or the capital owned, by the seller. It is a tax on the transaction itself which would naturally be charged by the broker to the person on whose behalf he has entered into the contract of sale. It would clearly be indirect in its incidence.

(1) [1878] 3 App. Cas. 1090. (2) [1884] 10 App. Cas. 141.
(3) 12 App. Cas. 575.

1924

IN THE MATTER OF VALIDITY OF MANITOBA ACT.

Mignault J.

The case of *Cotton* v. *The King* (1), may be referred to as shewing that in the view of their Lordships took of the statute, the tax was indirect because the person who paid it, notary or executors, would naturally call upon the beneficiary for whom he was acting to recoup him, and thus their Lordships considered that the tax came within the definition of an indirect tax which they adopted.

Upon my best consideration of the questions submitted, my opinion is that the tax which the Legislature of Manitoba seeks to impose is an indirect one. The statute is therefore *ultra vires*.

I would answer question one in the negative.

Question 2 does not require any answer because in my opinion the statute in substance and as a whole is *ultra vires*.

MALOUIN J.—The Governor General in Council has referred to this court, for hearing and determination, chapter 17 of the Statutes of the Province of Manitoba, 1923.

This Act is intituled

an Act to provide for the collection of a tax from persons selling grain for future delivery.

It received the Royal assent on the 27th of April, 1923.

The province of Saskatchewan made representations to His Excellency the Governor General in Council in regard to the enactment in question upon the ground that it was *ultra vires* the provincial legislature.

The following questions have been referred to this court:—

1st. Had the Legislature of Manitoba authority to enact section 17 of its statutes of 1923 intituled "An Act to provide for the collection of a tax from persons selling grain for future delivery?"

2nd. If the said Act be, in the opinion of this court, *ultra vires* in part, then in what part is it *ultra vires*.

The submission on behalf of the province of Saskatchewan and Alberta is that the statute is *ultra vires* of a provincial legislature. Special exception is taken to sections 3, 4 and 5 of the enactment. The three following sections are those to which exception is taken:

3. Upon every contract of sale of grain for future delivery made at, on or in any exchange, or similar institution or place of business in Manitoba, except as hereinafter provided, the seller or his broker or agent shall pay to His Majesty for the public use of the province a tax computed upon

(1) [1914] A.C. 176.

the gross quantities of grain sold or agreed to be sold, as follows: Upon every thousand bushels of flaxseed, twelve cents; upon every thousand bushels of wheat, six cents; upon every thousand bushels of oats, barley or rye, three cents.

4. No such tax shall be payable in any case in which:

(*a*) the seller is the grower of the grain, or

(*b*) either party to the contract is the owner or tenant of the land upon which the grain is to be grown, or

(*c*) the sales are cash sales of grain or other products or merchandise which in good faith are actually intended for immediate or deferred delivery (such transactions for the purposes of this Act to be evidenced by the actual transfer of the tickets, storage or warehouse receipts, bills of lading or lake shippers' clearance receipts, or other documents of title for grain transferring actual ownership from the vendor to the purchaser in exchange for the price at the maturity of the contract), or

(*d*) the sales are "transfer" or "scratch sales" or "pass-outs," provided that the purchase and sale are made at the same exchange, on the same day, at the same price, and for the account of the same person, or

(*e*) the sales are made by a broker on account of a principal, and the name of the principal is not disclosed to the buyer, provided that the principal sells to the broker the same quantity and the same grade and kind of grain at the same price, on the same day, on the same exchange, the only tax in this case being the tax payable by the principal.

5. The tax imposed by this Act shall be a direct tax upon the person actually entering into the contract of sale, whether such person is the principal in the contract or is acting only in the capacity of a broker or agent for some other person and is imposed solely in order to supplement the revenues of this province.

The taxing powers of a provincial legislature are determined by section 92 of the B.N.A. Act, as follows:—

92. In each province, the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

(2) Direct taxation within the province in order to the raising of a revenue for provincial purposes.

The first exception taken to the Act by the provinces of Saskatchewan and Alberta is that while the object of the Act in question is undoubtedly the raising of a revenue for provincial purposes, it is not in its operation and effect confined to direct taxation in the province of Manitoba.

It seems to me that the remarks of Lord Hobhouse in the *Lambe Case* (1), is a complete answer to that:—

It is urged that the bank is a Toronto corporation having its domicile there and having its capital place there; that the tax is on the capital of the bank; that it must therefore fall on a person or persons or on property not within Quebec. The answer to this argument is that class 2 of section 92 does not require that persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may

(1) 12 App. Cas. 575 at p. 584.

1924

IN THE MATTER OF VALIDITY OF MANITOBA ACT.

Malouin J.

legally be taxed there if taxed directly. This bank is found to be carrying on business there and on that ground alone it is taxed.

The second exception taken to the Act is that the tax imposed by this statute is an indirect tax.

The definition of the expression "direct tax" given by John Stuart Mill, in his book on Political Economy, seems to be accepted by the Judicial Committee of the Privy Council. This definition is as follows:—

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.

In *Cotton* v. *The King* (1), the Act provided that executors, administrators and trustees should be personally liable for the duties chargeable in respect of the estates which they represented. The Privy Council held in that case that this was an attempt to impose taxation upon persons who were intended not themselves to bear the burden but to be recouped by someone else and that the taxation was therefore indirect and the Act *ultra vires.*

Applying that authority to this case, I say that Chapter 17 of the Statutes of the Province of Manitoba intituled: "An Act to provide for the collection of a tax from persons selling grain for future delivery" is *ultra vires,* because it is enacted in sections 3 and 5 of the Act that the tax is imposed not only on the principal in the contract but on the broker or agent for some other person. It is obvious that the broker or agent for another person will not bear the burden but will be recouped by someone else. This taxation is therefore indirect.

To the first question, I answer: No.

Being of opinion that the statute as a whole is *ultra vires* the second question needs no answer.

---

(1) [1914] A.C. 176.

JOHN T. SMITH (PLAINTIFF) ..... APPELLANT.

AND

THE ATTORNEY GENERAL OF ONTARIO (DEFENDANT) ..... } RESPONDENT.

1924
*Mar. 4, 6, 7, 11.
*May 22.

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

Constitutional law—Temperance legislation—Canada Temperance Act, c. 8, part IV, 10 Geo. V, c. 8 (D)—Ontario Temperance Act—Prohibition of sale of liquor—Action for declaratory judgment—Parties—Status.

Part IV of the Canada Temperance Act enacted by 10 Geo. V, c. 8, prohibiting, in a province which adopts it, the manufacture and importation of intoxicating liquor, is in force in Ontario.

The Ontario Temperance Act, 6 Geo. V, c. 50 and its amendments, is an Act prohibiting the sale of intoxicating liquor for beverage purposes and enables the Legislative Assembly, by resolution and a vote favourable thereto, to make Part IV of the Canada Temperance Act a law of the province notwithstanding it permits the manufacture and sale of wine containing a large percentage of alcohol, the manufacture and export of malt and spirituous liquors and extra-provincial transactions in liquor.

S., residing in Ontario, gave an order to a firm in Montreal to send him a specified quantity of intoxicating liquor. The firm refused the order on the ground that by filling it the Ontario Temperance Act would be violated and S. brought an action against the Attorney General of Ontario asking for a judgment declaring that Part IV of the Canada Temperance Act was not in force in that province.

Held, that S. had no status to maintain such action. Judgment of the Appellate Division (53 Ont. L.R. 572) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial which dismissed the appellant's action.

The circumstances which led to the bringing of the action for a declaratory judgment are stated in the above head-note. This appeal raises the question of whether or not Part IV of the Canada Temperance Act is in force in Ontario which depends on the further question, namely, is the Ontario Temperance Act an "Act prohibiting the sale

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff and Mignault JJ. and Maclean J. *ad hoc*.

(The Chief Justice presided at the hearing but died before judgment was pronounced.)

(1) 53 Ont. L.R. 572.

1924

SMITH v. THE ATTORNEY GENERAL OF ONTARIO.

Idington J.

of intoxicating liquor for beverage purposes?" The appellant claims that it is not.

Rowell K.C. for the respondent moves to quash the appeal on three grounds: 1. Leave should have been obtained. 2. It involves a matter of practice and procedure in Ontario. 3. The judgment appealed from was given in the exercise of judicial discretion. The court reserves judgment and orders that the hearing proceed on the merits.

H. J. Scott K.C. and *Tilley K.C.* for the appellant. When the resolution purporting to bring Part IV of the Canada Temperance Act into force in Ontario there was no law in the province "prohibiting the sale of intoxicating liquor for beverage purposes." The Ontario Temperance Act which allowed native wine to be sold and authorized transactions for sale of malt and spirituous liquors was not such an Act, and the subsequent proceedings under Part IV were nugatory. See *Gold Seal Co.* v. *Attorney General of Alberta* (1).

The appellant was entitled to bring this action for a declaratory judgment. [1924] 1 D.L.R. 1; *Dyson* v. *Attorney General* (2).

Rowell K.C. and *Brennan* for the respondent. If such an action as this lies at all the Attorney General of Canada should be the defendant. See *Independent Cordage Co.* v. *The King* (3) at page 630.

An action for a declaratory judgment cannot be brought against the Crown. *Dyson* v. *Attorney General* (2) does not apply to Ontario practice. *Electrical Development Co.* v. *Attorney General for Ontario* (4).

The law in force in a province when the resolution is passed to bring Part IV into force need not provide for absolute prohibition.

IDINGTON J.—The appellant by this action seeks to have a declaratory judgment as to the effect of certain legislation relative to the prohibiting of importing intoxicating liquors into Ontario.

(1) [1921] 62 Can. S.C.R. 424.
(2) [1911] 1 K.B. 410.
(3) [1906] 13 Ont. L.R. 619.
(4) [1916] 38 Ont. L.R. 383; [1919] A.C. 687.

He has no other foundation for his action against the Attorney General than that he wrote several dealers in Montreal requesting each of them to supply him, in Toronto, with such liquors, by shipment from Montreal, in the province of Quebec, and their respective refusals on the ground that doing so would be illegal.

The respondent had taken no steps in such matter, nor threatened to do so. Nor had any one on his behalf done so.

He rests his case upon the authority of *Dyson* v. *The Attorney General* (1), and subsequent cases following same and founded on facts analogous to those on which that case turned. The concrete cases presented therein of claims, so respectively made, demonstrate a legal situation whereby a claim was actually made on behalf of the Crown of which the Attorney General was the representative and hence likely to prosecute or liable to be brought into litigation actually threatened.

The appellant presents no such concrete case but a merely speculative case as a British subject that he might, in certain eventualities which have not transpired, be followed by the Attorney General although as yet no such attempt has been made or even threatened or the foundation laid for such action or threat.

In my opinion this is a straining of the said decisions a long way beyond what they are founded upon.

In short it is an attempt to elicit an opinion from the courts which, under the facts, they have no right to give either one way or the other.

So strongly do I hold this to be the case that I must respectfully decline to express any opinion on the questions sought to be raised.

To declare upon such request the interpretation or construction of such acts as in question, under such circumstances, I respectfully submit, is beyond our province.

I, therefore, am of the opinion, with all due respect, that such should have been the view taken by the courts below and should be that of this court in regard to this appeal unless we are quite prepared to assent to such like requests

(1) [1911] 1 K.B. 410.

1924
SMITH
v.
THE
ATTORNEY
GENERAL OF
ONTARIO.
Duff J.

on any point of law puzzling any private citizen on any question, for the Attorney General may be said to represent on behalf of the Crown the due and correct appreciation of any statute enacted by the Crown by and with the advice of any duly constituted legislature.

I would therefore dismiss this appeal with costs.

The judgment of Duff and Maclean JJ. was delivered by Duff J.

DUFF J.—It is convenient first to discuss the question raised by the objection taken *in limine* on behalf of the Attorney General. On behalf of the appellant the decision of the Court of Appeal in *Dyson* v. *Attorney General* (1) is cited, and that decision and the series of cases which followed it are relied upon in support of the proposition that in the circumstances of this case the appellant has a title to ask for a judicial declaration on the point in dispute, whether, namely: Part IV of the Canada Temperance Act has been brought into force in relation to Ontario. We assume, against the Attorney General, that if the appellant has a title at all the Attorney General of the province is the proper defendant—or at all events a proper defendant—without giving a decision on the question. We assume also, and as regards this point we may as well say that we have been quite unable to follow the argument addressed to us on behalf of the Attorney General, that the jurisdiction of the Supreme Court of Ontario to pronounce declaratory judgments is a jurisdiction exercisable in cases in which the Crown is a defendant, and without the Crown's consent.

The circumstances giving rise to the action, stripped of non-essentials, are that the appellant, who is a resident of Toronto, ordered from a dealer in Montreal a case of Dewar's Scotch Whisky and some ale and lager beer. In reply the dealer said that in view of the fact that the Canada Temperance Act had been brought into force in Ontario, and that importation of whisky into the province was thereby prohibited, he declined to accept the order. Counsel on behalf of the appellant points out that the order of the Governor General in Council professes under section

(1) [1911] 1 K.B. 410.

153 of the Canada Temperance Act to declare that part in force in Ontario, that the validity of the order in council has been assumed, and that the Act has been enforced by the exaction of the penalties prescribed by it, and by the Ontario Temperance Act, relative to the possession or transport in Ontario of liquor imported into the province. Contending, as he does, that the order in council is illegal and invalid, and that these penalties are not legally exigible, he is debarred, he says, from exercising his legal right to bring liquor into the province, except under conditions which are in practice intolerable—that is to say, by subjecting himself and everybody acting for him to criminal proceedings with their humiliating incidents; indeed that the very existence of the order in council, coupled with the fact that the penal clauses of the statutes are being enforced on the assumption that they are the law of the land, has the effect of preventing dealers in Canada selling him liquor for import into Ontario, and prevents transport companies and others acting for him in course of their lawful business in the transport of such merchandise into or in that province.

Of the decisions relied upon by the appellant, *Dyson's Case* (1) and *Burghes* v. *Attorney General* (2) may be considered typical. They arose in these circumstances:—

The Finance Commissioners, having certain strictly defined powers by statute, delivered to the plaintiffs a list of questions with a peremptory demand that they should be answered within a nominated time, and the notice contained an intimation, which amounted to a threat, that, unless the demand was complied with, proceedings would be taken to recover the penalties authorized by the statute under which they professed to act. The time nominated was less than the time permitted by the Act; the answers demanded were not answers which the Act authorized the Commissioners to require; and the demands therefore were illegal demands. These notices had been sent broadcast over the country under the authority of the Commissioners, and it may be added that the penalties to which the threat referred were penalties recoverable in the Supreme Court of Judicature, at the instance of the Attorney General.

(1) [1911] 1 K.B. 410. (2) [1911] 2 Ch. 139.

1924

SMITH v. THE ATTORNEY GENERAL OF ONTARIO.

Duff J.

There was in each case a demand actually made by the Finance Commissioners, professing to act under the authority of statute, a demand which they were not entitled to make, accompanied by a threat that if the illegal demand were not complied with the person to whom the notice was addressed would be subjected to proceedings at the suit of the Attorney General for penalties.

Two points should be noted in relation to these authorities: first, there was no decision upon a hypothetical state of facts, and secondly, the demand in each case was a personal demand and an illegal attempt to constrain the plaintiff personally by an illegal threat addressed to him as an individual. These points appear, superficially at all events, to mark rather important distinctions between the circumstances of the decisions cited and those of the case now under appeal. As to the penalties, the appellant was subjected to no actual threat and no actual risk; only if the liquor ordered were actually shipped, that is to say, only in a contingency which has not happened, could the appellant be put in jeopardy.

It is not the function of a court of justice to advise parties as to their rights under a hypothetical state of facts.

Glasgow Navigation Co. v. *Iron Ore Co.* (1).

As to the second point, it is convenient first to indicate more precisely the argument advanced by Mr. Tilley. It is argued that the effect of the order in council bringing the Act into force and the actual enforcement of the Act, by the prosecution of offenders and the exaction of penalties, was to create a situation which in itself constituted an attack by the constituted authorities of the Dominion and the Province upon what were in law the rights of individuals, including the plaintiff, the attack having the consequence of preventing such persons exercising their legal rights in pursuit of their lawful business and otherwise; that this is shown by the refusal of the dealer in Montreal which was one of the natural, direct and intended consequences of the situation so created. There are methods by which the Provincial Government, or the Dominion Government, as the case may be, may ascertain the opinion of the courts with respect to such questions as that raised

(1) [1910] A.C. 293.

by this appeal.. The governments, we are informed, have declined to resort to these methods. Other methods of testing the validity of the Act are, it is said, not practicable for citizens who, in order to bring before the courts an arguable question of constitutional law, are naturally reluctant to expose themselves to the embarrassing incidents of criminal proceedings. The conduct of the authorities concerned constitutes, it is said, an announcement to everybody, including the appellant, that any attempt to exercise his legal right to purchase liquor for transport into Ontario, or to transport it in Ontario, will expose him to prosecution under the statutes; and although there has been no attempt to coerce him into doing any act he is thereby constrained from exercising his legal rights by the certainty that if he attempts to do so he will be exposed to such proceedings. In principle it is said there is no distinction between such a state of facts and circumstances giving rise to the decisions mentioned.

Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.

We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining *ultra vires* ex-

1924
SMITH
v.
THE
ATTORNEY
GENERAL OF
ONTARIO.
Duff J.

penditures by the governing bodies of municipalities; *MacIlraith* v. *Hart* (1). We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the appellant's contention, but this exception does not rest upon any clearly defined principle, and we think it ought not to be extended.

On the whole we think the principle contended for, since it receives no sanction from legal analogy, and since it is open to serious objection as calculated to be attended by general inconvenience in practice, ought not to be adopted. But the question is an arguable one; and, as the merits of the appeal have been fully discussed, we are loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure; and accordingly we think it right to say that in our opinion the appellant's action also fails in substance.

We now turn to the substantive question raised by the appellant's action, whether, that is to say, the prohibitions of Part IV of the Canada Temperance Act have the force of law in, and in relation to, the province of Ontario. On the 27th April, 1920, the Ontario Legislature, purporting to act under section 152 of Part IV of that Act passed a resolution in the form prescribed by that section, and the vote taken at the resulting poll having been favourable to prohibition the order in council provided for by section 153, declaring the prohibitions of Part IV in force, was duly passed.

In order that such a resolution may take effect under section 152 it must be passed by the Legislative Assembly of a province in which there is, at the time, in force, a law prohibiting the sale of intoxicating liquor for beverage purposes. In substance the contention on the part of the appellant is that this condition was not fulfilled, and consequently, of course, that the resolution of the Ontario Legislature had no legal operation.

In support of this contention certain sections of the Ontario Temperance Act, as it stood at the date of the resolution, are referred to. Under these provisions, it is said, so

(1) [1907] 39 Can. S.C.R. 657.

much liberty in dealing in intoxicating liquor was allowed by that Act as to remove the enactment from the category described by section 152, as a

law prohibiting the sale of intoxicating liquor for beverage purposes.

The sections are 41, 44, 45, 46 and 139. The fundamental enactment of the statute is section 40 which provides that nobody, by himself, clerk, servant or agent, shall expose or keep for sale or sell or barter or, for any valuable consideration, give to any other person any liquor without having first obtained a license under this Act authorizing him so to do, and then only as authorized by such license and as prescribed by the Act. Licences may be granted to vendors, and licences by the Government of Canada for the manufacture of liquor are recognized by the Act. The vendor's licence does not authorize the sale of liquor in quantities greater than those mentioned in the Act or otherwise, or in any other place, or to other persons or for other persons, than provided by the Act. Vendors may sell alcohol for mechanical and scientific purposes, and physicians may give prescriptions in case of actual need, where, in the judgment of the physician, the use of liquor is necessary, and, under the sanction of such prescriptions, the vendor is authorized to sell specified minimum quantities of fermented and distilled liquors and wines. There are also provisions authorizing physicians, dentists and veterinary surgeons to keep on hand limited quantities of liquor for use in the practice of their respective professions. Severe penalties are prescribed for the abuse of these provisions. By section 139 it is declared that the Act is not intended to affect *bona fide* transactions in liquor between a person in the province of Ontario and a person in another province or in a foreign country, and by sections 45 and 46 provision is made authorizing manufacturers of liquor to keep the product of their manufacture in a warehouse for export, and there is likewise provision for the maintenance of bonded warehouses. By section 47 the Act prohibits the use or consumption in Ontario of liquor which has been purchased or received from any person in Ontario except a licensee. By section 44 authority is given to manufacturers of native wines made from grapes grown in Ontario, subject to regu-

1924
SMITH
v.
THE
ATTORNEY
GENERAL OF
ONTARIO.
Duff J.

lations or restrictions imposed by the Board, to sell the same in wholesale quantities, i.e., not less than 5 gallons.

Counsel for the respondent, I think rightly, contends that the object of section 139 is to make it clear that the province in enacting the Ontario Temperance Act was not exceeding the limits of its lawful jurisdiction. In the case of the Manitoba Licensed Victuallers, *Attorney General of Manitoba* v. *Maritime Licensed Holders' Association* (1), Lord Macnaghten pointed out that the decision of the Privy Council in 1896 had left undetermined the question whether the authority of the provinces to suppress the sale of liquor was an authority derived from head 13-92 "Property and civil rights" or from head 16, the residuary subdivision, "Matters merely local or private within the province," but intimated an opinion that it must be ascribed to the latter head. The presence in the Manitoba Act of a provision similar to section 139 was noted in the judgment as manifesting an intention on the part of the legislature to deal with the subject of the sale of liquor as a strictly provincial matter. Similar declarations have appeared as a rule in provincial legislation on this subject since then. Section 139 does not in any pertinent respect differ from the section in the Manitoba Act, and ought, we think, to be interpreted as filling the same office. The sections relating to the sale of liquor by "vendors" are not enactments dealing with the sale of liquor "for beverage purposes," and obviously, the same may be said with regard to sales for manufacturing and scientific purposes. Nor again can it be contended with much plausibility that the recognition of manufacturing establishments operating under Dominion licences and of bonded export warehouses touches the subject. It is quite true that the manufacturer sells to a customer beyond Ontario and that the bonded warehouseman sells for export, but though they sell "for beverage purposes," they do not sell for consumption within the province. These provisions seem to be entirely consistent with the scope of the statute, as a measure of provincial operation, suppressing the sale of liquor as a beverage.

(1) [1902] A.C. 73.

There is, we think, nothing in any of these provisions just discussed which could even raise a serious doubt upon the point whether or not the Ontario Temperanct Act falls within the category described by the words quoted from section 152. That section contemplates a provincial prohibitory law and therefore a law within the constitutional competence of a Canadian province. Neither do we consider it at all doubtful that it must be construed with reference to the existing practice, and with reference to the prevailing view as to the form which provincial legislation should take in order to enjoy security from attack as beyond the powers of a province.

A more serious question, however, arises in respect of section 44. That section gives authority to manufacture and sell native wines without restriction, save as to the minimum quantity sold on any one occasion, and beyond doubt is intended to, and does, authorize the manufacture and sale of wines of such alcoholic strength as to fall within the scope of the expression " intoxicating liquor." The intention is to exempt from the prohibitions of the statute the native wine industry, and to that extent to encourage the development of the manufacture and sale of wines, made from grapes produced in Ontario, as a beverage. The evidence shews that this industry has grown since the enactment of the Ontario Temperance Act, and it may be assumed that if the law is not changed this growth will be much greater still; and on behalf of the appellant it is argued, by no means without force, that a law protecting and encouraging such an industry and traffic cannot be described properly as a law prohibiting the sale of alcoholic liquor " for beverage purposes."

We have come to the conclusion that counsel for the Attorney General has made good his contentions:

(1) That notwithstanding this provision the Ontario Temperance Act when viewed as a whole falls within the description in section 152, rightly understood, and

(2) That Part IV itself does recognize the possibility that the prohibitions of that enactment may be brought into force in relation to a province in which the prohibition created by the provincial law is a limited one.

1924

SMITH v. THE ATTORNEY GENERAL OF ONTARIO.

Duff J.

Counsel for the appellant bases his attack upon the order in council upon the proposition that the condition laid down by section 152 is expressed in language which cannot fairly be interpreted as applicable to the Ontario Temperance Act, and that the other provisions of the statute of 1919 must be construed as giving effect to this principle, not as qualifying it.

We are content to assume the correctness of the view advanced that the critical question is whether or not the phrase used in section 152 can fairly be interpreted as embracing a statute containing such a departure from the prohibition principle as that which is found in section 44.

The term " prohibition " as applied to legislation affecting the drink traffic has never, we think, in Canada denoted, exclusively, a system of repression involving the total abolition of the sale of intoxicating liquor for use as a beverage. For over fifty years Canadians have been familiar with two legislative methods of dealing with the trade in liquors. One, in which the trade, including sales in saloons, inns and restaurants where liquor might be consumed on the premises where it was sold, as well as sales by manufacturers and wholesale and retail merchants, was regulated by means of a system of licences. The other under which, in localities in which the law was in force, the retail trade in spirituous and fermented liquors and in imported wines was wholly abolished. In some instances under this system what was commonly called the " wholesale " trade (sales in considerable quantities) was left unmolested.

Legislation of this last mentioned order has generally been designated as " prohibitory."

By the Temperance Act of 1864 (27-28 Vict., c. 18) for example, the councils of municipalities of the old province of Canada were empowered by by-law to " prohibit the sale " within the jurisdiction of the counsel " of intoxicating liquors and the issue of licences therefor." The by-law, by the requirement of the statute, was to be limited to the declaration that under the authority of the Act such sale and the issue of such licences " is prohibited," and the provisions of the statute under which this authority was given were grouped under the heading " Provisions as to Local Prohibition." And yet by these provisions any brewer or

distiller, as well as a merchant or trader having his place of business within the locality affected by the by-law, was permitted to sell spirituous liquors (in the case of the distiller of his own manufacture) in quantities of not less than 5 gallons on any one occasion, and beer (which in the case of the brewer must be of his own manufacture), in quantities of not less than one dozen bottles.

This measure has, I think, always been classed as a measure of local prohibition, according to the description contained in the statute itself, and is so referred to in the judgment of Lord Watson, in *A. G. O.* v. *A. G.* (1),

The Temperance Act of 1864 was repealed by the Canada Temperance Act, which came into force in 1878; and by that enactment the sale of spirituous and fermented liquors and imported wines, for consumption as beverages in any county in which Part II of the Act is in force, is wholly abolished; but the manufacture of native wines from grapes grown in Canada and the sale of such wines in quantities of not less than 10 gallons is permitted.

Part II of the Canada Temperance Act is described in the Act itself as legislation relating to " the prohibition of the traffic in intoxicating liquors," and in popular speech as well as in more formal utterances it has received the same designation. The references by counsel for the Attorney General to judgments and to arguments before the courts illustrate this; indeed nobody familiar with the course of the discussion in this country upon the subject of the drink traffic could be ignorant of the fact.

It may well be doubted whether an enactment modelled on the Temperance Act of 1864 would be an enactment conforming to the present day conception in Canada of a measure " prohibiting the sale of intoxicating liquors." At the time it was enacted it was no doubt considered to be an effective method of repressing that part of the liquor traffic giving rise to its most dangerous abuses, namely, the retail trade and especially the bar and saloon trade. The Canada Temperance Act was, of course, a much more stringent measure, and notwithstanding the exemption of the native wine industry from its prohibitions it has, as we

(1) [1896] A.C. 348 at p. 356.

1924
SMITH
v.
THE
ATTORNEY
GENERAL OF
ONTARIO.
Duff J.

have already observed, always been considered and described as a prohibitory enactment, without a thought of impropriety or inaptitude of expression. There has been no doubt a very good reason for this. The use of native wine, that is to say, wine manufactured in Canada, has never been a habit widely or even considerably indulged in by the Canadian people, and the traffic in such wines is not a traffic against which an enactment for the repression of the liquor traffic would naturally be directed. The exemption of such wines, if it attracted attention at all, would be regarded as a harmless concession to a native industry, not seriously impairing the efficiency of the measure as one for the repression of the traffic in liquor.

We are not, however, for the moment concerned with the question whether the phrase under consideration, namely,

> law prohibiting the sale of intoxicating liquors for beverage purposes.

would, if read *in vacuo,* be properly descriptive of an enactment containing such exemptions as those to be found in sections 121 and 122 of the Canada Temperance Act and in section 44 of the Ontario Temperance Act.

The immediate question is whether in the enactment in which it appears, in a statute dealing with the subject of repression of the liquor traffic passed by the Parliament of Canada in the year 1919, this language is reasonably capable of such a construction. Counsel for the Attorney General has very properly referred us to the phraseology of the orders in council upon the same subject, passed by the Governor in Council in the years 1917 and 1918. We shall not discuss these instruments in detail. It is sufficient to mention that, in one passed on the 11th of March, 1918, under the War Measures Act of 1914, there is a recital in these words:

> Whereas laws have been passed in all the provinces of Canada, prohibiting the sale of intoxicating liquor and such laws are now in force save in the province of Quebec where the prohibitory law is to come into effect by May 1, 1919,

and that it is indisputable that the statutes referred to falling under the description " prohibiting the sale of intoxicating liquors," include the Ontario Temperance Act. The reference to the prohibitory law " about to come into force in Quebec " together with the language of the second paragraph shews that the words " prohibit " and " prohibitory."

as applied to the subject of the orders, cannot be employed in a sense which excludes an enactment having for its general object the suppression of the liquor traffic, by reason solely of the fact that special exemptions such as that found in section 44 are permitted by its terms.

It is needless to say that the construction of the language of the Act of 1919 cannot be governed by orders in council passed by the Dominion Government in execution of its powers under the War Measures Act or otherwise; but as Lord Hobhouse said in speaking for the Privy Council in *Bank of Toronto* v. *Lambe* (1):

> The common understanding of men * * * is one main clue to the meaning of the legislature.

We think that the existence of the usage to which we have referred, in its various phases, in popular speech, and in more formal speech as exemplified in the judgments of the courts and in official instruments such as statutes and orders in council, justifies the conclusion that the words "prohibition" and "prohibit" when employed in connection with this subject have not, in the "common understanding" of Canadians, the inflexible signification which the appellant in his argument ascribes to them; and that section 152 is capable of a construction which would not exclude the Ontario Temperance Act from its purview.

In this view we cannot, of course, accept the argument advanced on behalf of the appellant, that section 152 ought to be read as establishing the dominant principle that the Act of 1919 is to be applied only in those provinces in which a prohibitory law is in force in the sense of a law wholly abolishing all sales of liquor for beverage purposes. That section being at least capable of a less rigorous construction the context in which the section occurs must be examined, for the purpose of ascertaining whether or not its true effect and meaning are those contended for by the appellant.

The proviso of section 154 appears to us to shew that these provisions do at least contemplate the possibility that the enactments of section 154 may come into operation in a province where the prohibition laid upon the "sale of intoxicating liquor for beverage purposes" is not absolute

(1) 12 App. Cas. 575, at p. 582.

1924
SMITH
v.
THE
ATTORNEY
GENERAL OF
ONTARIO.
Duff J.

but is subject to exceptions. We have not overlooked the argument that the words "other than for the manufacture or use thereof as a beverage" exclude this view of the proviso. That phrase must be taken, in our opinion, as imposing a qualification upon the right which, in other respects, the proviso gives absolutely, that is to say, independently of the character of the provincial law, the right to introduce intoxicating liquor into the province for sacramental or medicinal purposes or for manufacturing or commercial purposes. It has little relevancy to the question of the proper construction of the concluding words of the proviso which give a right dependent entirely upon the character of the provincial law, and authorize in the language of the statute the import into the province of "intoxicating liquors," which, under the laws of the province may lawfully be sold therein. We can perceive no legitimate reason for limiting these words in such a way as to exclude liquor falling within any class of liquor which under the provincial law may, notwithstanding its prohibitory enactments, be sold for beverage purposes. We find nothing in the proviso justifying such a limitation of the language which the legislature has employed, nor, as we have said, do we think that the language of section 152, when rightly construed, in view of the conditions and usage we have mentioned, requires such a limitation.

Our opinion is that on the true construction of these provisions, when read as a whole, the Ontario Temperance Act is an enactment falling within section 152.

The appeal should therefore be dismissed with costs.

MIGNAULT J.—The very full and satisfactory judgment rendered by my brother Duff on behalf of Mr. Justice Maclean and himself, permits me to express my views in a few words.

The preliminary objection of the respondent is that the appellant has not made out a case which would justify him, under the authorities, in asking, in a suit against the Attorney General, that the legislation in question be declared invalid or inoperative. The appellant contends that an intolerable situation has been created by this legislation, the validity of which he questions, and that, if his action cannot be received, he must either submit to an unjustifiable

abridgment of his legal rights, or suffer, so as to be in position to assert them, the ignominy of criminal prosecution and possible imprisonment. There might conceivably be such a situation of oppression, by reason of drastic and arbitrary legislation, that would entitle this argument to very serious consideration, but here the position of the appellant does not differ, in point of any interest which he can assert, from that of hundreds of other citizens of the province who are opposed to prohibition, and he is not in jeopardy by reason of any act of his or of any threat of a penalty unless he submits to an unjustifiable demand. Moreover, the inconvenience of allowing actions of this nature to be taken by one who pretends, without shewing any special interest, that certain legislation is *ultra vires* or inoperative is too obvious for discussion. Even were the situation an intolerable one, a convenient mode of testing the validity of an obnoxious statute might possibly be found in such a proceeding as was resorted to in *Union Colliery* v. *Bryden* (1). I can therefore see no reason for extending the rule laid down in *Dyson* v. *Attorney General* (2), and followed in a number of well known cases.

This preliminary objection suffices to dispose of the appeal, and it is not absolutely necessary to express an opinion upon the merits. However, as the question is one of great public interest and as doubt has been cast upon the validity of legislation given effect to after the electorate had been invited to pass upon its advisability, I think I should give the parties the benefit of the views I have formed after listening to the very full argument of counsel. I can do so with all the more brevity that I entirely concur in what has been well said by my brother Duff.

The question, as I understand it, is whether the Ontario Temperance Act is, within the meaning of Part IV of the Canada Temperance Act, a law prohibiting the sale of intoxicating liquor for beverage purposes. It is not whether it is an absolute prohibition, but merely whether it is what the Parliament of Canada must be assumed to have intended to describe in section 152 of the Canada Temperance Act as

a law prohibiting the sale of intoxicating liquor for beverage purposes.

(1) [1899] A.C. 580. (2) [1911] 1 K.B. 410.

1924
SMITH
v.
THE ATTORNEY GENERAL OF ONTARIO.
Mignault J.

Section 44 of the Ontario Temperance Act, allowing under certain conditions the sale of native wines, furnishes the only serious difficulty. But it must be observed that, under the Canada Temperance Act, the sale of native wines was not considered inconsistent with the prohibition of the sale of intoxicating liquor for beverage purposes (section 122 in Part II, which bears the title "Prohibition"). And the only question being what Parliament intended by the words I have quoted, I do not think that such an exception, in the Ontario Temperance Act as Parliament had itself admitted in section 122 of the Canada Temperance Act would take the provincial prohibitory law out of the class of laws which Parliament contemplated as prohibiting the sale of intoxicating liquors for beverage purposes. I need go no further, for without this express exception in the Canada Temperance Act the question might well be considered a doubtful one, and it is unnecessary to say whether or not exceptions of this nature may not, if extended, prevent the provincial law from coming within the category of prohibitory liquor legislation.

On the whole, I think the appellant fails on the preliminary objection of the respondent as well as on the merits of his action.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*
Solicitor for the respondent: *Edward Bayly.*

1924
*Feb. 6, 7.
*Mar. 21.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG (DEFENDANT) ..... APPELLANT.

AND

ALPHONSE E. MARTIN (PLAINTIFF) ....RESPONDENT.

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

Insurance—Fire—Agency—Draft for loss sent by company—Signature of insured procured by fraud of agent—Subsequent action by insured upon the draft—Company's responsibility—Estoppel.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Mignault and Malouin JJ.

The respondent had taken fire insurance policies in several companies, amongst which were the appellant company and The Farmers' Company, both represented by one Dace as their agent. The property insured having been destroyed by fire, the respondent received from the adjuster a memorandum shewing him entitled to $2,864.45 as against The Farmers' Company, and to $1,841.45 and $2,861.60, as against the appellant company, under two policies. Later on, The Farmers' Company, sent to Dace their cheque payable to the respondent; and Dace appropriated its proceeds by forging the signature of the respondent. The latter, pressing Dace for a settlement, accepted as an accommodation Dace's personal cheque for the amount of his claim against The Farmers' Company. On the afternoon of the same day, Dace informed the respondent that the cheque of The Farmers' Company had arrived. At that time, Dace had also received from the appellant company two drafts, payable to the order of the respondent, for the amounts already mentioned. Dace then obtained the respondent's endorsement on the larger one of the drafts on the representation that it was the cheque of the Farmers' Company, which he would use to reimburse himself for his personal cheque, and also secured the respondent's signature on the other draft on the representation that it was a receipt, the execution of which was a formality required by The Farmers' Company. Dace endorsed both drafts and deposited them to his own credit, and they were later paid and charged to the appellant's account by its bank. The respondent sued the appellant company on his policies and the defendant pleaded payment and release.

Held, Davies C.J. and Duff J. dissenting, that Dace, in the fraud practised upon the respondent, was acting within the scope of his agency so as to make his fraud that of his principals, the appellant company; and the endorsements on the drafts of the appellant company were not binding on the respondent in the circumstances in which they were given.

Per Davies C.J. and Duff J. (dissenting). Dace did not profess to act and was not in fact acting within the scope of his authority as agent of the appellant company; and as to the larger draft endorsed by the respondent, the latter was estopped from claiming upon it, as by his conduct he represented to the bank that Dace was authorized to collect it.

Judgment of the Appellate Division ([1923] 3 W.W.R. 897) affirmed, Davies C.J. and Duff J. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Tweedie J. at the trial (2) and maintaining the respondent's action.

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

Lafleur K.C. and *Ford K.C.* for the appellant.

Nesbitt K.C. for the respondent.

(1) [1923] 3 W.W.R. 897. (2) [1923] 2 W.W.R. 32.

1924

NATIONAL UNION FIRE INS. CO. v. MARTIN.

Idington J.

THE CHIEF JUSTICE (dissenting).—I concur with the reasons for judgment stated by my brother Duff.

IDINGTON J.—This action was brought by respondent to recover insurance due on two policies of insurance issued by the appellant and was tried by Mr. Justice Tweedie in the trial division of the Supreme Court of Alberta who, after apparently most careful consideration, gave judgment for the respondent.

From that judgment said company appealed to the Appellate Division of the Supreme Court of Alberta, taking almost every imaginable ground of objection.

Mr. Justice Beck of the Appellate Division, in an elaborate and comprehensive judgment, concurred in by his colleagues, assigned reasons, with which I fully agree, why said appeal should be dismissed and it was dismissed accordingly.

The statements of fact set forth in said respective judgments of the court below, in my opinion, entitle the respondent to rely, as his counsel did herein, upon the decisions in the cases of *Lloyd* v. *Grace* (1), and *Carlisle & Cumberland Banking Company* v. *Bragg* (2), in appeal, which seem applicable to the facts herein presented as I read them.

I cannot, with all due respect, after due consideration, accept the interpretation of said facts adopted by counsel for appellant and pressed upon us herein.

I, therefore, see no useful purpose to be served by repeating what the learned judges in the courts below have stated as to the facts or the law, and, agreeing therewith, am of the opinion that this appeal should be dismissed with costs.

DUFF J. (dissenting).—The respondent sued the appellants to recover $1,841.45 and $2,861.60 under two policies of insurance insuring against fire his restaurant in Edmonton and its fittings and furniture. In answer to the respondent's claim the appellants produced two warrants or drafts drawn upon the Standard Bank of Canada for these amounts, payable to the order of the respondent, to each of which was appended the respondent's endorsement, and which, on faith of these endorsements, had been paid by the bank and charged to the appellants' account. The

(1) [1912] A.C. 716. (2) [1911] 1 K.B. 489.

endorsements were in fact procured by the fraud of one Dace, the appellants' local agent at Edmonton, and the questions for decision are: First, assuming that the appellants are not responsible for Dace's fraud, are the endorsements or either of them binding on the respondent in the circumstances in which they were given? and, second, if this question should be answered unfavourably to the respondent, was Dace, in the fraud practiced upon the respondent, acting within the scope of his agency so as to make his fraud that of his principals? An affirmative answer to this question would, of course, involve a decision against the appellants.

The respondent had taken insurance in several companies, only one of which, in addition to the appellants—The Farmers' Company—it is necessary to mention. After the fire, which occurred on the 28th August, 1921, the usual adjustment occurred, and the respondent received an apportionment slip shewing that he was entitled as against the Farmers' Company to $2,864.45, and as against the appellants in respect of his two policies the sums already mentioned, for which the action was brought.

On the 10th October, 1921, the Farmers' Company sent to Dace, who also acted as their agent at Edmonton, their cheque payable to the respondent for the sum to which he was entitled from them, with a form of receipt attached. To these documents Dace appended the forged signature of the respondent, and having cashed the cheque, appropriated the proceeds. Pressed by the respondent's inquiries concerning this claim against the Farmers' Company, Dace on the 26th October offered the respondent his personal cheque for the amount of this claim as an accommodation, and this proposal being accepted, the respondent received Dace's cheque upon his personal account, which was by him post-dated 27th October. In the afternoon of the 26th October, after this interview, Dace informed the respondent that the cheque of the Farmers' Company had arrived.

In point of fact, Dace had received from the appellants the two drafts in question in this litigation, and then and there proceeded to obtain the respondent's endorsements upon both.

1924
NATIONAL UNION FIRE INS. CO. v. MARTIN.
Duff J.

One of the drafts—the larger one—Martin was told was the cheque of the Farmers' Company, which he was asked to endorse pursuant to his understanding with Dace, so that, as Dace said, "he could get his money." This request Martin complied with, notwithstanding the fact that Dace's post-dated cheque had not been deposited or marked, and was, as Martin said, in his wife's possession at his house. The other draft he endorsed on Dace's representation that it was a receipt: the execution was a formality which the company required. Martin saw that the first mentioned draft was an order on the Standard Bank of Canada for the payment of the amount mentioned; and he noticed as he thought, that it corresponded with the sum payable to him by the Farmers' Company, and that it was payable only upon acceptance by the Calumet Underwriters Department of the National Union Fire Insurance Company. Martin had in his possession at the time his apportionment slip, which he had read, and on which his policies with the National Union Company were referred to under the denomination "Calumet." Nevertheless, having asked Dace for an explanation of this term in the draft, he accepted his explanation that the Calumet Department was the clearing house for paying the Farmers' Company's losses. Martin had no suspicion throughout the interview that he was dealing with Dace in any other capacity than that of agent for the Farmers' Company or that any trick of any description was being practiced upon him. He endorsed the larger draft under the absolute conviction that Dace was entitled to have him do so unless he gave up possession of Dace's personal cheque.

It is convenient to consider first the second of the questions stated above, whether, namely, the appellants are responsible for what Dace did in the proceeding just described.

The answer to this must in turn be governed by the conclusion we reach upon the question whether, to quote the language of Lord Macnaghten in *Lloyd* v. *Grace* (1), a case to be discussed later, Dace was acting "in the ordinary course of his employment," as the appellants' agent, "and not beyond the scope of his agency."

(1) [1912] A.C. 716.

Dace was professing to act in part for himself and in part for the Farmers' Company. When he informed the respondent that the cheque of that company had arrived, he was professing to perform a duty within the scope of his employment as agent of that company. So, also, when he procured the signature of the respondent to one of the documents by misrepresenting it as a receipt which the company required; so also when he produced the other document and exhibited it as a cheque in his possession as agent for delivery to the respondent in payment of the company's liability. In procuring the respondent's endorsement upon that document to enable him to cash it he was purporting to act in his own behoof. It was, moreover, essential to his plan that he should mislead the respondent by concealing from him the fact that he was holding these documents for delivery to him in his capacity as agent of the appellants.

I suggested at the argument that he was purporting to act for the Calumet Underwriters Department of the appellants: that suggestion, I am convinced, quite fails to do justice to the facts as a whole, and is quite untenable in light of a critical examination of the findings of the trial judge.

Dace was not purporting to act on behalf of the appellants; on the contrary, he was discarding his character as agent for the purpose of enabling him to cheat both his principals and the respondent. His acts, on their face, were the acts of a person who was a stranger to the appellants, and the respondent dealt with him on that footing.

I am emphasizing these facts as of cardinal importance, the significance of which I think, with great respect, was not quite fully appreciated by the learned judges of the Appellate Division.

The company, therefore, cannot be held responsible for Dace's acts on the ground that these acts were within the apparent scope of his authority as the appellants' agent. Responsibility, if it exist, must rest upon the ground that in doing what he did Dace was acting within the *actual* course of his employment and not beyond the *actual* scope of his agency. It seems to be abundantly clear that he was not acting within the course of his employment. There

1924
NATIONAL UNION FIRE INS. CO. v. MARTIN.
Duff J.

may, no doubt, be occupations in which it is contemplated that in the ordinary course of his employment, an agent, without passing beyond the scope of his authority, shall at times represent himself as acting for another. But it would be an almost fantastic suggestion that a local insurance agent, entrusted as Dace was with cheques or orders to be delivered in payment on behalf of his company of an insurance loss, would be within the course of his employment in concealing the fact that he was in possession of such orders for that purpose, with the object of obtaining the signature of the payee for the purpose of appropriating the proceeds to himself. The orders, on the face of them, fully disclosed their character and the particulars of the claims they were intended to satisfy. Dace had obvious duties in relation to them: to inform the respondent that he had received them; to give any explanations that might be necessary to enable the respondent to understand and procure payment of them (although it would be difficult to suggest any point upon which explanation could be required); and if, in the performance of that duty, while professing to act in his capacity as agent for the appellants, he had deceived or misled the respondent to his detriment, it is conceivable that there might, in special circumstances, be some responsibility on part of the appellants. But even maintaining his proper character of representative of the appellants, it would seem to be impossible to contend that he would be acting within the course of his duty in procuring the respondent's endorsement for the purpose of enabling him to apply the proceeds of the orders in payment of a debt due by the respondent to himself. Such an act could only be viewed by Dace, as well as by the respondent, as an act done by the respondent on his own behalf. In point of fact, as I have already said, the respondent could not have failed to understand that Dace, in procuring the endorsement of the order for twenty-eight hundred odd dollars, was acting for himself, to serve his own personal purpose. The principle is stated in the judgment of Blackburn J., in *McGowan* v. *Dyer* (1), in the following passage:

(1) [1873] L.R. 8 Q.B. 141, at p. 145.

In Story on Agency, the learned author states, in s. 452 the general rule that the principal is liable to third persons in a civil suit "for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent *in the course of his employment,* although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them." He then proceeds, in s. 456: "But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit."

Christie, as managing director, had a most extensive authority to act for the company, and we do not at all question that the company must be bound by every act of his when acting for them within the scope of that extensive authority. But what he did here was in his private capacity, receiving payment of his own individual debt, and, extensive as his authority was, that act did not come within it. We see no principle on which the company should be liable for what he did, any more than an ordinary employer would be answerable for the act of his agent not acting within the scope of his authority.

The appeal must on this issue succeed because, as Lord Herschell said in *Thorne* v. *Heard* (1):

If the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal;

and as Lord Lindley said in *Farquharson* v. *King* (2),

I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist.

The court below have considered that the case in this aspect of it is governed by the decision in *Lloyd* v. *Grace* (3). As this is a point of considerable importance, it is well, perhaps, that the facts as found by the trial judge, Scrutton J., should be stated. The findings were as follows:

It was within the scope of Sandles' employment to advise clients who come to the firm to sell property as to the best legal way to do it and the necessary documents to execute; that the appellant did rely on the representations of Sandles professing to act on behalf of the firm that the documents in question were necessary to facilitate and carry out the sale of the land to her; that she did not know she was signing conveyances to

(1) [1895] A.C., 495 at p. 502. (2) [1902] A.C. 325, at p. 341.
(3) [1912] A.C. 716.

1924

NATIONAL UNION FIRE INS. CO. v. MARTIN.

Duff J.

Sandles outside the scope of his employment, and that she was justified in relying on the representation of Sandles without reading and trying to understand the documents tendered to her.

Lord Macnaghten adds in his judgment, at p. 731:

> That seems to me a clear finding that the fraud was committed in the course of Sandles' employment and not beyond the scope of his agency.

There is hardly a relevant particular in respect of which the facts of this case present any analogy to the facts as disclosed by these findings. It is perfectly clear that the respondent did not rely upon any representation of Dace professing to act on behalf of his principal. It would be beside the question to say that the respondent did not know that Dace was doing something outside of the scope of his employment as the appellants' agent when he believed that he was dealing with Dace in a different capacity altogether. Indeed, in *Lloyd* v. *Grace* (1), the essential point in the grounds of the decision is that the clerk was held out by his employer as having, on the employer's behalf, authority to transact business of the confidential nature he was professing to transact, and as being a person upon whom clients might rely as representing his principals, not only in preparing documents and advising about them, but in explaining their contents and effect and in advising as to the manner in which such transactions should be effected. In all cases of the class to which *Lloyd* v. *Grace* (1) belongs,

> It is * * * assumed (as Lord Selborne said in the passage referred to above) in all such cases that the third party, who seeks the remedy, has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal.

The supposed credentials in the agent's possession were the last things in the world the respondent relied upon. Had he done so, his, Dace's, fraudulent designs must have been foiled.

I come now to the first of the questions stated above. And, first, of the larger draft for twenty-eight hundred odd dollars. The doctrine of estoppel, as Lord Macnaghten said in *Whitechurch* v. *Cavanagh* (2).

> is founded upon a broad principle which enters * * * deeply into the ordinary dealings and conduct of mankind

and it has been expounded many times; but the precision

(1) [1912] A.C. 716. (2) [1902] A.C. 117 at p. 130.

of Parke B's judgment in *Freeman* v. *Cooke* (1), has never been impugned, and it is that statement of it which is most opposite to the question presented by this case. I quote the passage so far as material:

> The rule in *Pickard* v. *Sears* (2), said Parkes B., in *Freeman* v. *Cooke* (1), is "that where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" * * * The proposition contained in the rule itself, as above laid down in the case of *Pickard* v. *Sears* (3) must be considered as established. By the term "*wilfully*," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.

The second proposition laid down by Brett J., in *Carr* v. *London & North Western Ry. Co.* (3), may with advantage also be kept in mind:

> Another recognized proposition seems to be, that if a man, either in express terms or by conduct makes a representation to another of the existence of a certain state of facts, which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief in the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

There can be no doubt that the respondent did intend to invest Dace with authority to procure payment of the draft, and the critical question is whether his conduct, taken as a whole, involved a representation to the Standard Bank that he had invested Dace with such authority.

Before proceeding with a discussion of the facts immediately relevant, there are one or two subsidiary points which ought to be mentioned. There seems to be little reason to doubt that the draft, when it left Dace's hands, had all the acceptances required for presentation to the Standard Bank. It was in due course honoured, and it seems unlikely, first, that a draft which was still incomplete in this respect, would be in Dace's hands for delivery to the respondent, and more unlikely still that such a draft would

(1) [1848] 2 Ex. 654. (2) [1837] 6 Ad. & E. 469.
(3) [1875] L.R. 10 C.P. 307.

1924
NATIONAL UNION FIRE INS. CO. v. MARTIN.
Duff J.

have been paid by the Dominion Bank at Edmonton. I do not consider the question of the character of the instrument as regards negotiability at all important. Negotiability by estoppel is at best a slippery expression, and we need not concern ourselves with it here. The actual signature of the payee was, I think, a sufficient endorsement in the sense that if accompanied by delivery to a *bona fide* transferee for value it would have been sufficient to entitle such a transferee to assert Martin's rights against the appellants. "Proper endorsement" means a sufficient endorsement by the proper person, the payee, and this is not affected by the instructions on the back, the first sentence of which is couched in language of advice in contradistinction to the last, which contains an imperative direction. I do not suggest that the absence of the words, "operating as the Shasta Café," would not probably in fact have given rise to some difficulty with the bank; for the present I am speaking only of the legal position.

The respondent, as already mentioned, had agreed to repay Dace's advance by endorsing in his favour the Farmers Company's cheque when it arrived, and this understanding he thought he was carrying out by endorsing the draft in such a manner as to enable Dace to procure payment of it according to its tenour.

Did the respondent then by his conduct represent to the Standard Bank that Dace was authorized to collect this draft?

Both parties, of course, intended that Dace should be, and both thought he had been invested with this authority. Assuming, as was held in the court below, and I think rightly, that the draft was not a negotiable instrument, the respondent's action, intended as it was to have this effect, must be treated as giving Dace authority to act for him in the collection of the draft—an authority which would have been irrevocable had the transaction been what the respondent conceived it to be.

By endorsing the draft and giving it to Dace with authority to procure payment of it, he seems to have authorized Dace to make such a representation, which he, in effect did, by presenting the draft for payment through his own bank. Dace was unquestionably intended by both to have author-

ity to do this effectually, and assuming that Dace exceeded the limits of his actual authority implied from this understanding, by adding the description "operating as Shasta Café," it is difficult to see how, as against the bank, the respondent, who had by his signature accredited the endorsement, could dispute his authority.

I have refrained from speaking of estoppel by negligence, because this is a case of estoppel by representation arising from conduct or it is not a case of estoppel at all. If Martin's conduct amounted to a representation within the principle as enunciated above, that is the end of the matter; if not, that is also the end of the matter.

With respect, there is not much analogy between this case and *Carlisle* v. *Bragg* (1). Rigg's fraud was similar to Dace's and Bragg's stupidity on the same plane as Martin's; but Bragg did not execute a document, knowing it to be a guarantee, or a document of any description, which Rigg was intended to present to the bank for the purpose of obtaining money or credit upon it. In short, Bragg made no representation himself and authorized Rigg to make no representation as to Rigg's authority or as to the validity of the document Rigg produced. Consequently, the appellants could only succeed by shewing that Bragg was under some duty to them to exercise care for their protection.

The case of *Swan* v. *North British Australasian Co.* (2) also is easily distinguishable. The blank transfers in themselves amounted neither to a representation nor to authority to make one, because the clerk was not put into possession of the indicia of title. It was his felonious act in possessing himself of these which enabled him to represent himself as having authority to transfer the shares. "Estoppel by negligence" availed nothing because of the absence of any duty to exercise care owing to the people who suffered by the fraud.

It was urged on behalf of the respondent that Dace's act in adding the words mentioned to the endorsement was an independent wrongful act interrupting the chain of causation—*novus actus interveniens*—between the respondent's

(1) [1911] 1 K.B. 489. (2) [1862] 2 H. & C. 175.

1924

NATIONAL UNION FIRE INS. CO. v. MARTIN.

Duff J.

conduct and the act of the bank in paying the draft. The essential thing, it is to be observed, in applying the principle of estoppel as above enunciated, is to consider whether the conduct relied upon as constituting the estoppel has given rise to the belief upon which the person misled has acted, and that is the decisive question in this case. An analogous question has come up for consideration again and again in cases in which, like this, the courts have had to decide which of two innocent persons who have been defrauded by a third person shall bear the loss caused by the fraud. The famous dictum of Ashurst J., in *Lickbarrow* v. *Mason* (1), to the effect that he should bear the loss who has "enabled" the third party to commit the fraud is, as a general proposition, much to wide, and the question in such cases is not whether the defendant has "enabled" by his conduct the third party to commit the fraud, but whether his conduct has directly led to the deception which the defrauder has been "enabled" to practice. All such cases involve, and any general principle derived from them postulates, the intervention of a fraud in the absence of which nobody would have suffered. A reference to one or two examples may be useful. In *Brocklesby* v. *Temperance Building Society* (2), a father intrusted his son with title deeds for the purpose of raising a limited sum, the son's authority being expressed in a document delivered to him by the father. The son by an ingenious series of frauds, by concealment of the written authority and by means of forgery, succeeded in borrowing a larger sum, secured by equitable mortgage by deposit of the title deeds, and appropriated the difference between the sum borrowed and the sum authorized to be borrowed. The father was held by his conduct to be bound, following the earlier case of *Perry-Herrick* v. *Attwood* (3) where a mortgagee having permitted the mortgagor to have possession of the title deeds for the purpose of borrowing money upon them for the benefit of the mortgagor but limited in amount, was held to be bound by his license to the mortgagor and the delivery of the title deeds to recognize the priority of the equitable mortgage

(1) [1787] 2 T.R., 63; 1 R.R. 425.

(2) [1895] A.C. 173.

(3) [1857] 2 De G. & J. 21.

created by the deposit of them to secure a much larger sum than that authorized. In both these cases, of course, it was the fraud of the defrauder that was immediately responsible for the loss. In the later of the two, *Brocklesby's Case* (1), the fraud involved misrepresentation and forgery. Neither case proceeded upon the principle of agency. In *Brocklesby's Case* (1), although the son obtained possession of the title deeds as his father's agent, the fact of his agency was concealed from the parties with whom he dealt. Both decisions are based upon the ground that, the indicia of title having been intrusted to the defrauder with authority to deal with them for the purpose of raising money (though limited in amount), the responsibility for the fraud practiced upon third parties must rest upon the owner, who armed the defrauder with the instrument that enabled him to carry his criminal designs into effect. In *Union Credit Bank* v. *Mersey Docks* (2), Bigham J., had to consider a curious case, in which the bank, holding as security eighteen hogsheads of tobacco warehoused with the Mersey Docks Board, gave the person who was the owner of the goods subject to their security a delivery order complete, with the exception that a blank was left in the space for the numbers of hogsheads, the understanding being that the owner, who had repaid his advance on one of these, should fill in the number of that hogshead. Instead of doing so, he filled in the blank in such a way as to enable him to obtain delivery of the whole eighteen hogsheads. The responsibility of the bank for the owner's action was affirmed by Bigham J., who rejected an argument founded upon the language of the head-note in *Swan's Case* (3) to the effect that

> the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments.

That learned and experienced judge held that the case was one of estoppel by representation, and that the bank was bound by the representation made by the person whose representation they had accredited by intrusting him with the delivery order in blank. In *London Joint Stock Company* v. *MacMillan* (4), the House of Lords had to consider

(1) [1895] A.C. 173.
(2) [1899] 2 Q.B. 205.
(3) 2 H. & C. 175.
(4) [1918] A.C. 817.

1924

NATIONAL UNION FIRE INS. CO. v. MARTIN.

Duff J.

a question arising out a forgery by a clerk who had presented for signature to Mr. Arthur, a member of the respondent firm, a cheque which was represented to be a cheque for petty cash to the amount of £2. Mr. Arthur signed the cheque without observing the body of it. In point of fact, the space provided for stating in words the sum to be drawn was left blank, while the space for stating the sum in figures had the figure " 2 " in it, but so placed that the clerk was able, without exciting suspicion through the appearance of the cheque, to insert a " 1 " to the left and a " 0 " to the right of the " 2," and to present a cheque to the bank for £120 accredited by a genuine signature. Their Lordships maintained the responsibility of the customer, all of them on the ground that the customer had made default in the exercise of the care which he owed to the bank arising out of the relation of banker and customer; but Lord Hardane, at pp. 817-820 of the report, deals with the questions raised by the appeal in their relation to the general principles of estoppel, and refers to *Brocklesby's Case* (1) and *Perry-Herrick's Case* (2) as illustrations of the general doctrine to be applied.

A very different situation, however, confronts us in considering the smaller of the two drafts. The respondent was not aware that this was a draft for a sum of money payable upon the authority of his signature. He believed he was signing a receipt, and, in doing so, observing a formality, connected with the settlement of the claim by the larger draft. There is no ground for saying that he intended to make any representation upon which the bank was to act, nor, I think, that he did anything which a reasonable man would have considered to be calculated to have the effect of such a representation. And he certainly had no intention to make any representation to the appellants, nor had he any reason to believe that his act would be used as a representation to them; nor can I discover any breach of any duty incumbent upon him to exercise care in respect of that particular document. Consequently I think, as regards that issue, that the appellants must fail. In the result the appellants succeed as to the larger draft and fail as to the smaller. Success, in this view, having

(1) [1895] A.C. 175. (2) 2 De G. & J. 21.

been divided throughout, I think the most just and convenient way to deal with the costs would be to award none to either party in respect of the proceedings of the action or in either of the appeals.

ANGLIN J.—I would dismiss this appeal.

The agency of Dace for the appellant company is fully established. It is a reasonable inference from all the circumstances that the procuring of Martin's signature to the documents sent by the appellant company to Dace was within the scope of his duties as its agent. His misrepresentation to Martin as to the relation of the appellant company to the Farmers' Insurance Company involved the statement to Martin that his signature was being sought for the appellant, as in fact it was. Invoking the documents signed by Martin as the basis of release from his claim under his insurance policies, the appellant cannot escape responsibility for the fraud by which its agent obtained his signature to them. Martin's failure to read the papers to which Dace asked his signature for the appellant in my opinion affords no answer to the position taken on his behalf that, as between him and the appellant company, his signature to them is wholly ineffective because of the fraud by which it was obtained.

MIGNAULT J.—This is an appeal from the judgment of the appellate divisional court of Alberta affirming a judgment of Mr. Justice Tweedie in favour of the respondent.

The respondent sued the appellant, claiming indemnity for loss by fire insured against under two policies issued by the appellant, which loss was adjusted at $1,841.45 on policy No. 11278 and at $2,861.80 on policy No. 11346. The respondent at the same time had policies of insurance in several other companies, under which his loss was also adjusted. Among these policies was one of the Farmers' Fire and Hail Insurance Co. of which the adjusted amount was $2,864.45.

The plea of the appellant was that the moneys due under policies Nos. 11278 and 11346 were fully paid and satisfied by two drafts for $1,841.45 and $2,861.80 respectively on the Standard Bank of Canada, Toronto, payable to the order of the respondent, which said drafts were properly endorsed by him and paid to him or to his order.

1924

NATIONAL UNION FIRE INS. CO. v. MARTIN.

Mignault J.

On this issue the learned trial judge found that these so-called drafts were sent by the appellant company to one Thomas Dace, who represented it in Edmonton, with what instructions was not disclosed, but that it was very clear that he had received them as agent of the company; that after the losses were adjusted, the respondent frequently called at Dace's office to inquire concerning the money payable under the policies, and, on October 4th, received from Dace two cheques of the Canada Security Insurance Co. in settlement of the claims against it, and that from October 4th he made frequent calls upon Dace up to October 26th, but without results; that in the meantime Dace received from the Farmers' Company its cheque drawn on the Merchants Bank at Calgary, dated October 11th, for the sum of $2,864.45, payable to the respondent with a voucher for the above amount to be signed by the latter; that Dace forged on this cheque and on the voucher the respondent's name, and the cheque was further endorsed for deposit by Dace and deposited by him to his credit on October 18th and paid by the bank; that on the 26th of October in the forenoon the respondent again called at Dace's office and made further inquiry for the money due him under the remaining policies, whereupon Dace gave him his own cheque dated October 27th for $2,864.45, which he said was in anticipation of the cheque which he was to receive from the Farmers' Company, the respondent accepting Dace's cheque as he was in urgent need of the money to re-establish his business.

The finding of the learned judge as to what was done, on October 26th, after the respondent had received Dace's personal cheque, with respect to the two drafts of the appellant company, had better be given in his own words:

> At noon Dace telephoned the house of the insured and left a message to the effect that he had received the cheque from the Farmers' Insurance Company and asked to have him come in and endorse it. Without knowledge of this request plaintiff went to the office of Dace, shortly after noon of the same day when Dace informed him that the Farmers' cheque had arrived and asked him to endorse it so that he could get the money which he had advanced to him. For this purpose they both sat at a table, the plaintiff sitting to the right of Dace. The documents were presented, the one relating to the claim of $2,861.80 being face up with Dace's hand upon it was visible to a very large extent to the plaintiff. He admits having read the words "Upon acceptance by the Calumet Agency Department" as his own name and the amount ($2,861.80) two thousand eight

hundred and sixty-one dollars eighty cents, and may have read the words "National Fire Insurance Company" and "The Standard Bank of Canada, Toronto." He paid particular attention to the amount which was within two or three dollars of the amount of the claim which he had against the Farmers' Fire and Hail Insurance Company, which undoubtedly he believed to be the correct amount of that claim and induced him to believe and rely upon the statements of Dace made in explaining the nature of the documents which he was signing. When the plaintiff made inquiries of Dace as to the opening words of the documents which referred to the Calumet Underwriters' Agency and which immediately preceded the "National Union Fire Insurance Company" he was informed by him that this company were the underwriters of the Farmers' Insurance Company and that its losses were cleared and paid through it, which statement the plaintiff accepted. All this time Dace kept his hand upon the document and turned it over after which he kept his hand upon the back of it and I am satisfied never released control or custody of it. When he turned the document over he directed the plaintiff where to endorse it, which he did. He then presented the second document for $1,841.45, the face of which the plaintiff did not see and explained that that was a receipt which was required by the insurance company whereupon the plaintiff wrote his name on the back. The words "Operating as Shasta Cafe" which form part of the endorsement on each of the documents were not written by the plaintiff nor at his request, nor with his authority, nor did he subsequently approve the same.

On October 26th the day upon which the plaintiff endorsed the two documents Dace subsequently endorsed each of them "For deposit T. Dace, Real Estate and Insurance" and deposited them to his credit at a branch of the Dominion Bank in which he did business. The bank credited his account with the proceeds, cleared them on the 27th and they were accepted and paid by the Standard Bank of Canada at Toronto on October 31, 1921, and charged to the defendant's account. The defendant subsequently acknowledging the correctness of its account.

It may be added that the respondent continued to press Dace for payment of the insurance due him by the appellant and finally threatened suit, whereupon shortly afterwards, Dace absconded from Edmonton and has not since been heard from.

The appellant relies on the endorsement on these drafts as conclusive evidence against the respondent that he was paid the amounts due under the policies of insurance. The respondent answers that this endorsement having been obtained by the fraud of Dace, the appellant's agent, for which fraud the appellant is liable, it cannot set it up as evidence of a payment which was never effected. To this the appellant replies that by a mere inspection of the documents which Dace tendered him for endorsement, the respondent could have discovered that these drafts were not those of the Farmers' Company but of the appellant, and that by

1924

NATIONAL UNION FIRE INS. CO. v. MARTIN.

Mignault J.

reason of his negligence the respondent is estopped from denying that he had been paid the amount for which these drafts were issued.

That Dace was the appellant's agent for some purposes was not disputed. It was stated in the policies that they would not be valid until countersigned by the duly authorized agent of the company at Edmonton, and Dace countersigned them as such. However the drafts in question were sent to Dace to be by him handed over to the respondent. Unfortunately we have not the covering letter from the appellant to Dace which no doubt accompanied the drafts. But I think we are entitled to assume from all the circumstances that it was within the scope of Dace's agency to hand over the drafts to the respondent and to see that they were properly endorsed by him. On the back of the drafts were instructions for the endorsement to be made by the payee as described on their face, and no doubt the appellant sent these drafts to Dace and not to the respondent, in order to ensure their proper endorsement. I therefore conclude that Dace was acting as the appellant's agent when by his fraud he obtained the signature of the respondent on the back of these drafts.

But it was argued that Dace in his dealings with the respondent, having represented these drafts to be those of the Farmers' Company, did not purport to act as agent for the appellant but as agent for the Farmers' Company. Dace undoubtedly received the appellant's drafts as its agent and was within the scope of his agency when he obtained the endorsement of the respondent. His representation that the larger of these drafts was that of the Farmers' Company—which the respondent was willing to endorse over to Dace who had given him his personal cheque for the amount of the payment—was a fraudulent misrepresentation in the course of the carrying out of Dace's agency for the appellant. And it seems clear that the appellant which relies on the endorsement so obtained as acknowledgment of payment of its debt towards the respondent cannot take benefit of this endorsement and repudiate the fraud by which it was obtained (Kerr, on Fraud and Mistake, 5th edition, p. 94, and cases cited).

The appellant's plea of estoppel by reason of the respondent's negligence—and that is the only estoppel set up as I read the pleadings—cannot in my opinion be entertained. Through the fraud of the appellant's agent the suspicion which came to the mind of the respondent when he read on the face of the larger cheque the words "upon acceptance by the Calumet Underwriters Agency Department of National Union Fire Insurance Company" was dispelled by Dace's assurance that this was the clearing house for the insurance company and that the Farmers' claim was being paid through this clearing house. The respondent's attention was chiefly directed to the amount of this draft, which was within two or three dollars the same amount as that of the Farmers' Company. And assuming that he was somewhat careless in endorsing the larger draft, for no estoppel can be asserted as to the smaller one the face of which was concealed from the respondent, I cannot see how the appellant being liable in law for the fraud of its agent can set up as a ground of estoppel against the respondent, a negligence induced by the very fraud for which it is responsible. In so far as these fraudulent representations of its agent are concerned the appellant is not an innocent third party entitled to set up estoppel.

The contention of the appellant in the courts below that these drafts were negotiable instruments was not repeated before this court and need not be discussed.

I would dismiss the appeal with costs.

MALOUIN J.—I would dismiss this appeal for the reasons for judgment of Mr. Justice Beck in the Appellate Division of the Supreme Court of Alberta.

Appeal dismissed with costs.

Solicitors for the appellant: *Ford, Miller & Harvie.*
Solicitor for the respondent: *P. G. Thomson.*

1924
*Mar. 12, 13.
*Mar. 22.

BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF TORONTO (PLAINTIFF). } APPELLANT;

AND

THE CITY OF TORONTO (DEFENDANT) . . RESPONDENT.

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

Municipal law—By-law—Building restrictions—Prior status of owner—Deposit of plans—Legal right to permit—Municipal Act, 11 Geo. V, c. 63, s. 10.

The Municipal Act of Ontario by section 399a passed in 1921 empowers the council of a city, *inter alia*, to pass a by-law to prohibit, within a defined area, the erection of any building other than a private dwelling but such by-law is not to apply to any building the plans for which were approved by the city architect before it was passed. The city of Toronto passed such a by-law in respect to part of a street on which the Separate School Board owned two lots on which it intended to erect a school house and had filed the plans therefor with the architect who refused to grant the permit to build by direction of the Board of Control in view of the contemplated by-law.

Held, reversing the judgment of the Appellate Division (54 Ont. L.R. 224) and applying *Cridland* v. *City of Toronto* (48 Ont. L.R. 266) Idington J. dissenting, that the architect had no right to refuse to issue the permit; that under the law as it stood the Board was entitled to have its plans considered and approved if in conformity with the law; and the by-law in this case was not a valid exercise of the statutory authority.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the order of Middleton J. (2) in favour of the respondent.

The facts are not in dispute. The only question raised on the appeal is whether or not the city by-law, prohibiting the erection on a part of Arthur street of buildings other than private dwellings, applied to the Separate School property owned by the Board when the by-law was passed and on which it proposed to build a school house, the plans for which had been filed with the city architect. Under the

PRESENT:—Sir Louis Davies C.J. and Idington, Duff and Mignault JJ. and Maclean J. *ad hoc*.

(The Chief Justice presided at the hearing but died before judgment was given).

(1) [1923] 54 Ont. L.R. 224. (2) [1922] Ont. W.N. 518.

Act empowering the city to pass such by-law it would not have applied if the plans had been approved and the permit to build issued.

The courts below held that the by-law applied and the school house could not be built. The Board has appealed to the Supreme Court of Canada.

Tilley K.C. and *Day K.C.* for the appellant. The architect had no rights to refuse the permit. *Cridland* v. *City of Toronto* (1). The city cannot use the statutory against an individual, *City of Toronto* v. *Virgo* (2)

Geary K.C. and *Colquhoun* for the respondent referred to *City of Toronto* v. *Williams* (3); *Commissioners of Taxation* v. *St. Marks* (4).

IDINGTON J. (dissenting).—This appeal is brought by leave given in an order of the Appellate Division of the Supreme Court of Ontario, but only upon the two following grounds:—

1. That the user of the property in question was such that the by-law did not apply thereto and that the non-user of a part of the property was no ground for holding that as to that part of the by-law did apply; and

2. That the passing of the by-law after application for a permit had been made was not a proper exercise of the power conferred by the statute.

This restricted form of leave is a novelty which there is room for doubting the efficacy of under the powers given the court below under the Supreme Court Act, as amended recently. I assume, however, for the present, that it is herein effective.

The litigation herein in question arises out of the facts that one of the Board's schools, consisting of four rooms, having been partly expropriated in the course of extending Terauley street by said city, the Board had to look elsewhere for new school grounds, and acquired two parcels of ground fronting on Prince Arthur avenue, a residential district in Toronto, and proceeded to turn the building on one of said parcels into a school-house of four rooms, and part of the other parcel into a playground for use by the scholars attending same, and fenced that part of the said second

(1) [1920] 48 Ont. L.R. 266.
(2) [1896] A.C. 88.
(3) [1912] 27 Ont. L.R. 186.
(4) [1902] A.C. 416.

1924

BOARD OF TRUSTEES OF ROMAN CATHOLIC SEPARATE SCHOOLS v. CITY OF TORONTO.

Idington J.

parcel off from its front part, which was at that time used as a dwelling-house wherein boarders were kept.

That front part of said parcel, known as No. 18, had been under lease when so acquired by the Board and so continued and, according to one of the formal admissions made by these litigants for the purposes of the trial and of these causes in appeal, had never been in the possession of the Board, or used as school property.

The questions raised must turn upon the correct interpretation of an amendment made to the Municipal Act, by section 399 (*a*) of said Act, 1921, 11 Geo. V, c. 63, section 10, which provided as follows:—

399a. By-laws may be passed by the councils of cities, towns and villages, and of townships abutting on an urban municipality;

Establishing restricted districts or zones.

1. For prohibiting the use of land or the erection or use of buildings within any defined area or areas or abutting on any defined highway or part of a highway for any other purpose than that of a detached private residence.

2. For regulating the height, bulk, location, spacing and character of buildings to be erected or altered within any defined area or areas or abutting on any defined highway or part of a highway, and the proportion of the area of the lot which such building may occupy.

(*a*) No by-law passed under this section shall apply to any land or buildings which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose, nor shall it apply to any building in course of erection the plans for which have been approved by the city architect prior to the date of the passing of the by-law, so long as when erected it is used for the purpose for which it was erected.

The city council, on the 26th September, 1921, passed the by-law now in question which, as required by said Act, before becoming valid, got the approval of the Ontario Railway and Municipal Board on the 28th of November, 1921, over three months before the Board of School Trustees got possession of said part of lot 18, now in question.

That by-law enacted as follows:—

No. 8834. A by-law

To prohibit the use of land or the erection or use of buildings on the property fronting or abutting on either side of Prince Arthur Avenue between Avenue Road and Huron Street, for any other purpose than that of a detached private residence.

(Passed September 26, 1921.)

The Council of the Corporation of the city of Toronto enacts as follows:

1924

BOARD OF TRUSTEES OF ROMAN CATHOLIC SEPARATE SCHOOLS v. CITY OF TORONTO.

Idington J.

1. No person shall use the land fronting or abutting on either side of Prince Arthur Avenue, between Avenue Road and Huron Street, or erect or use any buildings on the said land for any other purpose than that of a detached private residence.

The exception in subsection (*a*) above, is what is relied upon as entitling the Board appellant to claim exemption from the operation of said by-law.

I cannot convert the word " used " into the word " owns " as we are asked to do here under the foregoing facts. To do so would violate the plain meaning of the language.

I agree with the reasoning of the judgment of the Appellate Division, written at length by the late lamented Chief Justice Sir William R. Meredith, and need not repeat same here.

I cannot see any ground upon which to hold, as we are asked to do, that the passing of the by-law after a permit to build was asked by appellant, can be held in law not to have been a proper exercise of the powers given.

Suppose a person had bought but had never got possession of a lot in a residential district and had intended to erect thereon a building to be used by him as a business place that would destroy the value of all surrounding residences if insisted on, would his ownership be held as a user of it for such purpose simply because he had absolutely determined to do so, and had applied for a permit? I submit not.

I confess appellant's case at first blush seemed a hard one, and I approached the consideration of it from that point of view for they were driven out of one place because of public needs. But on seeing how much better they are off now I do not see why we should, by a metaphysical train of reasoning, set aside the plain reading of the act and thus strain the law.

I think this appeal should be dismissed with costs.

The judgment of Duff, Mignault and Maclean JJ. was delivered by Duff J.

DUFF J.—In August, 1921, the appellants, who for many years had conducted a school on St. Vincent street in Toronto, having been deprived by compulsory proceedings of

1924

BOARD OF TRUSTEES OF ROMAN SEPARATE SEPARATE SCHOOLS v. CITY OF TORONTO.

Duff J.

their school premises, which were required for the *situs* of a street, purchased for school purposes, pursuant to their statutory duty to provide schools for the children of separate school supporters, numbers 14 and 18 on Prince Arthur avenue. On the nineteenth of that month work was commenced on number 14 to convert the building, a dwelling house, into a temporary school-house, the intention of the Board being to erect a new school building upon the premises acquired. On the 9th September an application was made to the city architect for a permit authorizing the necessary alterations in number 14. On the 14th September the residents of the street (they appear to have acted with unanimity) requested the Board of Control to submit a by-law to the council regulating the character of buildings to be erected on the street in such a way as to prevent the erection of the projected school-house. On the following day the plans of a new school building to be erected on numbers 14 and 18 were filed with the City Architect, and a permit requested.

Neither of these applications for a permit was considered, the architect having received instructions from the Board of Control not to consider them, in view of the contemplated by-law, and applications for mandamus made by the appellants were dismissed. On the 28th September, the City Council passed by-law 8834, in these terms:—

1. No person shall use the land fronting or abutting on either side of Prince Arthur Avenue, between Avenue Road and Huron Street, or erect or use any buildings on the said land for any other purpose than that of a detached private residence.

This by-law shall take effect from and after receiving the approval of the Ontario Railway and Municipal Board.

This by-law was passed in professed execution of the authority given to the council by 11 Geo. V, 1921, c. 63, section 10, which is in these words:—

The Municipal Act is amended by inserting after section 399 the following section 399a:

399a. By-laws may be passed by the councils of cities, towns and villages, and of townships abutting on an urban municipality.

1. For prohibiting the use of land or the erection or use of buildings within any defined area or areas or abutting on any defined highway or part of a highway for any other purpose than that of a detached private residence.

2. For regulating the height, bulk, location, spacing and character of buildings to be erected or altered within any defined area or areas or

abutting on any defined highway or part of a highway, and the proportion of the area of the lot which such building may occupy.

(*a*) No by-law passed under this section shall apply to any land or building which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose, nor shall it apply to any building in course of erection or to any building the plans for which have been approved by the city architect prior to the date of the passing of the by-law, so long as when erected it is used for the purpose for which it was erected.

(*b*) No by-law passed by this section shall come into force or be repealed or amended without the approval of the municipal board; * * *

Applications for mandamus, made by the appellants, were refused.

The by-law having been approved by the Ontario Railway and Municipal Board by a majority of two to one, the chairman dissenting, an action was brought by the appellants, praying a declaration that the by-law was invalid, or, in the alternative, a declaration that it did not apply to the lands of the appellants, and that the appellants were entitled to a permit to erect a school-house; and for a mandatory injunction requiring the city architect to issue a permit; and damages.

This action was tried by Mr. Justice Middleton, who dismissed it. Mr. Justice Middleton had already held in *Cridland* v. *City of Toronto* (1), that the city architect ought not to delay the approval of plans with a view to effectuating the purpose of a proposed restrictive by-law. "Had this course been adopted," in relation that is to say to the application of the appellants, he observed in his judgment,

and had the plans been approved before the by-law was passed, the rights of the Board would have been saved, but the situation is now governed by the law which I have quoted,

the statute above set out, "and I can grant no relief." The Court of Appeal dismissed the appellant's appeal.

The statute on which the by-law rests endows the councils of municipalities of the designated classes with authority to restrict, in a material degree, the exercise by an owner of land of his rights of ownership. The legislature no doubt thought that, under the conditions nominated, a municipal council might not unreasonably consider that a landowner ought, in the general interest, to submit to some

(1) 48 Ont. L.R. 266.

1924

BOARD OF TRUSTEES OF ROMAN CATHOLIC SEPARATE SCHOOLS v. CITY OF TORONTO.

Duff J.

abridgement of his freedom. But it is very evident that when such a power is put into execution in an occupied street or district, there must be some provision for the protection of the existing status in order to avoid the possibility of serious, if not intolerable, injustice. Accordingly we find that the legislature, as might have been expected, has provided that no by-law, enacted under the authority of the statute, shall affect the use of any existing building for any purpose for which it is in use, at the date of the passing of the by-law, or the completion of any building then in process of erection, or the erection of any building, the plans of which, before that date, have been approved by the city architect.

The right of the owner of land, therefore, to make use of it, subject to the existing by-laws, in the erection of such buildings upon it as he thinks proper to erect, is preserved inviolate down to the point of time when the restrictive by-law is actually passed, and thereafter, in the limited degree prescribed, in the special cases mentioned. That right, as Mr. Justice Middleton held in the case already cited, includes the right to receive the necessary permit for the erection of a building proposed to be erected in conformity with the law in force for the time being. It is quite manifest that in the result, if effect be given to the judgments of the Ontario courts, this right is denied the appellants.

The by-law producing this result cannot, in view of the circumstances, in our opinion, be sustained as a valid exercise of the authority given by the statute. The protection of the existing status is a substantive element in the purpose of the enactment. The by-law, passed in the circumstances in which it was passed, necessarily had the effect (and it was so designed) of depriving the appellants of the benefit of a status of which the statute guaranteed the protection. That, in our opinion, is not according to the tenor of the authority created.

The appeal should therefore be allowed and there should be a declaration in the sense of the opinion just expressed. The judgment will include a declaration that the appellants are entitled to have their plans considered by the architect, and, if they conform to the law, approved. An injunction

is probably unnecessary; nor would it appear to be necessary to make any order as to the mandamus proceedings except as to the costs, but these points may be spoken to, if desired, on the settlement of the minutes. The appellants will have leave to apply, and they will have their costs throughout.

The appellants having succeeded in establishing their legal rights, we cannot refrain from expressing a hope that even now with the co-operation so far as necessary or useful of all parties concerned, it may be possible to make other arrangements which will relieve the residents of the street of the very grave detriment and hardship arising from the presence of the school, the existence of which is not disputed. In saying this we have no intention of intimating any doubt that the appellants acted in what they conceived to be their duty in the execution of the important functions entrusted to them by the law, but we hope it is not impossible that, having established their legal rights, they may find it consonant with their duty to make a serious effort to this end.

Appeal allowed with costs.

Solicitors for the appellant: *Day, Ferguson & Walsh.*
Solicitor for the respondent: *William Johnston.*

1924
*Feb. 15.
*May 13.

THE NAPIERVILLE JUNCTION RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

DAME L. DUBOIS (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Collision between two vehicles—Accident due to negligence of both drivers—Joint and several liability—Rule of common fault—Not applicable in absence of fault by the victim—Verdict—Articles 1053, 1054, 1056, 1106 C.C.—Articles 3, 500, 1248 C.C.P.

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc*.

1924

NAPIERVILLE JUNCTION RY. CO. v. DUBOIS.

Idington J.

In a case of collision between two vehicles in consequence of independent acts of negligence committed by their respective drivers, both directly contributing to the accident and to the injury suffered by a person having no control over the driver of the vehicle in which he was travelling, both drivers are jointly and severally liable. *The Grand Trunk Ry Co.* v. *McDonald* (57 Can. S.C.R. 268) followed. In such circumstances, the rule of common fault (which mitigates the liability of the negligent party owing to the contributing fault of the victim) does not apply; and the injured person is entitled to the full amount of the damages suffered by him, as the negligence of the driver or of any other passenger of the vehicle cannot be imputed to him.

The jury assessed the damages at $30,000; but under a misapprehension as to a rule of law applicable to the case (the question of common fault above stated), they awarded only "fifty per cent of the damages" to the respondent.

Held, Mignault J. dissenting, that the Court of King's Bench had authority under the provisions of articles 3 and 1248 C.C.P. to give effect to the conclusion necessarily resulting from the findings of the jury under a proper application of the law; and that court had the right, when affirming the judgment of the trial judge, to award to the respondent the full amount of the damages as found by the jury.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec, varying the judgment of the trial judge with a jury and maintaining the respondent's action.

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

Geoffrion K.C. and *F. Béique K.C.* for the appellant.

Lafleur K.C. and *St. Jacques K.C.* for the respondent.

IDINGTON J.—Dr. Gratton, the owner of an automobile car, had invited four guests to accompany him on a drive along the King Edward highway leading from Montreal to the United States boundary line.

The said owner was his own chauffeur in said drive and in no way under the control of any of his guests in the conduct thereof.

Dr. Desjardins, the husband of respondent, was one of said guests and took no part in directing the said owner and chauffeur. The respondent (now his widow) did not accompany the party.

The said highway is crossed at a very oblique angle by the appellant's railway track. And, by reason of the sur-

rounding conditions interrupting the view of those in an auto desiring to see any train or car on the railway, or those in a car travelling along the same, was in fact a dangerous crossing.

The said highway carried a very heavy traffic, and thus rendered it doubly dangerous.

The owner and chauffeur was proceeding at too high a rate of speed in approaching such a crossing, and when some of his guests who had caught sight of something moving on the railway track (which turned out to be two hand-cars tied together) and warned him thereof, he, in response thereto, by an error of judgment, increased his speed in the hope of crossing before the cars on the railway track could reach him, and diverted his auto slightly in the opposite direction to increase the distance between him and the incoming cars.

His effort was a failure, for the front one of said incoming cars struck the hind wheel of his auto and upset same on the adjacent embankment. That resulted in such serious injuries to the late Dr. Desjardins that he died in consequence thereof.

Hence this action by the respondent widow on behalf of herself and her eight children.

By reason of the introduction of numerous irrelevant suggestions set up during the trial, this case has, I respectfully submit, been rendered needlessly confusing. And questions were submitted to the jury, and answers got thereto, which seem to have continued the confusion of thought engendered thereby.

The sole issue was or ought to have been confined to the question of whether or not the defendant (now appellant) was guilty of negligence which produced the death of Dr. Desjardins.

Even if others had contributed thereto, but were not defendants herein, so long as it clearly appeared that neither deceased nor respondent was one of them, the issue was within a very narrow compass.

The said two cars tied together were hand-cars, of course small and low, used by the workmen in course of their repairs on appellant's track, for carring them to and from

1924

NAPIERVILLE JUNCTION RY. CO. v. DUBOIS.

Idington J.

their work, and their tools or other material incidental to the performance of their work in repairing said track.

It is alleged in appellant's factum that a power motor used in the first car could not with the power it had in use travel at a greater speed than from eight to ten miles an hour.

Such being the case, it would, I submit, if the car properly equipped for such an emergency, as it ought to have been when used to cross such a much travelled highway as that in question herein, have been easily stopped at a safe distance from the automobile.

Indeed the instructions given the foreman in charge of such cars by his superior officer directed him to stop if necessary. I fear there was a disobedient bravado existent, arising out of a supposed preference the appellant's cars had over highway travellers.

The question 6 submitted to the jury and the answers thereto are as follows:—

6th. Is the said accident due to the common fault of defendant and one or several of the passengers in the automobile in which the said L. N. Desjardins was then travelling? If so, which of them is in fault and in what did the fault of each consist?

Yes. Defendant is in fault in not having a whistle, bell, or some proper device for giving alarm, and also not having on their motor such control which would enable them to stop at short distance before crossings and avoid accidents.

The auto was travelling at a rate of speed which prevented them from stopping in due time; consequently, the driver of the auto, Doctor Albert Gratton, was at fault; also Abbé Gauthier, Camille Gratton and Joseph Gratton were partly at fault for advising. Unanimous.

The latter paragraph as to others I submit does not apply to anything necessary for the determination of this case, but the preceding finding against the appellant is not only amply supported by the evidence but also should dispose of all involved herein save the question of damages (covered by a later finding) if we have any regard to articles 1053 and 1054 of the Quebec Civil Code, which I think contain the relevant law which should govern our decision herein.

I cannot agree with appellant's counsel that the reference to the defective equipment of the car should be discarded on the assumption that this car, or those cars used for the purpose they were, had any preference to the right-of-way at this crossing.

It may be implied from the statutory provision relative to a locomotive and the train it is hauling that such a preference is given to such a train over the rest of the public travel at a crossing, but there is nothing, I submit, to entitle the workman using such a hand-car for the purposes of his work to any such preference.

Would he have the right, if repairing the railway track where it crosses the highway, to keep on working and disregard the public travel along the highway?

I cannot find any statutory provision that would justify such preference either for the car carrying the men home, for which purpose it was being used at the time in question, or for such a specimen of obstinacy as I suggest by way of illustrating the absurdity of the preference set up.

I admit the preference given to trains drawn by locomotives is not as clear and distinct in the Quebec legislation I have looked at, as in the "Railway Act" of Canada, but I cannot see how that helps appellant.

In other legislation we have had recently to consider the definition of a train and its preferential right was clear and explicit, but certainly did not extend to a hand-car.

In my humble opinion the hand-car in question and its driver had no more preference than a truck car has over an ordinary auto when meeting it at a busy street corner in our city.

In considering all that sort of legislation and how it is to be reasonably and rationally dealt with, the judgment of the Privy Council in the case of *Rex* v. *Broad* (1), written by Lord Sumner, and cited to us herein, after my brother Duff had called attention to it, is well worth considering.

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

DUFF J.—The action was brought by the respondent, the widow of L. N. Desjardins, who sued personally as well as in her capacity of tutrix of her eight minor children. The respondent's husband was killed in July, 1921, while driving as a passenger in an automobile owned and driven by Dr. Albert Gratton, of Montreal, with three other friends. The accident occurred at the point at which the appellant's railway crosses the King Edward Highway,

(1) [1915] A.C. 1110, at p. 1113.

1924

NAPIERVILLE JUNCTION RY. CO. v. DUBOIS.

Duff J.

about a mile from the village of Napierville, where the automobile was struck by a train of two hand-cars running on the appellant's line, which were propelled by a gasoline motor attached to the leading car. The jury found the appellant company

in fault in not having a whistle, bell or some proper device for giving the alarm, and also not having their motor under such control as would enable them to stop in a short distance before crossings and thus avoid accidents.

They also found that the automobile was

travelling at a rate of speed which prevented them from stopping in due time,

and they attributed this to the fault of the driver and to that of three of the party: l'abbé Gauthier, Camille Gratton and Joseph Gratton. Impliedly they quite definitely acquitted the respondent's husband of any fault.

Before discussing the question which arises upon the form of the verdict, it is necessary to advert to one or two questions of law raised by the appellant company. First, it is contended that there being no statutory duty imposed upon railway companies in the province of Quebec requiring them to equip vehicles, such as the hand-cars with which we are concerned in this litigation, with means for signalling their approach to frequented highways, they are under no legal obligation to take such precautions; and further that no duty is imposed by the law of Quebec upon the servants of such companies to have such vehicles under proper control on approaching such highways. It is sufficient to say that the law as laid down in numerous authorities is quite incompatible with this contention. In *The Canadian Pacific Railway Co.* v. *Roy* (1), it is pointed out by Lord Halsbury, who delivered the judgment of the Judicial Committee, that the statutory right to work a railway does not, by the law of England or the law of Quebec,

authorize the thing to be done negligently, or even unnecessarily to cause damage to others.

Whether there was default in the performance of this duty, not to act negligently or unnecessarily to be the occasion of peril to others, in running these hand-cars without having proper control over them and without any means of giving passengers on the highway warning of their approach, was a question of fact; and I see no reason whatever to disagree with the finding of the jury that in fact

(1) [1902] A.C. 220.

there was negligence on part of the servants of the appellant company. Slightly different in form although the same in substance is the argument presented in the factum of the appellant, where it is contended that in the statutory authority given to the appellant company to construct and work their railway is involved the consequence that passengers on the highway when crossing the railway must exclusively bear the risk of injury from passing trains, so long as the railway company observes the explicit statutory requirements as to signals. *Rex* v. *Broad* (1) may be referred to as authority (if authority, indeed, could be needed for such a proposition) that nothing short of a legislative enactment, expressed in language unambiguous and precise, could affect the right of persons on the highway to have reasonable care exercised by the appellant company in the use of its line, with a view to the safety of such persons.

Then it was argued that the negligence of the driver of the automobile was negligence which must be imputed to the respondent's husband. That argument is sufficiently answered by the decision of the House of Lords in *The Bernina* (2), and by the decision of this court in *Grand Trunk Ry. Co.* v. *McDonald* (3), in which it was held that where an accident arises in consequence of independent acts of negligence committed by two sets of persons, both directly contributing to the accident and to the injury suffered by the plaintiff, each is severally answerable under the law of Quebec to the plaintiff for the damages sustained by him; a principle which is applicable here.

The appellant company is therefore responsible to the respondent under article 1056 of the Civil Code for the whole of the loss suffered by her in consequence of her husband's death. But a question which requires notice arises from the form of the verdict. The jury, having found that the accident was in part due to the fault of the servants of the appellant company and in part to the fault of some of those who were travelling in the automobile and having by necessary implication acquitted the respondent's husband of fault, the logical consequence of these findings would be a verdict against the appellant company for the

(1) [1915] A.C. 1110. (2) [1888] 13 A.C. I.
(3) [1918] 57 Can. S.C.R. 268.

1924

NAPIERVILLE JUNCTION RY. CO. v. DUBOIS.

Duff J.

whole amount of the damages suffered by the respondent. The jury, however, having assessed these damages at $30,000 and having, in answer to a question, stated that there was "common fault" and that in view of such common fault

> fifty per cent of the damages should be attributed to the defendant,

proceeded as if the amount awarded the respondent were the sum of $15,000 to distribute that sum among the respondent and her children, awarding to each of the children $1,000, and to the respondent personally $7,000. The explanation of this seems to be clear enough when the form of the questions is considered. Question six is in these words:

> 6. Is the said accident due to the common fault of the defendant and one or several of the passengers in the automobile in which the said L. N. Desjardins was then travelling? If so, which of them is in fault, and in what did the fault of each consist?

Question eight in these words:

> 8. If you find common fault, what proportion of the damages should be attributed to the defendant?

It seems sufficiently plain that the jury, having acquitted the respondent's husband of fault, conceived it to be their duty to divide the damages by ascribing part to the defendant company and part to the persons responsible for the course of the automobile, with the result that only fifty per cent of the damages suffered by the respondent were imputed to the negligence of the appellant company; and I am afraid that some excuse for this course is to be found in the manner in which they were instructed upon the rules of law they were to apply.

The Court of King's Bench did not feel embarrassed by the form in which the verdict was given, and upheld the trial judge in giving judgment in favour of the plaintiff for the whole amount of the damages which were by him fixed at $28,000 by an obvious slip. The only alternative was of course to grant a new trial; but in granting a new trial, in the circumstances of this case, the court would obviously be called upon to exercise the authority given by article 500 C.C.P., to direct a new trial as to such issues only as were affected by the misdirection which was the cause of the jury's mistake.

Now when the findings are scrutinized, it becomes abundantly clear that those dealing with the decisive issues, the issues as to the appellant company's fault, the victim's fault, and as to the amount of the damages and the proportionate shares of the dependents therein—leave nothing further to submit to the jury. These findings conclude the matters in dispute; and the Court of King's Bench held (Greenshields J. who dissented from the judgment, concurred on this point with the majority) that its authority under the provisions of the Code of Civil Procedure was comprehensive enough to enable it to give effect to the conclusion necessarily resulting from the findings of the jury, when the answer to the 8th question was disregarded as resting upon a misapprehension as to the legal effect of the other findings.

I see no reason to disagree with this view. Article 1248 C.C.P. when read with article 3 seems to point to an intention on the part of the legislature that the court should be endowed with rather wide powers enabling it within the limits fixed by the rules of substantive law to prevent the defeat of substantive rights by mere technicalities of procedure; and the present case seems to have afforded a favourable occasion for the exercise of such powers.

MIGNAULT, J. (dissenting).—L'intimée, restée veuve avec huit enfants mineurs dont un posthume, poursuit la compagnie appelante qu'elle tient civilement responsable de la mort de son mari, feu L. N. Desjardins, en son vivant chirurgien-dentiste de Montréal, et réclame, tant pour elle que pour ses enfants mineurs dont elle est la tutrice, la somme de $60,000 comme dommages-intérêts. Le jour de l'accident, le 28 juillet 1921, Desjardins avait pris place dans une automobile conduite par le docteur Albert Gratton où se trouvaient également l'abbé P. E. Gauthier et les nommés Camille Gratton et Joseph Gratton. Il n'y avait aucune relation de commettant à préposé entre le docteur Desjardins et les autres occupants de l'automobile. A une traverse à niveau sur le chemin de fer de l'appelante, près de Napierville, l'automobile où Desjardins se trouvait fut frappée par un wagonnet mû par un moteur à gazoline et conduit par des employés de l'appelante sur le chemin de fer de celle-ci, et le docteur Desjardins eut l'épine dorsale

1924

NAPIERVILLE JUNCTION RY. CO. v. DUBOIS.

Mignault J.

brisée et est mort des suites de ses blessures une couple de semaines plus tard. De là l'action en responsabilité que l'intimée a prise contre l'appelante.

En principe, lorsque quelqu'un est blessé par la faute de deux ou plusieurs personnes, il peut les tenir conjointement et solidairement responsables du préjudice qu'il en éprouve. Il peut donc actionner l'une des personnes en faute pour le tout, et c'est ce que l'intimée a fait. Cela est certain dans la province de Québec où le code civil en a une disposition expresse (l'art. 1106). La jurisprudence est au même effet en France où le code civil ne contient pas d'article semblable, et je trouve dans une décision de la cour de cassation du 6 février 1883, Dalloz, 1883, 1.451, l'énonciation de la règle suivante qui ne fait aucun doute dans la province de Québec, même sans le qualificatif qui paraît en restreindre la portée.

> Tous ceux qui par leur coopération commune ont concouru au préjudice éprouvé par un tiers, sans qu'il soit possible de déterminer la part exacte de chacun d'eux dans ce préjudice, doivent être condamnés solidairement à le réparer.

Ainsi une collision arrive entre deux voitures par la faute de leurs conducteurs, ceux-ci en sont responsables conjointement et solidairement à l'égard d'un passager qui n'est pas le commettant de l'un des conducteurs, et partant responsable de sa faute. Cela est conforme à la jurisprudence de cette cour: *The Grand Trunk Ry. Co.* v. *McDonald* (1).

D'autre part, si dans l'espèce que je suppose la collision entre les deux voitures est causée par la seule faute de l'un des conducteurs, celui-ci (ainsi que son commettant) en est seul responsable, et il n'existe aucun droit d'action contre l'autre conducteur.

Enfin, dans le cas où les deux conducteurs sont en faute, si le passager d'une des voitures actionne en responsabilité le conducteur de l'autre voiture, la règle de la faute commune, qui mitige la responsabilité quand la victime a contribué à l'accident, ne s'applique pas, et il importe peu qu'il y ait eu faute de la part du conducteur et des passagers de la voiture où ce passager se trouvait.

Dans l'espèce, l'action de l'intimée était dirigée uniquement contre l'appelante, et la faute des compagnons du Dr Desjardins, si elle n'était pas la seule cause de l'accident,

(1) 57 Can. S.C.R. 268.

était indifférente. Il ne pouvait être question dans ce cas de la doctrine de la faute commune, si le Dr Desjardins n'était pas lui-même en faute, car alors le seul point à déterminer était de savoir s'il y avait eu faute de la part des employés de l'appelante. En d'autres termes, la question de la faute commune ne se présente que dans les rapports entre la victime de l'accident et la personne qu'elle en tient responsable.

Je vais maintenant citer les questions suivantes posées au jury ainsi que ses réponses.

2. Is the said accident due to the sole fault of the defendant or its employees? If so, in what did such fault consist?

No. Unanimous.

3. Is the said accident due to the sole fault of the late Louis Napoléon Desjardins? If so, in what did such fault consist?

No. Unanimous.

4. Is the said accident due to the sole fault of one or several of the passengers in the automobile in which the late L. N. Desjardins was then travelling? If so, which of them is in fault and in what did such fault consist?

No. Unanimous.

5. Is the said accident due to the common fault of defendant and the said L. N. Desjardins? If so, in what did the fault of each consist?

This question is answered by the answer to question number six. Unanimous.

(The attention of the jury being called to the fact that the answer is not categorical after deliberation, it is withdrawn and replaced by the following): No. Unanimous.

6. Is the said accident due to the common fault of defendant and one or several of the passengers in the automobile in which the said L. N. Desjardins was then travelling? If so, which of them is in fault and in what did the fault of each consist?

Yes. Defendant is in fault in not having a whistle, bell, or some proper device for giving alarm, and also not having on their motor such control which would enable them to stop at short distance before crossings and avoid accidents.

The auto was travelling at a rate of speed which prevented them from stopping in due time; consequently, the driver of the auto, Doctor Albert Gratton, was at fault; also Abbé Gauthier, Camille Gratton and Joseph Gratton were partly at fault for advising. Unanimous.

7. Has plaintiff personally and in her quality of tutrix to her minor children suffered any damages as a result of the death of the said L. N. Desjardins,and at what sum do you assess the damages?

Yes. Thirty thousand ($30,000). Unanimous.

8. If you find common fault, what proportion of the damages should be attributed to the defendant?

Fifty per cent. Unanimous.

1924

NAPIERVILLE JUNCTION RY. CO. v. DUBOIS.

Mignault J.

9. If some damages are granted, how do you divide them between plaintiff and her children?

The children, one thousand dollars ($1,000) each; the plaintiff, seven thousand dollars ($7,000). Unanimous.

Les questions 2, 3, 4 et 5 étaient pertinentes à la contestation liée entre les parties. Par contre, on n'aurait pas dû poser au jury la question 6, car elle demande si l'accident fut causé par la faute commune de la défenderesse et de tiers, et la faute de tiers, coopérant avec la faute de la défenderesse, ne pouvait excuser cette dernière ni diminuer sa responsabilité.

Cette question 6 a évidemment embrouillé le jury. Celui-ci a évalué les dommages de l'intimée à la somme de $30,000. Venant alors à l'hypothèse de la faute commune que le jury avait écartée, en tant que le Dr Desjardins était concerné, la question 8 demande quelle proportion des dommages doit être attribuée à la défenderesse si le jury trouve faute commune, et il répond: cinquante pour cent. Procédant ensuite à partager les dommages entre l'intimée et ses huit enfants, le jury ne partage entre eux que cinquante pour cent du montant total des dommages, démontrant par là que c'était la seule somme qu'il entendait leur accorder.

On peut interpréter la réponse du jury à la question 8 comme impliquant soit qu'il trouvait faute commune chez Desjardins, et alors il y a contradiction avec ses réponses aux questions 5 et 6, ou comme indiquant que le jury était d'opinion qu'il y avait eu faute commune chez les autres occupants de l'automobile, et j'ai dit que dans ce cas la doctrine de la faute commune ne s'applique pas. Lisant les réponses du jury aux questions 8 et 9 avec les instructions du savant juge, on voit que le jury a pu, malgré sa réponse à la question 5, envisager la possibilité d'une faute chez Desjardins. Après avoir cité la question 8, le savant juge a donné les instructions suivantes au jury:

Well now this case has got its difficulties. The common fault I suppose would be either the common fault of Desjardins and the defendant company, or the common fault of the defendant company and say of the other occupants in the car.

By the court to counsel: Is that the way you understand it, gentlemen of the bar?

By the court: If you find anybody else at fault, if you find the defendant company and the plaintiff at fault that is easy. Let us say the defendant company and Desjardins at fault, I would suggest that your answer to No. 8 would be, and you mention whose common fault it is,

that is to say you will mention whose joint fault it was, that is the combination of two faults, both of which were necessary to produce this accident, and without which this accident could not have happened.

If you find that there is such a combination at fault, then you will say who are the parties you find are commonly at fault, and what proportion of the damages you attribute to the defendant company.

If the damages are granted, you will state how you divide them between the plaintiff and children; the plaintiff has set out a series of names of the children, and if you have already mentioned the full damages, which will be a bulk sum in answer to question 7,—I suppose you will answer that in a block sum, that is all the plaintiff herself is entitled to and all she is entitled to as representing the children.

Then in answer to question 9, you will detail, if you take the list of the children set out in the declaration, you will say so much for the plaintiff herself, Mrs. Desjardins, and so much for whatever the names of the different children are.

Je ne puis m'empêcher de penser qu'à tort ou à raison le jury ne voulait mettre à la charge de la défenderesse que la moitié des dommages. A tout événement le moins qu'on puisse dire, c'est que le verdict est équivoque.

Maintenant, pour donner effet à ce verdict on pouvait envisager deux alternatives: ou bien accorder à l'intimée et à ses enfants les cinquante pour cent des dommages, part attribuée à la défenderesse, soit $15,000; ou bien lui donner jugement pour le plein montant des dommages, $30,000. C'est la dernière alternative que le savant juge a choisie, mais par une erreur qui ne peut plus être corrigée, il n'a accordé à l'intimée que $28,000.

Etant données les réponses du jury, l'autre alternative m'aurait paru préférable, car, pour une raison ou pour une autre, le jury n'a attribué à la défenderesse que cinquante pour cent des dommages, et en réponse à la question 9 le seul montant qu'il accorde à la demanderesse et à ses enfants, on le voit par le partage qu'il en fait, c'est la somme de $15,000.

Je ne pourrais certainement pas donner à l'intimée plus que le jury ne lui a réellement accordé, quand même je serais convaincu, et je le suis, que c'est par erreur que le jury n'a attribué à la défenderesse que la moitié des dommages qu'il a constatés. Mais puisque l'erreur du jury a été causée par la forme des questions qu'on lui a posées, et peut-être, je le dis avec beaucoup de déférence, par les explications du savant juge, il me paraîtrait plus juste pour la demanderesse d'ordonner un nouveau procès. Je ne puis

1924

NAPIERVILLE JUNCTION RY. CO. v. DUBOIS.

Mignault J.

faire davantage, car on ne peut évidemment condamner l'appelante à payer une plus forte proportion des dommages que celle que le jury lui a attribuée.

J'ajoute qu'à mon avis il ne s'agit pas ici d'une question de procédure mais de l'interprétation des réponses du jury. Le juge présidant le procès aurait pu poser des questions supplémentaires au jury pour éclaircir les réponses qu'il avait données; il ne l'a pas fait et le verdict ne peut être changé sur appel.

Je maintiendrais donc l'appel et j'ordonnerais un nouveau procès, avec frais devant la cour d'appel et cette cour, les frais du premier procès devant faire partie des frais généraux de la cause.

MALOUIN J.—Je suis d'opinion de rejeter le présent appel avec dépens pour les raisons données par le juge Duff.

MACLEAN J.—I concur in dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Béïque & Béïque.*

Solicitors for the respondent: *St. Jacques, Filion & Houle.*

1924

*May 14, 15.
*June 8.

WILLIAM KENT ....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Income of non-residents derived from working of mines—Re-enactment of taxation clause—Retrospectivity—Ultra vires—B.N.A. Act (1867) s. 92, ss. 2—Taxation Act, R.S.B.C. (1911) c. 222, s. 155—(B.C.) 1918, c. 89, ss. 25, 26—(B.C.) 1920, c. 89, s. 19.

Section 155 of the Taxation Act, R.S.B.C. (1911) c. 222, as re-enacted by section 25 of c. 89, 1918, has not the effect of making taxable the income of non-residents, as well as the income of residents, derived from the working of mines. The words therein "as provided in Part I," have reference not only to the manner and machinery of taxation of incomes but also to the persons to be taxed; and, by Part I, the non-residents are expressly not assessable to income tax. Idington J. expressing no opinion.

---

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc.*

Per Idington J.—Section 19 of c. 89 of B.C. Statute of 1920, making the re-enactment of section 155 of the Taxation Act retrospective so as to make any person who earned income from mines in the years 1915 and 1917 liable to taxation under its provisions, is *ultra vires*.

Judgment of the Court of Appeal ([1923] 3 W.W.R. 865) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1) affirming the judgment of the Court of Revision which had confirmed the taxation of the appellant in respect of income derived from the working of mines.

The appellant, residing in the United States of America, was operating in 1915 and 1917 a mine in British Columbia and received income therefrom. During the same period, the appellant paid the production or 2 per cent tax on the output of the mine from which he received the income. In 1920 he was assessed on the above-mentioned income received in 1915 and 1917. The appellant appealed to the Court of Revision which confirmed the assessment.

Hamilton K.C. for the appellant.

Donaghy for the respondent.

IDINGTON J.—This is an appeal from the Court of Appeal for British Columbia (1) dealing with an appeal from the assessment in 1920 of the appellant in respect of products of a mining property for the years 1915 and 1917.

The appellant was, during all the said years, a non-resident, being domiciled in the United States. During the years 1915 and 1917 he was possessed of the mine in question and properly assessed there in respect thereof or its products, and paid the taxes he was then liable for under the Taxation Act of said province.

In the last named year he would seem to have sold or given an option of purchase to a company to be operative from the 1st of January, 1918, and thereafter that company operated the mine and was assessed in respect thereof.

In April, 1918, an Act was passed by the legislature changing the law as it stood in said years 1915 and 1917, and further in the year 1919, and again in 1920.

(1) [1923] 3 W.W.R. 865.

1924
KENT
v.
THE KING.
Idington J.

In the last-named year it is pretended that the legislation then enacted, coupled with what had preceded it in the years 1918 and 1919, had become so effectual as to impose upon the appellant retrospectively income taxes for said years 1915 and 1917, although as the law then stood, he clearly was not so liable.

I should require more clear and express language used to uphold such a confiscatory proposition under the name of a taxing Act.

Moreover I gravely doubt the power of the legislature to do so, and confiscate, *pro tanto,* the property of non-residents who had parted with their property meantime and yet liable for the future income from the purchase price.

It would only be in the case of the resident in a foreign country that the pretension of the respondent could become operative,. for it is only such that had for the years 1915 and 1917 escaped, by virtue of the law as it then stood.

I am quite clear that such retrospective legislation is unjust and also, in this case on the existent facts in question herein, *ultra vires,* even if it were so expressed as to render its construction operative despite the rule applicable to a taxing Act if *intra vires.*

The only power the legislature has is that conferred by section 92, subsection (2) of the British North America Act, 1867, which reads as follows:—

> Direct taxation within the province in order to the raising of a revenue for provincial purposes.

Can retrospective legislation such as this ever be held to be imposing direct taxation? I submit not.

We have been told that the power of a local legislature over property is such that it can transfer one man's property to another: but even so, it does not enable the local government to take, by way of a penalty called " taxation," the entire property of one of its citizens, much less the property of a foreign citizen, as it would be doing if this tax is to be enforced as against appellant. He is not (we were told in the course of the argument) in possession of the property in question for he had transferred it by an option sale, and if, as probable, he has protected himself against the payment of any taxes by a covenant from his vendees

who, if that is to be observed, will have to pay the taxes, surely as against them it would be very indirect taxation.

And if appellant has to pay the taxes, he is paying the taxes of another, and in that sense it would be rather an indirect tax as a penalty for nothing.

At every angle from which one can look at such an attempt to recover this assessment, it seems to me a most offensive attempt at violation of the power given by the above quoted power of direct taxation.

The agreement between the appellant and the vendees of the property came before our notice in the case of the vendees' appeal, and seems to have been filed in that case, I find as writing this. Perhaps, therefore, had it not been for what occurred in the course of the argument of counsel for the appellant asserting the fact of this transfer being operative from the 1st of January, 1918, and appellant thereafter being non-resident in Canada, I should not have the right to consider it.

The cases were both argued at the same sitting before us and by the same counsel in each case. He for the appellant seems to have been the same throughout the course of the several appeals.

Retrospective taxation for from three to five years seems so intolerable that if possible at all it must be expressed differently from what are the provisions in this case.

I would therefore allow this appeal with costs throughout.

DUFF J.—The appellant is a citizen of the United States, who has never resided in Canada. During the year 1915, as well as in 1917, he was working a mine in British Columbia, and in receipt of an income from it. For these periods the appellant paid the (so-called) production tax of two per cent on the output of the mine. In 1920 he was assessed by the assessor at Kaslo, B.C., in respect of the income received from the mine in the years mentioned. The appellant's appeal to the Court of Appeal for British Columbia (1) was dismissed, and from that judgment he now appeals to this court.

(1) [1923] 3 W.W.R. 865.

1924
KENT
v.
THE KING.
Duff J.

It is not disputed that, at the time when the income, in respect of which the assessment is made, was received, it was not assessable under any law then in force in British Columbia. The assessment was made professedly under authority given by statutes passed in the years 1918 and 1920. The law actually in force in the years 1915 and 1917 is, subject to amendments made in 1913 and 1917 mentioned hereafter, to be found in sec. 155 of c. 222, R.S.B.C., 1911, which in effect provides that

there shall be assessed, levied and collected quarterly from every person owning, managing, leasing or working a mine other than a coal mine * * * two per cent on the assessed value of all ore * * * gained from any lands in the province, and which have been sold or removed from the premises (and) the taxes imposed by this section shall be in substitution for all taxes upon the land * * * so long as the said land is not used for other than mining purposes, and shall also be in substitution for all taxes upon the personal property used in the working of the said mines.

By sec. 25 of c. 89 of the Statutes of 1918, sec. 155 was repealed and a new section substituted therefor, in the following words:

155. (1) Subject to subsection (2), every person owning, managing, leasing, or working a mine, other than a coal or gold mine, shall be assessed and taxed on his income from the mine as provided in Part I, or on the output of the mine under this Part, whichever tax shall be the greater in amount. The tax on output shall be assessed, levied, and collected quarterly, and shall consist of two per cent on the assessed value of all ore removed from the premises of the mine. In case the tax on the income proves to be greater in amount, the quarterly payments collected shall be considered to be in part payment of the tax payable on the income earned during the corresponding period.

(2) In the case of ore producing mines which prove taxable on their output not yielding and realizing on ore a market value of five thousand dollars in any one year, and in the case of all mines (placer or dredging) which prove taxable on their output not producing a gross value of two thousand dollars in any one year, the taxpayer shall, upon a statement verified by him and certified by the assessor of the district, and forwarded to the Minister of Mines, be entitled to:—

(*a*) A refund, in the case of ore-producing mines, of one-half of the tax paid; and

(*b*) A refund of the whole tax in the case of placer or dredging mines.

(3) Every person owning, managing, leasing, or working a gold mine, which shall for the purposes of taxation consist of a mine in which the market value of the gold recovered from ore is eighty-five per cent or more of the gross value of the metal content of such ore, shall be assessed and taxed on his income from the mine as provided in Part I: Provided that any mineral tax paid during the year 1917 may be applied to payment of the income tax levied in respect of the income from the mine during the corresponding period.

(4) The taxes imposed by subsections (1) and (2) shall be in substitution for all taxes upon the land from which the said ore or placer gold is mined or won, so long as the said land is not used for other than mining purposes, and shall also be in substitution for all taxes upon the personal property used in the working of the said mines.

(5) In addition to all other taxes imposed by this or any other Act, there shall be assessed, levied, and collected quarterly from every person, owning, managing, leasing, or working a mine in the province, and paid to His Majesty, a tax of thirty-seven and one-half cents per ton of two thousand pounds upon all iron ore removed from the premises of the mine, whether the ore is obtained from mineral claims held under a General Act or under any special Act of the legislature. Nothing in this subsection shall apply in respect of iron ore mined and used in the province as a flux in the smelting of ores or other metals.

This enactment, having been passed in the year 1918, would, of course, in itself not affect the appellant in respect of income received before that year, but by sec. 26 of the same statute it was enacted that:

26. (1) The amendments of said chapter 222, as enacted by section 25 of this Act, shall relate back to and take effect from the first day of January, 1917; and the provisions of the "Surtax Act, 1917," shall apply in respect of all assessments for the year 1917 affected by such amendments.

(2) Forthwith after this Act comes into force the Provincial Assessor for each assessment district shall determine the several amounts payable for taxes and surtaxes therein in respect of the year 1917 pursuant to this section, giving effect to all amendments in respect of deductions brought into force under the provisions of this Act, and shall cause to be inserted in the assessment rolls of the district a statement showing the amounts so levied against each taxpayer, and shall mail a notice of assessment in such form as the Minister of Finance may prescribe to each taxpayer affected, stating the amount payable by him and the date when the same is due and payable.

This last-mentioned section was again amended by sec. 19, c. 89, of the Statutes of 1920, by which ss. 1 of sec. 26 was struck out and the following subsection substituted:

26. (1) The re-enactment of said section 155 by section 25 of this Act shall relate back and take effect and shall be deemed to have always related back and taken effect in such a manner that every person to whom subsection (1) of said section 155, as so re-enacted, applies shall be liable for taxes thereunder in like manner as if he had been liable and had been lawfully assessed and taxed thereunder on the assessment roll for 1917, revised in 1916, and the assessment roll for 1918, revised in 1917, in respect of income earned during the years 1915 and 1916 respectively, or, in the discretion of the Minister, in respect of income earned during the last fiscal or business year of the taxpayer terminating prior to the thirty-first day of December, 1915 and 1916, respectively; and the provisions of the Surtax Act, 1917, shall apply in respect of all assessments for the year 1917 affected by such amendments.

1924
KENT
v.
THE KING.
Duff J.

On behalf of the Crown it is contended, and it has been held by the Court of Appeal for British Columbia, that the effect of this legislation of the years 1918 and 1920 is to bring within the operation of sec. 155 of c. 222, as re-enacted in 1918 by sec. 25 of c. 89 of the statutes of that year, the above-mentioned income earned by the appellant in the years 1915 and 1917.

The fundamental question obviously is whether the conditions, under which a mine owner's income is assessable under sec. 155 as so re-enacted, are conditions which can be affirmed to have been in existence in relation to the income so earned by the appellant in those years; and if that question be answered in the negative the assessment is obviously invalid. On behalf of the appellant, it is contended that this section, in so far as it imposes a tax upon income, has no application to a non-resident. The contention is based upon that part of the section which declares such income to be assessable "as provided in Part I" and admittedly by Part I non-residents are not assessable to income tax. As against that it is argued that section 155 deals with a special case, that the operative part of the section in question is quite unrestricted in its terms, save in this respect, that it applies only to income derived from a mine in British Columbia, and that on its true construction all income so earned, whether by residents or non-residents, falls within its purview.

The important words of sec. 155 as re-enacted in 1918 are

> shall be assessed and taxed on his income from the mine, as provided in Part I, or on the output of the mine under this part, whichever tax shall be the greater in amount.

The income is to be assessed and taxed "as provided in Part I." The tax on the output is the tax under Part IV. Part I provides the machinery for assessment and imposes the liability to taxation, fixing the scale of rates, which are graduated according to the amount of taxable income. By sec. 23, every person

> other than corporations and persons assessed under Part IV

of the Act, is required, when requested by the assessor, to make a return, upon a form supplied by the assessor, as to property and income; and by sec. 33, provision is made

authorizing the assessor, in cases of default in furnishing the return or where he is not satisfied with the return, to make the assessment at such sum as, in the assessor's judgment, ought to be charged under the Act; and there is power given to make a supplementary assessment roll, increasing the value of the property or the income assessed where omissions are subsequently discovered. Admittedly, the reference to Part I manifests an intention that in order to ascertain the income from a mine for the purpose of applying the re-enacted section 155, this machinery shall be available, and that any income from the mine shall, for the purpose of applying the provisions of sec. 155, be treated as a part of the whole taxable income of the person assessed, within the meaning of Part I. That is to say, the assessment referred to in this section is not an assessment under Part IV within the meaning of sec. 23 of the Act.

It would appear to be very difficult indeed to harmonize with this view, which appears to me to be incontestable, the proposition that the liability of mine owners to be assessed and taxed in respect of income derived from their mining property is a special liability imposed by section 155 of Part IV. In 1918, when the section was re-enacted in its present form, the resident mine owner was liable to assessment and taxation in respect of such income under Part I. To arrive at the result suggested, it would be necessary to suppose that by the re-enactment of 1918 this liability under Part I is abrogated, and a new liability created, which, in the case of resident mine owners, is, as regards its conditions, its scope, and the pecuniary measure of it, precisely the same as the pre-existing liability.

The contention that the words, "as provided in Part I," refer only to machinery and rate, would be very much more forcible if income from mining property were not assessable and taxable already under Part I. Read literally, the words refer to assessment and taxation, "as provided in Part I," which primarily means assessment and taxation as authorized in Part I. The re-enacted section therefore, in my judgment, construed in light of the relevant parts of the Act, is at least fairly capable of a construction according to

1924
KENT
v.
THE KING.
Duff J.

which no new liability is imposed in respect of income tax; and that, I think, is on the whole the preferable reading.

This conclusion is fortified by two considerations of no little weight: The enactment is a taxing statute, and if construed according to the view advanced by the Crown, imposes a new liability to taxation. In conformity with settled principles, the enactment ought not to receive such a construction unless, on the fair reading of it, its language clearly discloses an intention to create such a liability. Words, which are equally consistent with the absence of such an intention, are not sufficient. The other consideration arises from the fact that by sec. 26 of the Act of 1918, sec. 155, as re-enacted in that statute, has a retrospective operation. In so far as it affects non-residents, the legislation of 1918 would appear to have had the effect of lightening the burden resting upon them under the law as it in fact was in the year 1917; for by the Act passed in May of that year, the provision of the statute of 1913, by which it was declared that a tax on output was to be in lieu of all taxes in respect of income derived from the mine, was repealed, and after this statute of 1917, the mine owner continued, until the passing of the statute of 1918, to be liable in respect not only of the output tax, but in respect of income tax as well, as he was before the passing of the Act of 1913. As regards non-residents, however, the effect of the legislation of 1918, on the construction proposed by the Crown, was, for the first time, to impose a liability to income tax and to impose it in respect of income which had been received in the preceding year, 1917. It is conceivable, of course, that the legislature, in a statute having apparently for its principal object the lightening of the burden of taxation upon resident mine owners, should, at one and the same time and by the same clause, impose retrospectively a new burden by way of taxation upon non-resident mine owners; but the intention to do so will not be ascribed to the legislature unless manifested by express words or by necessary implication—*nisi nominatim et de praeterito tempore cautum sit;* and it is no answer to say that the law, to be construed, is plainly retrospective in a certain degree. The rule is that the maxim is applicable

whenever we reach the line at which the words of the enactment cease to be plain.

That is a necessary and logical corollary of the general proposition, that you ought not to give a larger retrospective "operation" to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant. *Reid* v. *Reid* (1).

It appears to follow that where an enactment, admittedly retrospective, is expressed in language which leaves the scope of it open to doubt, and according to one construction it imposes retrospectively a new liability, while upon another at least equally admissible, it imposes no such burden, the latter construction is that which ought to be preferred.

The appeal should therefore be allowed and the assessment annulled.

MIGNAULT J.—The question here is whether the appellant, a non-resident, is liable to taxation on the income he derived from a mine in British Columbia in the years 1915 and 1917. It is common ground that under the legislation in force during these years, he was not subject to the provincial income tax levied on residents of the province, but merely to the two per cent production tax on the ore extracted from his mine, which tax he paid. But the amendments to the Taxation Act adopted in 1918 and 1920 were expressly made retrospective, and the British Columbia Court of Appeal (2) has decided that they apply to a non-resident like the appellant, who paid all taxes due for these years and is now asked to pay a tax said to be retrospectively imposed.

The effect of the Taxation Act as it stood in 1915 and 1917 was as I have stated and the non-resident did not pay income tax. In 1919, he was deprived, but not retrospectively, of this privilege to the extent of the income earned by him within the province (c. 79, sect. 3, statutes of 1919). Mines were dealt with in Part V of the Act, and up to 1918 section 155 imposed only the production tax of two per cent, this tax being in substitution for all taxes on the land and on personal property used in the working of the mine, and also, between 1913 and 1917, for all taxes on the income derived from the mine.

(1) [1886] 31 Ch.D. 402 at p. 409. (2) [1923] 3 W.W.R. 865.

1923
KENT
v.
THE KING.
Mignault J.

In 1918, section 155, which is in Part V, was re-enacted by section 25, c. 89, of the statutes of that year, and it was declared that

> every person owning, managing, leasing, or working a mine, other than a coal or gold mine, shall be assessed and taxed on his income from the mine as provided in Part I, or on the output of the mine under this part, whichever tax shall be the greater in amount.

This tax on the output is two per cent, and by the effect of the amendment, in case the tax on the income from the mine is greater in amount than the production tax, the quarterly payments of the latter tax are considered as part payment of the tax payable on the incomes from the mine.

This of course would have applied only in the future, had not section 26 of the 1918 statute stated that the amendments of chapter 222 of the Revised Statutes (the Taxation Act), as enacted by section 25, should relate back to and take effect from the 1st of January, 1917. Whether this is the real construction of section 26 remains to be seen.

The legislature was apparently not satisfied with this declaration of retroactivity, for in 1920, by chapter 89, section 19, section 26 of the 1918 statute was amended by striking out subsection 1 and substituting therefor the following:

> 26. (1) The re-enactment of said section 155 of section 25 of this Act shall relate back and take effect and shall be deemed to have always related back and taken effect in such a manner that every person to whom subsection (1) of said section 155, as so re-enacted, applies shall be liable for taxes thereunder in like manner as if he had been liable and had been lawfully assessed and taxed thereunder on the assessment roll for 1917, revised in 1916, and the assessment roll for 1918, revised in 1917, in respect of income earned during the years 1915 and 1916 respectively, or, in the discretion of the Minister, in respect of income earned during the last fiscal or business year of the taxpayer terminating prior to the thirty-first day of December, 1915 and 1916, respectively; and the provisions of the "Surtax Act, 1917," shall apply in respect of all assessments for the year 1917 affected by such amendments.

As a result, section 155 as re-enacted in 1918 must be considered with the provision I have just cited.

The crucial point however is whether the appellant is a person to whom subsection 1 of section 155, as so re-enacted, applies.

The appellant argues that the statement in the re-enacted section that every person owning, managing, leasing, or working a mine, shall be assessed and taxed on his

income from the mine " as provided in Part I," excludes a non-resident who is not subject to income tax under Part I.

The respondent, on the other hand, contends that this reference to Part I is tantamount to saying that the income tax imposed upon every person operating a mine shall be calculated and levied in the same way as the tax under Part I, in other words that the machinery for levying and calculating this tax shall be that provided by Part I.

This, however, does not appear to be the necessary meaning of the new section 155. It must be remembered that Part I of the Taxation Act imposes (section 4) a tax generally on real and personal property and on income, but before 1919 this did not apply to the income of non-residents. As defined in the Act, " income " would certainly comprise any amount derived from a mine. But before the amendments of 1918 and 1920, Part V dealt specifically (as it now deals) with taxation of mines and minerals other than coal and coke. And section 155, which, I have said, is in Part V, imposed a production tax of two per cent on the output of mines which tax was in substitution for taxes on land and personal property used in working the mine, and also, from 1913 to 1917, for income derived from the mine. When this system was changed in 1918 by the re-enactment of section 155, the owner or operator of a mine became subject to a tax on his income from the mine or to a two per cent tax on the output of the mine, whichever tax was greater in amount, and the owner or operator was assessed on his income from the mine " as provided in Part I." The tax on the income or output was in substitution for taxes on the land and for taxes on personal property used in working the mine, but no longer in substitution for taxes on income from the mine. Reading together Parts I and V, we find a tax imposed generally on income from all sources, with special provisions as to the part of the income which is derived from a mine. The import of the words " as provided in Part I," which are also found in subsection 3 of section 155, as re-enacted, appears to be that Part I governs the taxation of income generally, and Part V contains special provisions as to income derived from mines, with the obligation of the operator of the mine to pay

1924
KENT
v.
THE KING.
Mignault J.

either the tax on his income from the mine or the production tax, according as the one or the other is greater in amount.

This seems to me a more reasonable reading of these provisions than one which would see in the words "as provided in Part I" a mere reference to the machinery sections of Part I. It is a reference to the whole of Part I and not merely to certain of its provisions.

It would follow that Part I determines what persons shall pay tax on income, comprising income from mines, and a non-resident would of course be subject, as before, to the production tax, for he would not be assessable generally on his income from whatever source it might be derived, and the production tax would necessarily be the greater in amount.

This construction harmonizes Parts I and V, for it would be extraordinary to say the least that a non-resident, exempt generally under section 4, until its amendment in 1919, from taxes on his income, should nevertheless be assessed retroactively on the part of his income which, in the years in question, he had derived from a mine. And the amendment of section 4 in 1919, which is not retrospective, subjects him to pay income tax on income earned by him within the province, which of course would include income from mines, and this would give full play, but only for the future, to the special provisions of the new section 155.

Were there any doubt as to this construction of the Act, I confess that I would give the preference to a construction which prevents the entirely unjust result which the Crown seeks to obtain in this case.

I would therefore allow the appeal with costs throughout and annul the assessment.

MALOUIN J.—This appeal should be allowed and the assessment annulled for the reasons given by Mr Justice Duff with which I concur.

MACLEAN J.—The facts have already been stated and I need not repeat them, or enlarge upon them.

It is admitted that by virtue of section 4, Part I, of c. 222, R.S.B.C., the appellant was not liable for income tax for the years 1915 and 1917, as the statute stood in these

years and up to 1918. Neither was he liable in these years for taxation upon any income derived by him from the mine by virtue of section 155, Part V of the same statute, although the mine itself was subject to an output tax, that is a tax based upon the assessed value of ores recovered from the mine. By sec. 25, c. 89 of the Statutes of 1918, sec. 155 above referred to was repealed and a new section substituted therefor. This substituted section provided that every person owning or working a mine should be assessed and taxed on any income, derived from the mine, as provided in Part I, or upon the output of the mine under Part V, whichever tax should be the greater in amount. The same enactment made this income tax effective as and from Jan. 1, 1917. By sec. 19, c. 89 of the Statutes of 1920, the enactment of the new sec. 155 was made to relate back so as to include incomes earned in 1915 and 1917, the years relevant to this appeal.

On behalf of the respondent it is claimed that the effect of the legislation enacted in 1918 and 1920 is to bring within the scope of sec. 155 as enacted by sec. 25, c. 89, Statutes of 1918, the income received from the mine by the appellant for the years 1915 and 1917. The Court of Appeal of British Columbia (1) so held. The appellant claims that this section has no application to income derived from a mine in British Columbia by a non-resident.

Section 155 (1918) is to the effect that income derivable from a mine by any owner is assessable for income tax as provided in Part I. This means that the assessment shall in any event be made and the amount of the tax determined. If the amount of the tax or taxes so determined total more than the tax upon the output from the mine, two per cent of the assessed value of the ore recovered, then the latter shall be applied as payment upon the former. If the income tax is less than the output tax, then the former though assessed is not payable. Under Part I, this income is already taxable as to residents, and it is a little difficult to understand whether or not it was intended that this particular income was subject to further taxation in the contingency mentioned in sec. 155 (1918). However the assessment is clearly to be made under the provisions of Part I, which in explicit terms exempts non-residents from

(1) [1923] 3 W.W.R. 865.

1924
KENT
v.
THE KING.
Maclean J.

income tax. If the legislature intended to abrogate this specific exempting provision in so far as income from mines was concerned, we should find it expressed in certain and unambiguous language, especially in a statute imposing a tax. As re-enacted, sec. 155 does not reveal any clearly expressed intention of repealing partially sec. 4, Part I, so as to make liable non-residents from taxation upon income received from mines in British Columbia. I think it should be read therefore subject to the last-mentioned provision. I do not think this exemption in favour of non-residents, qualifying as it does the general enactment, can be disregarded in any degree, without legislation clearly disclosing the fact that the legislature so intended, and this has not been done. I think therefore that sec. 4 Part I is fully operative in favour of the appellant. Holding the view I do upon this point it is unnecessary to discuss other points raised by the appellant.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Hamilton & Wragge.*

Solicitors for the respondent: *Nisbet & Graham.*

1924
*Feb. 22, 25.
*May 22.

IN RE STRATHCONA FIRE INSURANCE COMPANY ..... } IN LIQUIDATION.

J. E. LEMIRE AND OTHER (PETITIONERS) ... APPELLANTS;

AND

THE HONOURABLE J. NICOL AND OTHER (RESPONDENTS) ..... } RESPONDENTS.

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

Insurance company—Fire—Quebec charter—Federal winding-up—Deposit with Provincial Treasurer—Administration—Quebec Fire Insurance Act, R.S.Q. (1909) sections 6929, 6930, 6931, 6932, 6933.

When a fire insurance company incorporated under a Quebec charter is placed in liquidation, the administration of the company's deposit made under the Quebec Insurance Act with the provincial treasurer for the guarantee of its insured is governed by sections 6930 and 6931 and not by sections 6932 and 6933 R.S.Q. Idington J. dissenting.

PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc.*

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and dismissing the appellant's petition.

The Strathcona Fire Insurance Company was incorporated by the legislature of the province of Quebec. To comply with the provisions of the Quebec Fire Insurance Act, it lodged with the provincial treasurer a deposit made in debentures of a nominal value of $59,000 to guarantee its insured upon insurance contracts having for object some property in the province (sections 6923 to 6929 R.S.Q. (1909)). Later on, the company went into liquidation under the Dominion Winding-Up Act and the appellants were appointed joint liquidators. They presented the present petition to the Superior Court, asking that the provincial treasurer, one of the respondents, be ordered to hand this deposit to them for its administration, upon the ground that sections 6930 and 6931 R.S.Q. were applicable to a company in liquidation and that their provisions were not restricted to a company still doing business. The respondents contested the petition, alleging that the provincial treasurer should continue to have the custody and administration of the deposit until all the formalities prescribed by sections 6932 and 6933 R.S.Q. be completed.

Eug. Lafleur K.C. and *Paul Lacoste K.C.* for the appellants.

A. Perrault K.C. for the respondents.

IDINGTON J. (dissenting).—The Strathcona Fire Insurance Company was incorporated by the Quebec legislature, by 8 Edward VII (1908), c. 122, which Act brought it under the Quebec Insurance Act so far as the provisions of the said Act of incorporation were not inconsistent with said general Act. Before doing any business in Quebec it was required to obtain a license from Quebec and by section X, articles 98 *et seq* of said Quebec Insurance Act it was bound to make with the Provincial Treasurer a deposit or deposits to meet the claims of Quebec insurers on certain classes of property in Quebec and not beyond.

The said company became insolvent about two years ago when it was put in liquidation under the Dominion Wind-

1924

IN RE STRATHCONA FIRE INS. CO.

LEMIRE v. NICOL.

Idington J.

ing-up Act, and the respondents were appointed thereunder its liquidators.

The said liquidators petitioned to have the respondent, the Treasurer of Quebec, directed to hand over to them the deposits so made with him and amounting to the sum of about $59,000.

The said respondent insisted, as I understand and think he was entitled to do, before complying with such a wide demand, that due notice should be given as required by the Act so that the limited number of those creditors entitled to share therein should be thus ascertained and the respective amounts of such claims be duly verified.

There should never have been any hesitation about duly recognizing such right, for the Treasurer is a trustee subject to certain limitations and obligations.

There is no doubt in my mind that the company having become insolvent the Dominion Act supersedes the provisions of the Provincial Act for winding up the company.

And, if I am at liberty to draw inferences from the course of the litigation persisted in relative to the recovery of said fund from the Treasurer, he was well advised in awaiting and insisting upon a more reasonable claim being made before he complied.

These moneys are clearly applicable to meeting the claims of the special class of the insured they were designed to protect and that free from any liability to bear any part of the general expenses of liquidation.

The only question I have any serious doubt about is what course should be pursued.

The Winding-Up Act does not provide for such a case as this. And the provision of the Quebec Act seems to point to a separate liquidation of the fund regardless of the Winding-Up Act which supersedes that, subject to the rights of the respondent to see his *cestui que trust* protected.

I agree with the suggestions made by Mr. Justice Guerin at the end of his notes.

We are not in a position in this case to give any specific directions.

When appellants have complied with what it was to my mind their clear duty to have done by a delivery of the

claims made by those alone entitled to share in the fund in question, then, by a little common sense, harmoniously applied to a particular situation, I have no doubt the difficulties existent can be overcome.

Meantime I agree with the unanimous conclusion reached below and am of the opinion that this appeal should be dismissed with costs, none of which should be chargeable by appellant against those entitled to share in said fund.

The judgment of Duff, Mignault, Malouin and Maclean JJ. was delivered by

MIGNAULT J.—The appellants are the liquidators of the Strathcona Fire Insurance Company, an insurance company incorporated under a Quebec charter, which was placed in liquidation under a winding-up order made on the 24th of April, 1922. The winding-up is under the provisions of the Dominion Winding-Up Act, R.S.C., c. 144.

The appellants petitioned the Superior Court for the administration of the company's deposit in the Quebec Treasury Department, the Provincial Treasurer and the Quebec Inspector of Insurance being made respondents.

One of the main questions discussed was which set of provisions of the Quebec Insurance Act applies. We are clearly of opinion that the case is governed by articles 6930 and 6931, and not by articles 6932 and 6933 of the Revised Statutes of Quebec.

We think, however, that the last paragraph of article 6931, providing for the appointment of a provincial liquidator in the case of a company incorporated by the province, is inoperative where the liquidation takes place under the Dominion Winding-Up Act. There obviously cannot be two separate liquidations of the same company and the liquidation under the Dominion statute, which is anterior in time, excludes any other.

The appellants, as representing in some respects the company and in some other respects the creditors and the contributories, appear to us to have a status to invoke the action of the court under article 6930. It should be observed, however, that this can only be done with the approval of the Superior Court (sections 33 and 34 Winding-Up Act), and that court has full control of the proceedings.

1924

IN RE STRATHCONA FIRE INS. CO. LEMIRE v. NICOL.

Mignault J.

It is clear that the deposit should be made available for the policyholders thereunto entitled although the liquidation is proceeding under the Dominion Winding-Up Act. In view of the long delay which has elapsed since the winding-up order, we venture to suggest to the parties that they should cordially co-operate to the end that the liquidation of this company and the administration of the deposit may be speedily completed.

The learned judge of first instance treated the petition as one presented by the appellants in their personal and not in their official capacity as liquidators; and at least one of the learned judges in the Court of King's Bench (Guerin, J.) makes it plain that he would not have approved of the proceedings. Further, the liquidators do not appear to have obtained the approval of the court under section 34 of the Winding-Up Act. In view of all the circumstances, we will not ourselves make an order for the administration of the deposit, but we will remit the case to the Superior Court so that, with its approval and subject to its direction, the deposit may be administered for the benefit of the policyholders who are entitled to it. We express no opinion as to the person who should be appointed administrator.

There will be no order as to costs.

Appeal allowed.

Solicitors for the appellants: *Kavanagh, Lajoie & Lacoste.*

Solicitors for the respondents: *Perrault & Raymond.*

1924

*May 12.
*June 18.

S. D. BLACKMAN AND OTHER (PETITIONERS) ..... } APPELLANTS;

AND

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Succession duty—Letters probate—Valuation—Bond—Petition by executors—Determination of real value of estate—Succession Duty Act, R.S.B.C. (1911) c. 217, ss. 21, 23, 24, 29, 31, 34, 40, 43.

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc*.

Although executors, when applying for ancillary letters patent in British Columbia, had placed a value on the estate in the province for the purpose of succession duty and, such valuation being accepted by the Crown, had given a bond to secure payment of the duty, they are not bound by such valuation and its acceptance by the Crown; but they have still the right afterwards to present a petition under section 43 of the Succession Duty Act to a judge of the Supreme Court of the province who has jurisdiction to determine what property of the estate is liable to duty and the amount due thereof.

Judgment of the Court of Appeal ([1924] 1 W.W.R. 161) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of Morrison J., and dismissing the appellants' petition under section 43 of the Succession Duty Act.

The appellants are the executors of one Edward Grunder who had in British Columbia a claim against E. F. Voigt and M. S. Voigt for money lent. In order to institute proceedings against the debtors, who were apparently insolvent, the appellants were obliged to obtain letters of ancillary probate of Grunder's will and to secure this probate some arrangement had to be made as to the succession duties. A long correspondence ensued between the solicitors of the appellants and different departments of the provincial government to whom it was represented that the Voigt claim, the only asset of the deceased in British Columbia, was of very doubtful value. Finally the appellants obtained ancillary letters of probate on filing an affidavit of value under section 21 of the Act, placing the value of the Voigt claim at $16,000 and also a bond, under sections 23 and 24, for the due payment to the Crown of any duty to which the property coming to the hands of the appellants might be found liable. The Voigt claim later on proved to be worthless, as a return of *nulla bona* was made on an execution against them. The appellants then presented a petition under section 43 of the Succession Duty Act addressed to a judge of the Supreme Court of British Columbia, setting forth all the facts of the case and asking for an order that no succession duties had become payable by them on the estate of the deceased.

Lafleur K.C. for the appellant.

Donaghy for the respondent.

(1) [1924] 1 W.W.R. 161.

1924
BLACKMAN
v.
THE KING.
Idington J.

IDINGTON J.—The late Edward H. Grunder, domiciled at the time of his death (which took place on or about the 20th day of April, 1920) in the state of Pennsylvania, appointed the appellants herein executors of his last will and testament of which they obtained probate in said state.

In the years 1915 and 1916 he had joined one Beck, also a resident of Pennsylvania, in lending $5,000 and $14,000 to Emil F. Voigt and Mary Agnes Voigt of the province of British Columbia, and to secure re-payment thereof and interest obtained a lien on some mining claims in that province.

In the course of doing so the appellants found it very difficult to satisfy the authorities there, for a long time, as to the nature of the security to be given under the Succession Duties Act.

The solicitors acting for said appellants found that it was very doubtful if anything could be realized out of either of the Voigts, or the security given on said mining claims, especially as Emil F. Voigt pretended to have a counterclaim against the testator.

All these features of the said indebtedness and alleged security were presented to the officers of the respondent in turn, but without anything satisfactory resulting until Mr. Mayers of the said solicitors' firm wrote the Prime Minister of British Columbia a long letter on the 29th August, 1921, on the subject in which he set forth the facts relative to said indebtedness, as follows:—

> Some years ago, an American citizen called E. H. Grunder, living at Warren in the state of Pennsylvania, lent to a citizen of this province, one E. F. Voigt, the sum of fourteen thousand dollars odd and took from him as security a charge on some thirteen mineral claims. Mr. Grunder has now died and his executors wish to try and recover for his beneficiaries some of the money lent to Mr. Voigt. Mr. Voigt refuses to pay, asserting that he has a counter-claim exceeding the amount of the loan for moneys expended by him for the use of Mr. Grunder, and it has become necessary to commence an action on behalf of the executors with a view to enforcing the claim of the deceased. You will see, therefore, that there are three matters which have to be determined before it can be ascertained whether the executors will obtain any money at all: in the first place, they must succeed in procuring a judgment in their favour; secondly, they must be able to execute that judgment, either upon Voigt personally, or out of the mineral claims which were given as security. It is not at all certain that the executors will succeed at the trial; it is quite certain—so far as my information goes—that Voigt has no money and is

execution-proof, and I do not know at all whether the mineral claims can be sold, although I think it very doubtful.

In order to prosecute the action, it is necessary for the executors to take out probate in this province, and it is with regard to the succession duties and probate duties that I am writing to you.

As it is impossible now to tell whether the executors will recover any money for the estate at all, it seemed to me and it seems to me that the only reasonable course to pursue with regard to the succession duties and the probate duties is to give a bond to the Crown for the payment of the succession duties upon so much as may eventually be recovered for the estate of the deceased.

That was followed by the story he had to relate as to treatment he had met with.

That letter the Prime Minister replied to promptly; and in courteous terms, expressing surprise and informing Mr. Mayers that he was taking the matter up with the Minister of Finance, which resulted in a letter being sent by an official in the Treasury Department as follows:—

Victoria, 14th September, 1921.

Messrs Taylor, Mayers & Co.,
Barristers, etc.,
470 Granville St.,
Vancouver, B.C.

Dear Sirs,—In *re* Estate E. H. Grunder, Deceased, 499/21. With reference to your request for a bond to secure probate and succession duties herein, I am to-day in receipt of a memorandum from the Honourable the Minister of Finance, which reads as follows:

"In view of the fact that the question of value of the British Columbia property is a question for the court, it might be well for the department to accept a bond payable in twelve months for succession duty in this estate, but the probate duty must be paid in cash."

Yours very truly,

A. C. CAMPBELL.

That was followed by the giving of a bond by the appellants and the Canadian Surety Company professing to secure $16,000.

The condition of that bond was as follows:—

The condition of this obligation is such that if the above named Sidney D. Blackman of Warren, in the state of Pennsylvania, and Hyett Grunder, of the township of Pleasant, in Warren county, in the said state of Pennsylvania, executors of all the property of Edward H. Grunder, late of the township of Pleasant, in the county of Warren aforesaid, deceased, who died on or about the 20th day of April, 1920, do well and truly pay or cause to be paid to the Minister of Finance of the province of British Columbia for the time being, representing His Majesty the King in that behalf, any and all duty to which the property, estate and effects of the said Edward H. Grunder coming into the hands of the said Sidney D. Blackman and Hyatt Grunder may be found liable under the provisions of the "Succession Duties Act," within two years from the date of the

1924

BLACKMAN v. THE KING.

Idington J.

death of the said Edward H. Grunder, or such further time as may be given for payment thereof, under the provisions of the said Act, or such further time as they may be entitled to otherwise by law for payment thereof, then this obligation shall be void and of no effect, otherwise the same to remain in full force and virtue.

On receipt of that bond Mr. Campbell wrote the registrar that it had been received and was on file approved by the Minister of Finance and that it would therefore be in order for him to issue consent to letters probate and they were issued accordingly. The appellants proceeded with the action against the Voigts and got judgment but could realize nothing on it.

The execution was returned *nulla bona*. Attempts were made by the executors to sell the mining claims but they were equally fruitless and the lands so held as security were sold for taxes.

The appellants then presented a petition addressed to the Honourable the Chief Justice and the Justices of the Supreme Court of British Columbia, setting forth everything, apparently, that had transpired relative to the death of the testator, and his having made said will and named said appellants as executors, and who got anything thereunder, and of what the entire estate consisted, and a most complete history including the correspondence relative to the getting of ancillary letters of probate and the results flowing therefrom, of which my unusually lengthy quotations are but a mere trifling fraction, and all verified by the affidavit of the managing clerk in charge of the entire business in question.

That petition was heard by Mr. Justice Morrison and counsel for the respondent appeared in answer thereto, as well as in support of the petition, on the 16th of February, 1923, and on the 9th of March following he gave his judgment reciting the facts of the hearing and affidavits filed before him, and counsel having appeared and the postponement for judgment ends by declaring that no duties have become payable from the petitioners under the above-mentioned Act, meaning, as the style of cause shows, the Succession Duties Act.

From that judgment an appeal was taken to the Court of Appeal for British Columbia.

That court, consisting of five justices, by a bare majority thereof, allowed the appeal and set aside the said judgment of Mr. Justice Morrison.

The learned Chief Justice and Mr. Justice Galliher each wrote reasons in support of said judgment so appealed against. Mr. Justice Eberts gave no reasons.

Mr. Justice Martin and Mr. Justice McPhillips each gave written reasons for their dissenting judgments. Each of them took the ground that under section 43 of the Succession Duties Act the judge hearing such a petition was a *persona designata* and hence no appeal would lie therefrom.

There is much to be said in favour of such a view—but, for reasons I am about to assign, that view is not the only one to rest upon in reversing the said appellate judgment.

Said section 43 reads as follows:—

> Section 43: A judge of the Supreme Court shall also have jurisdiction, upon motion or petition, to determine what property is liable to duty under this Act, the amount thereof, and the time or times when the same is payable, and may himself or through any reference exercise any of the powers which by sections 29 to 31, both inclusive, of this Act are conferred upon any officer or person.

The learned Chief Justice, I most respectfully submit, erred on the basic facts herein in assuming that the amount of duty had been agreed upon.

He seems to have overlooked the facts I have set forth above ending in the giving of the bond conditioned expressly to cover the case of a non-agreement, and render the question subject to the result of future developments.

I fear he was misled by the ground taken in the notice of appeal which states the facts incorrectly, I submit.

He also, I respectfully submit, drew an erroneous inference from what was said by the Judicial Committee of the Privy Council in dealing with the case of the *United States Fidelity & Guarantee Co.* v. *The King* (1), where the expression used was:—

> The powers of s. 43 were not invoked at any material time, if a resort to them was at any time open, as of right, to Quagliotti or the appellants.

This, I infer, had arisen in course of the argument before said court by reason of my own reference to section 43 when

(1) [1923] A.C. 808, at p. 815.

1924
BLACKMAN
v.
THE KING.
Idington J.

that case was before us and then, by reason of this court being equally divided, the said company's appeal to this court was dismissed.

I could not, on the remarkable facts of that case, overlook the omission of Quagliotti failing, for years, to invoke this section if, as pretended, a clear mistake had been made.

The view taken by myself and two others of this court, hearing that appeal, was ultimately upheld by the court above.

The result of the consideration I then gave to the Succession Duties Act appears in the report of that case (1).

I certainly came to the conclusion therein that there were several means given the Crown to protect itself, even after the amount determined by the officers charged with the duties of fixing the amounts, to be considered and finally getting a bond therefor, before issuing the letters of administration or grant of probate. Surely that determination was never based on an agreement to be taken as final.

I then thought and still think, that there was, despite the assent of the Crown by its officers and the parties applying, nothing to be inferred therefrom as a final binding agreement, but *prima facie* an amount fixed unless and until the Crown found otherwise and resorted to the means given it to alter such amount, or the representatives of the estate found they had been mistaken and resorted to this section 43, which seems to me enacted for no other purpose. I certainly can find no other use for it.

And clearly on the facts of this case there is ample reason shown of the necessity for such a provision.

And I am at a loss to understand why the respondent representatives persist in refusing the relief.

I submit that the due sense of right demands it, especially in the case of foreigners far removed from the seat of the facts to be decided.

Counsel for respondent was confronted before us with the question of whether or not he would, if this court held appellants entitled under said sec. 43 to a hearing under it, desire the opportunity of having it sent back to present further evidence. He promptly declined, in such event of our so holding the chance of further inquiry.

(1) [1922] 64 Can. S.C.R. 48 at page 53.

As to the question of *persona designata,* I may point out that the learned judge is given the power to appoint a referee, but no right of appeal is given as is given expressly by section 33 relative to another like inquiry provided by preceding sections.

I submit that there are several other features of the Act, as well as this instance I cite, which are in conflict, I most respectfully submit, with the view expressed by Mr. Justice Galliher, that reading the whole Act it appears that the legislature could not have so intended.

I am afraid the Act was not all drafted by the same hand but amendments were made from time to time as the subject matter of succession duties developed and thus the Act grew by chance.

I am, from my point of view, not much concerned in maintaining the proposition, and make these remarks to indicate that if, as Mr. Justice Galliher infers, it was never the intention of the legislature, it, perhaps, should make its meaning clear.

I, for the several foregoing reasons, am of the opinion that this appeal should be allowed with costs here and in the Court of Appeal below, and the judgment of Mr. Justice Morrison be restored.

DUFF J:—The principal question raised by this appeal is one of not a little difficulty. The crucial point seems to be this: Is the procedure provided under sections 21 to 33 the exclusive procedure for determining the value of property for the purpose of calculating the amount of succession duty payable under the Act by the legal personal representatives before or after grant of probate or letters of administration? Normally, the duty payable is to be determined and paid before any such grant takes place. And even where the registrar is authorized by the Lieutenant-Governor in Council to accept a bond in lieu of present payment of duties presently due, the statute contemplates a determination of the amount of the duty, at least provisionally. This amount is ascertained in all cases by the Deputy Minister of Finance upon the basis of the facts disclosed by the affidavits of value and relationship, and a statement of this amount accompanies the consent to the issue of probate or

1924

BLACKMAN v. THE KING.

Duff J.

letters of administration which is necessary before the probate or the letters of administration are issued by the registrar.

How is this provisional ascertainment to be reviewed? In what circumstances does it become final and conclusive? Disputes may obviously arise, either as to the inventory of property or the value ascribed to the property inventoried in the affidavits; and then, given the amount and value of the property, as to the scale upon which duty is to be calculated. Facts touching relationship and questions of law might quite conceivably come into controversy. Sections 29 *et seq.* provide a procedure by which the Minister, if dissatisfied with the inventory or with the estimate of value in the affidavits, may have the points in controversy referred to a commissioner, from whose decision there is a right of appeal to the Court of Appeal. Proceedings under section 29 cannot be initiated by the representatives of the estate. They are entitled to be heard, however, on the inquiry before the commissioner, and I see nothing in the Act that makes either the inventory or the estimate of value in the affidavits binding upon them or binding upon the commissioner. I am by no means satisfied that on such an inquiry it would not be open to the representatives of the estate to say that property had been included by mistake which did not belong to the estate, or that the valuations were excessive; and if that is so, it must be equally open to the representatives of the estate to appeal from the decision of the commissioner on any such contention advanced by them before him. But if this procedure is not set in motion by the Minister, what is the position? Some means must be available to the representatives of the estate for questioning the determination of the Deputy Minister of Finance as to the amount of the duty. Assuming, for the moment, the estate to be bound as to the enumeration of parcels and as to the values given in the affidavits, there still remains the possibility of dispute as to the sum which, on the given facts, the Crown is entitled to be paid in respect of duty. If a dispute arises, there must be some method by which the estate can invoke the jurisdiction of the courts. Section 44 makes it quite clear that the right to bring an action exists.

Is there also a right of petition under section 43? After a good deal of fluctuation of opinion, I have reached the conclusion expressed by Mr. Justice Maclean in his judgment, which I have had an opportunity of considering; after, I may add, giving full weight to the contentions advanced by Mr. Donaghy in his able argument. There is nothing in the earlier provisions expressly excluding such a right. It appears to be quite clear that the Crown, instead of resorting to the procedure under sections 29 *et seq.*, might bring an action; and the terms of section 43 seem to imply that resort might be had to that section as well. That section obviously confers jurisdiction to deal with questions of inventory and valuation. The more reasonable view would appear to be that in such circumstances proceedings under secs. 43 and 44 are likewise open to the representatives of the estate. On the whole, I think the better view is that there are alternative methods of procedure: reference to a commission; action; summary application under section 43. A decision in course of any one of such proceedings would, of course, be conclusive.

The learned judge of first instance had, therefore, jurisdiction under section 43. As to the substance of his decision, I can find no evidence of any agreement precluding the appellants from setting up the real facts; nor have I any doubt that facts were adduced establishing a *prima facie* case that the debt and the security were both valueless at the time of the testator's death. This *prima facie* case was unanswered, and was therefore a sufficient basis for the judgment.

The appeal should be allowed and the judgment of Mr. Justice Morrison restored. The appellants are entitled to their costs throughout.

MIGNAULT J.—Questions as to the construction and effect of the British Columbia Succession Duty Act, chapter 217, R.S.B.C., 1911, have been of not infrequent occurrence, and at least two cases, before this one, have reached this court and eventually the Judicial Committee of the Privy Council. The problem which the present litigation presents is a rather difficult one.

1924

BLACKMAN v. THE KING.

Mignault J.

Edward Grunder, the deceased, was a citizen of the state of Pennsylvania and resided there at the time of his death. He had in British Columbia a claim against Emil F. Voigt and Mary S. Voigt, to whom, a few years before his death, he had, jointly with one Edward Beck, lent $14,000 and $5,000, taking as security several mineral claims in British Columbia. This claim was disputed by the Voigts, and if it had any value whatever it could only be the value of the mineral claims. But it was very problematical whether anything could be realized out of this security, and eventually it proved to be worthless and the mineral claims were sold for unpaid taxes. The Voigts had no property, and a return of *nulla bona* was made on an execution against them.

After Grunder's death, the latter's executors, the appellants herein, instituted proceedings in the British Columbia courts against the Voigts who resisted payment. They could go on with their suit only by obtaining letters of ancillary probate of Grunder's will, and to secure this probate some arrangement had to be made as to succession duties. A long correspondence ensued between the solicitors of the appellants and different departments of the provincial government, and it was represented that this, the only asset of the deceased in British Columbia, was of very doubtful value, but in order to carry on the suit and attempt to realize something out of the security it was necessary to obtain probate of the will. Finally the appellants obtained ancillary letters of probate on filing an affidavit of value and relationship under section 21 of the Act, placing the value of the Voigt claim at $16,000, and also a bond, under sections 23 and 24, for $16,000 (by virtue of section 24, the bond should have been only for $1,600, ten per vent of the valuation) for the due payment to His Majesty of any duty to which the property coming to the hands of the appellant might be found liable. I think it was well understood at the time that, although the Voigt claim was valued at $16,000, efforts to collect it might prove unsuccessful, and that it might be ascertained, as in fact it was, that it was worthless.

The Act, as I read it, does not make the affidavit of value and relationship and the accompanying inventories

conclusive as to the amount or value of the estate. Certainly it is not binding on the Government, which can appoint a commissioner to enquire into and report as to the property subject to duty and its value (sec. 29). There is an appeal to the Court of Appeal from the report of the Commissioner, which is open to "any person dissatisfied with the report" (sec. 23), but I cannot find anything in the Act making in terms the commissioner's report conclusive as to any interested party.

We next find a provision (sect. 34) giving authority to a judge of the Supreme Court to issue, on the application of the Minister of Finance, a summons directing the executor, administrator, heir or devisee of the property liable for duty to appear and show cause why the duty should not be paid forthwith or on a day to be fixed by the judge. This presupposes that the amount of the duty has been determined, for the section does not direct the judge to ascertain its quantum. There is a somewhat similar provision in section 40, empowering a judge to summon "on the application of any person interested" the persons interested in the property subject to the duty to appear before the court and show cause why the duty should not be paid.

All the sections above referred to are grouped under the caption "Procedure to enforce payment of duty." Sections 42 and following are preceded by the title "Additional remedies," and among them is section 43 under which Mr. Justice Morrison made the order which the Court of Appeal, on appeal by the Government, set aside. This section reads as follows:—

> 43. A judge of the Supreme Court shall also have jurisdiction, upon motion or petition, to determine what property is liable to duty under this Act, the amount thereof, and the time or times when the same is payable, and may himself or through any reference exercise any of the powers which by sections 29 to 31, both inclusive, of this Act are conferred upon any officer or person.

The reference to sections 29 to 31 is to the provisions of the Act concerning the appointment of a commissioner. It is not very clear whether it is meant, by this reference, that the judge may appoint a commissioner, as the Government only can do under section 29, or that he may exercise the powers which would be exercisable by the commissioner when appointed by the Government.

1924

BLACKMAN v. THE KING.

Mignault J.

But it would seem to me that, notwithstanding what occurred in this case, the learned judge, upon a motion or petition of these appellants, had jurisdiction to determine what property of the Grunder estate was liable to duty under the Act, and the amount thereof. The learned judge, in his formal judgment, there are no reasons for judgment, declared

> that no duties have become payable from the petitioners under the above-mentioned Act.

I think the learned judge had jurisdiction to make this declaration which could only be based upon the fact, which is established, that no property in British Columbia had come to the hands of the appellants.

The point relied on by the learned judges of the Court of Appeal was that these appellants were bound by their valuation and its acceptance by the Government, and that it was thus conclusively established that property of the value of $16,000 had come to the hands of the appellants. As I have said, there is nothing in the Act declaring that the affidavit of value and relationship and the inventories are conclusive against those filing them. It may be urged that they are an admission by the representatives of the estate of the property and its value which has come to the hands of these representatives, but does that mean that in case of a demonstrated mistake in making this admission, or of sufficient evidence that a claim such as the one in question was really valueless at the time of the death of the deceased, the representatives of the estate are nevertheless precluded by their affidavit from alleging and proving the contrary? I would greatly hesitate before answering this question in the affirmative. I think, taking the affidavit with the bond which accompanies it, the governing condition is that the estate will pay to His Majesty

> any duty to which the property coming to the hands of the said applicant or applicants may be found liable (sect. 24).

This leaves for subsequent determination, a determination such as made in this case, the question of what property came to the hands of the applicant for probate. And section 43 empowers the judge to determine what property is liable to duty under the Act and the amount thereof.

Under all the circumstances I am of opinion that there was no agreement between the appellants and the Government to the effect that this claim was worth $16,000, or any amount. And I also think that it was open to the learned judge under section 43 to determine that no duties were payable by the appellants under the Act.

I would therefore allow the appeal with costs here and in the court below and restore the judgment of Mr. Justice Morrison.

MALOUIN J.—For the reasons stated by Mr. Justice Idington, with which I concur, I would allow this appeal and restore the judgment of the trial judge, with costs.

MACLEAN J.—Edward H. Grunder, a citizen of the United States, died in 1920, and in his will named the appellants as his executors. In his lifetime Grunder, together with one Beck, loaned to one Voigt and his wife, residents of British Columbia, sums of money aggregating $19,000. The executors brought action against Voigt and his wife for the recovery of the said sum of $19,000 and, alternatively to foreclose the interest of the Voigts in certain mineral claims in British Columbia charged with the repayment of this sum of money. In order that the executors might prove their title on the trial, it was necessary that they obtain probate in British Columbia of the last will and testament of the deceased Grunder. The Succession Act requires payment of succession duties or security therefor before letters probate may issue. Thereupon the appellants' solicitor obtained leave to file a bond in lieu of payment of duties, and as required they filed the statutory affidavit and inventory, in which they described the asset in question as a claim against Voigt and his wife secured by an interest in fourteen mineral claims in the Similkameen District of the amount of $16,000.

The appellants ultimately recovered judgment against the Voigts, but a writ of execution issued against the goods and chattels of the judgment debtor was returned *nulla bona*. The mineral areas charged by the Voigts to secure payment of the loan proved valueless and were sold for non payment of taxes, and the appellants were still unable to realize upon the judgment.

1924

BLACKMAN v. THE KING.

Maclean J.

The appellants then proceeded by petition under s. 43 of the Succession Duty Act, praying for a declaration that no estate of the deceased in British Columbia came into the hands of the appellants and that no duties had become payable. After the hearing of the petition, an order was granted by Morrison, J. that no duties had become payable by the petitioners under the Succession Duty Act. On appeal to the Court of Appeal this order was set aside, and the present appeal is from the decision of the Court of Appeal of British Columbia.

Considerable correspondance was carried on between the appellants' solicitor and the respondent prior to the issue of the letters probate and the giving of the bond which perhaps should be referred to here. The first letter was addressed to the Deputy Attorney General, and it was pointed out that one Edward H. Grunder, living in Pennsylvania, U.S.A. had died, and that his executors wished to sue for the recovery of money loaned to a man named D. F. Voigt and his wife upon the security of some mineral claims in British Columbia. In this letter it was pointed out that the ultimate value of the security when foreclosed or sold was uncertain, and in the meanwhile the solicitor asked for leave to file a bond in lieu of the succession duties and also the probate duties. In another letter addressed to the Minister of Finance the appellants' solicitor wrote as follows:

> Now it is quite doubtful whether Voigt has any money and equally doubtful whether the mineral claims have any value and it is therefore very difficult to fix any sum which should be paid for succession duties or probate duties.

This letter then proceeds to point out the probable difficulties in the executors recovering judgment, and that the future alone would determine whether they could realize anything out of Voigt's for the mineral claims. At a later date a departmental official wrote the solicitor, that the Treasury did not wish through a bond to extort payment of duties from assets which possibly did not exist, but the solicitor encountered delays in obtaining a final acceptance of the bond for succession duties.

He thereupon took up correspondence with the Prime Minister of British Columbia and in his letter of August 21st, 1921, wrote as follows:

As it is impossible now to tell whether the executors will recover any money for the estate at all, it seems to me that the only reasonable course to pursue with regard to the succession duties and the probate duties, is to give a bond to the Crown for the payment of succession duties, upon such money as may eventually be recovered of the estate of the deceased.

To this the Prime Minister replied deprecating the unnecessary volume of correspondence on such simple a matter and stated that the only question was whether the Minister of Finance had power to accept the bond in lieu of the payment of succession duties. The Minister of Finance then wrote an official of his department to accept a bond in respect of the succession duties. He said:

In view of the fact that the question of value of the British Columbia property is a question for the court, it might be well for the department to accept a bond payable in twelve months for succession duty in this estate.

A bond was subsequently accepted. The condition of the obligation in the bond was to well and truly pay or cause to be paid to the Minister of Finance of the province of British Columbia, for the time being representing His Majesty the King on that behalf, "any and all duty" to which the property, estate and effects of the said Edward H. Grunder, coming into the hands of the said Sydney Blackman and Hyett Grunder "may be found liable" under the provisions of the Succession Duties Act, within two years from the date of the death of the said Edward H. Grunder or such further time as being given, etc.

The Succession Duty Act contains no provision giving authority to refund where any duty shall have been paid on account of any succession tax, if it is afterwards discovered that such duty was not due, or was paid by mistake, or paid in respect of property which the successor was unable to recover, or where for any other reasons, a refund ought to be made. There is no statutory power to compound the duty payable, upon any terms, where the succession is of such a nature, or so disposed, or circumstanced as not to be fairly ascertainable, nor in case of doubt or dispute as to the valuation is there any direct provision for agreement between the parties, although this of course is implied.

In these circumstances the appellants petitioned the court for the declaration referred to, and their contention

1924

BLACKMAN v. THE KING.

Maclean J.

on this appeal is that the judge in the premises had jurisdiction. Section 43 reads:

> A judge of the Supreme Court shall also have jurisdiction upon motion or petition to determine what property is liable to duty under this Act, the amount thereof and the time or times when the same is payable and may himself or through any reference exercise any of the powers which by sections 29 to 31, both inclusive, of this Act are conferred upon any officer or person.

The section is apparently wide enough in terms to cover the case, but the respondent claims it is not available to the appellants, and that the judge was without jurisdiction. If the section is not operative in these proceedings it must be because there was some previous decision binding upon the executors, or because there was an agreement between the parties which is conclusive.

There has been no binding decision because section 22 (1) is purely tentative, at least where a bond has been given. This section only authorizes the determining of the amount of succession duty for the purpose of making it possible to have letters of probate issue. The functions of the Deputy Minister of Finance are ministerial entirely, he simply makes a computation on the footing of the affidavit and inventory. The word "estimate" would more appropriately express the latter document then "inventory" and in many succession acts that is the term used.

There is nothing in the Act which binds the Minister to accept as final, the assessment which the Deputy Minister of Finance made. The Minister only goes so far in the form of consent, form 5 of the Act, as to state that he considers, after a perusal of the affidavits, that there is a property subject to succession duty. He stated in this consent, the amount of succession duty "due," that is "due" for the purposes of the next subsection, which shows that the duty must be paid before the probate can be issued. If the Minister is not bound, then the executors should not be bound. The two subsections of section 22 must be read together, and I think it can be fairly said that the effect of them is to make the succession duty assessed by the Deputy Minister of Finance, only tentative.

It may be that the executor, having once paid the amount of this tentative assessment, could not obtain a refund, since the only provision for refund is in section 39, which

authorizes a refund by the Minister when a refund has been made by legatees, etc. Possibly it did not occur to the draftsman of the statute that there might be a case where payment had actually been made by the executor, and where it subsequently turned out that there was no estate, and, therefore, no legacies had been paid and consequently there was no legatees from whom a refund could be asked. This state of affairs is apparently a *casus omissus,* although it might be held that, even in these circumstances, the executor would have the right outside the statute, to apply for refund by petition of right on the ground that the payment was only tentative.

Whether this is so or not in the case where payment has actually been made, the circumstances are quite different when security is furnished and accepted. It would seem as if the idea might be that the executor in making an actual payment must be sure of his ground and not expect a refund, but that the executor who did not know how an estate would eventually turn out might protect himself by declining to pay and by giving a bond. This bond, it should be noted, is not for the amount which has been determined by the Deputy Minister of Finance, but is in the penal sum of ten per cent of the property subject to duty, and the condition is that the obligor will pay, not the amount determined by the Deputy Minister of Finance, but will pay the amount of duty to which the property coming into his hands *may be found liable,* under the provisions of the Succession Duty Act.

It was urged upon us that there was an agreement between the parties to pay the duty on the footing of an inventory filed. I must say I am unable to discover anything in this case supporting such a view, and I am at a loss to determine why the suggestion is put forward. Every step discloses that there was no agreement such as suggested. Possibly if the executor had paid duty upon the basis of the inventory filed, that would have constituted an agreement that the amount he paid was the amount for which the property was liable, but the agreement in this case is not left to be worked out by implication from the statute, or by a nebulous presumption arising from the equivocal act of the parties, but it is nominated in the bond, and this

1924

BLACKMAN v. THE KING.

Maclean J.

bond is in the words of section 23 of the statute and of the form of bond prescribed in the schedule. The bond, the only positive agreement in existence in this connection, is to the effect that the amount payable is the amount found to be due, and the correspondence referred to clearly shews that it was intended that the bond should express the accommodation reached between the parties.

Section 43 is the only section which actually provides for a judicial determination of the amount of duty to which property is liable. It is significant that the word "liable" used in this section is only used in one other place, and that is in the provisions of section 23, which prescribes the form of the bond. Section 29 does authorize a judicial decision by a commissioner, but this is not as to the amount of duty for which the property is liable, but is only as to what property is subject to duty. Further than this, section 29 can only be invoked by the Minister as a sort of court of inquiry to test the correctness of the applicant's statement in the affidavit. The applicant cannot under this section take the initiative to avail himself of the good offices of the commissioner.

It would be an unthinkable proposition if the applicant as a preliminary to obtaining letters of probate was obliged to search the country over, to ascertain all the debts of the deceased, and in effect guarantee that the amount to be placed opposite the item "debts" at the foot of the inventory showed the precise amount of the deceased's liabilities. One of the primary objects of appointing executors or personal representatives is to have some person who may, by appropriate advertisement and other notice, discover in the course of time what the actual liabilities of the deceased are.

The effect of the respondent holding the executors liable for the amount of money which would be payable as succession duty on the basis of the necessarily tentative statement which he furnished as to debts would be to directly take from the executor the monies to which the province is not in any way entitled, because property subject to duty is as laid down in sec. 7 (et seq.) the net value of the property, and this net value is what the learned judge has determined upon this proceeding. The only

other basis on which the province could possibly claim this money would be on the ground that the applicant having made this statement of assets and liabilities is now estopped from asserting that it was incorrect, but estoppel does not arise unless the person to whom the representation was made believes the representation and actually acts upon it to his detriment. There could be no suggestion here that the Crown which has taken the bond for the payment of the amount for which the property may be found liable has acted to its detriment. It must be remembered that at that time the Deputy Minister of Finance had actually determined the amount of the succession duty and therefore the use of the words "may be found liable" indicate clearly that it could not have been the amount which had then actually been determined, but that it was the amount which was to be the subject of some future finding or decision. The proper words to have used if the bond referred to the amount already determined by the Deputy Minister of Finance would have been "has been found liable." As I have already said, sec. 43 contains the only procedure which is open to the applicant to initiate for the purpose of having the amount of this liability determined, and the use of the word "liable" in ss. 23 and 43 and also in the bond itself is peculiarly significant.

It was pointed out by the respondent's counsel that a determination of the issues involved in the petition were not properly supported inasmuch as only affidavits were used. It was open to the judge, on the application of the respondent, to order the attendance for cross examination of any person making an affidavit.

I think the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Stockton & Smith.*

Solicitor for the respondent: *D. Donaghy.*

1924
*May 20, 21.
*June 8.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

ARISTIDE OUELLETTE (PLAINTIFF) ....RESPONDENT.

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

Railway--Negligence—Level crossing—Engine with tender leading—Section 310 of the Dominion Railway Act—Interpretation—Dominion Railway Act, R.S.C. (1906) c. 37, s. 2, ss. 25, 34, s. 276; 9-10 Geo. V, c. 68, s. 310.

A train, drawn by a locomotive with tender attached and moving reversely, so that the tender is foremost, is not a train "not headed by an engine" within the purview of section 310 of the Dominion Railway Act as enacted by 9-10 Geo. V, c. 68. Idington and Malouin JJ. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge with a jury and maintaining the respondent's action.

The respondent sued the appellant company claiming compensation in respect of the death of his two minor sons, who were struck down and killed on the company's track at a level crossing. The "train" of the company consisted of two locomotives, each with its tender attached, moving reversely, i.e., with the tenders leading. The negligence affirmed by the jury's verdict was the failure of the railway company to have a person on the leading tender to warn people about to cross the track of the approach of the train in conformity with section 310 of the Dominion Railway Act.

Tilley K.C. and *Foran K.C.* for the appellant.

Laflamme K.C. and *Lemieux K.C.* for the respondent.

IDINGTON J. (dissenting).—The appellant had a train consisting of a tender at its head and an engine next and a tender and engine behind them, running at a rate of at least ten miles an hour, and possibly fifteen miles or more an

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

(1) [1923] Q.R. 36 K.B. 431.

hour, across St. Florent street in the city of Hull, where there was a level crossing not adequately protected by gates or otherwise, and no person stationed on that tender heading the train, to warn persons standing on, or crossing, or about to cross, the track at said level crossing.

That train struck, at said level crossing, a truck auto driven by one Bertrand (and on which two boys sons of the respondent were riding), when the said driver was attempting to cross the said railway track.

The said sons of the respondent were killed thereby and hence this action to recover damages.

Many grounds therefor were taken by respondent, and amongst them that the appellant had not duly complied with the requirements of section 310, subsection (1) of the Railway Act of 1919, which reads as follows:—

Section 310 (1): Whenever in any city, town or village any train not headed by an engine is passing over or along a highway at rail level which is not adequately protected by gates or otherwise, the company shall station on that part of the train, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway.

The jury found in favour of respondent but that Bertrand was also to blame, and hence assessed the damages the respondent was entitled to as against the appellant alone, at $1,500, being for one-half of the total he had suffered.

And that verdict was rested upon the said subsection I have just quoted, in not having a man on the tender which was the head of the train.

The appellant appealed, from the learned judge's judgment entered pursuant to said verdict, to the King's Bench, on the appeal side, and that court, consisting of five judges, unanimously upheld said judgment (1).

The language used in said subsection, quoted above, seems to me most clear and explicit, and to have been correctly applied by the learned judges in appeal, and also by the learned trial judge.

The statute clearly requires where the train is not headed by an engine that under such circumstances as found existent in this case, the company shall station on that part of

(1) Q.R. 36 K.B. 431.

1924
CAN. PAC. RY. CO. v. OUELLETTE.
Idington J.

the train which is then foremost a person who shall warn persons standing on or crossing or about to cross the track of such railway.

"A train" is defined by subsection 34 of section 2 of said Railway Act, as follows:

includes any engine, locomotive or other rolling stock.

And "rolling stock" is defined by subsection 25 of said section 2 of said Railway Act, as follows:—

(25) Rolling stock means and includes any locomotive, engine, motor car, tender, snow-plough, flanger, and every description of car or of railway equipment designed for movement on its wheels, over or upon the rails or tracks of the company;

Yet we are gravely asked by counsel for appellant in face of such express language and definitions to hold that a "tender" is only part of an engine although common knowledge, as well as this express language, tells us they are separate.

And a remarkable feature of the contention is that the plain meaning of the words are to be given another meaning because some words used in an old Act, were dropped out, when such changes as made were obviously part of a revision of the entire legislation relative to railways, and intended to make clearer the law and improve it in many respects by eliminating useless verbiage.

When parties are driven to such arguments and no better, it makes it rather hard, I most respectfully submit, to understand why leave to appeal was granted.

That evidently was given because of it being urged that the judgment would impose serious loss upon all railways in Canada.

Just imagine a serious loss arising from being forced to carry the tender in its proper place instead of putting it in the reverse order of things!

I prefer that interpretation of any statute which will tend to avoid the sacrifice of human life, even if some careless employee is put to a little trouble.

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

DUFF J.—The sole question of substance on this appeal concerns the construction of sec. 310 of the Dominion Railway Act, 9-10 Geo. V, c. 68. The respondent sued the ap-

pellant company, claiming compensation under article 1056 of the Civil Code in respect to the death of his two minor sons, who were struck down and killed on the company's railway track at the crossing of St. Florent street, Hull, in August, 1922. The victims of the accident were crossing the track in an auto truck when a "train," so-called, of the company ran into it. The "train" consisted of two locomotives, each with its tender attached, moving reversely, i.e., with the tenders leading. The negligence affirmed by the jury's verdict, which is the foundation of the respondent's judgment, was the failure of the company to have a person on the leading tender to warn people about to cross the track of the approach of the train.

Section 310 is in these words:—

> Whenever in any city, town or village, any train not headed by an engine is passing over or along a highway at rail level which is not adequately protected by gates or otherwise, the company shall station on that part of the train, which is then foremost, a person who shall warn passengers standing on, or crossing, or about to cross any track of such railway.

By subsection (2) of section 34 of the statute, "train" includes any engine, locomotive or any rolling stock. The word "train" is broad enough to comprehend in its ordinary meaning any series of vehicles attached together moving upon a railway track, and *prima facie* would apply to the two locomotives and tenders with which we are concerned. But the point in controversy turns upon the meaning to be ascribed to the words "engine" and "train" in the context in which they are found in this section. Where the engine is moving reversely, so that the leading vehicle is the tender, can it be affirmed within the meaning of that section that the train "is not headed by an engine," and that the tender is a vehicle falling within the description, "that part of the train which is then foremost"? The section obviously distinguishes between the engine and the "train," i.e., between the engine and the other vehicles comprising the "train." It does not in terms distinguish between the engine and the tender, and I am inclined to think that in this section, construed without extraneous aid, "engine" comprises both locomotive and tender, i.e., the locomotive and what ordinarily is an inseparable adjunct of the locomotive. We are, however, entitled, when confronted with a provision of that kind, which is

1924
CAN. PAC. RY. CO. v. OUELLETTE.
Duff J.

capable of more than one necessarily exclusive construction, to examine the history of the legislation and to read the enactment to be interpreted by the light of that history.

Section 310 of the present Railway Act was substituted for sec. 276, c. 37, R.S.C., 1906, which was in these words:—

> Whenever in any city, town or village, any train is passing over or along a highway rail level, and is not headed by an engine *moving forward in the ordinary manner,* the company shall station on that part of the train, *or of the tender, if that is in front,* which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway.

The italicized phrases are those which have been omitted in the consolidation now in force. The omission of these phrases affords in my judgment conclusive evidence as to the intention of the legislator. The section as it stood in the Revised Statutes applied in all cases in which the engine leading the train was not

moving forward in the ordinary manner.

This qualification is struck out. "Not headed by an engine," in the substituted section, is obviously intended to take effect according to its ordinary meaning, i.e., where the leading vehicle is not an engine or part of an engine. The omission of the second phrase indicates very clearly the absence of any intention to distinguish, in the substituted section, between the engine and the tender.

The point may, perhaps, be more clearly put in this way. It is quite obvious that in sec. 276 of c. 37 of the Revised Statutes, the distinction was drawn between the vehicles forming "the train" and the engine (i.e., the engine as composed of the locomotive and tender) leading the "train." In that section the tender is treated as forming part of the engine, and not as part of the "train"; and the word "engine" is used as in itself including both locomotive and tender, or applying to any such combination, whether moving reversely or "forward in the ordinary manner." These words are reproduced *ipsissimis verbis* in the consolidation. The inference seems plain that the intention was by the substituted section to give effect to these words of the existing section according to the con-

struction they bore before the deletion of the italicized phrases.

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

ANGLIN J.—The sole purpose of this appeal, for which special leave was granted by the Court of King's Bench on the terms that

no costs would be asked against the respondent,

is to determine whether a train drawn by a locomotive with tender attached and moving reversely, so that the tender is foremost, is or is not a train "not headed by an engine" within the purview of s. 310 of the Dominion Railway Act, 9 & 10 Geo. V, c. 68. I had occasion to consider this question in *Grand Trunk Pacific Ry Co.* v. *Earl* (1), and then reached the conclusion that under such circumstances, for the purposes of s. 310, the train should be regarded as headed by an engine.

In deference to the contrary view taken in the present case by the Court of King's Bench, I have carefully reconsidered the question in the light of the argument addressed to us. I retain the opinion which I held in *Earl's Case* (1).

In common parlance a locomotive with tender attached is spoken of as an engine. Parliament recognized that fact when it distinguished between the engine and its tender in the corresponding section of the former Railway Act, R.S.C., c. 37, s. 276. Such a case as that now before us would have fallen within the explicit terms of that provision, which applied whenever the train was "not headed by an engine *moving in the ordinary manner*" and prescribed that a person should be stationed on "*the tender if that is in front.*" Parliament has now removed from the section the italicized words. We must attribute to it the intention thereby to effectuate the change in the law which such an alteration in the language fairly imports. Probably because it was thought that the engineer and fireman on an engine at the head of a train (or running alone) would have sufficient means of observing persons standing on, or crossing, or about to cross, the railway

(1) [1923] S.C.R. 397.

1924
CAN. PAC. RY. CO. v. OUELLETTE.
Anglin J.

tracks, and would be able to give sufficient warning of the approaching train whether such engine was
moving forward in the ordinary manner
or moving reversely, Parliament appears to have thought that the requirement that a special person be stationed on the foremost part of the train to give warning should be restricted to the case where the engine is preceded by cars. But, whatever the motive which actuated it, the change made in the legislation would seem to render it clear that the section no longer applies to the case of an engine (including its tender) moving reversely if it be travelling alone or be at the head of a train of cars. Neither of these is the case of a train "not headed by an engine."

Other derelictions of duty charged against the defendants were impliedly negatived by the jury's finding that their negligence consisted in "not having man on back of tender." *Andreas* v. *Canadian Pacific Ry. Co.* (1). The learned trial judge had charged that this omission would be a breach of s. 310 and would entail liability. It was not suggested that a duty to have a man stationed on the back of the tender existed at common law.

Under these circumstances the appeal must be allowed and the action dismissed.

MIGNAULT J.—The two children of the respondent were killed when a motor truck in which they were riding came in collision at a highway crossing in Hull, Que., with two engines of the appellant company coupled together and proceeding reversely, that is to say tender first. There were no cars, for the engines were backing in the direction of the Union railway station in Ottawa, where they were to take their trains. Several faults were charged against the appellant, but the only one found by the jury was
for not having man on back of tender,
all other faults being thus negatived.

The learned trial judge read to the jury subsection 1 of section 310 of the Railway Act and then directed them as follows:—

Now, the whole question there is whether these two engines and tender constitute a train. The statutory enactment has been changed from time to time. "Or of the tender if that is in front"—those words were used after the word "train." They appear to have been omitted, but in

(1) [1905] 37 Can. S.C.R. 1.

looking at the interpretation clause of what a train means by the Act it includes any engine or any rolling stock by subsection 34 of section 2. I may be wrong in my interpretation of the law and if I am the Court of Appeal will set me right, but I am of opinion, and I so instruct you, that it was a statutory duty of the railway company to conform to the requirements of section 310, subsection 1.

Taking the finding of the jury in connection with the instructions of the learned judge, it is clear that the fault found was failure to comply with section 310 in not stationing some one on the back of the tender to warn persons standing on, or crossing, or about to cross the track of the railway. In *Grand Trunk Pacific Ry. Co.* v. *Earl* (1), I expressed the opinion that section 310 does not apply to the case of a train headed by an engine moving tender first. Having given my best consideration to the judgments of the learned judges of the Court of King's Bench as well as to the arguments of counsel, I see no reason to change my view.

The contention of the respondent is that these two engines moving reversely were a "train" within the meaning of the Railway Act, and the interpretation clause of the Act is relied on as so defining the word "train." It is obvious however that the context of section 310 must be considered, for it requires the stationing of a look-out man only when the "train" is not headed by an engine. There is here a clear distinction between the train and the engine.

That this provision does not apply when the train is headed by an engine, although the engine is moving tender first, is shown by comparing section 276 of the former Railway Act (R.S.C., c. 37) with section 310 of the Railway Act of 1919 (9-10 Geo. V, c. 68). I will cite the two provisions in juxtaposition.

R.S.C., c. 37, sec. 276:—

Whenever in any city, town or village, any train is passing over or along a highway at rail level, and is not headed by an engine *moving forward in the ordinary manner,* the company shall station on that part of the train, *or of the tender if that is in front,* which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway.

9-10 Geo. V, c. 68, sec. 310, subsec. 1:—

Whenever in any city, town or village, any train not headed by an engine is passing over or along a highway at rail level which is not ade-

(1) [1923] S.C.R. 397.

1924

CAN. PAC. RY. CO. v. OUELLETTE.

Mignault J.

quately protected by gates or otherwise, the company shall station on that part of the train, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway.

It will be seen at a glance that in re-enacting this provision in 1919, Parliament struck out the words

moving forward in the ordinary manner (and) or of the tender if that is in front.

Its obvious intention was to effect a change in the law as it stood under the old Act, and since the re-enactment it is only when a train not headed by an engine is moving over or along a highway not adequately protected by gates or otherwise, in a city, town or village, that a look-out man must be placed on that part of the train which is then foremost. Here the train, if it can be so called, was headed by an engine and section 310, subsection 1, does not apply.

There is no suggestion in this case that it was negligence at common law not to have placed a man on the tender to warn persons crossing the railway. The verdict must stand or fall on the statutory fault found by the jury, to wit, non-compliance with section 310. If the section did not apply, this statutory fault did not exist. The appeal must therefore be allowed and the action dismissed.

As to costs, the condition of the special leave to appeal obtained by the appellant from the Court of King's Bench, was that

on the appeal of appellant to the Supreme Court, no costs would be asked against the respondent.

The appellant's main interest was to obtain from this court pronouncement on a very important question of railway law, and for that reason its factum does not ask for costs against the respondent. Under these circumstances, I would grant no costs to the appellant either here or in the two courts below.

MALOUIN J. (dissenting):—La décision dans la présente cause dépend de l'interprétation à donner à l'article 310 de la loi des chemins de fer du Canada, 9 & 10 Geo. V., c. 68, qui se lit comme suit:

310 (1). Chaque fois que, dans une cité, une ville ou un village, un train n'ayant pas en tête une locomotive traverse ou longe une voie publique à niveau et qui n'est pas suffisamment protégé par des barrières ou

autrement, la compagnie doit avoir sur la partie du train formant ainsi la tête du convoi, quelqu'un pour avertir les personnes qui se tiendraient sur la voie du chemin de fer, la traverseraient ou seraient sur le point de la traverser.

Le juge qui a présidé au procès a dit dans son adresse au jury que la défenderesse, pour se conformer à cet article de la loi, aurait dû placer en avant du train une vigie pour prévenir de son approche les piétons qui traverseraient la voie, vu qu'il n'y avait pas en tête du train une locomotive.

Le train qui a causé l'accident se composait de deux locomotives ayant en tête un tender.

La question à décider est celle de savoir si le tender fait partie de la locomotive ou s'il est un wagon distinct.

La loi désigne le tender comme un wagon séparé et l'énumère au nombre des voitures qui composent le "rolling stock". Les dictionnaires nous disent que c'est un wagon qui suit la locomotive et qui contient l'eau et le charbon. Il me paraît donc certain que la locomotive et le tender sont deux choses distinctes.

La Cour du Banc du Roi a adopté la manière de voir du juge de première instance et a confirmé le jugement.

L'appelante devant cette cour prétend que l'appellation *locomotive* dans l'article 310 du statut comprend la locomotive et le tender et que partant l'appelante n'était pas tenue de placer une vigie en avant de son train.

Je ne puis accepter cette manière de voir. Le statut décrète que quand un train n'a pas en tête une locomotive, une vigie doit être placée en avant du train pour traverser un chemin public afin d'avertir de son approche les personnes qui le traversent.

Le législateur est présumé avoir voulu dire ce qu'il exprime et le juge ne peut chercher en dehors du texte de la loi son intention quand le texte est clair et ne prête à aucun doute.

Je renverrais l'appel avec dépens.

Appeal allowed.

Solicitor for the appellant: *T. P. Foran.*

Solicitor for the respondent: *Auguste Lemieux.*

1924

*May 27.
*June 8.

DAME O. CATELLIER (PLAINTIFF) .....APPELLANT;

AND

DAME A. BELANGER (DEFENDANT) ...RESPONDENT.

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

Promissory note—Loan—Both made simultaneously—Prescription—Action for less and cross-demand for more than $2,000—Same judgment dealing with both—Jurisdiction.

The appellant was creditor and the respondent debtor of an annuity of $300. In May, 1923, the appellant sued the respondent for $150 then due. The latter did not repudiate appellant's claim but pleaded that it was compensated by a loan of $3,000, represented by a promissory note, dated September, 1917; and the respondent also instituted a cross incidental demand for that amount. The appellant, in her answer, admitted the existence of the loan but added that the note was payable at her death only. The trial judge by the same judgment dismissed the appellant's action and maintained the incidental demand.

Held that a promissory note given in consideration of a loan of money, even though there be nothing commercial in the transaction, constitutes, if the note and the loan are made simultaneously and in absence of legal proof to the contrary, the contract between the parties, which is subject to the prescription of five years; and therefore the respondent had no existing claim against the appellant.

Held also that this court has authority to deal with the judgment in the principal action for an amount of $150 as ancillary to its authority to give effect to a judgment allowing the appeal from the same judgment maintaining the incidental demand.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, approving the judgment of the trial judge which dismissed the appellant's action and maintained the respondent's incidental demand.

The material facts of the case are fully stated in the above head-note and in the judgment now reported.

Maurice Rousseau K.C. for the appellant.

Ls. St. Laurent K.C. for the respondent.

IDINGTON J.—I agree with the reasons assigned by my brother Mignault J., and the conclusions reached thereby, and therefore that this appeal should be allowed, the claim of the appellant maintained and that of the respondent rejected, with costs throughout.

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

1924

CATELLIER v. BÉLANGER.

Duff J.

DUFF J.—I concur with the view expressed by my brothers Mignault and Malouin of the decision in *Vachon* v. *Poulin* (1), the effect of which appears to be that where a promissory note is given in consideration of a present loan of money, even though there be nothing commercial in the transaction in the relevant sense, then, in absence of legal proof to the contrary, the contract between the parties is that expressed in the promissory note; and that the prescription of five years applies.

I have some difficulty in understanding how the first paragraph of the defence to the *demande reconventionnelle* can assist the respondent. If the existence of the promissory note is so inconsistent with the condition to which, according to the pleading, the collateral obligation was subject, as to require the rejection of the condition, I can discover nothing of substance in the way of legal proof in the *residuum* of the admission to establish the existence of a collateral obligation within the doctrine of *Vachon* v. *Poulin* (1). I also concur in the opinion of Mignault and Malouin, JJ., that authority to deal with the judgment in the principal action is ancillary to the authority to give full effect to a judgment allowing the appeal from the judgment on the incidental demand.

ANGLIN J.—I have had the advantage of reading the opinions of my brothers Mignault and Malouin JJ. and I concur in their conclusions that the *demande reconventionnelle* has been extinguished by prescription and that it is competent for this court so deciding to rectify the mistake made in the Superior Court in allowing compensation in respect of an ill-founded cross-demand and to award the plaintiff the judgment to which she was admittedly entitled but for such claim of compensation.

With my learned brothers, I am of the opinion that where a promissory note is taken for a loan concurrently with the making of it, although the transaction be in nowise commercial, a presumption arises that the entire liability is that evidenced by the note, with the consequence that upon its extinction liability in respect of the loan likewise ceases. But, as indicated in *Vachon* v. *Poulin* (1), that presumption will prevail only if there be no legal proof to the con-

(1) [1898] Q.R. 7 Q.B. 60.

1924
CATELLIER
v.
BÉLANGER.
Anglin J.

trary, i.e., no proof that the parties intended that there should be a liability in respect of the loan independent of that upon the note. The respondent relies for such proof upon an admission contained in the appellant's answer to her cross-demand. But she is confronted by a dilemma. If the admission be taken as made, while it might suffice to evidence a liability in respect of the loan independent of that upon the note and subject only to a prescription of thirty years, it would at the same time establish that the *demande reconventionnelle* was premature and should on that ground be dismissed. If, on the other hand, the portion of the admission which attaches to the loan the condition that it should be repayable only at the death of the borrower and without interest be rejected, as the respondent insists and as has been done in the provincial courts, so that the admission is merely of the making of the loan, it in nowise indicates an intention of the parties that the liability in respect of the loan should be independent of that upon the note given in consideration for it and concurrently with its being made. The presumption of a single liability, to wit, that upon the note, remains unaffected. Whichever way the admission be taken it does not furnish the proof necessary to entitle the respondent to recover upon her *demande reconventionnelle.*

MIGNAULT J:—L'appelante est créancière et l'intimée débitrice d'une rente annuelle et viagère de $300. L'intimée se prétend créancière de l'appelante en la somme de $3,000, pour un prêt que lui aurait fait son beau-frère, le nommé Amable Bélanger, le 3 septembre 1917. Bélanger est décédé après avoir institué sa veuve, Dame Marie Catellier, comme sa légataire universelle, et cette dernière a fait une donation de tous ses biens à l'intimée, y comprise cette créance de $3,000. Ajoutons que le même jour qu'Amable Bélanger prêtait à l'appelante cette somme de $3,000, celle-ci lui consentit un billet payable à demande pour la somme prêtée. Lors de l'institution des procédures dont il s'agit en cette cause, ce billet était prescrit.

L'appelante ayant poursuivi l'intimée pour lui réclamer un semestre de sa rente, soit $150, l'intimée lui opposa en compensation cette créance de $3,000. Et se portant demanderesse reconventionnelle contre l'appelante, l'intimée

demanda que celle-ci fût condamnée à lui payer $2,965, soit la créance de $3,000 avec intérêts, moins le versement de rente, $150, dû à l'appelante.

L'intimée, tant dans sa défense que dans sa demande reconventionnelle, allègue le prêt de $3,000, et ajoute que l'appelante a donné, sous forme de promesse d'en rembourser le montant à demande, une reconnaissance écrite de ce prêt, laquelle reconnaissance et promesse de payer, dit-elle, lui a été transportée par endossement et délivrance par Dame veuve Amable Bélanger. Cette prétendue reconnaissance écrite n'est autre que le billet à demande prescrit lors de la défense et de la demande reconventionnelle, mais l'intimée a apparemment cherché à détourner l'attention de l'appelante et lui dissimuler le vice radical de son titre de créance en parlant d'un prêt et d'une reconnaissance écrite.

Au lieu d'objecter à l'intimée que sa créance était éteinte par la prescription de cinq ans, l'appelante a répondu comme suit:

> Elle (l'appelante) admet cependant qu'un prêt de $3,000 lui a été fait par son beau-frère, Amable Bélanger, mais à la condition que ce montant ne serait payable qu'à la mort de la dite défenderesse reconventionnelle, sans intérêt.

L'appelante se faisait probablement scrupule de soulever la question de la prescription. D'autre part, elle comptait sans doute que son aveu ne pourrait être divisé, mais l'intimée lui oppose le billet à demande, et invoquant l'article 1243 du code civil, elle dit que la partie contestée de l'aveu de l'appelante, savoir sa prétention que le prêt ne devait être remboursé qu'à sa mort, est combattue par une preuve contraire, c'est-à-dire par le billet à demande, et elle prend pour son compte l'aveu du prêt, et rejette, en divisant l'aveu, l'allégation que le prêt n'était payable qu'au décès de l'appelante. Il n'y eut de part et d'autre aucune preuve de faite en dehors des pièces littérales produites avec les demandes et les défenses.

A la cour supérieure comme à la cour d'appel, le débat a roulé sur cette question de la division de l'aveu fait par l'appelante. Dans mon opinion, il n'est pas indispensable de se prononcer sur ce point, bien que je ne puisse voir une contradiction nécessaire entre un billet à demande et une entente que le paiement de ce billet ne serait exigé qu'à une date ultérieure.

1924

CATELLIER v. BÉLANGER.

Mignault J.

Mais même en supposant que l'aveu puisse être divisé, l'intimée, dans mon opinion, ne peut obtenir ses conclusions. Pour rejeter sa défense de compensation et sa demande reconventionnelle, il suffit d'appliquer des règles de droit absolument élémentaires.

Le prêt et le billet à demande ont été faits le même jour, 3 septembre 1917, le prêt étant la considération du billet. Le billet est endossé par Marie Catellier Bélanger à l'ordre de Dame Aldéa Bélanger, l'intimée.

Or en fait de lettres de change et de billets promissoires, l'action se prescrit par cinq ans (art. 2260 C.C.). Dans tous les cas mentionnés aux articles 2250, 2260, 2261 et 2262, la créance est absolument éteinte, et nulle action ne peut être reçue après l'expiration du temps fixé pour la prescription (art. 2267). Cette prescription est une véritable déchéance et la loi déniant l'action, les tribunaux peuvent, et j'ajoute doivent, suppléer d'office le moyen résultant de la prescription (art. 2188). Il n'importe donc pas que l'appelant n'ait pas plaidé prescription.

Un cas identique s'est présenté dans la cause de *Vachon* v. *Poulin* (1), où la cour d'appel a jugé qu'un billet promissoire fourni en échange ou en considération d'un prêt d'argent, même entre non commerçants, constitue, lorsque tout se fait simultanément et en l'absence de preuve légale au contraire, le contrat entre les parties et ce contrat est sujet à la prescription de cinq ans. Dans l'espèce, il n'y a pas de preuve contraire, car l'aveu du prêt n'indique nullement que les parties aient distingué l'obligation du prêt de celle du billet. Il ne faut pas oublier que l'intimée divise l'aveu dont elle rejette la seconde partie quant à la date où paiement du billet serait exigé. Cela étant, l'aveu du prêt ne constitue pas la preuve contraire dont parle *Vachon* v. *Poulin* (1). Il en serait autrement si l'intimée avait accepté l'aveu tel que fait; il n'y aurait pas eu prescription, mais sa demande reconventionnelle serait prématurée.

Il est à remarquer que dans *Vachon* v. *Poulin* (1), la cour d'appel a confirmé le jugement unanime de la cour de revision présidée par le juge-en-chef, Sir L. N. Casault, et par les juges Caron et Andrews, tous magistrats de grande

(1) Q.R. 7 Q.B. 60.

expérience, dont le jugement est très complet et satisfaisant (1).

La décision dans *Vachon* v. *Poulin* (2) a été suivie par la cour de revision dans *Hébert* v. *Demers* (Tellier, Greenshields et Beaudin, JJ (3). Il est à remarquer que dans cette dernière cause il y avait deux réclamations, et celle fondée sur un prêt accompagné de la signature d'un billet à ordre fut rejetée pour cause de prescription. Quant à l'autre réclamation pour un prêt sans billet, on a divisé l'aveu du défendeur.

La cour de revision (Cannon, McCorkill et Drouin, JJ.) a également suivi *Vachon* v. *Poulin* (2) dans *Angers* v. *Dumas* (4).

On voit que la décision dans *Vachon* v. *Poulin* (2) a fait jurisprudence dans la province de Québec.

Revenant maintenant à la prescription dont il s'agit ici, je répète qu'elle est une véritable déchéance. Les textes que j'ai cités démontrent qu'elle éteint la créance. Ainsi l'intimée, lorsqu'elle a produit sa défense de compensation et qu'elle a instituée sa demande reconventionnelle, n'avait plus de créance. Sa défense et sa demande reconventionnelle tombaient d'elles-mêmes.

Mais l'intimée, prétendant diviser l'aveu de l'appelante, se base sur l'admission de celle-ci que le prêt lui a été fait.

Je suis décidément d'opinion qu'une telle admission ne suffit pas pour faire revivre une créance éteinte. Il faudrait une nouvelle obligation ou une promesse non équivoque de payer la dette prescrite. Une simple reconnaissance de la dette peut bien interrompre une prescription en cours; elle ne comporte pas, surtout dans les cas visés par l'article 2267, renonciation à la prescription acquise. Dans mon opinion, la renonciation à la prescription acquise doit renfermer les conditions d'une obligation nouvelle: *Milliken* vs. *Booth* (5).

On peut lire avec profit, sur l'effet absolu des prescriptions courtes comme celle de l'article 2260, le jugement de feu le juge-en-chef Casault dans *Fuchs* v. *Legaré* (6).

(1) [1897] Q.R. 12 S.C. 323.
(2) Q.R. 7 Q.B. 60.
(3) [1914] Q.R. 47 S.C. 252.
(4) [1916] Q.R. 50 S.C. 481.
(5) [1893] Q.R. 3 Q.B. 158.
(6) [1876] 3 Q.L.R. 11.

1924
CATELLIER
v.
BÉLANGER.
Mignault J.

Il résulte de ce que je viens de dire et des décisions que j'ai rapportées que lorsqu'un billet a été donné en considération d'un prêt fait en même temps que le billet, la prescription applicable à la dette est la prescription qui régit le billet, et qu'on ne peut séparer la considération et le billet et admettre quant à la première une prescription autre que celle qui s'applique au second.

Dans *Renaud* v. *Beauchemin* (1), le juge Fortin a exprimé (p. 204) l'opinion suivante, à laquelle j'adhère:

> Il est de règle que lorsque les parties ont donné à leur convention la forme d'un contrat commercial, ce contrat est régi par les règles applicables à tel contrat.

J'arrive donc à la conclusion que l'intimée, même en divisant l'aveu de l'appelante, ne peut réussir dans sa demande reconventionnelle. Elle aurait mieux fait de demander acte de l'aveu qualifié de l'appelante et conserver sa créance. Puisqu'elle rejette la deuxième partie de l'aveu, on ne peut éviter la question de prescription, et le jugement qu'elle a obtenu contre l'appelante ne peut être maintenu.

Je suis également d'avis que l'intimée ne pouvait opposer sa créance éteinte en compensation du versement de rente réclamé par l'appelante par sa demande principale.

On dit cependant que le jugement sur la demande principale—et il n'y a qu'un seul jugement qui se prononce tant sur la demande principale que sur la demande reconventionnelle—ne peut être l'objet d'un appel devant cette cour.

S'il ne s'agissait que d'une action où la demande serait pour $150, il est visible que nous n'aurions pas juridiction, et j'ajoute qu'une telle action ne pourrait être portée par voie d'apel devant la cour du Banc du Roi, juridiction d'appel, de la province de Québec.

Cependant dans cette cause la cour supérieure, par un seul jugement, a renvoyé la demande principale et a maintenu la demande reconventionnelle. L'appelante a appelé de ce jugement à la cour du Banc du Roi et cette dernière cour, par un jugement rendu sur une motion de l'intimée, a refusé de rejeter, faute de juridiction, l'appel quant au jugement rendu sur la demande principale de l'appelante. Et le juge Dorion, dans son opinion dissidente, conclut au main-

(1) [1908] Q.R. 35 S.C. 193.

tien de la demande principale et au renvoi de la demande reconventionnelle. Le juge Howard aurait été d'avis qu'il n'y avait pas droit d'appel du jugement rendu sur la demande principale, mais son opinion apparemment n'a pas été partagée par ses collègues.

Il est certain qu'ici la demande principale et la demande reconventionnelle sont très intimement liées, car dans chacune d'elles il s'agit de savoir si l'intimée possède une créance de $3,000 qu'elle puisse opposer en compensation à l'appelante et dont elle puisse réclamer d'elle le résidu. Il me paraît impossible de nous prononcer sur l'exigibilité de la créance de l'intimée sans par là adjuger sur le droit de celle-ci d'opposer cette créance en compensation à l'appelante, la compensation entre deux dettes également liquides et exigibles s'opérant de plein droit (art. 1188 C.C.).

Nous avons ainsi devant nous un jugement qui a adjugé sur ces deux questions qui n'en forment réellement qu'une, et il n'y a pas, que je sache, de précédent de cette cour qui s'oppose à ce que nous nous prononcions sur le mérite de ce jugement sur ces deux points.

Après y avoir sérieusement réfléchi, je crois que nous avons juridiction pour trancher tout le débat soulevé dans cette cause. Je maintiendrais donc l'appel et j'accorderais les conclusions de l'appelante dans sa demande principale et je rejeterais la demande reconventionnelle de l'intimée, avec dépens contre cette dernière dans les trois cours.

J'ajoute que depuis la préparation de ce jugement, j'ai trouvé une décision de la Cour du Banc du Roi dans le sens que j'ai adopté: *McIntyre* v. *Patterson* (1).

MALOUIN J:—Pour les raisons données par le juge Mignault, je suis d'opinion de maintenir l'appel, d'accorder les conclusions de la demanderesse appelante dans son action principale, de rejeter la demande reconventionnelle de la défenderesse intimée, avec dépens dans les trois cours.

Je suis d'avis que le billet donné en échange du prêt de $3,000 constitue un contrat commercial et que ce billet était prescriptible par cinq ans. De fait, il était prescrit à la date à laquelle la rente de $150 réclamée par la demanderesse est devenue exigible.

(1) [1923] Q.R. 36 K.B. 499.

1924
CATELLIER
v.
BÉLANGER.
Malouin J.

Dans sa réponse au plaidoyer sur l'action principale et dans sa défense à la demande reconventionnelle, la demanderesse dit bien qu'elle a emprunté $3,000, remboursable à sa mort; mais cet aveu ne constitue pas une renonciation à la prescription du billet. Par cet aveu, la demanderesse a reconnu un prêt civil payable à sa mort; mais elle n'a pas renoncé à la prescription acquise du billet du 3 septembre 1917. La prescription éteint la créance; et pour la faire revivre, le débiteur doit non-seulement reconnaître son existence mais promettre de la payer.

Etant d'opinion que le billet qui fait la base de la créance de la défenderesse principale, qui est en même temps la demanderesse par reconvention, est prescrit, la question de divisibilité de l'aveu ne se présente pas.

La question de savoir si le prêt est civil ou commercial est une question de droit, qui ne peut faire l'objet d'un aveu. En conséquence, l'aveu de la demanderese ne peut porter sur la question de savoir si l'emprunt qu'elle a contracté constitue un prêt civil ou commercial. Il appartient à la cour de le décider. Partant, la première partie de l'aveu de la demanderesse ne peut servir à la défenderesse. La seconde partie de l'aveu peut lui être utile si elle accepte l'aveu en son entier. Si elle rejette l'aveu, son plaidoyer et sa demande reconventionnelle doivent être rejetés parce que le prêt est prescrit. Si elle l'accepte en son entier, son plaidoyer et sa demande reconventionnelle doivent être également rejetés, mais comme prématurés; et, dans ce dernier cas, elle pourra faire valoir sa réclamation à la mort de la demanderesse.

Appeal allowed with costs.

Solicitors for the appelant: *Rousseau, Chouinard & Laflamme.*

Solicitors for the respondent: *St. Laurent, Gagné, Devlin & Taschereau.*

ROSEBERY-SURPRISE MINING COMPANY ..... APPELLANT;

1924
*May 15.
*June 8.

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Income tax—Mining company—Deductions from gross income —Taxation Act, R.S.B.C. (1911) c. 222—(B.C.) 1917, c. 62, ss. 8, 15.

In 1917, K. assigned to the appellant company an option to purchase certain mining properties from S. By the assignment, the appellant acquired the immediate right to take possession of the property, to work it, to ship the ore produced and to retain 90 per cent of the proceeds, depositing 10 per cent in the Bank of Montreal to the credit of S. to be applied on the final instalment of the purchase price when paid but to belong to S. in any event. The appellant company was to pay $17,500 upon the execution of the option, the same sum in 1918, 1919 and 1920, and $80,000 in 1921. In 1918, the appellant, being assessed to income tax in respect of the income derived from the mine, claimed as deductions: 1, as to the 10 per cent of the proceeds of the mine paid to S.; 2, as to the instalment of $17,500 paid to K.; 3, as to the costs of plant additions, and 4, for depletion of mine. These deductions were disallowed by the Court of Revision.

Held, that (reversing the judgment of the Court of Appeal), as to the first claim, the 10 per cent of the proceeds of the mine paid to the credit of S. should have been declared a proper deduction; (affirming the judgment of the Court of Appeal), as to the second claim, the determination of the assessor made in conformity with the provision of the Taxation Act, treating the payment of $17,500 as part of the purchase price and therefore chargeable against capital rather than against revenue, should not be disturbed; Idington J. *contra;* as to the third claim, upon the facts, such expenses have been properly treated by the assessor as a capital expenditure; and as to the fourth claim, allowance for depletion of mine is entirely within the discretion of the Minister of Finance for the province (s. 6, ss. 9 of c. 79 of the Statute of 1919.)

Judgment of the Court of Appeal ([1924] 1 W.W.R. 1017) reversed in part.

APPEAL from the decision of the Court of Appeal for British Columbia (1) affirming the judgment of the Court of Revision as to assessment of the appellant company for income tax.

PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean *ad hoc.*

(1) [1924] 1 W.W.R. 1017.

1924

ROSEBERY-SURPRISE MINING CO. v. THE KING.

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

Hamilton K.C. for the appellant.

Donaghy for the respondent.

IDINGTON J.—This is an appeal by the said company from a judgment of the Court of Appeal for British Columbia dismissing an appeal from a special Court of Revision held at the city of Kaslo on the 30th of January, and following days, 1923.

Four grounds of appeal are taken. The appellant had an option to purchase a mine and pending that the right to operate it, and bound itself to pay into the Bank of Montreal ten per cent of the smelter returns to be held for the vendor until the expiration of the option and ultimately to become the vendor's if there was default in accepting the option and paying the prices named.

But in the event of the appellant accepting the option it might claim this fund belonging tentatively to the vendor as part of the price and get credit for it.

The appellant may never accept the option. Meantime it clearly is a charge upon its earnings and I agree with Chief Justice McDonald in the Court of Appeal (1) in holding that such sums as thus paid, are not part of the taxable income of appellant, and that the appeal should be allowed with costs throughout against the respondent.

I cannot see how the well known rule of law in regard to the necessity of taxing statutes being so restricted as to render them clear beyond doubt can otherwise be observed than by doing so, making them apply to present realities instead of to speculative chances.

The next ground of complaint is as to an item of $17,500 due under and by the terms of another similar agreement for an option but payable as cash direct for the year in question.

For the same reason, as the option had not yet been taken up, I think that was a sum which should have been allowed as a deduction from the gross income and, therefore, am of the opinion that this appeal should be allowed with costs throughout as against respondent.

(1) [1924] 1 W.W.R. 1017.

There is another, or third claim, for expenses in way of erections on the mining premises which probably might have been allowed if shewn to be of such an incidental nature as to render it clearly part of the reasonably necessary expense to recover the minerals, but I agree with the said Chief Justice that in the absence of evidence it is not possible to allow such reduction. The fourth claim is for depletion in the value of the mine, but the statute seems to bar any such reduction and, even if it did not, I fail to see how we could arrive at any correct determination or give, in an appeal of this kind, any directions to arrive at any adequate or accurate result.

I agree with appellant's counsel that in reason it may be a claim founded in justice, but in law, as the Taxation Act stands, nothing can be done unless by the respondent.

The adding of these last two grounds has not made any material addition to the costs.

And as there has only been one cause, or course of litigation, in these appeals as if all the said causes of appeal formed one suit, of course there should be only one set of costs throughout.

DUFF J.—The controversy in this appeal arose in these circumstances: On the 1st January, 1918, one Kent assigned to the appellant company an option to purchase certain mining properties from one Sellon. By the assignment the appellant company acquired the immediate right to take possession of the mining property, to work it, to ship the ore produced and to retain ninety per cent of the proceeds, depositing ten per cent in the Bank of Montreal to the credit of Sellon. In the event of the option being exercised, this share of ten per cent was to be applied in liquidation of the purchase price, but was to belong to Sellon in any event. The appellant also acquired the right to the immediate possession and use of the mining mill at Roseberry. By the terms of the option the appellant company was to pay $17,500 upon the execution of the instrument creating it, and the same sum on a specified date in each of the years 1918, 1919 and 1920, and the residue of the purchase price, $80,000, on the 10th November, 1921.

1924

ROSEBERY-SURPRISE MINING CO. v. THE KING.

Duff J.

In the year 1918, the appellant company was assessed to income tax in respect of the income derived from this mine. Certain deductions claimed having been disallowed, an appeal taken to the Court of Appeal for British Columbia was dismissed, and from that judgment the appellant now appeals.

The first question relates to Sellon's share of the proceeds of the smelter returns for the ore shipped pursuant to the privilege given under the option. I cannot concur with the view of the Court of Appeal as regards this claim. It is quite true that the whole of the smelter returns came into the hands of the appellant company, but as regards ten per cent of them, the company received the money not as its own property, but as the property of Sellon. It was the company's duty to pay that part of the receipts into the bank immediately for Sellon. If anybody was assessable in respect of the sum so paid in, it was Sellon, and not the appellant company. In *Forrest* v. *Traves* (1), the full court of British Columbia, having occasion to consider a clause framed in identical terms, held that an equitable charge upon the ore shipped had been created in favour of the mine owner. The decision was reversed upon another point by this court (2), but the majority of this court concurred with the view of the court below as to the effect of the clause.

As to the second claim, the appellants' contention is based upon no. 2 of the enumeration of deductions allowed in form 7 as amended by section 15 of c. 62 of the statutes of 1917. The deduction is defined in these words:

> Outgoings or necessary expenses, actually incurred and paid out in the production of the income by the taxpayer, other than expenditures on capital account or reinvestment account or to replace or provide against depreciation.

It is necessary, however, to refer also to section 76 as re-enacted by section 8 of c. 62 of the statutes of the same year, which provides that none of the deductions set forth by form 7 shall include

> any expenses or charges which ought, in the opinion of the assessor, to be chargeable against the capital of the taxpayer, and not against revenue.

(1) [1908] 14 B.C. Rep. 183. (2) [1909] 42 Can. S.C.R. 514.

I think it is open to question whether or not the determination of the assessor, upon a question arising under this clause, is open to review. At all events, the language of the clause seems sufficiently to indicate an intention that, in so far as the question is a question of fact, the assessor's opinion should be final. If, therefore, the assessor might reasonably take the view that the deduction claimed was a deduction properly chargeable against capital, his determination ought not, in my opinion, to be disturbed. The precise claim is this: The appellant company, in 1918, paid under the terms of the option the $17,500 required to keep the option alive. It is strictly true, no doubt, that the annual payments under the option are expenses necessarily incurred by the appellant company in earning the income it receives from the production of ore; but nevertheless this sum in each instance is in part a sum paid for the right to mine during the succeeding twelve months. If the final payment be made, it is a part of the purchase money paid for the title to the mine in fee; but whether the final payment be or be not made, each successive instalment is capable of being looked at as the purchase price paid by the holder of the option for the absolute right he thereby acquires to take from the mine the ore mined during the succeeding year, which thereupon becomes his own, subject to the equitable charge above-mentioned, as well as for the maintenance of his potential right to its fee which ripens into the actual right upon full performance of the conditions. To regard these payments as purchase price, and therefore as chargeable against capital rather than against revenue, could not, I think, be considered an unreasonable view. On that claim I think the appeal fails.

The third and fourth claims also fail, in my opinion; the third because on the facts it seems impossible to affirm that the expenditure has not been properly treated as a capital expenditure; and the fourth on the ground that the statute manifests an intention that such claims should be dealt with by the Minister of Finance.

The appeal should be allowed as to the first claim, but otherwise dismissed. The appellant company is entitled to the costs of the appeal.

1924

ROSEBERY-SURPRISE MINING CO. v. THE KING.

MIGNAULT J.—I am of opinion to allow the appeal with costs to the extent, and for the reasons, stated by my brother Duff.

MALOUIN J.—I concur with Mr. Justice Duff. I would allow this appeal as to the first claim, but otherwise dismiss it, with costs against the respondent.

MACLEAN J.—I have had the opportunity of reading the written judgment of Duff J. in this appeal, and I agree with the conclusions he has reached.

Appeal allowed with costs.

Solicitors for the appellant: *Hamilton & Wragge.*

Solicitors for the respondent: *Nisbet & Graham.*

1924

*May 19, 20.
*June 6.

NEW BRUNSWICK AND CANADA RAILROAD COMPANY (PLAINTIFF). } APPELLANT;

AND

NEW BRUNSWICK RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

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

Lease—Demise of railway—Covenant by lessee—Construction—Payment of taxes.

In 1882 The N.B. and Can. Rd. Co. leased its railway to The N.B. Ry. Co. for 999 years and the lessee covenanted, *inter alia,* to pay "all taxes that may be lawfully assessed upon the (lessor) and upon the real and personal estate taken under this lease" and a rental of $35,000 per annum.

Held, affirming the judgment appealed from (50 N.B. Rep. 376), Idington J. diss., that the covenant as to taxes only applied to those imposed in respect of the property demised and did not oblige the lessee to pay taxes imposed on the lessor under the Dominion Income War Tax Act, 1917, and amendments.

APPEAL by consent from the judgment of the Chancery Division of the Supreme Court of New Brunswick (1) in favour of the defendant company.

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

(1) 50 N.B. Rep. 376.

The question for decision on this appeal is one of construction of the covenant set out in the head-note contained in a lease by appellant to respondent of the former's railway. The appellant contends that such covenant obliged respondent to pay the income tax imposed on appellant under the Dominion Income War Tax Act, 1917, and Amending Acts. The Supreme Court of New Brunswick, on a reference from the Chancery Division, held against this contention.

Baxter K.C. for the appellant. The grammatical construction of the covenant, whether or not you read "and" as "or" and the terms of the whole lease show that the parties intended the whole rent to come to the lessor without diminution so that the entire sum could be distributed among its shareholders.

In construing written instruments the grammatical and ordinary sense of the words is to be adhered to unless it would lead to absurdity or some repugnancy or inconsistency with the rest of the instrument. Maxwell on Statutes (5 ed.), page 4. No such result would follow in this case.

The view taken in *Hurst* v. *Hurst* (1) is in accord with the appellant's contention; and see *Arran* v. *Crisp* (2); *Amfield* v. *White* (3); *Palmer* v. *Earith* (4).

Tilley K.C. and *Fred. R. Taylor K.C.* for the respondent: A covenant to pay all taxes only applies to future taxation of the kind in existence when the covenant was made. See Woodfall Landlord and Tenant (20 ed.), page 675. Foa Landlord and Tenant (5 ed.), page 184. *Shrewsbury* v. *Shrewsbury* (5).

The spirit of the Income Tax Act is that the person who receives the income shall pay the tax and that it shall not be passed on to any one else. *Nova Scotia Steel and Coal Co.* v. *Minister of Finance of Newfoundland* (6); *North British Ry. Co.* v. *Scott* (7).

IDINGTON J.—The appellant, being what its name implies, became the owner of certain railroad properties acquired by virtue of its powers given it by the New Bruns-

(1) 4 Ex. 571.
(2) 12 Mod. 55.
(3) Ry. & M. 246.
(4) 11 M. & W. 428.
(5) 40 Times L.R. 16.
(6) 91 L.J. P.C. 185.
(7) 39 Times L.R. 66.

1924

NEW BRUNSWICK & CANADA RAILROAD CO. v. NEW BRUNSWICK RY. CO.

Idington J.

wick Legislature incorporating it, or later legislation authorizing it to so acquire, and on the 22nd of August, demised same for the term of 999 years to the respondent, a corporation created by virtue of the laws of New Brunswick and of the Dominion of Canada, and the indenture containing said demise is somewhat lengthy.

Though it thereby bound itself to pay all taxes lawfully assessed upon the lessor, the lessee disputes its liability to repay the taxes imposed upon the appellant by virtue of the Dominion Income War Tax Act, 1917.

The whole question of such liability, which is all that is involved herein, must turn upon the interpretation and construction of the third paragraph of said agreement, of which the herein directly pertinent point reads as follows:—

ARTICLE III

The party of the second part, for itself, its successors and assigns, hereby accepts said lease and agrees to take, manage and operate all of the railroads and branches, hereby demised, substantially in the present line, during the term of this lease, at its own expense and for its own benefit, in accordance with the charter of the party of the first part and any amendments thereto and will hold the party of the first part harmless against and from all loss and damage by reason of any act or thing done or omitted to be done or negligence on the part of the party of the second part, its successors or assigns, in the operation, maintenance or use of said railroads and branches and will keep and maintain said railroads, its fences, rolling stock, equipments, depots and other leased property and all renewals and additions thereto in good condition and repair and will make good all loss or damage to any of the leased property, and substantially restore, at the termination of this lease, the same and all parts thereof to the party of the first part, its successors or assigns, in good order and condition, fulfil all duties relating to the maintenance, use or management of the property leased, which may be imposed by law, pay all taxes that may be lawfully assessed upon the party of the first part, and upon the real and personal estate taken under this lease, including all lawful expenses and charges of Railroad Commissioners and such like expenses and pay the interest and rental indebtedness of said party of the first part, as follows:—

That is followed by seven distinctly specified liabilities then borne by the appellant, and thereafter to be assumed by the respondent.

And those by the following:—

And the party of the second part for itself, its successors and assigns, further agrees to pay, for each and every year during the continuance of this lease, to the said party of the first part, its successors and assigns, by way of further rental, the annual sum of thirty-five thousand dollars ($35,000).

And for the expense of keeping up the corporate organization of the said party, the further sum of one hundred dollars ($100) annually, all of the aforesaid interest and rental charges being payable, one-half on the first of January, and one-half on the first of July, in each and every year.

The court below held that the said income tax for which appellant was assessed under and by virtue of said Income Tax Act for the years 1917 to 1921 inclusive, did not fall within the meaning of said covenant above quoted.

I submit that having due regard to the entire purview of the said agreement, which evidently was designed to give the appellant an annual annuity of $35,000, clear of all expenses, during the currency of the lease, save and except the expense of maintaining its corporate existence during that period, to cover which there was to be paid the further annual sum of $100 each year, it clearly was the intention of the parties that all such taxes as were lawfully assessed by any duly constituted authority upon the appellant, should be paid by the respondent.

The tax seems to have been lawfully assessed for that is not denied.

The tax is not imposed upon the shareholders of the appellant but upon the corporation making this lease upon the assurance that the lessee would pay it.

It may indeed turn out that the respective shareholders getting parts of said rental may have to meet income taxes in their respective home jurisdictions.

It seems to me that it is quite beside the question to argue that Dominion income taxes had not been sought prior to the making of this lease. The power to do so existed. Indeed the first sentence of the indenture indicates that the respondent had owed some of its corporate powers, enabling it to enter into such a contract at all, to the Dominion laws.

And it seems to me that it clearly must have been within the contemplation of the parties that if the Dominion should impose any burden on this railway property the respondent must be prepared to meet it.

The period for which the lease was to run is far beyond what has to be considered in many leases for short periods of time.

We must therefore extend our range of vision and not take a narrow view of what the parties must have intended.

1924
NEW BRUNSWICK & CANADA RAILROAD CO. v. NEW BRUNSWICK RY. CO.
Duff J.

The language used seems to me clear and express and wide enough to cover what appellant claims.

I may observe that our Dominion was only a few days over fifteen years in existence when this agreement was entered into.

I am of the opinion that this appeal should be allowed with costs here and below and the amounts assessed, with interest from the respective dates when due (but not to includes the penalties incurred by appellant for non-payment), should be directed to be paid by respondent to appellant.

DUFF J.—The clause which has given rise to this litigation, read literally, makes the appellant responsible for taxes assessed upon the real and personal estate passing under the lease, which are also properly assessed against the appellant. The clause, that is to say, gives a right of indemnity in relation to taxes for which the appellant is personally liable with respect to the property passing under the lease. I think this construction should be given effect to, because I think it best harmonizes with the context which appears to exhibit an intention to create a right of indemnity in respect of obligations arising by virtue of the lessor's proprietorship of the reversion in the properties demised.

The tax in question is not a tax levied upon the appellant company as proprietor of the reversion or even as a railway company; that is to say, as a corporation having authority to construct and work railways. It is simply an income tax and is payable by the appellant in respect of its income from whatever source it may be derived, on precisely the same conditions as those upon which it is exigible from other income earners. It is therefore, in my opinion, not a tax of the class envisaged by the clause.

I express no opinion upon the question, which does not arise, whether a tax levied upon the company, in respect of its rent under the lease, would fall within the scope of the indemnity.

Nor do I express an opinion upon the other point upon which counsel for the respondent company relies, namely, that the indemnity is limited in its application to taxes of a character similar to those which, up to the time of the

execution of the lease, had been known to be public finance of New Brunswick.

The appeal should be dismissed with costs.

ANGLIN J.—The circumstances under which the question at issue between the parties has arisen and the terms of the document upon the construction of which its solution depends are set out in the judgment of the Supreme Court of New Brunswick, delivered by Mr. Justice White (1).

Neither in a grammatical reading of the covenant relied upon, which is found towards the end of the first paragraph of Article III of the lease or agreement between the appellant and the respondent, nor in the tenor of that instrument taken as a whole, do I find any expression or indication of an intention on the part of the lessee to assume the burden of income tax imposed on the lessor in respect of rental to be derived by it from the leased properties. The obligation of the lessee in regard to the rental of $35,000 per annum is to pay that rental to the lessor without deduction. That obligation has been fulfilled. It has also undertaken to satisfy all charges in the nature of taxation levied upon the demised property itself, and possibly, in addition, such as may be imposed upon the lessor *qua* owner of the property. Beyond that it is, I think, quite impossible to extend the obligation in regard to taxes assumed by the lessee. It has not undertaken, and there is nothing to indicate that it was ever contemplated that it should undertake, to pay any taxes which might be levied upon the $35,000 rental after its receipt by the lessor, or which might be imposed upon the lessor itself by reason, or as a consequence, of such receipt. It is against payment of such taxes that the lessor now seeks indemnification. The covenant relied upon, in my opinion, is not open to a construction which would support that claim.

The appeal therefore fails.

MIGNAULT J.—By a lease dated the 22nd of August, 1882, the appellant company demised its line of railway, stations, rolling stock, etc., to the respondent for the period of 999 years from the 1st of July, 1882. The rental was

(1) 50 N.B. Rep. 376; [1924] 1 D.L.R., 72.

1924

NEW BRUNSWICK & CANADA RAILROAD CO. v. NEW BRUNSWICK RY. CO.

Mignault J.

fixed at $35,000 a year, and among other charges the respondent undertook to pay to the appellant $100 annually for the expense of keeping up its corporate organization and also agreed that it would

> pay all taxes that may be lawfully assessed upon the party of the first part (the appellant), and upon the real and personal estate taken under this lease.

Under the Federal Income War Tax Act, 1917, and amending Acts, the appellant was called upon to pay to the Receiver General of Canada various sums as an income tax imposed on its income comprising the rental it received from the respondent under the lease, and it claims these sums from the respondent, contending that the latter assumed the obligation to pay such a tax by the covenant I have cited. This contention was rejected by the Appeal Division of the Supreme Court of New Brunswick.

The only question therefore involved in this appeal is one of construction. Assuming that the two members of the phrase I have quoted, and which are separated by a comma, should be read disjunctively, it would be altogether unreasonable to contend that the respondent assumed the obligation to pay any tax that might be lawfully assessed upon the appellant, irrespective of its nature or of the cause of its imposition. Mr. Baxter was asked whether the respondent would be liable for a tax imposed on property purchased by the appellant with the rental it received from the respondent, and refrained from so arguing. It is obvious that the first part of the phrase is subject to some limitation, and when read with the second part its reasonable meaning, and that no doubt which was intended by the parties, is that the respondent assumed liability for taxes imposed upon the appellant in respect of the property demised by the lease. In other words if, after the respondent has acquitted its obligation to pay the annual rental to the appellant, this rental is taxed in the appellant's hands as property belonging to it the respondent is not bound to pay the tax. Whether the appellant retains the rental in money or invests it in the purchase of property, any tax imposed upon the rental or its investment, as property belonging to the appellant, is a tax which the appellant alone must bear.

I would dismiss the appeal with costs.

MALOUIN J.—I agree with Mr. Justice Anglin and Mr. Justice Mignault. I would dismiss this appeal with costs for the reasons stated by them.

Appeal dismissed with costs.

Solicitor for the appellant: *N. Marks Mills.*

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

1924

NEW BRUNSWICK & CANADA RAILROAD CO. v. NEW BRUNSWICK RY. CO.

Malouin J.

THE KING EX PARTE THE BANK OF NOVA SCOTIA (PLAINTIFF) ..... APPELLANT;

AND

THE ASSESSORS OF RATES AND TAXES FOR THE TOWN OF WOODSTOCK (DEFENDANTS) ..... RESPONDENTS.

1924

*May 20.
*June 18.

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

Assessment and taxes—Bank branch—Personal property—Situs—Transmission of deposits to head office or other branches—Arbitrary assessment.

Of the deposits by customers of the branch of the Bank of Nova Scotia at W. sufficient is retained by the branch to meet the requirements of its local business and the surplus transmitted to the head office or another branch to be used there.

Held, per Idington and Duff JJ., Anglin and Malouin JJ. contra, that the money so transmitted by the branch is not an asset of the bank localized at W. and cannot be taxed by the municipality as personal property.

The bank was assessed by the municipality of W. on personal property valued at $65,600.

Held, per Mignault J. that no justification is given for such assessment which must have been made arbitrarily and without consideration of the real value of the personal property of the branch and cannot be allowed to stand.

Judgment of the Supreme Court of New Brunswick (50 N.B. Rep. 435) reversed, Anglin and Malouin JJ. dissenting.

APPEAL from the Appeal Division of the Supreme Court of New Brunswick (1) discharging a rule for a writ of certiorari to quash an assessment on the personal property of the Bank of Nova Scotia at its branch in Woodstock. The question for decision on this appeal and the material facts on which it is based are stated in the above head-note.

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

(1) 50 N.B. Rep. 435.

1924

THE KING
Ex parte
BANK OF
NOVA SCOTIA
v.
ASSESSORS OF
RATES AND
TAXES OF
WOODSTOCK,
N.B.

Tilley K.C. and *Fred. R. Taylor K.C.* for the appellant. Branch banks are merely agencies of the banking corporation; *Prince* v. *Oriental Bank Corporation* (1); *Bain* v. *Torrance* (2); and the fact that for certain purposes they may be considered distinct is not inconsistent with this proposition; *Clode* v. *Bayley* (3). Consequently the surplus funds sent abroad by the branch is not an asset at Woodstock.

The findings of fact by the assessors are only unimpeachable when they act judicially; *Local Government Board* v. *Arlidge* (4) per Lord Moulton at page 150. In this case they fixed an arbitrary sum as the value of personal property at Woodstock.

Baxter K.C. and *Hartley K.C.* for the respondents.

IDINGTON J.—This is an appeal from the Supreme Court of New Brunswick dismissing an appeal by way of writ of certiorari from the assessment of the said bank by respondent in respect of its personal estate within said town. The said bank is only one of the branches of the said bank of which the head office is situate elsewhere than in the said town.

The agent in charge of said branch, in response to a public notice which rendered it his duty to do so, made a sworn statement of its property at and within the said town.

The part thereof relevant to its personal estate is as follows:—

What is the gross value of all the personal estate of the said bank within said town, as held and used in the said town or elsewhere in connection with the business done in the said town?

Answer,—

As at December 31, 1921, cash on hand	$ 14,584 05
Overdrafts and discounted bills	298,183 57
Stamped cheques	203 20
Fixtures	2,000 00
Total	$314,970 82
Deposits by public	562,909 74
Excess of liabilities over assets	$247,938 92

(1) 3 App. Cas. 325.
(2) 1 Man. R. 32.
(3) 12 M. & W. 51.
(4) [1915] A.C. 120.

What is the net amount of the annual income, earnings or profit of the business of the said Bank of Nova Scotia within said town?

Answer: Net loss for year 1921, $3,042.36.

Do you so keep your books of account that you can speak with certainty and accuracy in answering the questions above?

Answer: Yes.

Notwithstanding the delivery thereof to the respondent in due time they assessed the said Branch Bank at Woodstock for the sum of $65,000 for personal estate.

From that the said bank appealed to the respondent and was heard by them as required by the statute in such case provided.

Upon that appeal the said agent was duly sworn and testified at length explaining the said statement and how arrived at. I am satisfied from a perusal thereof and all else appearing in the case, that in fact there was no sum for which in law the said branch bank should be assessed for personal property, yet the respondent dismissed said appeal and continued the said assessment for $65,000.

From the said decision the said bank appealed to the town council, which in turn refused any relief.

Having exhausted the means of rectification without results in way of relief the bank then applied, as the law of New Brunswick provides, for an appeal by way of a writ of certiorari, to the Supreme Court of New Brunswick, and that court in turn discharged the rule with costs.

It seems a very clear case and arises I infer from a misapprehension of the law and the facts.

It seems quite evident that the depositors of money at said branch have to go there for the return of their deposits which are a clear indebtedness of that branch, and more than counterbalance anything in the way of personal property acquired by using said part of deposits at said branch.

That being a mere branch it is subject to the orders of the head office and, pursuant thereto, the surplus moneys of said depositors, not needed for the operation of said branch, are sent to other business centres where they can be successfully used.

The court below, and other authorities below it, seems to imagine that the town assessors can assess in respect of moneys so sent elsewhere.

1924

THE KING
Ex parte
BANK OF
NOVA SCOTIA
v.
ASSESSORS OF
RATES AND
TAXES OF
WOODSTOCK,
N.B.

Idington J.

They cannot do so in law or by any law the local legislature can enact.

Any one conversant with the subject ought to know that the head office or the other branches using the said moneys are liable to be taxed for income derived therefrom and, beyond a shadow of doubt, usually are, by the cities or towns wherein such moneys are profitably used.

Neither in law nor in justice can the branch receiving such deposits be taxed for that over which it has no control.

The disregard of the evidence herein in question and consequent assumption on the part of the local authorities seems to me surprising after the discussion the subject has had for many years.

I am clearly of the opinion that this appeal should be allowed and the said assessment of the said appellant branch of the bank be quashed with costs throughout against the respondent.

DUFF J.—The only question which has given me any concern on this appeal has been the question of the authority of the Supreme Court of New Brunswick to review the assessment. I have come to the conclusion that sections 124-125 of the Rates and Taxes Act, 1913, ch. 21, do confer such a power of review in proceedings by certiorari where the assessment has been based upon—to quote the language of s.s. (b) of s. 125—"a wrong principle in whole or in part."

That the assessment did proceed upon a wrong principle seems to be conclusively established. It has been assumed throughout and is, I understand, not seriously disputed, that section 2 of 53 Vic., ch. 40, is in force and applies, and therefore that it was the duty of the assessors to

> deduct from each person's personal property the amount of his or her indebtedness, as the case may be, and assess the balance remaining of said personal property after making such deduction.

Therefore the amount of the "indebtedness" is to be deducted from the value of the personal property assessable under the Act of 1883. Now that means, I have no doubt, an indebtedness which can be localized in Woodstock just as the amount in respect of which the bank is assessable for real and personal estate is determined by the value of

the real and personal estate held by the bank in the town or "in connection with the business done therein."

I agree with the argument presented on behalf of the appellant bank that the effect of *Lovitt* v. *The King* (1) is that deposits made at the branch in the ordinary way have a *situs* in Woodstock because in the ordinary course, so long as the branch is maintained, it is there and there only that payment of these deposits can, as of right, be demanded by the depositor.

The argument turned principally upon the question of the amount assessable in respect of personal property. On behalf of the respondent, it is contended that the whole mass of moneys received for deposit must be treated as an asset localized in Woodstock. I am unable to agree with this. These moneys may have been received in legal tender or through the transfer of some form of credit not falling within that class. The amount retained by the bank for the purpose of its business in Woodstock may properly be treated as localized there, but credits transferred elsewhere like gold or Dominion notes so transferred cannot, by any process of reasoning which I can follow, be localized at the branch where they were originally received merely because they were in fact received there. Such moneys and credits have a *situs* without doubt; but where that *situs* is is a question of fact, and on the material before the assessors in this case the only possible conclusion was that the *situs* of such moneys and credits was not in Woodstock.

It seems at first sight, no doubt, a plausible contention that the *situs* of the asset should be considered to be the same as the *situs* of the liability. It requires little reflection, however, to reveal that the two things have no necessary connection with one another. The liability is not a liability charged upon the moneys deposited; it is an obligation of the bank arising out of a contract of loan. The *situs* at any given moment of the moneys lent, which may have been transferred to another branch, cannot be governed by the *situs* of the obligation, which is primarily determined, under the authority of *Lovitt's Case* (1), by reference to the terms of the contract of deposit.

Nor does the evidence show that the moneys are held in Woodstock "in connection with" the business done there.

(1) 43 Can. S.C.R. 106.

1924

THE KING *Ex parte* BANK OF NOVA SCOTIA *v.* ASSESSORS OF RATES AND TAXES OF WOODSTOCK, N.B.

Anglin J.

The appeal should be allowed, and there should be a direction under ss. 124-125 of the statute above referred to for the rectification of the roll. The appellants should have their costs throughout.

ANGLIN J.—The sole question in this appeal is whether under s. 2 of the N.B. stat., 53 V., c. 40, the Bank of Nova Scotia is entitled to treat the average amount standing on its books to the credit of depositors in Woodstock as a liability deductible for purposes of assessment from the amount of assessable personal estate owned by it and held in the town of Woodstock or in connection with the business done therein (46 V., c. 26, s. 11), without offsetting against, or deducting from, such indebtedness not merely, as it has done, so much of such deposits as is invested in the town or through the medium of the bank's Woodstock branch but also the balance thereof transmitted by it for investment either to the head office or to branches of the bank situate elsewhere.

The facts are fully stated by Mr. Justice Crockett in delivering the judgment of the Appeal Division of the Supreme Court of New Brunswick (1). A reasonable inference from the evidence of Mr. Roy L. Daniel, the local bank manager, there quoted, appears to be that, in respect of deposits transmitted by it to other branches, the Woodstock branch receives credit at the Toronto branch of the bank, which for this purpose is treated as the bank's head office, and is entitled to demand from it, or from some other branch of the bank having surplus funds, upon giving credit therefor at Toronto, any sums it may from time to time need in order to repay depositors. Mr. Daniel in his testimony spoke of the deposits of the Woodstock branch so transmitted to other branches, amounting to $349,393.90 at the time of the assessment, as an indebtedness of head office. He did not say to whom such indebtedness was owing, but it must be either to the Woodstock branch, which he said acts as a separate bank in regard to deposits, or to the depositors. If, as his evidence with regard to credits given in Toronto would indicate, the head office should be regarded as indebted to the branch bank for deposits transmitted by it for investment to other

(1) 50 N.B. Rep. 435.

branches, then, as Mr. Justice Crockett points out, the credit so given the Woodstock branch should for assessment purposes, if not treated as personal property of the bank in the town of Woodstock or used in connection with its business done in that town, at least be offset against its liability to depositors as a deductible item under s. 2 of 53 V., c. 40. If, on the other hand, the indebtedness in respect to deposits so transmitted should be regarded as that of the head office to depositors, the deductible liability of the Woodstock branch should in that particular be reduced by the amount thereof. From either point of view the bank would appear to be chargeable with a surplus of personal property held by it in the town of Woodstock or in connection with the business done therein to an amount exceeding $100,000.

The total assessment for personal property appealed against is $65,600. How that amount was arrived at by the assessors is not very clear and is not now of much moment, the sole ground of appeal being that, if a proper deduction be made in respect of liability to local depositors, the bank's assessment for personal property is excessive—in fact should be *nil*.

If the bank's assessment, made on the same basis as the assessments of individual ratepayers, should have been for a sum in excess of $100,000 in respect of personal property, the only conclusion upon a complaint that the impeached assessment of the $65,600 is, "special, unequal and improper" would be that it should be increased. That is not sought. The evidence is that the appellant is assessed on the same footing as other banks having branches in the town. The appeal on the ground of inequality cannot prevail.

The provision of the statute of 1856 (19 V., c. 32, s. 47) prohibiting an assessment at an amount greater than that mentioned in the ratepayer's return of property and income when attested as prescribed, if then still in force, was, I think, repealed by section 4 of the Act of 1920 (10 Geo. V, c. 78). It is inconsistent with section 1 of that statute, which requires the assessors to obtain information and to assess to the best of their judgment any person who has failed to make a sworn return of *all* his property and in-

1924

THE KING
Ex parte
BANK OF
NOVA SCOTIA
v.
ASSESSORS OF
RATES AND
TAXES OF
WOODSTOCK,
N.B.

Mignault J.

come. The conclusiveness of such return is dependent upon its accuracy and completeness. Unless accepted by the assessors it is their duty to assess according to their best judgment and the ratepayer has the opportunity of establishing by appeal the accuracy and completeness of his return if the assessment should be for a greater amount. That the statement of the ratepayer should in every case be accepted by the assessors as conclusive is inconsistent with the directions for assessment and the system of appeal provided for.

While in my opinion, upon the evidence an assessment in respect of personal property for a considerably larger sum would have been justifiable, the bank cannot successfully resist its assessment upon that item for $65,600.

For these reasons and those stated by Mr. Justice Crockett I would dismiss this appeal.

MIGNAULT J.—The statutory authority for levying the tax for which the appellant was assessed is to be found in section 11 of the Act, 46 Victoria, chapter 26 (New Brunswick), of 1883, being an Act further to amend the several Acts relating to the town of Woodstock, in the county of Carleton. Section 11 reads as follows:

> 11. All joint stock companies or corporations who shall carry on business within the said town, or who shall have an agent, sub-agent or manager within said town, shall be rated and assessed in like manner as any inhabitant upon any real or personal property owned by any such company or corporation, and upon the income received by them, and the income of any company or corporation, being an insurance company, shall be appraised at twelve and one-half per centum of the premium and moneys received from said company by such manager, agent, or sub-agent; and for the purpose of enabling the assessors to rate such company or corporation with accuracy, the agent, sub-agent or manager thereof, shall, if required in writing by the assessors so to do, according to the form in the schedule to this Act, furnish to them a true and correct statement in writing under oath to be made before a Justice of the Peace, setting forth the whole amount of annual income received for such company or corporation within said town during the year preceding the making up of the assessment, and the amount of the real and personal estate held by or for such company or corporation in said town, or in connection with the business done therein; and in the event of the neglect or refusal on the part of such agent, sub-agent or manager to furnish the required information to the assessors within ten days after such application therefor, the assessors shall rate and assess the said company or corporation according to the best of their judgment, and there shall be no appeal from such rate or assessment; but nothing herein shall be deemed to make such demand of a statement necessary in order to make such assessment.

The manager of the branch of the appellant bank at Woodstock furnished to the assessors a statement of its personal property, as of December 31, 1921, from which I take the following figures:

Cash on hand	$ 14,584 05
Overdrafts and discounted bills	298,183 57
Stamped cheques	203 20
Fixtures	2,000 00
Total	$314,970 82
Deposits by public	562,909 74
Excess of liabilities over assets	$247,938 92

The assessors assessed the appellant upon real estate at the value of $5,700, as to which there is no dispute this being the appellant's own valuation. And they assessed the bank upon personal property at the value of $65,600. It is as to the latter assessment that complaint is made.

No one could state how the assessors arrived at this sum of $65,600 for personal property. It is not based upon the statement made by the manager of the branch, and the only defence offered is that according to this statement the personal property of the appellant's branch office at Woodstock should have been placed at a higher figure.

The recent decision of this court in *Royal Bank* v. *Town of Glace Bay* (1), is of no assistance here, except that it may be observed that there a general statute provided an easy means of establishing the amount of the personal property of a branch bank upon consideration of the amount of its yearly income. Were such a rule applicable in the case of the town of Woodstock there would be no practical difficulty in determining the amount of the personal estate of the branch bank on a statement furnished by it of its income.

The statement in question, I think, could be of little or no assistance, except perhaps as to the item of fixtures, under the New Brunswick statute in so far as an assessment of personal property is concerned, for there was in this case no assessment of income. Were it to be used as a basis for assessment I would think, under the authority of *The King* v. *Lovitt* (2), that deposits made at the

(1) [1923] S.C.R. 524.

(2) [1912] A.C. 212.

1924

THE KING
Ex parte
BANK OF
NOVA SCOTIA
v.
ASSESSORS OF
RATES AND
TAXES OF
WOODSTOCK,
N.B.

Mignault J.

branch bank should be considered as a liability of that branch of the bank. Whether the amount deposited should be also considered as an asset would depend upon the circumstances.

But inasmuch as no justification is given for the assessment, at $65,600, of the appellant's personal property, I am forced to the conclusion that this assessment was arbitrarily made, without any consideration of the real value of the personal property of the branch office. This being so it obviously cannot stand.

I would therefore allow the appeal with costs throughout and set aside the assessment of the appellant in respect of its personal property.

MALOUIN J.—I would dismiss this appeal with costs. I agree with Mr. Justice Anglin.

Appeal allowed with costs.

Solicitor for the appellant: *A. B. Connell.*

Solicitor for the respondent: *J. C. Hartley.*

1924

*June 6.
*June 18.

VERSAILLES SWEETS, LIMITED (DEFENDANTS) ..... APPELLANT;

AND

THE ATTORNEY GENERAL OF CANADA (PLAINTIFF) ..... RESPONDENT.

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

Assessment and taxes—Excise tax—Dominion Sales Act, 5 Geo. V, c. 8, s. 19 amended by 11-12 Geo. V, c. 5, s. 19BBB and 12-13 Geo. V, c. 47 s. 13—Tax on manufacturers—Sale direct to consumers.

By the Special War Revenue Act of 1915 as amended in 1921 and 1922, a tax is imposed on sales by manufacturers to consumers, the purchaser in each case to be given an invoice.

Held, that notwithstanding the difficulty of furnishing invoices of sales for very small amounts, and that in such cases the exact amount of the tax cannot be collected from the purchaser, the manufacturer of candy for sale over the counter at 30 cents and 40 cents per pound is liable for the amount of the prescribed tax on each such sale.

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

1924

VERSAILLES SWEETS, LIMITED v. THE ATTORNEY GENERAL OF CANADA.

Idington J.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the respondent.

The question for decision on this appeal is stated in the above head-note and the material statutory provisions are cited in the judges' opinions published herewith.

Beament K.C. for the appellant.

Charles W. Kerr for the respondent.

IDINGTON J.—I can find no good reason for interfering with the judgment appealed from herein and am therefore of the opinion that this appeal should be dismissed with costs.

DUFF J.—The appellant company carries on a business in Toronto, which includes a restaurant and what is called "an ice cream parlour and candy shop"; and in its shop are sold, at retail only, sweets purchased in the ordinary course of business from manufacturers, and others made in the appellant company's own kitchen, which is the restaurant kitchen, the annual returns from the sale of sweets so made being above five per cent of the total receipts of the business. The question is whether the appellant company is subject to taxation by way of sales tax under section 19BBB of the Special War Revenue Act of 1915. In so far as relevant, the section is as follows:—

19BBB. (1) In addition to the present duties of customs and excise there shall be imposed, levied and collected an excise tax of one and one-half per cent on sales and deliveries by Canadian manufacturers or producers, and wholesalers or jobbers, and a tax of two and one-half per cent on the duty paid value of goods imported, but in respect of sales by manufacturers to retailers or consumers. * * *

It is argued that "manufacturers" in this context does not include manufacturers who sell exclusively to consumers, within which description the appellant company admittedly would be included. It is pointed out that retailers—persons who sell by retail to consumers, who are neither wholesalers (that is to say, who do not sell to retailers) nor manufacturers—do not fall within the incidence of the section. Sales by them are not within the scheme of taxation established. It is argued that such a scheme naturally excludes all sales by persons, whether manufacturers or not, who sell exclusively to consumers; and in support of the contention that the scheme of the Act excludes them, the

1924

VERSAILLES SWEETS, LIMITED v. THE ATTORNEY GENERAL OF CANADA.

Duff J.

appellant calls attention to the circumstance that, in case of sales coming within the ambit of the section, the seller is obliged to furnish the purchaser with what is called an "invoice"; and moreover, that, having regard to the scale of the tax, it would be impossible, in the case of sales of sweets in small quantities to consumers, to collect the exact amount payable; and consequently that, in order to carry out the provisions of the Act, the seller in each case, if the Act applied to such sales, would be obliged to collect a sum greater than the tax.

Without denying the force of much of this argument, it does not, in my judgment, carry one to the point at which one is entitled to ascribe to the word "manufacturer" a less limited meaning than that which it naturally and ordinarily bears. The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington* v. *Attorney General* (1):

> I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

Lord Cairns, of course, does not mean to say that in ascertaining "the letter of the law," you can ignore the context in which the words to be construed stand. What is meant is, that you are to give effect to the meaning of the language; you are not to assume:

> any governing purpose in the Act except to take such tax as the statute imposes

as Lord Halsbury said in *Tennant* v. *Smith* (2). Construed according to this rule the statute, I think, does not admit of the construction proposed by the appellant. In this view it is unnecessary to construe the provisions of the statute of 1922.

The appeal should be dismissed with costs.

(1) L.R. 4 H.L. 100, at page 122. (2) [1892] A.C. 154.

ANGLIN J.—The appellant seeks to be declared not liable for sales tax under the Special War Revenue Act, 1915, for the years 1921 and 1922 and to be relieved of penalties imposed upon it for non-compliance with that statute during those two years—as to the earlier year on the ground that it was not a " manufacturer or producer " within the meaning of section 19BBB (1) of the Special War Revenue Act, 1919, as re-enacted by section 1 of chapter 50 of The Dominion Statutes, 1921, and as to the later year on the ground that no tax is specified in section 19BBB (1) as again re-enacted in 1922 by section 13 of chapter 47 of the statute of that year, as payable on

sales of goods manufactured for stock for merchants who sell exclusively by retail,

the classification within which it claims to fall.

Prima facie the appellant is " a Canadian manufacturer or producer " of candies who sells them directly to consumers and is therefore liable under section 19BBB (1), as re-enacted in 1921, for an excise tax at the rate of three per cent on such sales. I cannot accede to Mr. Beament's ingenious argument that the natural meaning of the terms " manufacturers and producers " is by the context restricted to persons who manufacture or produce for sale to persons who ordinarily purchase for re-sale, such as wholesalers, jobbers or retailers. The Act explicitly covers the case of the manufacturer or producer whose business in whole or in part is to sell directly to consumers, and I find nothing to justify excluding from its application a case so specifically dealt with.

The fact that the concluding clause of the proviso to the section, as re-enacted in 1922, appears to have been designed to fit precisely such a case as that of the appellant does not warrant taking out of the operation of section 19BBB (1), as re-enacted in 1921, a case which it appears plainly to include.

I am also unable to assent to the contention that no tax is specified in section 19BBB (1), as re-enacted in 1922, as applicable to the merchant who sells exclusively to consumers but manufactures goods for stock which he thus disposes of. His sales are in the language of that section " sales by a manufacturer or producer to consumers " and

1924

VERSAILLES SWEETS, LIMITED v. THE ATTORNEY GENERAL OF CANADA.

Anglin J.

the section specifies for such sales an excise tax of four and one half per cent.

No other ground of appeal was urged. As both grounds taken fail, the appeal must be dismissed with costs.

MIGNAULT J.—I would dismiss the appeal with costs for the reasons stated by my brother Anglin.

MALOUIN J.—I would dismiss this appeal with costs for the reasons assigned by the trial judge.

Appeal dismissed with costs.

Solicitors for the appellant: *Beament & Beament.*
Solicitor for the respondent: *Charles W. Kerr.*

1924

*June 18.
*May 27, 28.

THE OTTAWA ELECTRIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

NOE LETANG (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Injury—Obvious danger—Knowledge of injured person—Liability.

The respondent brought an action against the appellant company to recover damages suffered by his wife in passing over a stairway leading to the appellant's station. It was proved by the respondent that the stairway was, at the time of the accident and had been for a considerable time before, covered with ice and snow to such an extent that it was extremely dangerous for any person to use it. The respondent's wife had used these steps twice daily on six days of the week during that period and it was shown that there was a safer route of approach.

Held, Idington J. dissenting, that the danger being so obvious that, if actual knowledge of it should not be inferred, notice of its existence must be imputed to the injured person, and there was no duty owing to her in respect of it by the appellant company, and therefore no actionable breach of duty. *Indermaur* v. *Dames* (Q.R. 2 C.P. 311) discussed.

Judgment of the Court of King's Bench, (Q.R. 36 K.B. 512) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judg-

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

(1) [1923] Q.R. 36 K.B. 512.

ment of the trial judge, Joseph Demers J., and maintaining the respondent's action in damages.

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

Foran K.C. and *Ritchie K.C.* for the appellant. The stairway is not upon the property of the appellant.

The evidence clearly established that, at the time of the accident, the stairway was in such an obviously dangerous condition that no one could have used it without being fully aware of the risk of so doing.

From the evidence it is clear that the respondent's wife, from her almost daily use of the stairway, must have been fully cognizant of its dangerous condition; and it was incumbent upon her to use reasonable care for her own safety while upon the property. *Dobson* v. *Horsley* (1); *Lucy* v. *Bawden* (2); *Brackley* v. *Midland Ry. Co.* (3); *Fairman* v. *The Perpetual Investment Building Society* (4); *Southcote* v. *Stanley* (5); *19 English Ruling Cases, 60.*

Sinclair K.C. and *Lemieux K.C.* for the respondent. The case turns entirely and exclusively on questions of facts; and the evidence shows that the accident happened on appellant's property and that the latter is liable for the damages resulting therefrom.

IDINGTON J. (dissenting).—This appeal arises out of an action brought by the respondent to recover damages suffered by his wife in passing over a cement stairway, leading up to the appellant's station at Rockliffe, to take its car running into Ottawa, which was in such a condition at the top steps that she slipped and fell and suffered thereby very serious injuries, for which the learned trial judge entered judgment in his favour with damages assessed at $4,607.65, with interest and costs.

From that judgment the appellant appealed to the Court of King's Bench (appeal side) at Montreal, and that appeal was dismissed with costs.

(1) [1914] 84 L.J. K.B. 399.
(2) [1914] 83 L.J. K.B. 523.
(3) [1916] 85 L.J. K.B. 1596; [1916] 114 L.T. 1150 (C.A.)
(4) [1922] 92 L.J. K.B. 50.
(5) [1856] 25 L.J. Ex. N.S. 339.

1924

OTTAWA ELECTRIC RY. CO. v. LÉTANG.

Idington J.

The respondent and his wife lived in Gatineau Point, in Quebec, and, having been domiciled and married there, he was, by the law of Quebec applicable to the circumstances, the party entitled to bring this action.

Nevertheless it is the law of Ontario, in which the accident happened, that must be rested upon to maintain the action.

Mrs. Létang served as a charwoman in Ottawa almost daily, and her nearest way to her work was to cross from Gatineau Point to Rockliffe Park, and then ascend the hill on top of which the appellant's railway ran, and alongside of its track was situated the station at which she was accustomed to take the car to Ottawa.

The road ascending said hill is rather zig zag in its course, and has, I think it is said, no less than four stairways of which that now in question is the top one adjacent to the station.

Mrs. Létang, on the occasion now in question, when she reached that top stair, was carrying no parcel and kept her left hand in touch with a railing on that side, so that it seemed to her, thus protected, and, as it happened, wearing a new pair of rubbers, that she could safely ascend that stairway, as she had done so many times, but, as already stated, when she reached the top step she slipped and fell.

There were, the learned trial judge finds, some seven hundred persons, or more, passing daily either up or down same road or stairway. I cannot, under such circumstances, attach any blame to the respondent's wife or see how she was not entitled to assume that the respective owners would do their duty.

The appellant denies any ownership or other right of control over said stairway and counsel for it before us seemed to rest chiefly on that objection. If well founded there could be no such action as this maintained.

I cannot accede to such contention, for the evidence, as I read it and as the learned trial judge finds, clearly demonstrates that at least a number of the steps, nearest the top and on which the accident took place, were on part of the land owned by appellant and had been acquired for the purposes of its railway.

The said stairway seems never to have been cleared off, much less sprinkled with ashes or the like in winter, as

would be the reasonable duty of appellant as owner. And it seeing the travellers' use thereof I cannot understand how such a situation was tolerated.

I would gather from a mass of irrelevant evidence, which was allowed, that the stairs lower down were even worse looked after than the one in question, but the appellant was not the owner thereof, and hence that evidence has tended to produce an impression unfavourable to the respondent's case, as giving ground for suspecting that Mrs. Létang was a reckless person who passed over a road she never should have entered upon.

I cannot accept that theory or its foundation as having anything to do with this case.

Let us confine our attention to the one stairway, and only the top part of that, in the last analysis, for evidently there was nothing to warn one not to ascend it.

Indeed the appellant was in duty bound to have it fenced off at the true line, and not allow passengers to run into such a trap.

The freezing and thawing, at the end of February when this accident happened, produced a rather treacherous condition, such as Mrs. Létang describes, and the trial judge finds, and which would not have existed if the appellant as owner had discharged its duty, as required by the law as laid down in the leading case of *Indermaur* v. *Dames* (1), and other cases cited by respondent's counsel.

Of these *Norman* v. *Great Western Ry. Co.* (2), is useful as shewing, in the numerous authorities cited, where to find the law and many limitations thereof. *Cox* v. *Coulson* (3) for the like reasons.

London, Tilbury & Southend Railway v. *Paterson* (4), presents an illustration akin to that presented herein. Whenever the principle in question has to be applied a fair measure of common sense has to be used for so many misleading words such as " trap " have had their day as if the entire limitations of the operation of the principle invoked, though used only in a metaphorical sense.

It is quite clear to me that, if we eliminate some cases wherein undue subtlety has been used, and the possibly

(1) [1866] L.R. 1 C.P. 274.
(2) [1915] 1 K.B. 584.
(3) [1916] 2 K.B. 177.
(4) [1913] 29 T.L.R. 413.

1924
OTTAWA ELECTRIC RY. CO. v. LÉTANG.
Duff J.

exaggerated stories of the conditions existent elsewhere on the roadway or pathway leading up from the ferry, as above set forth, there is a clear case made by respondent.

I therefore, am of the opinion that this appeal should be dismissed with costs.

DUFF J.—The steps were obviously impracticable in the sense that they could not be used without risk of serious injury. There was another approach open apparently free from danger. In these circumstances, the principle of *Indermaur* v. *Dames* (1) is not applicable.

ANGLIN J.—No objection was taken in the pleadings and none would appear to have been made at the trial to the plaintiff's status to maintain this action to recover damages for physical injuries sustained by his wife. I am not disposed to entertain such an objection when first taken in appeal.

There is some evidence afforded by the plan attached to the deed by which the defendant company acquired their property in Rockliffe from the late Anne Keefer that the portion of the steps on which Madame Létang slipped and fell was its property. The learned trial judge regarded that evidence as sufficient to warrant the finding of that fact in the plaintiff's favour. That finding has been affirmed by the Court of King's Bench. Meagre as the proof in support of it undoubtedly is, I am not prepared to say that these courts were both clearly wrong—the one in making the other in affirming it.

The plaintiff abundantly proved that when his wife was injured the stairway in question was covered with ice and snow to such an extent that it was extremely dangerous for any person to attempt to use it. Indeed he proved more. Presumably in order to fix the defendant with notice of that state of affairs he established that it had existed for a considerable time before the accident. But Madame Létang tells us that she had used these steps twice daily on six days of the week during that period. While she has not admitted her knowledge of the dangerous condition of the steps, neither has she denied such knowledge. The inference that she had it is almost irresistible. The danger was so obvious, according to the evidence of the plaintiff's wit-

(1) L.R. 1 C.P. 274; 2 C.P. 311.

nesses, that notice of it to any person taking reasonable care for his own safety in using the stairway is beyond question. Anybody ascending it for the first time would almost certainly have perceived, a person who had made daily use of it for many weeks must have been fully aware of, the danger. Another reasonably convenient mode of access was available and known to Madame Létang.

Under these circumstances what duty did the appellant company owe to Madame Létang? There was not a little discussion at bar as to whether she should be regarded as a mere licensee or as an "invitee" on the company's premises. I am by no means satisfied that, having regard to their manifestly neglected and dangerous state, the railway company can be treated as having invited intending passengers to approach its embarking platform by means of the steps Madame Létang used. I shall, however, assume her to have been entitled to the full benefit of the position of an "invitee." What were her rights? What duty did the defendant owe her?

Although the action was brought in Quebec, it is of course clear—indeed it is common ground—that these questions must be answered according to the law of Ontario where the accident happened. That law was settled nearly sixty years ago in the leading case of *Indermaur* v. *Dames* (1). The following passage in the judgment of Willes J., speaking for the Court of Common Pleas, has become classic:

> The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know.

As said by Lord Atkinson, referring to the principle of *Indermaur* v. *Dames* (1), in *Cavalier* v. *Pope* (2):

> One of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risk he has no cause of action.

(1) L.R. 1 C.P. 274; 2 C.P. 311. (2) [1906] A.C. 428 at p. 432.

1924

OTTAWA ELECTRIC RY. CO. v. LÉTANG.

Anglin J.

The duty of the "invitor" to the "invitee" is either to have the premises free from any concealed danger in the nature of a trap, or, if such a danger exists and he knows or should have known of it, to give clear and sufficient warning of it. Where the danger is obvious, as the evidence shows it to have been in the case at bar, it does not call for a warning and an essential condition of liability is lacking. As put by Atkin L.J. in *Lucy* v. *Bowden* (1):

> In such case the true maxim seems to be *scienti non fit injuria.*

A person unnecessarily incurring an obvious danger can scarcely be said to be

> using reasonable care on his own part for his own safety.

He might well be regarded as falling within the maxim *volenti non fit injuria* or as guilty of contributory negligence. Had either of those findings been made in the present case it would have been so abundantly justified that it could not be disturbed. But the true ground on which liability of the appellant must be negatived appears to be that, the danger being so obvious that, if actual knowledge of it should not be inferred, notice of its existence must be imputed to the injured person, there was no duty owing to her in respect of it by the appellant company, and therefore no actionable breach of duty.

The law bearing on this aspect of the case was fully discussed and the authorities reviewed by the House of Lords in the recent case of *Fairman* v. *Perpetual Investment Building Society* (2). A case very closely in point is *Brackley* v. *Midland Railway* (3). Indeed, upon the alternative ground on which the English Court of Appeal rested its judgment *Brackley's Case* (3) is indistinguishable in principle from the case at bar. If, as Lord Atkinson indicates in *Cavalier* v. *Pope* (4), the patent and obvious nature of the danger and continued familiarity with the surroundings by the injured person requiring an inference of his knowledged of its existence be fatal to the plaintiff equally with actual proof of such knowledge, the two decisions are indistinguishable in principle.

The appeal, in my opinion, should be allowed and the action dismissed, with costs throughout—if the appellant insists upon having them.

(1) [1914] 2 K.B. 318, at p. 326.
(2) [1923] A.C. 74; 92 L.J. K.B. 50.
(3) 85 L.J. K.B. 1596
(4) [1906] A.C. 428, at p. 432.

MIGNAULT J.—On the evidence, I would not disturb the finding of the learned trial judge, concurred in by the Court of King's Bench, that the stairway where the respondent's wife fell and was injured was on the appellant's property.

Although this action was taken in the province of Quebec, where the appellant has property, the accident happened in the province of Ontario, and the question whether the respondent had established a case of liability under the Ontario law was, before the courts below, a question to be determined on proof of that law. This court, however, takes judicial notice of the laws prevailing in all the provinces; *John Morrow Screw and Nut Co.* v. *Hanken* (1); *Logan* v. *Lee* (2); so it will not be necessary to refer to the expert evidence as to the Ontario law adduced at the trial.

Whether or not the respondent's wife, when she fell, on the 18th of February, 1921, at about 8.30 a.m., while climbing the stairway, was an invitee or a mere licensee on the appellant's property, she was undoubtedly obliged to exercise reasonable care when passing over it, the more so as during that winter she had been daily crossing this property to reach the appellant's trolley cars and must be held to have been well acquainted with the condition of the stairs. She describes this condition as follows:

Q. Pouvez-vous me dire comment cette glace était disposée sur les marches de l'escalier; quelle sorte de glace est-ce que c'était; était-ce plat ou rond?

3. C'était de la belle glace; ensuite il y avait comme des monceaux de glace; c'était tout comme raboteux; de la glace bien épaisse. La glace était ronde; les marches étaient arrondies par la glace.

The respondent's witnesses state that during all that winter the stairway was in a terrible condition, that on account of the slope of the hill water flowed over it and froze, that it was constantly covered with ice, that each step was " un bourrelet de glace," a mound of ice.

This condition was of course perfectly visible and must have been known by the respondent's wife who passed over the property at least twice a day, for she lived at Gatineau Point and worked in Ottawa.

The plan filed as well as the testimony shew that at that place there is a road called the " ferry road" leading from the landing on the Ottawa river to the top of the hill. The respondent's wife knew of this road, for she says:

(1) [1918] 58 Can. S.C.R. 74. (2) [1907] 39 Can. S.C.R. 311.

1924

OTTAWA ELECTRIC RY. CO. v. LÉTANG.

Mignault J.

Ils (les gens qui venaient de la Pointe Gatineau et qui allaient à Ottawa pour prendre le tramway) ont toujours passé par les escaliers; tout le monde passait là; les chevaux passaient dans le chemin.

There was therefore no necessity to take the stairway in its dangerous condition to reach the trolley cars. The road furnished an alternative mode of ascent.

I think the respondent's wife must be held to have had full notice of the risk she assumed in using the stairway instead of the road as a means of reaching the street cars. There was here nothing of the nature of a trap but a very obvious danger which her familiarity with the place possibly led her to disregard, but which was not the less self evident. The accident happened in full daylight. Under the authorities, which are fully referred to in the judgment of my brother Anglin, the plaintiff cannot succeed.

I would allow the appeal and dismiss the action. The appellant is entitled to costs throughout if it cares to exact them from the respondent.

MALOUIN J.—Je partage la manière de voir du juge Anglin dans cette cause; et, pour les raisons qu'il donne, j'infirmerais le jugement dont est appel et je renverrais l'action de la demanderesse avec dépens.

Si cette cause avait été décidée en vertu de la loi de la province de Québec, j'aurais été d'opinion contraire, parce que je crois qu'il y a eu faute commune; mais, comme c'est la loi de l'Ontario que s'applique et que c'est la demanderesse elle-même qui s'est chargée d'en faire la preuve, il m'est impossible de maintenir son action.

Appeal allowed with costs.

Solicitor for the appellant: *T. P. Foran.*

Solicitor for the respondent: *Auguste Lemieux.*

ALBERIC ANGERS (DEFENDANT).....APPELLANT;

AND

J. C. GAUTHIER AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1924
*June 2.
*June 18.

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

Contract—Licensed pilots—Public officers—Agreement—Pooling of fees—Validity—Public order.

In 1918, the appellant and the respondents, being all the licensed pilots for the pilotage district of Montreal, entered into an agreement whereby for a period of twenty-five years they agreed to form an association with the view to further their common welfare and to divide all their earnings equally among themselves. In May, 1921, the appellant having refused to pay over to the association the fees then earned by him as pilotage dues, the respondents sued him to recover the sum of $2,400.

Held that such an agreement was not illegal nor contrary to public order.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and maintaining the respondent's action.

The plaintiffs, respondents, and the defendant, appellant, are licensed pilots for the pilotage district of Montreal. They are also members of an association of a civil character called "United Montreal Pilots."

The appellant is sued as a member of this association for the recovery of the sum of $2,400, which, according to respondents, he owes them pursuant to the terms of a contract passed before a notary in 1918. They allege that on the 27th of December, 1918, they entered into an agreement whereby for a period of twenty-five years they agreed to form an association with the view to further their common welfare and to divide their earnings equally among themselves after certain expenses and charges, which are also defined, have been paid.

They state that since the first of May, 1921, the appellant has neglected to pay over to the directors of the association, or its treasurer, the fees earned by him as pilotage due, contrary to the terms of the agreement. They also allege that, notwithstanding his default, respondents have offered to the appellant his share of the moneys distributed according to the contract.

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

1924

ANGERS v. GAUTHIER.

Idington J.

Appellant does not deny these facts but contends that the contract entered into by respondents and himself is null and void inasmuch as it is contrary to law and to public order and moreover that it is inconsistent with the by-laws of the Department of Marine.

Bond K.C. and *L. Beauregard* for the appellant. A pilot is a public official; and a contract between the pilots, agreeing to pool their fees to be received as such public officials, is illegal and contrary to public order. *La Corporation des Pilots de Québec* v. *Paquet* (1); *Rémillard* v. *Trudelle* (2); *Powell* v. *The King* (3).

Geoffrion K.C. and *L. Guérin* for the respondents. The agreement rests on the principle of liberty of covenants. The pilots had the right to bind themselves and they are bound by the conditions of the contract.

IDINGTON J.—I cannot see that the parties hereto, because of being licensed as pilots, can be held to be such public officers as to bar their right to pool their receipts from fees got for service.

I should be glad if I could see otherwise for the appellant seems to have been rather improvident in joining.

It can easily be rectified if the Government is satisfied, as appellant's counsel contends is the fact, that pooling receipts tends to impair efficiency of the service, and sees fit to shape its regulations so as to prevent its continuance. Meantime I cannot say as matter of law that the system so operates.

I conclude that in my opinion this appeal should be dismissed with costs.

DUFF J.—The question is a difficult one, but on the whole I think the agreement in question is not within the principle which withholds from assignments of the salaries of public officers recognition and the assistance of the law.

Here it is questionable, to say the least, whether the assignors are public officers within the scope of the principle; and, moreover, the object of the agreement is to provide for the whole body of pilots greater pecuniary security.

(1) [1917] Q.R. 53 S.C. 220, at p. 222; 54 D.L.R. 323.

(2) [1889] 15 Q.L.R. 328.

(3) [1905] 9 Ex. C.R. 364.

That such an agreement would, in fact be detrimental to the public service seems to me very debatable, and I know of no established legal doctrine which requires me to say that it is.

The appeal should be dismissed with costs.

ANGLIN J.—I would affirm the judgment of the Court of King's Bench for the reasons assigned by the learned Chief Justice and Mr. Justice Dorion.

MIGNAULT J.—Je ne vois rien de contraire à l'ordre public dans la convention entre plusieurs personnes exerçant la même profession ou la même industrie de s'associer et de mettre dans un fonds commun tous leurs gains, lequel fonds sera divisé entre tous les membres de la société dans la proportion convenue entre eux. L'association " United Montreal Pilots," dans laquelle l'appelant a consenti à s'enrôler, est une association de ce genre qui a été librement formée pour l'avantage mutuel des associés. Cette association doit durer vingt-cinq ans, et l'appelant, avant l'expiration de ce terme, refuse d'apporter ses gains à la mise commune, sous prétexte que l'association est illégale et contraire à l'ordre public.

Les sociétés universelles de tous gains ne sont pas inconnues dans le droit civil, ainsi qu'en fait foi l'article 1858 du code civil. Celui qui y entre librement doit en observer les conditions tant que la société dure. Les pilotes qui ont formé cette association sont tous des pilotes licenciés pour le district de pilotage de Montréal, et l'ordre public, mot dont on abuse parfois, n'est nullement troublé par la convention qu'ils ont faite de mettre leurs gains en commun pour leur bénéfice mutuel.

L'appelant trouve qu'il gagnerait plus d'argent s'il pouvait conserver ses gains, au lieu de se contenter de la part qui lui est attribuée par le pacte social. C'est bien possible, mais alors il n'aurait pas dû s'enrôler dans cette association. Tant qu'elle existera et qu'il n'aura pas de raison valable de s'en retirer, il devra respecter la convention qu'il a faite avec ses co-associés. Sa prétention qu'il est une sorte d'officier public et que pour ce motif il ne peut s'associer avec ses confrères, est dénuée de fondement.

L'appel doit être renvoyé avec dépens.

1924

ANGERS v. GAUTHIER.

Malouin J.

MALOUIN J.—Je suis d'opinion que les pilotes ne sont pas des officiers publics. Je renverrais le présent appel avec dépens pour les raisons données par la cour du Banc du Roi, juridiction d'appel.

Appeal dismissed with costs.

Solicitors for the appellant: *Atwater, Bond & Beauregard.*

Solicitors for the respondents: *St. Germain, Guérin & Raymond.*

1924

*June 5, 6.
*June 18.

DAME MARIE M. RAYMOND (PLAINTIFF) ..... } APPELLANT;

AND

JOSEPHAT DUVAL AND OTHER (DEFENDANTS) ..... } RESPONDENTS.

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

Capias—Abandonment by debtor before judgment—Surety—Liability—Arts. 913, 926, 930, 854 to 892 C.C.P.

In order to relieve the surety of a debtor arrested under a writ of *capias ad respondendum* from the conditional obligation he is required to assume to answer for the debt (Art. 913 C.C.P.), the debtor must make an abandonment of property within thirty days after the rendering of judgment maintaining the *capias*. An abandonment preceding such judgment is insufficient to relieve the surety.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Surveyer J., and dismissing the appellant's action.

By his action, the appellant claimed from the respondents the sum of $4,964.34. On the 13th of March, 1919, one Edouard Thibodeau, the late husband of the appellant, sued one J. A. Champoux for $4,232.38 and interest at 6 per cent per annum from the date of the action. That action was accompanied with a writ of *capias ad respondendum*. The said J. A. Champoux was arrested on that capias on the 13th of March, 1919. On the same day he was released upon the security given under article 913 C.C.P. by the respondents. Judgment was rendered in the case of

* PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

Edouard Thibodeau vs. J. A. Champoux on the 9th of June, 1920; the *capias* was maintained and the defendant was condemned to pay to the appellant herein, in her quality of plaintiff by reprise d'instance, the sum of $4,232.38 with interest at 6 per cent from the 13th of March, 1919, and costs. The interest amounted to $354.76 and the costs to $327.20. The total indebtedness of the said J. A. Champoux to the appellant was accordingly $4,964.34. By her action appellant claims from the respondents jointly and severally the said sum of $4,964.34, contending that the amount is due to her by the respondents in virtue of the bail bond inasmuch as the defendant J. A. Champoux did not make an assignment within thirty days from the date of the judgment maintaining the *capias,* nor at any time thereafter. By his plea respondent Josaphat Duval denied the indebtedness. He acknowledged having signed the bail bond upon which the appellant rests her action, but he stated that this bail bond was illegal and null. The respondent Duval pleaded in particular that he was never made aware of the amount of the appellant's claim against J. A. Champoux, and that, as a result, he never could give a valid consent concerning the said bail bond. Moreover, the respondent Duval invoked the assignment made by J. A. Champoux on the 2nd of March, 1920, subsequent to his arrest, the fact that this assignment was made known to the appellant and the appointment, on the 10th of March, 1920, of a curator who was then proceeding to liquidate the goods and effects assigned by the said J. A. Champoux. The respondent Duval further pleaded that neither the curator nor the appellant had contested, within the legal delays, the right of the said J. A. Champoux to make an assignment of his property, nor the debtor's statement, and that the defendant J. A. Champoux had not, since the judgment of the 9th of June, 1920, acquired any property subject to an assignment. By her answer and the particulars in connection therewith, the appellant denied the validity of the assignment made by the said J. A. Champoux. According to her, this assignment was made at the request of J. A. Champoux's brother, who was holder of a cheque for $250 given to him without any consideration. J. A. Champoux was not a trader. (Article 853 C.C.P.) The appellant stated, moreover, that the said

1924
RAYMOND
v.
DUVAL
ET AL

J. A. Champoux had not abandoned all his property, and, in the particulars of her answer to plea, she pointed out divers so-called cases of secretion. Furthermore, the appellant raised the question that by the bail bond the respondent Duval had undertaken to pay the amount of the judgment rendered against the said J. A. Champoux in capital, interest and costs, should the said J. A. Champoux fail to make an assignment of his property within thirty days following the judgment maintaining the *capias*. According to the appellant's contentions, this obligation was not fulfilled by the abandonment made by the said J. A. Champoux before such judgment; and the reason of this would be that the appellant, in the case of an abandonment made after the judgment maintaining the *capias*, could invoke, under the provisions of article 930 C.C.P., all the acts of secretion anterior to the *capias*, whilst in the case of an abandonment made before judgment, the appellant could only rely on the acts of secretion committed in the year preceding the filing of the statement.

Lafleur K.C. and *Lamothe K.C.* for the appellant.

St. Jacques K.C. and *Duranleau K.C.* for the respondents.

IDINGTON J. (dissenting).—This is an appeal arising out of an action against the respondents upon a bail bond given by them as sureties for one J. A. Champoux, who had been arrested under a writ of *capias ad respondendum*, and turns upon the interpretation and construction to be given article 913 of the Quebec Code of Civil Procedure.

The learned trial judge dismissed the action with costs. From that judgment the present appellant appealed to the Court of King's Bench (appeal side) and said appeal was heard by five judges of that court and dismissed with costs.

They were all, with one exception, agreed upon such decision.

The Chief Justice Lafontaine and Mr. Justice Rivard wrote at some length. Mr. Justice Dorion briefly referred to his reasons given in the case of *Champoux* v. *Raymond*, and Mr. Justice Howard concurred with Mr. Justice Rivard, and all were agreed in said dismissal.

Mr. Justice Tellier, the dissenting judge, wrote at some length.

Their views I have carefully considered, as well as the respective arguments presented at the hearing hereof, and the voluminous factums presented respectively on behalf of appellant, and respondent Duval, and one more briefly presenting the case on behalf of respondent Champoux.

The fact that it is a test case of seven arising out of similar writs of *capias ad respondendum* renders it rather important. And I am, as the result of much reading of evidence and argument, deeply impressed with the fact that, if the statute in question must be construed as the counsel for the appellant contends, a grave injustice will, under the circumstances, be done the respondents, who acting, so far as I can see, in good faith, brought about an abandonment by the debtor, after his arrest, of all his properties as completely as could have been done had he waited the trial of the case and then done so, as is now urged was the only time it could.

The appellant insinuates bad faith on the part of one of respondents, but I am inclined to submit that, possibly anticipating the debtor and his sureties would rest content with the view of the law since taken, and thus fall down if another view should ultimately prevail, the appellant kept quiet.

I agree with the reasons assigned by the learned trial judge and the majority in the Court of King's Bench, and would therefore dismiss this appeal with costs.

DUFF J.—The words of article 913 C.C.P., read literally, import an abandonment after the judgment maintaining the *capias*, and the terms of Art. 930 C.C.P. support very definitely the contention that it is such an abandonment which is contemplated.

The appeal should be allowed.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed.

As pointed out by Mr. Justice Tellier in his dissenting judgment the abandonment made on the 2nd of March, 1920, could not include any property which the assignor. Champoux, might have acquired between that date and the 9th of June, 1920, when judgment maintaining the *capias* on which he had been arrested was pronounced. It

1924
RAYMOND
v.
DUVAL
ET AL
Anglin J

has not been shown that no property had been acquired by him during that period.

Moreover, an important right of the creditor, who, as in the present case, has had a *capias* maintained because of his debtor's secretion of property, is that given him by Art. 930 C.C.P. of contesting any abandonment made by the debtor to satisfy the condition of a bond given for his release pursuant to Art. 913 C.C.P. on the ground that such abandonment does not include property for the secretion of which the *capias* has been so maintained. The duration of *capias* proceedings may be prolonged and it may sometimes happen that in respect of an abandonment made during their pendency under Art. 853 (1) C.C.P. the creditor could never exercise his right under Art. 930 C.C.P. That right arises only when judgment maintaining the *capias* has been pronounced. That judgment may not be rendered within six months of the date on which the curator's advertisement of the abandonment has appeared in the Official Gazette. For default of contestation, the abandonment may in the interval have become absolute under Arts. 886, 887 and 889 C.C.P.

The combined operation of the several provisions of the Code of Civil Procedure to which I have alluded seems to make it clear that the provision of Art. 913 C.C.P., that, in order to relieve the sureties from the conditional obligation they are required to assume to answer for the debt in respect of which the *capias* issued, the debtor must make an abandonment within thirty days after the rendering of judgment maintaining the *capias*, was advisedly so made and is not, and was not meant to be, satisfied by an abandonment preceding the rendering of that judgment. The bond given by the respondents explicitly requires an abandonment in the terms prescribed. It was not made. In the particular case now before us no substantial wrong may have resulted. It may be that the debtor had acquired no property in the interval between the abandonment and the judgment: it may be that the abandonment includes all the secreted properties, although this seems scarcely possible in regard to moneys found to have been paid in fraudulent preference; it may be that an omission in either of these particulars would not render an abandonment made within the prescribed thirty day period insufficient

quoad the sureties; it may be that the creditor was in a position to exercise the rights conferred by Art. 930 C.C.P. to the fullest extent. Nevertheless the condition prescribed by Art. 913 C.C.P. for the release of the sureties has not been fulfilled according to its terms. In some other case its non-fulfillment might be of real importance. The question before us is not whether in the present instance the creditor has been actually prejudiced. It is simply the proper construction of the bond actually given and of Art. 913 C.C.P. Has the condition upon which the sureties are to be relieved from their obligation to pay the creditor's debt been satisfied? Would an abandonment made after the debtor's arrest under a *capias* and before the judgment maintaining it always fulfil the condition of the bond prescribed by Art. 913 C.C.P.? In my opinion these questions must be answered adversely to the respondents. The condition of their bond has not been fulfilled and their obligation to pay under it has become absolute.

The appeal must be allowed with costs throughout and judgment entered against the respondents for the amount claimed.

MIGNAULT J.—Les intimés se sont portés cautions pour le nommé J. A. Champoux, arrêté sur *capias* pour cause de recel de ses biens à la poursuite du nommé Edouard Thibodeau, maintenant décédé et représenté par sa veuve, l'appelante, demanderesse par reprise d'instance.

Ce cautionnement était donné aux termes de l'article 913 du code de procédure civile, et les cautions s'engageaient conjointement et solidairement que le défendeur fera cession de ses biens pour le bénéfice de ses créanciers dans les trente jours de la prononciation du jugement maintenant le *capias*, et aussi que le défendeur se mettra sous la garde du shérif, lorsqu'il en sera requis par une ordonnance du tribunal ou du juge, dans les trente jours de la signification de cette ordonnance à lui ou à ses cautions; et, qu'à défaut par le défendeur de faire cette cession ou de se livrer, ou de l'un ou de l'autre, dans les délais susdits, nous, les dites cautions, paierons au demandeur le montant du jugement à intervenir et, en plus, toute autre somme à laquelle s'élèveront les intérêts et les frais.

Le *capias* a été maintenu le 9 juin 1920, par jugement rendu par l'honorable juge Mercier, qui a trouvé bien fondées les allégations de recel. Champoux n'a pas, dans les trente jours de la prononciation de ce jugement, fait cession de ses biens pour le bénéfice de ses créanciers, et l'appelante

1924
RAYMOND
v.
DUVAL
ET AL
Mignault J.

demande maintenant que ses cautions, les intimés, soient condamnées conjointement et solidairement à lui payer sa dette en principal, intérêts et frais, soit $4,964.34, avec contrainte par corps à défaut de paiement.

Les intimés prétendent que le 2 mars 1920, J. A. Champoux a fait cession de ses biens pour le bénéfice de ses créanciers à la demande de J. W. Champoux; que cette cession n'a pas été contestée dans les délais; qu'il n'appert pas que J. A. Champoux ait depuis acquis d'autres biens; et que cette cession de biens équivaut à toutes fins de droit à celle qu'aurait pu faire le dit Champoux dans les trente jours du jugement maintenant le *capias*.

L'action de l'appelante fut renvoyée par la cour supérieure (Surveyer J.) dont le jugement fut confirmé par la cour du Banc du Roi, le juge Tellier dissident. De là l'appel à cette cour.

Les motifs suivants du jugement de la cour supérieure résument suffisamment les moyens de droit qu'invoquent les intimés devant cette cour:

> Considérant que le but du *capias ad respondendum* étant d'obtenir, à défaut du paiement de la dette, la cession de biens du débiteur, ce but se trouve atteint par toute cession de biens, qu'elle soit antérieure ou postérieure au jugement déclarant le *capias* bien fondé;
>
> Considérant que le terme de trente jours mentionné dans l'article 913 C.P.C. est, comme tout terme, présumé stipulé en faveur du débiteur (art. 1091 C.C.) lequel peut toujours y renoncer; que non seulement il ne résulte pas des circonstances que ce terme ait été convenu en faveur du créancier; mais que l'article 926 C.P.C. suppose le contraire puisqu'il dit que le débiteur peut, en tout temps, c'est-à-dire même après les trente jours, faire cession de ses biens, sauf la responsabilité encourue par les cautions, ce qui serait absurde si toute cession de biens autre que celle faite dans les trente jours du jugement maintenant le *capias* rendait les cautions irrévocablement débitrices du créancier demandeur;

Je crois qu'en cette matière il vaut mieux se rattacher strictement aux textes ainsi qu'aux termes mêmes du cautionnement fourni par les intimés.

Le code de procédure civile mentionne plusieurs cas où le débiteur peut, et doit même quelquefois, faire cession de ses biens pour le bénéfice de ses créanciers.

Ainsi le débiteur est sous le coup d'un jugement ordonnant la contrainte par corps. Il peut, dans ce cas, obtenir sa libération, entre autres cas, par la cession de biens (art. 846, parag. 5). Cette cession de biens est régie par les

règles contenues dans les articles 854 à 892 inclusivement (art. 849).

Le débiteur est arrêté sur *capias ad respondendum*, ou bien il est un commerçant qui a cessé ses paiement et il est requis de faire cession de ses biens par un créancier dont la créance n'est pas garantie pour une somme de $200 ou plus (art. 853).

Dans le cas du débiteur arrêté sur *capias ad respondendum* et contre lequel le *capias* a été maintenu, ce débiteur peut aussi faire cession de ses biens (art. 926), et cette cession de biens à la suite d'un *capias* est régie par les règles contenues dans les articles 854 à 892 inclusivement (art. 927).

Dans tous les cas, il s'agit de la même cession de biens, comme le montre le renvoi aux articles 854 à 892 inclusivement. Ajoutons que le débiteur qui fait cession de ses biens dépose au greffe son bilan, c'est-à-dire une liste de ses biens et de ses créanciers avec le montant de leurs créances. Ce bilan peut être contesté par ses créanciers ou l'un d'eux, ou par le curateur à le cession de biens autorisé par les inspecteurs, à raison de l'omission frauduleuse de la mention de biens de la valeur de $100, ou de fausses représentations dans le bilan relativement au nombre de ses créanciers ou à la nature ou au montant de leurs créances, ou de recélé par le débiteur dans l'année précédant immédiatement le dépôt du bilan, ou depuis, de quelque partie de ses biens, dans la vue de frauder ses créanciers (art. 885).

Le délai pour contester le bilan est de quatre mois à compter de l'insertion dans la Gazette Officielle de l'avis de la nomination du curateur (art. 886).

Si le contestant établit quelqu'une des offenses mentionnées en l'article 885, le juge peut condamner le débiteur à être emprisonné pour un terme n'excédant pas un an (art. 888).

Je cite l'article 889 qui s'explique quant au défaut de contestation du bilan et quant au défaut de preuve des allégations du contestant:

Si le bilan n'est pas contesté dans les délais voulus, ou si la contestation n'est pas prouvée dans ces délais, le juge peut ordonner la libération du débiteur, et ce dernier est exempt d'arrestation ou d'emprisonnement à raison d'une cause d'action antérieure à la production du bilan, à moins qu'il ne soit déjà arrêté sur *capias* ou qu'il ne soit détenu et emprisonné

1924

RAYMOND v. DUVAL ET AL

Mignault J.

pour quelque dette de la nature de celles indiquées dans les articles 833 et 834; et, au cas de cet emprisonnement ou arrestation, il peut obtenir du juge sa mise en liberté sur requête et preuve suffisante.

Revenons maintenant au cas où le débiteur arrêté sous *capias* a donné le cautionnement requis par l'article 913, ce qui a été fait dans l'espèce, et demandons-nous si la cession de biens faite par J. A. Champoux, le 2 mars 1920, répond aux exigences du cautionnement fourni par les intimés.

J'ai dit que dans cette matière il vaut mieux s'en tenir aux textes. Or à mes yeux il y a un texte absolument décisif. C'est celui de l'article 926 qui se lit comme suit:—

Sauf la responsabilité encourue par les cautions lorsque le défendeur n'a pas fait cession de ses biens dans les trente jours du jugement maintenant le *capias*, le débiteur peut en tout temps faire cession de ses biens.

Donc la responsabilité des cautions est encourue lorsque le débiteur n'a pas fait cession de ses biens dans les trente jours du jugement maintenant le *capias*. Ce sont d'ailleurs les termes mêmes du cautionnement. Cela ne veut pas dire qu'après l'expiration des trente jours le débiteur ne peut pas faire cession de ses biens—sauf à être puni de son recel comme le dit l'article 930—mais cette cession tardive n'empêche pas que la responsabilité des cautions ne soit encourue par le défaut de cession dans les trente jours. L'obligation de la caution est peut-être plus rigoureuse que celle du débiteur, contrairement à la règle générale de l'article 1933 du code civil, mais c'est la loi qui le veut ainsi, et le législateur pouvait bien admettre une exception à l'article 1933.

S'il en est ainsi, comment peut-on dire qu'une cession de biens antérieure au maintien du *capias*, surtout une cession qui n'est pas faite dans la cause où le *capias* est émané, empêche que les cautions soient responsables suivant les termes de leur cautionnement?

On dit que le débiteur ne peut céder que ce qu'il possède, que la cession de biens le dépouille de la possession de ses biens saisissables (art. 863), que c'est le curateur à la cession de biens qui en a désormais possession (art. 870), et que le débiteur, s'il est un commerçant ayant cessé ses paiements, ne peut refuser de faire cession de ses biens lorsqu'il en est requis par un créancier dont la créance est de $200 ou plus.

J. A. Champoux prend la qualité d'agent d'immeubles et il ne semble pas avoir été commerçant. Il a cédé ses biens à

la demande de son frère, J. W. Champoux, l'un des intimés, qui prétend être créancier en vertu d'un chèque de $250 que le défendeur lui aurait donné quelques jours avant la demande de cession. Tout cela me paraît assez suspect.

Mais ayant déjà fait cession de ses biens, Champoux pouvait-il faire une nouvelle cession après le maintien du *capias?* Il pouvait certainement faire une cession de biens supplémentaire qui aurait compris tout bien qu'il aurait pu acquérir depuis la première cession, et s'il n'en avait pas acquis, il pouvait faire une déclaration au greffe qu'il avait cédé tous ses biens le 2 mars précédent et qu'il n'avait plus rien à céder. L'intention du législateur quant au débiteur aurait été remplie, car le but de ces procédures rigoureuses est de forcer le débiteur à mettre tous ses biens saisissables sous la main de la justice. Il est loin d'être démontré que le terme de trente jours est fixé en faveur du débiteur. Je crois plutôt qu'il est stipulé dans l'intérêt du créancier poursuivant le *capias*, et c'est ce qui me paraît résulter des articles que j'ai cités.

Cependant il s'agit ici non du débiteur mais des cautions, et l'obligation de celles-ci de conditionnelle qu'elle était d'abord devient absolue lorsque la cession n'est pas faite dans le délai fixé tant par la loi que par le cautionnement. *Dura lex,* peut-être, *sed lex.*

La question n'est pas absolument nouvelle, et elle a été résolue dans le même sens par la cour d'appel dans la cause de *Keating* v. *Burrows* (1), où il s'agissait d'une cession de biens faite deux jours avant la présentation d'une requête pour contrainte par corps. Il a été décidé que cette cession de biens ne suffisait pas pour libérer le débiteur de la contrainte.

On peut invoquer une autre raison. Le but du *capias* est de forcer le débiteur à ne pas quitter les limites des provinces de Québec et Ontario (l'ancienne province du Canada) et de l'empêcher de soustraire ses biens aux poursuites de ses créanciers en général et du demandeur en particulier (art. 895). Lorsque le *capias* est maintenu, on peut faire ordonner au débiteur de se remettre entre les mains du shérif, ou en d'autres termes on peut faire prononcer son

(1) Q.R. 8 Q.B. 1.

1924
RAYMOND
v.
DUVAL
ET AL
Mignault J.

incarcération pour un temps indéterminé, cette ordonnance n'étant exécutoire que trente jours après sa prononciation (art. 925). Cependant le débiteur peut en tout temps, après le jugement maintenant le *capias*, faire cession de ses biens mais ses cautions sont responsables s'il ne fait pas cette cession dans les trente jours (art. 926). La cession de biens se fait par la production de la déclaration et du bilan au greffe de la cour supérieure pour le district où a été émis le *capias* (art. 928). Ce bilan peut être contesté à raison du recel qui a précédé le *capias* et qui en a déterminé le maintien, à moins que les objets recélés ne soient compris dans le bilan, et s'il est établi que ces effets n'y ont pas été compris, le débiteur est passible de la peine édictée par l'article 888 (art. 930). Etant données ces dispositions claires et précises, comment peut-on soutenir qu'une cession de biens faite à la demande d'un créancier avant le maintien du *capias* satisfait aux exigences de la loi, alors surtout que la contestation du bilan ne peut dans ce cas se plaindre d'un recel commis plus d'un an avant le dépôt du bilan, malgré que ce recel ait pu, comme dans l'espèce, donner lieu au *capias*? Je ne vois qu'une réponse possible, et c'est que les intimés ne peuvent se baser sur la cession de biens qu'ils invoquent pour échapper à la responsabilité qu'ils ont encourue. Si cette solution est dure pour eux, elle est certainement voulue par la loi que le législateur, à dessein, a rendue très rigoureuse.

Il est peut-être temps que les personnes qui se portent cautions dans des procédures de ce genre se rendent bien compte des obligations qu'elles assument.

Il y a d'autres objections des intimés, telles que le défaut de mention dans le cautionnement du montant cautionné et le défaut de signification aux cautions du jugement maintenant le *capias*, que je n'ai pas besoin de discuter, car elles sont manifestement mal fondées. Les jugements dont on appelle n'en ont pas tenu compte.

Je suis d'avis de maintenir l'appel avec dépens dans toutes les cours et de donner jugement à l'appelante pour la somme qu'elle réclame, $4,964.34 avec intérêt.

MALOUIN J.—Un nommé J. A. Champoux a été arrêté sur *capias* à la demande du mari de la demanderesse qu'elle représente par reprise d'instance.

Le 13 mars 1919, les défendeurs se sont portés cautions du dit Champoux, et par leur cautionnement se sont engagés à payer aux demandeurs le montant du jugement auquel s'élèveront les frais et les intérêts, si dans les trente jours de la prononciation du jugement maintenant le *capias* le défendeur ne fait pas la cession de ses biens pour le bénéfice de ses créanciers.

Le 9 juin 1920, jugement a été rendu par la Cour Supérieure maintenant le *capias* et condamnant J. A. Champoux à payer à la demanderesse la somme réclamée avec intérêts et frais.

Antérieurement à la prononciation du jugement, à savoir, le deuxième jour de mars 1920, J. A. Champoux a fait cession de ses biens à la demande de son frère et cette cession a été portée à la connaissance de la demanderesse.

La demanderesse, par la présente action, réclame des cautions de J. A. Champoux le capital, les intérêts et les frais auxquels ce dernier a été condamné, alléguant que le dit Champoux n'a pas fait cession de ses biens pour le bénéfice de ses créanciers dans les trente jours de la prononciation du jugement.

La question à décider est celle de savoir si la cession qui a été faite par J. A. Champoux le deuxième jour de mars était suffisante pour libérer les cautions ou s'il devait faire une cession supplémentaire des biens qu'il aurait pu acquérir à compter de la première cession, c'est-à-dire du deuxième jour de mars 1920.

La Cour Supérieure et la Cour du Banc du Roi ont jugé que cette cession était suffisante pour libérer les cautions, le juge Tellier étant d'opinion contraire.

Il est certain que la cession faite le 2 mars 1920 doit bénéficier à la demanderesse comme aux autres créanciers; mais il s'est écoulé quatre mois entre la date de la cession et la prononciation du jugement, intervalle pendant lequel Champoux a pu acquérir d'autres biens.

L'article 873 du code de procédure civile édicte ce qui suit:

1924

RAYMOND v. DUVAL ET AL

Malouin J.

Si après le dépôt du bilan et avant que le curateur ait rendu un compte définitif, le débiteur acquiert d'autres biens, il peut être requis par une nouvelle demande d'en faire cession.

Cette demande peut être faite par le curateur, du consentement des inspecteurs, ou par un créancier habile à faire une demande de cession.

Notons que la cession du 2 mars ne comprend pas les biens acquis subséquemment et que si le débiteur en acquiert il faut lui faire une nouvelle demande de cession pour qu'il les cède.

L'article 873 du Code de Procédure Civile prévoit cette possibilité puisqu'il autorise le curateur à faire cette demande avec le consentement des inspecteurs.

La cession du 2 mars est valide mais incomplète à l'égard de la demanderesse en ce qu'elle ne comprend pas les biens que Champoux aurait pu acquérir entre la date de la cession et celle du jugement du 9 juin. Le débiteur devait donc en faire une nouvelle pour se conformer au cautionnement qu'il a donné; n'ayant pas fait une nouvelle cession, il ne s'est pas conformé à la condition du cautionnement et les cautions doivent payer.

Assurément le jugement qui a maintenu le *capias* a pour effet d'obliger le débiteur à faire une nouvelle cession, tout comme l'aurait obligé une nouvelle demande faite en vertu de l'article 873 du Code de Procédure Civile, ou bien de faire dans les trente jours du jugement une déclaration qu'il n'a acquis aucuns biens depuis le dépôt de son bilan.

Les défendeurs dans leurs plaidoyers allèguent que Champoux n'a pas acquis de biens après sa cession; mais ils ne l'ont pas prouvé. Il est vrai que la demanderesse dans sa réponse au plaidoyer allègue aussi ce fait; mais je suis d'opinion que c'était aux défendeurs à faire cette preuve parce qu'il leur incombait de démontrer qu'une seconde cession n'était pas nécessaire. Néanmoins cette preuve, à mon avis, n'aurait pas eu pour effet de faire échapper les défendeurs à une condamnation, car dès l'instant de l'expiration des trente jours accordés pour faire cession, les défendeurs sont devenus irrévocablement débiteurs de la créance de la demanderesse.

En conséquence, je suis d'opinion que le débiteur Champoux aurait dû faire une nouvelle cession de biens dans les trente jours de la prononciation du jugement du 9 juin

1920 ou une déclaration à l'effet qu'il n'avait acquis aucuns biens depuis sa première cession.

Pour ces raisonns et celles données par les juges Anglin et Mignault, dans lesquelles je concours, je maintiendrais l'appel et accorderais jugement à l'appelante pour la somme réclamée.

1924
RAYMOND
v.
DUVAL
ET AL
Malouin J.

Appeal allowed with costs.

Solicitors for the appelant: *Lamothe, Gadbois & Charbonneau.*

Solicitors for the respondent Champoux: *St-Jacques, Filion, Houle & Lamothe.*

Solicitors for the respondent Duval: *Monty, Durauleau, Ross & Angers.*

SAMUEL THOMAS STARR (DEFENDANT) ..... APPELLANT;

AND

HOWARD B. CHASE AND ANOTHER (PLAINTIFFS) ..... RESPONDENTS.

1924
*Mar. 21, 24, 25.
*June 18.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Trade Union—Provisions of constitution—Unlawful purposes—Restraint of trade—Protection of property—Resort to courts—Necessity to plead illegality.

The secretary-treasurer of an unregistered trade union was removed from office but declined to hand over to his successor a fund which he held for payment of certain expenses and salaries. In an action on behalf of the union for the amount:—

Held, per Duff and Malouin JJ., Idington J. *contra* and Mignault J. expressing no opinion, that though some of the purposes of the union may be illegal as being in restraint of trade the union is not thereby deprived of its right to hold a beneficial interest in the fund and to invoke the aid of the courts for its protection.

Per Mignault J. In the absence of a plea raising the defence that the union is an illegal association and the necessary proof to support it such defence should not be considered.

Per Duff J. Illegality was not pleaded and the claim cannot be rejected on that ground unless it has before it all the matter germane to the question so that it can see that some purposes are illegal in the sense that the law will not aid them and are so interwoven with the others that the legal and illegal parts cannot be separated. But the constitu-

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. (Chief Justice Davies was present at the hearing but died before judgment was given.)

1924

STARR v. CHASE

tion and rules of the union do not show that any of its purposes are in unreasonable restraint of trade or, if any are, the whole constitution is not thereby affected with illegality.

One section of the constitution provides for expulsion of any member who takes the place of a striker.

Held, per Duff J. that this cannot be pronounced oppression or unreasonable without hearing such explanations as might have been given if illegality had been pleaded.

Judgment of the Court of Appeal (33 Man. R. 233) affirmed, Idington J. dissenting.

APPEAL from a decision of the Court of Appeal for Manitoba (1) reversing the judgment at the trial (2) in favour of the appellant.

The Brotherhood of Locomotive Engineers is a voluntary association not registered under the Trades Union Act of Canada. The appellant Starr was secretary-treasurer of that part of the system which was formerly the Canadian Northern Railway and on being removed from office refused to hand over funds alleged to be in his hands to his successor and this action was brought on behalf of the Brotherhood for the amount.

The constitution and rules of the Brotherhood authorize the calling of strikes on the system, the expulsion of members who take the places of strikers and forbid individual members to make agreements directly with their employers. The defence raised on the trial was that the action did not lie as the Brotherhood was an illegal association, some of its purposes being in restraint of trade, and at the trial the action was dismissed on this ground. This defence of illegality was not pleaded and the trial judge ruled that an amendment adding such plea was not necessary. The Court of Appeal reversed the judgment pronounced at the trial.

The material portions of the constitution of the Brotherhood are set out in the reasons for his judgment given by Mr. Justice Duff and published herewith.

Bonnar K.C. and *McArthur* for the appellant. Where, as here, on the material before the court illegality is shown the action must fail. *North Western Salt Co.* v. *Electrolytic Alkali Co.* (3); *Lipton* v. *Powell* (4).

The Trade Unions Act of Canada does not apply to unregistered societies (sec. 5). Therefore sec. 32 of that Act

(1) 33 Man. R. 233.
(2) 33 Man. R. 26.
(3) [1914] A.C. 461.
(4) [1921] 2 K.B. 51.

does not help the respondent nor do sections 496-7 of the Criminal Code. See *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1).

The purposes of the Brotherhood were in unreasonable restraint of trade. See *Hilton* v. *Eckersley* (2); *Horniby* v. *Close* (3); *Rigby* v. *Connol* (4).

David Campbell K.C. and *Congdon K.C.* for the respondents. Illegality should have been pleaded and evidence given not only as to restraint of trade but that such restraint was unreasonable; Odgers on Pleading (7 ed.) page 220; *Connolly* v. *Consumers Cordage Co.* (5); *Northwestern Salt Co.* v. *Electrolytic Alkali Co.* (6).

Conspiracies in restraint of trade are not criminal so far as trade unions are concerned. Criminal Code secs. 497-8. *Reg.* v. *Truscott* (7); *Reg.* v. *Tankard* (8); *Ogilvie & Co.* v. *Davie* (9).

Any restraint of trade shown cannot be said to be so unreasonable as to be contrary to public policy. *Attorney General for Australia* v. *Adelaide SS. Co.* (10); *Amalgamated Society of Railway Servants* v. *Osborne* (11).

IDINGTON J.—For the reasons assigned by the learned trial judge for dismissing this action, and Mr. Justice Fullerton in the Court of Appeal, I am of the opinion that the judgment of the learned trial judge should not have been disturbed and that this appeal should be allowed with costs and said judgment be restored.

The magnitude of the association and the fact that its headquarters are in a foreign country, and the final disposition of any conflict of opinion relative to the conduct of its affairs being subject to the ultimate ruling of the officials there, and thus beyond the jurisdiction of our courts or any legislation in Canada to rectify the operation of such an association, render it necessary that we should be exceedingly cautious in recognizing it herein and furnishing thereby a precedent of which no one can tell the ultimate consequences.

(1) [1912] A.C. 421.
(2) 6 E. & B. 47, 66.
(3) L.R. 2 Q.B. 153 at p. 158.
(4) 14 Ch. D. 482.
(5) 89 L.T. 347.
(6) [1914] A.C. 461.
(7) 19 Cox C.C. 379.
(8) [1894] 1 Q.B. 548.
(9) 61 Can. S.C.R. 363.
(10) [1913] A.C. 781.
(11) [1910] A.C. 87.

1924
STARR
v.
CHASE
Duff J.

DUFF J.—The respondents sue on behalf of themselves and the members of the Brotherhood of Locomotive Engineers employed in that part of the Canadian National Railways which was formerly known as the Canadian Northern Railway. According to the system of organization of the Brotherhood, the engineers employed on the railway system known as the Canadian Northern Railway were represented by a General Committee of Adjustment elected by the twenty-one divisions comprising in their membership all the members of the Brotherhood employed on that system; and after the absorption of the Canadian Northern Railway in the Canadian National Railways no change was made. The General Committee of Adjustment is elected triennially, one member from each division, who is the chief engineer of his division; and there are a permanent chairman and a secretary-treasurer of the General Committee who receive salaries.

For the purpose of paying expenses and indemnifying the members of the General Committee of Adjustment in respect of loss of wages in consequence of attendance on the sessions of the Committee, as well as for the purpose of providing a salary for the General Chairman and the secretary-treasurer, a fund is created by assessing all the members.

These assessments are collected regularly by the secretary-treasurer for each division, and by him remitted to the sec'y.-treasurer of the General Committee of Adjustment whose duty it is to hold the fund thus created and to pay it out under instructions of the committee for the purposes for which it was brought into existence. It is also the duty of the secretary-treasurer, on his retirement from office, to hand over all moneys in his hands to his successor. The appellant was removed from office on the 25th May, 1921, but declined to hand over the funds in his possession to his successor, or to account for moneys received by him in his official capacity. The action was brought for an account and for recovery of moneys for which he was alleged to be accountable. The secretary-treasurer is custodian of these funds merely, and the question arises whether the members of the Brotherhood who had contributed this fund are destitute of any remedy by which

their interest in it can be protected against the depredations of a defaulting official.

The learned trial judge has based his judgment on the circumstances enumerated by him as follows:—

In the constitution of the Brotherhood of Locomotive Engineers the following provisions appear:

1. The Grand International Division, having its head office at Cleveland in the United States, is given exclusive jurisdiction over all subjects pertaining to the Brotherhood, and its decisions are the supreme law of the Brotherhood (sec. 3).

2. All brothers engaged in a legalized strike (i.e. a strike declared to be legal by the Head Official), and all brothers who lose their positions on account of the interest they take in brotherhood matters, upon satisfactory evidence of such facts being presented to the grand officers, shall receive $40 per month for a period of six months, unless they get employment sooner (sec. 39).

3. Any member of the Brotherhood of Locomotive Engineers who takes the place of any one engaged in a strike recognized as legal by the B. of L.E. shall be expelled when proven guilty and shall forever be ineligible for readmittance to this Brotherhood (sec. 51).

4. Members are prohibited from signing any contracts with a railway company, or making any verbal agreement without the consent of the General Committee of Adjustment of the system on which they are employed, under penalty of expulsion (p. 77, sec. 33).

5. Under the so-called Chicago Joint Agreement entered into between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, the following provision appears: "When a strike is called by one organization, the members of the other organization shall not perform any service that was being performed before the strike was called, by the members of the organization who are on strike." (p. 97, Art. VII (E)).

6. The so-called Ritual (Exhibit 18) sec. 1, contains a lengthy procedure for declaring a strike, after a two-thirds vote of all the members who are employed on the system where trouble exists. The remaining one-third of the men have no power to continue work, if they so desire, but must join in the strike."

These circumstances, the learned trial judge has held, impart to the Brotherhood the character of an illegal association, with the consequence that all contracts expressed by the rules and all trusts under them are void.

The unit of the organization is the division, each of which has its local Committee of Adjustment elected triennially, with its chief engineer, who is chairman and delegate of the division on the General Committee of Adjustment for the system. The duty of the local Committee of Adjustment as defined by section 13 is, to meet when and where the chairman may designate and

adjust, if possible, with the railway officials of the road or system the grievances of the members of their respective divisions.

1924
STARR
v.
CHASE
Duff J.

The local committee is prohibited from dealing with "any brotherhood business except upon instructions from their divisions," and is required to make a written report of all "cases the division instructs them to handle." Differences they are unable to adjust satisfactorily with the officials are to be

> sent by and under the seal of the division to the General Committee of Adjustment for further action.

By section 14, it is provided:

> Any Chairman of a General Committee of Adjustment, when called upon by one or more Divisions on his system, shall be empowered in conjunction with the Local Committee to adjust, if possible, all differences that may arise between members and their employers without convening the General Committee of Adjustment,

and by section 39:

> The General Committee of Adjustment shall have full power to settle all questions of seniority and rights to runs, or jurisdiction of territory that are presented to them legally, and their decision shall be final unless, on an appeal to the membership, their decision is repealed by a two-thirds vote of the membership on the system.

The activities of the Committees of Adjustment, so far as disclosed by the rules, concern rates of pay and conditions of work and the settlement of disputes between engineers and the management, and disputes among the engineers themselves, who are members of the Brotherhood, with respect to seniority and runs.

The constitution and rules of the Brotherhood contain nothing in relation to strikes or the support of striking members (with the possible exception of section 51 which I shall consider later) that can with any shew of reason be said to be illegal as being in unreasonable restraint of trade. The resolutions in the so-called ritual to which the learned judge refers were not, as we shall presently see, properly before him. So far as the constitution of the society is properly in evidence it can only be affirmed that the possibility of strikes is contemplated, that conditions are laid down which must be observed before a strike is sanctioned, and that maintenance is provided in such cases from the funds of the society. There is nothing to indicate that any member can be required to strike, or requiring him not to return to work after he has joined a strike. There is nothing to authorize a strike in violation of law or wrongful against an individual, or authorizing the application of the society's funds in support of such a strike; and the rules obviously

contemplate the exhaustion of all reasonable efforts for peaceable settlement before a strike is to be resorted to.

The fund in question, moreover, is a fund for defraying the costs of maintaining the General Committee of Adjustment, including the expenses and indemnities of members and the salaries of the Chairman and the Secretary-Treasurer. I can see no authority for the diversion of this fund to any other purpose; and the functions of the General Committee of Adjustment are mainly, if not exclusively, the settlement of disputes of the character indicated above. The General Committee of Adjustment has, so far as appears, no authority in relation to expulsion of members or the investigation of charges leading to expulsion. These are matters for the local divisions, subject to appeal to the Grand Chief Engineer and the Grand International Division.

Can it be affirmed, then, because of the circumstances enumerated by the learned trial judge as the foundation of his judgment, that the General Committee of Adjustment and the engineers it represents are disentitled by law to hold a sufficient beneficial interest in the fund in question to enable them to call upon the Secretary-Treasurer to deliver the fund to his successor in office?

The primary objects of the Brotherhood plainly are to secure satisfactory arrangements for its members in relation to conditions of employment and rates of pay, and to provide means of settling disputes amongst its own members arising out of their service, and, as I have said, there is nothing to indicate that the constitution has in view any means other than lawful means for accomplishing these objects. Illegality was not pleaded, and on the view most favourable to the appellant the court cannot reject the claim on the ground of illegality unless, being sure that it has before it all the facts germane to the question, it can see that some of the purposes of the society are illegal in the sense that the law will not aid them, and that these are so interwoven with the other purposes as to make it impossible to separate the legal from the illegal parts of the constitution. *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1).

The document produced (the Constitution, Statutes and Rules of the Brotherhood) is one which plainly requires in-

(1) [1914] A.C. 462.

1924
STARR
CHASE
v.
Duff J.

terpretation and which in its actual operation is governed by interpretations by the constituted authorities of the society. As Cockburn C.J., said in *Farrar* v. *Close* (2). "It is the actual working of the society" that furnishes the decisive test in such matters, and therefore not the written word only, in this assemblage of rules, which has grown together during the sixty years of the society's life, but the interpretation, as well, that has been put upon it by actual practice, may have to be taken into account.

As to the first ground upon which the learned judge proceeds, the declaration is a general declaration, and must be construed by reference to the particular provisions of the constitution and regulations. The Grand International Division, representing, as it does, all the divisions comprised in the Brotherhood, has vested in it authority to amend the provisions of the constitution and statutes and rules, by a two-thirds majority vote of the delegates present at a session of the Grand International Division. It exercises also final authority in the matter of appeals in respect of expulsion and grievances of members. The character of the Brotherhood in respect of legality or illegality must, I think, be judged, not by reference to possible amendments, but by reference to the existing constitution and rules of the society.

Paragraph no. 6, as quoted from the learned judge rests upon an inadmissible document, which must be disregarded. The appellant, not having pleaded illegality, was not entitled to adduce evidence of facts solely for the purpose of establishing illegality, and otherwise irrelevant. *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1). Paragraph no. 2 has already been dealt with. But it must be observed that the learned judge's interpretation of the word "legal" is not based upon evidence.

In considering the fourth ground, it must be remembered that the value of such an association must depend very largely upon its capacity to secure satisfactory arrangements in relation to pay and conditions of work, and this in turn must be affected by the capacity of the association to secure strict observance of its undertakings entered into on behalf of its own members collectively. Therefore,

(1) [1869] L.R. 4 Q.B. 602. (2) [1914] A.C. 462.

special arrangements by individuals behind the backs of the authorized representatives of the society obviously could not be tolerated. Effective action by a voluntary association would hardly be possible if the door were left open to individuals, while enjoying the advantages secured for all members, to obtain secretly special terms for themselves. It is quite clear that " contract " and " agreement " here are not used in any strict or accurate sense; they refer to special arrangements as to pay or conditions, varying those applicable to engineers generally.

As regards the third and fifth grounds, it should be recalled that no applicant is admitted to membership who has taken the place of a striking engineer in a strike recognized as " legal " by the Brotherhood. That is a fundamental condition of membership, and the rule referred to gives effect to the principle of it by decreeing expulsion and disqualification when the principle is violated by a member. In the earlier years of their organization, when disputes with railway companies were probably not infrequent, and pursued *à outrance,* it may well have been considered that the safety of the organization demanded the strict observance of this rule; actual experience, one can readily conceive, may have dictated that policy. The relations between the companies and the Brotherhood are, it may be presumed, on a different footing now but new sources of danger may demand the maintenance of the old safeguards. I am not satisfied that I can pronounce this rule to be oppressive or unreasonable, without hearing such explanations as might have been offered had illegality been pleaded. At all events, I can see no reason for holding that it affects with illegality the whole constitution. As to the fifth ground, the stipulation is a term of an agreement with the Brotherhood of Locomotive Firemen and Enginemen, and considering the relations between firemen and engineers is, I think, neither oppressive nor unreasonable. And even if so, it appears to me that nullification of it would not necessarily affect the provisions of the constitution with which we are concerned.

On principle, one has some difficulty in concluding that the policy of the law prevents recognition and protection by the courts of the interests in the fund of the General Committee of Adjustment and of the members from whose

1924
STARR
v.
CHASE
Duff J.

assessments the fund has been created. The functions of the General Committee of Adjustment being what they are, and the fund being exclusively applicable for the maintenance of the Committee, I do not know why the fact that some of the rules of the Brotherhood constitute an unreasonable restraint of trade, if that be so, should disentitle the engineers concerned to the aid of the court in requiring their custodian to account for the funds placed in his custody. As I have said, primarily the Committee is concerned with obtaining redress of grievances and settling disputes; and a wide distinction between this Brotherhood and other associations whose rules have been discussed in England—such, for example, as the Amalgamated Society of Carpenters, with which *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1)—is that not only does the Brotherhood permit its members to work side by side with engineers who are not members of the society, but the rules of the Brotherhood require the General Committee of Adjustment to take up the grievances of any engineer who presents to them a complaint in writing.

On the ground, therefore, that this fund is not applicable to any of the illegal purposes of the Brotherhood, if there be such illegal purposes, the respondents would seem to be entitled to the protection of their property by legal process.

But I think their title to such protection may be put on a broader ground. If the Secretary-Treasurer were not a member of the Brotherhood, if he were a depositary whose duties arose from the acceptance of the custody of the fund simply, and not from any provision in the rules of the Brotherhood, the case would seem to be abundantly clear. Is it really less so because the Secretary-Treasurer is a member, a party to the agreements of the constitution, and because his duties are defined in the constitution? As regards this fund, his duty is merely that of a custodian. Is there any real difficulty in holding, either that those parts of the rules which make him the custodian and require him to deal with the fund in his hands according to the orders of the General Committee of Adjustment and to hand it over to his successor are capable of separation from the mass of the rules, so that they are not affected by the

(1) [1910] 1 K.B. 506.

nullity attaching to such agreements as may be considered illegal on the ground that they constitute an unreasonable restraint of trade, or that the policy of the law which forbids the enforcements of such agreements is not so wide as to forbid the recognition of the interest of the members of the society in the fund and the protection of that interest by legal process? May one not say that at this point one encounters a paramount policy which has to do with the protection of the owners of property against the defalcations of dishonest custodians? My conclusion is that since the Act of 1869, 32-33 Vict., ch. 61 (even before the Trades Union Act of 1871), such an action as this has been maintainable in England; and consequently that the right to maintain the action was recognized under the law of England, which was introduced into Manitoba in 1870.

It is quite true that prior to 1868, as a rule a member of a trade union who misappropriated trade union property could not be made criminally liable; but this was not primarily due to the illegality of the association, but to the common law rule that the misappropriation of common property by a co-owner was not theft. Before this disability was removed, a special procedure for prosecuting for misappropriation was conferred by statute on friendly societies. After the disability had been removed by the Act of 1868, the question was raised whether the illegality of a trade union, in the sense of its purposes being in unlawful restraint of trade, operated to prevent such a prosecution. In *Hornby* v. *Close* (1), it was held that the summary proceedings open to friendly societies were not available to a trade union, whose purposes were illegal in the sense mentioned, because, by the terms of the statute, such proceedings were open only to societies formed for purposes "not illegal"; and where the rules of the society, as being in restraint of trade, were illegal in the sense of being void, it was held that such purposes could not be described as "not illegal," within the meaning of this condition. The same principle was applied later in *Farrar* v. *Close* (1). Chapter 61 of 32 and 33 Vict. was passed in consequence of these decisions. By that statute it was declared:—

(1) [1867] L.R. 2 Q.B. 153. (2) L.R. 4 Q.B. 602.

1924
STARR
v.
CHASE
Duff J.

An association of persons having rules, agreements or practices among themselves as to the terms on which they or any of them will or will not consent to employ or to be employed shall not, by reason only that any such rules, agreements, or practices may operate in restraint of trade, or that such association is partly for objects other than the objects mentioned in the Friendly Society Acts, be deemed, for the purposes of the twenty-fourth section of the Friendly Societies Act, 1855, for the punishment of frauds and impositions, to be a society established for a purpose which is illegal, or not to be a Friendly Society within the meaning of the forty-fourth section of the said Act.

In *The Queen* v. *Stainer* (1), a society not registered as a Friendly Society within the meaning of this enactment initiated a prosecution of a defaulting official; and Cockburn C.J., with reference to this statute, observed:—

It was argued that the 32 and 33 Vic., ch. 81, applies only to registered societies; but even if this were so, it is equally an indication of the intention of the legislature that such societies as the present shall not have a defective title to property.

Piggott B. said in the report in (2), at p. 489:—

It is said that this society cannot hold property because its rules are illegal. Now they are only illegal as being in restraint of trade, *and not affecting their right to property*. By 32-33 Vic., ch. 61, the legislature *has recognized their right to property*.

In a later case, *Reg.* v. *Registrar of Friendly Societies* (3), Lord Blackburn, then Blackburn J., dealing with *Hornby* v. *Close* (4), said:—

It is a great mistake to affirm that there is any decision that trade unions or societies of that kind are, as it were, outlaws and out of the protection of the courts of law or equity. All that this Court held was that where statutes give certain benefits to friendly societies, societies whose rules were in restraint of trade, and illegal in that sense, could not claim the benefit of the statutes. However, section 3 of the Trades Union Act (1871) seems to put an end to all doubt as to the jurisdiction of the Court of Chancery by enacting that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful, so as to render void or voidable any agreement or trust.

In more recent years, similar questions have arisen with regard to associations which, being composed of more than twenty members, were carrying on business in violation of section 4 of the Companies Act of 1862. In *The Queen* v. *Tankard* (5) speaking of such an association, the Lord Chief Justice (Lord Coleridge) said, at page 550:—

There are a number of persons who join themselves together, not for any criminal purpose, but their joining together is not legalized. It is

(1) 39 L.J.M.C. 54.
(2) 11 Cox 483.
(3) L.R. 7 Q.B. 741.
(4) L.R. 2 Q.B. 153.
(5) [1894] 1 Q.B. 548.

true they have no legal existence as a company, association or co-partnership, but they are none the less beneficial owners of property. * * * It would be a very strong thing to hold that a society not expressly sanctioned by law, yet not criminal, is incapable of holding any property at all.

In *Marrs* v. *Thompson* (1), a question arose as to the right of the trustees of a society of workmen formed for the purposes of mutual insurance, composed of more than twenty members, against a defaulting treasurer. One of the defences raised was that the society was an illegal society by reason of section 4 of the Companies Act, and consequently that no trust of the funds in the treasurer's hands could be recognized by a court of law. The action was held to be maintainable by the Lord Chief Justice and Darling J. and *Sheppard* v. *Oxenford* (2), supports this view.

The view of Cockburn C.J. expressed in *Reg.* v. *Stainer* (3) apparently was that, the taint of criminality being absent, the members of a trade union, though its purposes were illegal in the sense mentioned, were capable of possessing beneficial ownership in the union funds; that the Act of 1869 afforded conclusive evidence that it was not contrary to the policy of the law that this beneficial ownership should be protected by legal process. The opinion of Blackburn J. goes further. The language above quoted implies that such an association is entitled to resort to civil, as well as criminal remedies for the protection of its property.

Blackburn J.'s opinion apparently was that the Act of 1871 did not create a new right, but merely removed doubts as to the authority of the Court of Chancery to afford such protection. If I may say so, with the greatest respect, the Act of 1869 seems to give support to the view that thereafter such protection could not be regarded as contrary to the policy of the law, even where the society must, by reason of the character of its rules, be pronounced illegal as having, among its purposes, some which are in unreasonable restraint of trade.

The question is of great importance in Canada, because of the peculiar condition of trade union law in this country. The Canadian Act, which is ch. 125 of the Revised Statutes

(1) 86 L.T. 759. (2) 1 K. & J. 491.
(3) 39 L.J.M.C. 54.

1924
STARR
v.
CHASE
Duff J.

of Canada, 1906, has not been adopted by the provinces, and as to many of its provisions there is, to say the least, doubt as to the authority of the Dominion to enact them. Section 32, for example, in providing that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render void or voidable any agreement or trust, is, *prima facie,* dealing with the subject of civil rights and property. No doubt the declaration that trade unions, whose purposes are in unlawful restraint of trade, are not, on that ground, to be regarded as criminal conspiracies, coupled with the declarations on the subject contained in the Criminal Code which have been cited to us, establish beyond question, if there ever was a doubt upon the subject, that such a society as the Brotherhood of Locomotive Engineers is not a criminal society. But these declarations do not carry us beyond the point reached by the declaration in the first section of the Act of 1869 above mentioned. If the appellant's contention is sound, it is highly probable that every trade union in Canada is, as regards the security of its funds, largely at the mercy of the officials who have the custody of them.

This would indeed be an extraordinary thing. Provincial and Dominion statutes for the past fifteen or twenty years have been directed to the encouragement of what is called " collective bargaining." Associations of employers, as well as associations of employees, must, if " collective bargaining " is to be effectual and bargains are to be carried out, have rules giving authority to discipline recalcitrant members; and must have funds; and most trade unions have rules vesting in some body authority to give a final decision upon the question of strike or no strike, a fact which the Industrial Disputes Act, 6-7 Edw. VII, c. 26, sec. 15, explicitly recognizes. It would be singular indeed if the rights of the members of such associations in the funds provided for defraying expenses and salaries of officers, were left with no legal protection except that which arises from the liability to criminal prosecution. My conclusion, for the reasons given, is that the action is maintainable.

The appeal should be dismissed with costs.

MIGNAULT J.—There is no question, in my opinion that the appellant is accountable for moneys received by him as secretary-treasurer of the General Committee of Adjustment of the Brotherhood of Locomotive Engineers.

The ground on which he chiefly relies to escape from this liability is that this Brotherhood is an illegal association or at least an association the objects of which are an undue restraint of trade, and that it, or those acting for it, should be denied the assistance of the court to enforce this liability.

In my opinion this question should have been raised by a plea to the action, and if this had been done all circumstances and facts connected with this association and its alleged illegality would have been investigated.

It is true that a motion was made to amend the plea in order to set up this ground of defence against the plaintiffs' action. The learned trial judge however did not allow the amendment, but thought that with the material put into the record it was possible to determine the character of this association.

With great respect, I do not feel that I should pass on so important a question in the absence of a plea raising it and of a full investigation of the objects and activities of the association. Nor would I at this stage send the case back to the trial court so that this amendment may be made and the matter inquired into. The appellant holds trust funds which he refuses to pay over to the body which employed him and the latter, to obtain the return of these funds, relies on a contract of employment which *per se* does not appear to be illegal. Without therefore expressing any opinion as to the character of this association, I would dismiss the appeal with costs.

MALOUIN J.—For the reasons stated by the Chief Justice of Manitoba, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. J. G. McArthur.*
Solicitors for the respondents: *Campbell & Campbell.*

1924
*June 17.

IN RE STRATHCONA FIRE INSURANCE COMPANY ..... } IN LIQUIDATION;
J. E. LEMIRE AND OTHER (PETITIONERS) ... APPELLANTS;

AND

THE HONOURABLE J. NICOL AND OTHER (RESPONDENTS) ..... } RESPONDENTS.

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

Appeal—Judgment sent to appeal court for transmission to trial court —Petition to suspend execution—Jurisdiction.

The judgment of this court ordering the record to be transmitted to the Superior Court having received full effect by its being sent to the Court of King's Bench, a judge has no more jurisdiction to grant a petition for stay of execution of such judgment pending petition for leave to appeal to the Privy Council.

*PRESENT:—Mr. Justice Mignault in Chambers.

MOTION for stay of execution of judgment (1) pending petition for leave to appeal to the Privy Council.

The facts are stated in the judgment of Mr. Justice Mignault.

A. Perrault K.C. for the motion.

Paul Lacoste K.C. contra.

MIGNAULT J.—Dans cette cause, les intimés m'ont présenté une requête pour suspendre l'exécution du jugement de la cour suprême pour leur permettre de s'addresser au conseil privé de Sa Majesté aux fins de demander la permission d'appeler de ce jugement. Il appert que le jugement de cette cour a été dûment certifié et envoyé à la cour du Banc du Roi pour transmission à la cour supérieure. Il s'ensuit que le jugement de la cour suprême qui ordonne la remise du dossier à la cour supérieure, pour qu'on y procède sur la requête des appelants, a reçu tout son effet.

Dans ces circonstances, je me trouve sans juridiction pour ordonner la suspension de l'exécution de ce jugement. La cour supérieure, d'après le jugement de la cour suprême, est chargée de l'instruction de la cause sur la requête des liquidateurs; et c'est cette cour seule qui peut suspendre

(1) [1924] S.C.R. 402.

les procédures afin de permettre à une des parties d'adresser une demande au conseil privé. Il n'est pas nécessaire que je me prononce sur le mérite de cette requête pour suspension des procédures, car je me trouve sans juridiction pour l'accorder.

Pour ces raisons, la requête est renvoyée sans frais.

Motion dismissed.

DONOHUE BROTHERS REGISTERED (PLAINTIFF) ..... } APPELLANT;

AND

THE CORPORATION OF THE PARISH OF ST ETIENNE DE LA MALBAIE (DEFENDANT) ..... } RESPONDENT

AND

THE SCHOOL COMMISSIONERS FOR THE PARISH OF ST. ETIENNE DE LA MALBAIE.... } MIS-EN-CAUSE.

1924
*May 22, 23.
*June 18.

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

Municipal corporation—Valuation roll—Pulpmill—Machinery—Non-assessable—Action in nullity before Superior Court—Art. 50 C.C.P.—Arts. 16 (27), 430, 651, 656, 662, 664 M.C.

The appellant is owner of a pulpmill located in the municipality respondent. The valuation roll included in the value of the property assessed the value of a large quantity of machinery. The appellant took an action before the Superior Court under Art. 50 C.C.P. to have the roll declared null and void.

Held that the machinery was non-assessable as immovable property under articles 16 (27), 651 and 656 M.C. Idington and Malouin JJ. expressing no opinion.

Held also, Idington and Malouin JJ. dissenting, that the appellant had the right to take proceedings before the Superior Court under article 50 C.C.P. in order to have the valuation roll declared null. The appellant having been assessed for property non-assessable, the valuation roll was void *ab initio* and this case falls within the principle of the decision of the Privy Council in *Toronto Railway Company* v. *City of Toronto* ([1904] A.C. 809).

Per Anglin and Mignault JJ. The decision in *Shannon Realties Limited* v. *Ville St. Michel* ([1924] A.C. 185) applies only when, the subject matter of the assessment being within the jurisdiction of the assessors, the grounds of complaint are illegality, over-valuation or other causes of injustice in the making of the valuation roll (Arts 430, 662, 664 M.C.)

---

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

1924

DONOHUE v. CORPORATION OF PARISH OF ST. ETIENNE DE LA MALBAIE

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Stein J. and dismissing the appellant's action.

By this last mentioned judgment the municipal valuation roll was declared null and void, because it had not been made up in accordance with the real value of the properties assessed, and because there had been included in the value of the property assessed as taxable, the value of a large quantity of machinery which should have been excluded. The appellants are the owners of a pulpmill located on the Murray River in the parish of St. Etienne de la Malbaie. When this mill was established in 1910, the owners were exempted from certain municipal taxes for a period of years which had not yet expired at the time of the action, and also obtained a commutation of school taxes for a period of ten years, which expired in 1920. The appellants are the successors of the original owners of this pulpmill, and in the fall of 1920 they received accounts for school taxes assessed on a valuation of $575,000 for their pulpmill and $24,000 for other real estate belonging to them. As they never had had any taxes to pay up to that time, they had never given the proceedings of the municipal council or of the school board any attention, but upon receipt of these bills they inquired into the situation and found that a valuation roll had been drawn up during the summer of 1920, and that though the farmers' lands were valued in this roll at from one-third to one-half of their real value, their pulpmill was valued at $5,000 for the land and at $570,000 for the building and machinery. Now they knew that when this mill was built, it had cost only $540,250, as follows: For the buildings $94,600; for the hydraulic development, excavations, dams and so forth, $169,000; and for machinery, $276,650. They were advised that this machinery though attached to the building was not immovable by nature but only by destination, and that the value thereof should not have been included in that of their taxable property. They were also advised that a municipal roll had been drawn up in accordance with the real value of the properties, and that a roll in which they were practically the only ratepayers assessed at their real value, whilst all the others were assessed at less than one-half of their real value, could not be sustained.

They immediately brought an action in the Superior Court to have this valuation roll set aside, and they made the School Commissioners parties to this action, as under the Quebec system municipal valuation rolls are used as the basis for the apportioning of school taxes.

St. Laurent K.C., for the appellant. The value of the machinery installed in the pulpmill should not have been included in the valuation assessed against the appellant in the roll, as such machinery was not "immovable property" within the meaning of Arts. 16 (27), 651 and 656 M.C. *Breakey* vs *Township of Metgermette North* (1).

The decision in *Shannon Realties, Ltd.* v. *Ville St. Michel* (2) does not apply in this case, and the appellant had the right to invoke Art. 50 C.C.P. and ask the Superior Court to annul the valuation roll. *Côté* vs *Corporation of County of Drummond.*

Rochette for the respondent. The appellant did not *allege* nor *prove* in this action an interest sufficient in law; as it describes itself as owner, but not as tax payer or elector. *The machineries,* factories or machine shops are *taxable* under the Municipal Code; art. 719 old M.C. Commissioners Report, p. xxv, under art. 580; art. 656, M.C.

The remedy exercised by the appellant was barred by prescription; art. 430, 433, 662, 664 M.C.

The appellant has no action under article 50 C.C.P.

IDINGTON J. (dissenting).—This is an appeal from a judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court.

The action was brought by the appellants to have the valuation roll of the respondent, made in the year 1920, declared null.

That roll came into force on the 5th of September, 1920, by its confirmation by the council of respondent on that date.

The appellant had failed to appeal to the council although due notice had been given of its having been drawn up by duly qualified assessors and duly deposited by them as required by law.

(1) [1920] 61 Can. S.C.R. 237. (2) [1924] A.C. 185.
(3) [1924] S.C.R. 186.

1924

DONOHUE v. CORPORATION OF PARISH OF ST. ETIENNE DE LA MALBAIE

Idington J.

Two months after said three months had elapsed they brought this action, and they pretend to found it upon Art. 50 of the Code of Civil Procedure.

There is no fraud proven, or even alleged, except by using the word "illegal".

All that is proven, and that could have been rectified if appellants had taken advantage of the duly provided means therefor, is that the assessors had not assessed on the correct basis of the market value but as many others do in rural municipalities, drew a line at a third of that.

If the assessors are to be believed they tried their best to make this apply to everybody, including the appellants.

They, if the appellants are to be believed, made the very serious mistake of being led to believe the property now in question was worth a million and a half.

That could all have been corrected if appellants had done their duty.

I think this case falls within our ruling in the case of *Town of St. Michel* v. *Shannon Realties, Limited* (1), and upheld by the Judicial Committee of the Privy Council (2).

I have long held that when municipalities are created and given the power to assess and produce an assessment roll as the basis of their power to impose a tax rate, and that is accompanied by a specific means of rectification of the roll on the application of those having a right to complain, that unless there has been actual fraud or something done clearly *ultra vires*, there is no remedy such as invoked herein conceivably intended by any legislature to have been applicable to such a system.

The confusion sure to ensue from the setting aside, by any court, of the assessment roll, once it has been finally adopted, and acted upon, seems so repugnant to what we should expect the legislature to have intended, that clear and explicit language is necessary to enable us to attribute to it any such absurdity.

The Court of King's Bench has adopted the clear meaning of the judgment expressed by the court above, in the above cited case, and has, in the reasons assigned by Mr. Justice Dorion and Mr. Justice Rivard, shewn why it has

(1) [1922] 64 Can. S.C.R. 420. (2) [1924] A.C. 188.

applied as well to rural municipalities as to towns and cities.

I cannot see how they can be distinguished if we have due regard to the legal principle involved in each.

The little peculiarities in the modes of expression used in the respective enactments governing towns and cities and those dealing with rural municipalities are such that, with due respect, I cannot find worthy of serious attention after reading the reasons assigned in the court appealed from.

I would dismiss this appeal with costs.

DUFF J.—I concur with my brother Mignault in thinking that the machinery in question is not assessable as immovable property.

Since the property is not assessable, I can see no reason why the principle of *Toronto Railway Company* v. *City of Toronto* (1) is not applicable.

The appeal should be allowed; there should be a declaration in accordance with the view above expressed.

ANGLIN J.—Three questions arise in this appeal:—

1. Have the appellants sufficient interest to maintain the action?

2. Are the various pieces of machinery in the appellants' mills, valued at $276,650, assessable as immovable property under articles 651 and 656 of the new Municipal Code of Quebec?

3. If not, are the appellants, who neither appealed from such assessment under article 662 M.C. nor sought to have the valuation roll annulled under article 430 M.C., disentitled to seek redress by action under article 50 C.C.P.?

With the learned trial judge and my brother Mignault, for the reasons indicated by the latter, I am of the opinion that the first and second questions should be determined in the appellants' favour.

It is on the third point that the Court of King's Bench decided against them on the authority of the recent decision of the Judicial Committee in *Shannon Realties, Limited,* v. *Ville St. Michel* (2). With the utmost respect, I am of the opinion that that decision is not in point and that the failure of the appellants to proceed under either of the articles of the Municipal Code above referred to does not preclude their maintaining an action under Art. 50 C.C.P.

(1) [1904] A.C. 809.

(2) [1924] A.C. 185.

1924

DONOHUE v. CORPORATION OF PARISH OF ST. ETIENNE DE LA MALBAIE

Anglin J.

I regard the present case as falling within the principle of the decision of the Privy Council in *Toronto Railway Co.* v. *City of Toronto* (1).

The ground of the appellants' action is that they have been assessed for property which is non-assessable. If that be so, the assessment in that particular was made without jurisdiction. Now the power conferred on the Municipal Council by Arts. 662 and 664 M.C. is to amend the roll so as to do justice; the power of the Circuit, County, District or Magistrates Court under Art. 430 M.C. is to annul a roll for illegality. An assessment made with jurisdiction over the subject matter and therefore not void *ab initio* is assumed in both provisions. The council is empowered to amend such an assessment; the function of the *curiae designatae* is to deal with questions of illegality in the making up of the roll and, upon a case therefor being established, to annul the roll as a whole.

The appellants' machinery was non-assessable. In assessing the appellants in respect of it the assessors were dealing with something beyond their jurisdiction. The assessment was therefore a nullity and neither appeal from it nor action to question the roll for illegality in respect of it was necessary. As to the latter, moreover, the inclusion in a roll of a parcel of non-assessable property would seem not to be such an illegality as would warrant its annulment, which under Art. 430 M.C. apparently must be of the entire roll. The inclusion of the non-assessable property is simply ineffectual. Such property, though included in the roll, cannot be made the subject of taxation.

But the person so assessed is not without a remedy. He is entitled to have the assessment of non-assessable property declared null and void, with or without, such consequential relief as was granted in the *Toronto Railway Case* (1).

In the *Shannon Case* (2) the subject-matter of the assessment was admittedly within the jurisdiction of the assessors; it was over-valuation that was complained of; that over-valuation was charged to be the result of a systematic disregard of the prescribed principles of assessment. That was held by their Lordships to be matter cognizable under

(1) [1904] A.C. 809. (2) [1924] A.C. 185.

the provisions made for appeals by the Cities and Towns Act, Articles 5706 and 5715 R.S.Q. Accordingly, in their opinion, Art. 50 C.C.P. could not be invoked to obtain, on that ground, the nullification of valuation rolls which covered several years and against which appeals that would have afforded the ratepayer all the relief it was entitled to and were the special remedy designated by the statute had not been taken. Nothing in the *Shannon Case* (1) interferes in the least with the principle of the decision in the Toronto Railway case.

I am of the opinion that Art. 662 M.C.—as was the case with s. 68 of the Ontario Assessment Act dealt with in the *Toronto Railway Case* (2)—was not intended to provide a remedy for a person against whom an assessment had been made entirely without jurisdiction and in respect of non-assessable property. Article 430 M.C., on the other hand, deals not with particular assessments but with matters of illegality affecting the valuation roll as a whole and requiring its annulment. That is not this case. Except for the inclusion of an assessment on the appellant's machinery the validity of the roll appears to be unassailable. They are not, I think, entitled to have it set aside as a whole. Their right is to have the *ultra vires* assessment declared null.

Under these circumstances Art. 50 C.C.P. appears to afford a convenient and appropriate remedy which, I think, should be accorded. I would therefore, with great respect, allow this appeal to the extent of directing judgment to be entered declaring the assessment of the appellants' machinery null and void both as to the defendant municipality and as to the *mis en cause*. The appellants are entitled to their costs throughout.

MIGNAULT J.—Les appelants, entre autres griefs d'appel, prétendent que l'intimée a excédé sa juridiction en évaluant comme partie de leur moulin à pulpe les machines qui s'y trouvent. Ces machines sont d'une valeur très considérable, $276,650, disent les appelants, alors que le moulin lui-même vaudrait $94,600 et les travaux hydrauliques $169,000. Le rôle d'évaluation donne au tout, les machines comprises, une valeur de $575,000. Les appelants avaient un

(1) [1924] A.C. 185.

(2) [1904] A.C. 809.

1924

DONOHUE v. CORPORATION OF PARISH OF ST. ETIENNE DE LA MALBAIE

Mignault J.

grand intérêt à attaquer ce rôle, car bien qu'ils eussent une exemption de taxes municipales, ils payaient les cotisations scolaires qui sont basées sur le rôle d'évaluation. Et pour que le jugement à intervenir fût opposable aux commissaires d'écoles de la paroisse, ces derniers ont été assignés comme mis-en-cause. L'action a été contestée par la défenderesse, la corporation de la paroisse de Saint-Etienne de La Malbaie.

Pour déterminer si les machines dans le moulin à pulpe pouvaient être évaluées avec ce moulin, il faut interpréter le sous-paragraphe 27 de l'article 16 et l'article 656 du code municipal. Ces dispositions se lisent comme suit:—

Art. 16 (27). Les mots "biens-fonds" ou "terrains" ou "immeubles" désignent toute terre ou toute partie de terre possédée ou occupée, dans une municipalité, par une seule personne ou plusieurs personnes conjointes et comprennent les bâtiments et les améliorations qui s'y trouvent.

Art. 656. La valeur réelle des biens-fonds imposables comprend la valeur du terrain, et la valeur des constructions, ainsi que celle de toutes les améliorations qui y ont été faites, sauf ce qui est prescrit par l'article 657.

Le renvoi que ce dernier article fait à l'article 657 est sans intérêt dans cette cause.

L'intimée prétend qu'elle pouvait tenir compte des machines en évaluant ce moulin à pulpe. Elle soutient que ces machines sont comprises dans le sens du mot "bâtiments" ou "constructions", et qu'à tout événement ce sont des "améliorations" et imposables comme telles en vertu des articles que j'ai cités.

On paraît admettre que les machines en question sont des immeubles par destination. Cependant, bien qu'il s'agisse d'une taxe immobilière, tout ce qui est immeuble n'est pas par là même et nécessairement imposable en vertu du code municipal, ainsi que nous l'avons jugé dans *Breakey* v. *Metgermette Nord* (1).

Et l'immeuble par destination, étant, par définition, un objet mobilier par sa nature qui est considéré comme immobilier à titre d'accessoire d'un immeuble auquel il se rattache, diffère de l'immeuble par nature en ce que son immobilisation est purement juridique et fictive, et non pas matérielle et réelle (Planiol, tome 1er, n° 2210). On ne peut jamais dire qu'il fait partie du bâtiment ou construction où

(1) 61 Can. S.C.R. 237.

il se trouve, car alors il serait un immeuble par sa nature.

Pour cette raison, je ne comprendrais pas les machines immobilisées par destination dans la signification du mot "bâtiment" ou "construction".

Mais peut-on dire que ces machines soient des "améliorations" au sens des dispositions que j'ai citées?

On trouve souvent le mot "améliorations" dans le langage du droit civil. Les auteurs du Nouveau Denisart (vo. *Améliorations,* parag. 1er) les définissent comme suit:—

> On nomme améliorations les dépenses qui augmentent, pour ainsi dire à perpétuité, la valeur et le prix du fonds sur lequel elles sont faites. On dit qu'on a amélioré un héritage, quand on y a bâti une maison, planté des bois, qu'on y a fait faire une fuye, un moulin, un étang, etc., parce que toutes ces augmentations rendent réellement l'héritage plus précieux.

Ils distinguent les *améliorations* des *impenses,* en disant que celles-ci sont des dépenses soit nécessaires et utiles, soit voluptuaires, tandis que les améliorations ne s'entendent que des dépenses qui donnent plus de valeur et de prix à l'héritage.

On rencontre aussi le mot "améliorations" aux articles 417, 418 et 419 du code civil, qui diffèrent de l'article 555 du code français, lequel évite de se servir de l'expression "améliorations". Pour cette raison, j'ai préféré remonter à l'ancien droit pour une définition de ce terme. Les articles 417, 418 et 419 distinguent selon que les améliorations sont nécessaires ou non, ce qui semble indiquer, quant aux améliorations nécessaires, qu'il s'agit surtout de réparations. Je crois que les améliorations dont il est question en ces articles ne sont autre chose que des constructions ou des réparations à des constructions, car on y parle de la possibilité de les enlever sans détériorer le sol. On peut aussi considérer qu'un terrain a été amélioré par les travaux qu'on y a faits, mais cette extension du mot "amélioration" ne nous aiderait pas ici. Il est clair qu'on ne regarderait pas comme une amélioration au sens de ces dispositions, l'ameublement d'une maison, et il me paraît très douteux qu'on y comprenne des machines installées dans une usine, surtout si ces machines peuvent s'en enlever.

Cependant il s'agit ici du code municipal et non du code civil, et à cet égard il sera utile de rapporter le texte de l'article 719 de l'ancien code que l'article 656 a remplacé. Cet article disait:—

1924

DONOHUE v. CORPORATION OF PARISH OF ST. ETIENNE DE LA MALBAIE

Mignault J.

"9. La valeur réelle des biens-fonds imposables comprend la valeur des constructions, usines ou machineries (dans le texte anglais "factories or machine shops") qui y sont érigées, et celle de toutes les améliorations qui y ont été faites.

L'article 719 distinguait les "usines et machineries" des "améliorations". Et de fait, il paraît au rapport des commissaires qui ont rédigé le nouveau code municipal (1) que ces commissaires avaient proposé un article, portant le numéro 580 du projet du nouveau code, qui se lisait comme suit:—

La valeur réelle des biens-fonds imposables comprend, outre la valeur du terrain, la valeur des constructions, usines ou machineries qui y sont érigées par le propriétaire du fonds et des machineries, et celle de toutes les améliorations qui y ont été faites * * *

Les appelants nous disent que l'association des manufacturiers canadiens fit des représentations à la législature à l'encontre de cette rédaction de l'article, alléguant que les propriétaires de moulins et usines dans les municipalités rurales tiraient peu de bénéfice des travaux faits par les autorités municipales, et qu'alors on ne devait pas imposer les machines installées dans ces moulins et usines, mais seulement les édifices qui les contiennent. On ajoute que la législature a fait droit à ces représentations et a substitué à l'article 580 du projet l'article 656 du nouveau code, qui remplace l'article 719 de l'ancien, montrant que dans sa pensée on ne doit pas tenir compte de la valeur des machines en évaluant, pour les fins du rôle d'évaluation, les moulins et usines où ces machines sont installées.

Quoi qu'il en soit de la valeur juridique de cet argument, —et je ne veux pas en faire la base de mon jugement—il reste acquis que la législature, en rédigeant le nouvel article 656, a omis les mots "usines ou machineries qui y sont érigées", dans le texte anglais "factories or machine shops erected thereon", qui se trouvaient dans l'ancien article 719.

A l'ancien article, outre les usines ou machineries, on mentionnait les améliorations, ce qui indiquait que ces améliorations ne comprenaient pas les usines et machineries, mais s'entendaient d'améliorations proprement dites, c'est-à-dire, je crois, rappelant la définition du Nouveau Dénisart, des dépenses qui avaient augmenté la valeur et le prix

(1) Voy. ce rapport (document officiel, publié en 1912 par l'imprimeur du roi, et qui a ensuite été soumis à la législature), à la p. 151.

du fonds. Le nouvel article retranche les mots "usines ou machineries" et conserve le mot "améliorations", mais je ne crois pas qu'on puisse donner à cette dernière expression dans le nouvel article une signification plus étendue qu'elle n'avait dans l'ancien article, surtout en tenant compte du fait que les mots "usines ou machineries" ont été supprimés dans la nouvelle rédaction.

Le mot "améliorations" dans l'article 656 ne comprend donc pas les machines installées dans un moulin, même en reconnaissant à ces machines la qualité d'immeubles par destination, et il s'ensuit que l'intimée ne pouvait les inclure dans son évaluation du moulin à pulpe pour les fins du rôle d'évaluation.

Telle a été la conclusion du premier juge. En adoptant moi-même cette conclusion, je n'ai pas à me mettre en contradiction avec la cour d'appel, qui ne s'est pas prononcée sur cette question, car elle était d'avis que la règle adoptée par le conseil privé dans *Shannon Realties, Ltd.*, v. *Ville de Saint-Michel* (1) s'appliquait dans l'espèce. Cependant, comme en comprenant les machines dans l'évaluation du moulin à pulpe l'intimée a excédé sa juridiction, la décision dans *Shannon Realties* (1) ne régit pas le cas qui nous occupe. Le défaut ou l'excès de juridiction entraîne nullité absolue et celui qui en souffre a toujours le recours de l'article 50 du code de procédure civile.

Je n'ai pas besoin de me prononcer sur les autres griefs d'appel des appelants.

Je maintiendrais donc l'appel et j'annulerais le rôle d'évaluation de l'intimée, mais seulement en tant qu'il évalue le moulin à pulpe des appelants à la somme de $575,000, laissant subsister le rôle quant à ses autres parties, le tout avec dépens contre l'intimée dans toutes les cours.

MALOUIN J. (dissenting).—Je suis d'opinion que la décision du Conseil privé dans la cause de *Shannon Realties, Ltd.* v. *La Ville de Saint-Michel* (1), s'applique à la présente cause et que les demandeurs n'ont pas le recours de l'action directe de l'article 50 du Code de Procédure Civile pour faire annuler le rôle d'évaluation préparé par la défen-

(1) [1924] A.C. 185.

1924
DONOHUE
v.
CORPORATION OF PARISH OF ST. ETIENNE DE LA MALBAIE
Malouin J.

deresse, vu qu'ils ont laissé passer les délais accordés par le Code Municipal pour l'attaquer devant la cour de circuit.

A mon avis, cette décision s'applique aussi bien aux corporations régies par le Code Municipal qu'à celles qui le sont par les dispositions de la Loi des Cités et Villes. La réserve de l'article 433, parag. 2, du Code Municipal, n'affecte en rien le principe posé dans la cause de *Shannon Realties, Ltd.* v. *La Ville de Saint-Michel* (1). Cet article dit que ce recours spécial n'exclut pas l'action directe "dans le cas où elle peut avoir lieu". Or, le conseil privé a précisément décidé que ce recours n'existe pas en vertu de l'article 50 du Code de Procédure Civile.

Pour ces raisons et celles données par les juges Dorion et Rivard dans la Cour du Banc du Roi, juridiction d'appel, je renverrais le présent appel avec dépens.

Appeal allowed with costs.

Solicitors for the appellant: *St-Laurent, Gagné, Devlin & Taschereau.*

Solicitors for the respondent: *Lapointe & Rochette.*

1924
*Oct. 20, 21
*Oct. 23.

LEO DAVIS .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENTT.

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

Appeal—Jurisdiction—Criminal matter—Dissenting opinion—Question of law—Section 1013, as enacted by 13-14 Geo. V, c. 41, section 1024 Cr. C.

The Supreme Court of Canada has no jurisdiction to hear an appeal against a conviction where only questions of fact are involved, since the announcement of any dissent in the court of appeal is in such a case prohibited (s. 1013 (5) Cr. C. as enacted by 13-14 Geo. V. c. 41). An appeal lies to this court under 1024 Cr. C. read with s. 1013 Cr. C. only where a dissenting opinion has been expressed by a member of the court of appeal, upon a question which that court deems a question of law and pursuant to its direction. Mignault J. *dubitante.*

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

(1) [1924] A.C. 185.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Court of King's Bench, criminal side, whereby the conviction of the appellant upon an indictment for murder was sustained.

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

F. J. Laverty K.C. and *O. Gagnon* for the appellant.

C. Lanctot K.C. and *R. L. Calder K.C.* for the respondent.

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

NEWCOMBE J.—The appellant was convicted of murder on his trial before the Court of King's Bench (Criminal side) at Montreal. He appealed to the court of appeal (which by the definition clause of the criminal code is, in the province of Quebec, the Court of King's Bench, appeal side), under s. 1013 of the criminal code as enacted by c. 41 of 1923, upon grounds which include the submission

> that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence.

Before the hearing the court of appeal, upon the appellant's application, ordered that the evidence of the appellant, and of one Morel, should be received for the purposes of the appeal, and the testimony of these two witnesses was accordingly taken under the direction of the court and incorporated in the record upon which the appeal was heard. The court, having heard the case thus submitted, affirmed the conviction, but the Chief Justice and Guerin J. pronounced dissenting judgments, holding in effect that in view of the new evidence the proof was unsatisfactory, and that it could not be affirmed that the jury would have convicted the prisoner if the new evidence had been before them at the trial.

Thereupon the court, by its formal judgment, upon the narrative that the appeal had been heard

> on grounds involving questions of fact alone,

ordered that the appeal should be dismissed, and that the conviction should be in all respects confirmed.

1924
DAVIS
v.
THE KING.
Newcombe J.

From this judgment of the Court of King's Bench, appeal side, the prisoner appealed to this court, relying upon s. 1024 of the criminal code. The objection was suggested by the court that neither this section nor any other provision of the criminal code authorizes an appeal to the Supreme Court of Canada in cases like the one under consideration where the appeal is concerned only with weight of evidence, and counsel were heard upon the point both for the prisoner and for the Crown.

When the new provisions regulating appeals from convictions upon indictment were introduced by c. 41 of 1923, the sections of the criminal code from 1012 to 1023, inclusive, were repealed and new provisions were substituted for these, leaving unrepealed, however, s. 1024 which provides for appeal to the Supreme Court of Canada, and the question which now arises requires the interpretation of that section, having regard to the changes introduced by the substituted clauses. The appeal under s. 1024 extends only to convictions which have been affirmed under s. 1013. The text of subsection 1 of section 1024, in so far as material, is as follows:

> 1024. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the court of appeal is unanimous in affirming the conviction.

Section 1013 as enacted by the criminal code (1906) provided that:

> 1013. An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases, or of a magistrate proceeding under section seven hundred and seventy-seven, on the trial of any person for an indictable offence, shall lie upon the application of such person if convicted, to the court of appeal in the cases hereinafter provided for, and in no others.
>
> 2. Whenever the judges of the court of appeal are unanimous in deciding an appeal brought before the said court their decision shall be final.
>
> 3. If any of the judges dissent from the opinion of the majority, an appeal shall lie from such decision to the Supreme Court of Canada as hereinafter provided.

Followed ss. 1014, 1015 and 1016 providing for the statement and reservation of questions of law to be reviewed upon the appeal.

The section substituted for s. 1013 in 1923 is substantially different; it reads as follows:

1013. (1) A person convicted on indictment may appeal to the court of appeal against his conviction,—

(*a*) on any ground of appeal which involves a question of law alone; and

(*b*) with leave of the court of appeal, or upon the certificate of the trial court that it is a fit case for appeal, on any ground of appeal which involves a question of fact alone or a question of mixed law and fact; and

(*c*) with leave of the court of appeal, on any other ground which appears to the court of appeal to be a sufficient ground of appeal.

(2) A person convicted on indictment, or the Attorney General, or the counsel for the Crown at the trial, may with leave of a judge of the court of appeal, appeal to that court against the sentence passed by the trial court, unless that sentence is one fixed by law.

(3) No proceeding in error shall be taken in any criminal case, and the powers and practice now existing in the court of criminal appeal for any province, in respect of motions for or the granting of new trials of persons convicted on indictment are hereby abolished.

(4) The determination of any question before the court of appeal shall be according to the opinion of the majority of the members of that court hearing the case.

(5) Unless the court of appeal directs to the contrary in cases where, in the opinion of that court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court, the judgment of the court shall be pronounced by the president of the court or such other member of the court hearing the case as the president of the court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court.

It will be observed that subsections 2 and 3 of the original section 1013 providing for appeal to the Supreme Court of Canada, in cases in which any of the judges of the court of appeal dissent, have been omitted, and that provision is made by subsection 5 of the substituted section that the judgment of the court shall be pronounced by the president or such judge as the president directs, and that no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court, unless the court of appeal direct to the contrary in cases where in the opinion of the court the question is a question of law on which it would be convenient that separate judgments should be pronounced by members of the court. Consequently, upon any appeal upon a question of fact there can be no dissent expressed nor separate judgment pronounced by any member of the court, and, if the appeal be upon a question of law, it is only when the court of appeal so directs that dissenting members of the court may pronounce their dissent. Considering the re-

1924
DAVIS
v.
THE KING.
Newcombe J.

quirements of this subsection it seems plain that the learned Chief Justice and Guerin J. should not have pronounced their dissenting judgments upon the question of fact, which is the only question involved in the case; and, if these dissenting judgments be excluded from the record, as in my view they must be, having regard to the peremptory provision of the statute, there is apparent in the case neither dissent nor lack of unanimity to form the basis of the jurisdiction conferred upon the Supreme Court of Canada by section 1024. The interpretation of the latter section has frequently been considered by this court and it is established by a long and practically uniform course of decision, which has become firmly embedded in the practice of the court, that the only questions open to consideration upon appeals under that provision are the points of difference between the dissenting judge or judges and the majority of the court of appeal. Among other cases in which this interpretation has been expressed or applied may be mentioned: *McIntosh* v. *The Queen* (1); *Gilbert* v. *The King* (2); *Mulvihill* v. *The King* (3); *Kelly* v. *The King* (4); *Rémillard* v. *The King* (5). Therefore, in the absence of expressed dissent, there is no ground of appeal to be argued and, consequently, no appeal.

Obviously this court cannot acquire jurisdiction by a learned judge of the court of appeal pronouncing a dissent which the statute forbids to be pronounced.

When section 1024 was enacted and until the criminal code amendments of 1923, there was no appeal to this court except upon questions of law. It is true that it was provided by section 1021 that:

> 1021. After the conviction of any person for any indictable offence the court before which the trial takes place may, either during the sitting or afterwards, give leave to the person convicted to apply to the court of appeal for a new trial on the ground that the verdict is against the weight of evidence.
>
> 2. The court of appeal may, upon hearing such motion, direct a new trial if it thinks fit.

But this section was self-contained and by its own force enabled any person convicted of an indictable offence by

(1) [1894] 23 S.C.R. 180.
(2) [1907] 38 S.C.R. 284.
(3) [1914] 49 S.C.R. 587.
(4) [1916] 54 S.C.R. 220
(5) [1921] 62 S.C.R. 21.

leave of the trial court to move the court of appeal for a new trial on the ground that the verdict was against the weight of evidence; no authority for such a motion was derived from section 1013; the motion was not an appeal taken under section 1013, and therefore a judgment refusing the application was not appealable to this court under section 1024.

One would not expect to find the jurisdiction of this court, which in relation to criminal appeals was wisely limited to questions of law, enlarged to admit of appeals upon questions of fact, involving moreover the consideration of evidence taken in the court of appeal, unless by an apt change of the language which conferred the jurisdiction to entertain appeals upon questions of law. The judicial interpretation of section 1024 had been reported and was established and well known when chapter 41 of 1923 was enacted, and if it had been the intention of Parliament to extend the right of appeal to questions of fact, it is to be supposed that that intention, effecting an addition to the jurisdiction of the court in such an important particular, would have been clearly expressed. On the contrary while section 1024, the only section remaining which confers jurisdiction, stands unchanged, subsections 2 and 3 of section 1013 do not survive, but in the place of them is found subsection 5 which forbids the expression of dissent except upon questions of law and when considered convenient by the court of appeal.

I entertain no doubt that the plain operation and effect of subsection 5 is, not only to maintain the restriction of the right of appeal conferred by section 1024 to questions of law, but also to regulate the cases in which upon questions of law lack of unanimity may be expressed so as to embrace only those cases in which the court of appeal considers it in the interest of justice that separate judgments should be pronounced by the members of the court.

When it is considered that the questions which may be heard upon the appeal are only those upon which there was a difference of opinion in the court below, and that there is no means by which this court may consistently with the statute be informed of the dissent or the grounds of the dissent upon which its limited jurisdiction depends,

1924
DAVIS
v.
THE KING.
Newcombe J.

except with relation to questions of law, it follows logically enough that there can be no appeal except upon questions of law. Indeed, section 1024 will articulate with section 1013 of 1923 only upon the assumption that the dissent upon which the right of appeal is conditioned is that for the publication of which provision is made and which is not prohibited by subsection 5 of section 1013. In effect, therefore, an appeal lies to the Supreme Court of Canada only by leave of the court of appeal, and that leave is given only with relation to questions of law, and in the statutory manner by the decision of the court, when it is not unanimous, to authorize the pronouncing of separate judgments.

The present appeal does not raise any question of law, and this is not a case in which the absence of unanimity on the part of the members of the court of appeal in affirming the conviction could, except by breach of the statutory injunction be disclosed by the judgment of the court of appeal; neither is it a case in which any judgment could be pronounced by a member of that court, other than the president or such other member of the court hearing the case as was directed by the president to pronounce the judgment of the court.

The appeal should, therefore, be quashed.

Mr. JUSTICE IDINGTON (concurring).—I agree entirely with the conclusion herein reached by my brother Newcombe and in the main with the reasoning by which he arrives at such conclusion.

MIGNAULT J. (*dubitante*).—While not entering a formal dissent from the judgment quashing this appeal for want of jurisdiction, I have been unable to free my mind from serious doubts as to its correctness, if I may say so with every possible deference.

I quite agree that subparagraphs 4 and 5 of section 1013 of the criminal code, as enacted by 13-14 Geo. V (1923), ch. 41, contemplate but one judgment on behalf of the court of appeal when the appeal from a conviction is, in the opinion of that court, on a question of fact. Even when the question is one of law, there must also be but one judgment, unless the court of appeal directs to the contrary. Does this prevent the minority judges—for subsec-

tion 4 provides that the majority shall determine any question before the court—from having their dissent entered upon the formal judgment, as was done here and is always done in Quebec, without any pronouncement by them of a separate judgment? Parliament has not so declared, unless perhaps it may be said to have done so inferentially, and without a plain expression of its will I would hesitate to conclude that so radical a change has been made.

Our jurisdiction to entertain an appeal from a judgment of the court of appeal in criminal matters is governed by sections 1024 and 1024*a* of the criminal code, which were not modified by the legislation of 1923, but Parliament no doubt considered that these sections would fit in, if I may use the expression, with the new provisions allowing appeals from conviction on indictments. Subject to the provisions of section 1024*a*, our jurisdiction is taken away when the court of appeal is unanimous in affirming the conviction. How can the unanimity of the court of appeal be ascertained unless it be by its judgment, or by a statement made in the reasons for judgment handed down by the member of the court who is instructed to pronounce its judgment? And when, as here, the judgment on its face states that two of the learned judges dissented therefrom, can it be said that the court of appeal was unanimous in affirming the conviction? It does not appear to be an insuperable objection that our jurisdiction is limited to the points of difference between the judges of the appellate court, for an unrestricted dissent is a dissent on the whole case.

On the true meaning of these provisions depends the question whether Parliament really intended to allow appeals to this court when the appeal involves only a question of fact. But the new section 1013, when construed with the section 1024, raises such an important question of construction that I have thought it my duty to state my doubt as to the decision denying to the appellant the right to appeal to this court. It is, of course, clear that I express no opinion on the merits of his appeal.

Appeal quashed.

1924

*May 9.
*Oct. 14.

SEIBEL *v.* DWYER ELEVATOR COMPANY

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Sale of land—Crop payment agreement—"Crop payments Act" (R.S.S.) 1920, c. 126, s. 3—Strict construction—Attornment clause—Premature seizure of grain by vendor.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) affirming the judgment of Taylor J. (2) and dismissing the plaintiff appellant's action.

The action is for payment of the value of certain grain sold by other parties to defendant respondent. The grain was received by the latter from these parties who acquired it from the purchasers of the land upon which it was grown. The appellant founded his claim upon the right conferred upon him as the vendor of the land to a one-half share of all the crop taken from the said land by his purchasers. He relies upon the provisions of "The Crop Payments Act," R.S.S. 1920, c. 126, s. 3. It was held by the courts below that the appellant could not in the circumstances of this case claim the benefit of that section which did not apply where, under the agreement, the share of the crop to be delivered to the vendor is to be, or may be, applied toward the payment of things other than the price of the land itself. It was also held that no valid seizure of the crop had been made by the appellant.

On the appeal by the plaintiff 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, Idington J. dissenting.

Appeal dismissed with costs.

F. W. Turnbull for the appellant.
H. Fisher K.C. and *S. Clark* for the respondent.

PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc.*

(1) [1923] 17 Sask. L.R. 369; [1923] 2 W.W.R. 1051.
(2) [1923] 1 W.W.R. 497.

GLASGOW UNDERWRITERS AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

W. R. SMITH (PLAINTIFF) ..... RESPONDENT.

1924
*May 13, 14.
*Oct. 20.

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

Insurance—Arbitration as to amount of loss—Decision of majority binding —Statutory condition No. 22—Alberta Insurance Act, R.S.A. (1922) c. 171—Interpretation Act, R.S.A. (1922) c. 1, ss. 9, 29—Appeal—Jurisdiction—Final judgment—Supreme Court Act, s. 2, as amended by 10-11 Geo. V, c. 32.

On a submission to an arbitration of three persons under statutory condition No. 22 in schedule C to The Alberta Insurance Act, R.S.A. (1922) c. 171, to determine the amount of loss, the decision of a majority of the arbitrators is binding. Mignault J. dissenting.

In this case the appellate court while deciding that the majority of the arbitrators could render a valid award allowed an amendment of the statement of defence to the effect that the arbitrators had considered the replacement value and not the real value of the insured buildings and sent back the case for trial upon this issue.

Held, per Mignault J., that such a judgment was a final judgment within the meaning of s. 2 of the Supreme Court Act as amended by 10-11 Geo. V, c. 32.

Judgment of the Appellate Division (20 Alta. L.R. 114) affirmed, Mignault J. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Ives J. who affirmed an order of Clarry M.C. refusing the respondent's motion for judgment on the ground that the amount of loss, which it was necessary should be fixed by arbitration, had not been so fixed inasmuch as the award set up by the plaintiff was made by but two of three arbitrators and was consequently invalid as an award.

The appellant insurance companies issued policies of insurance against loss or damage by fire for a total amount of $5,000 on a building owned by respondent. The building and contents were totally destroyed by fire. Each of the policies was subject to the statutory conditions of The Alberta Insurance Act. The respondent claiming that differ-

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc.*

Reporter's Note.—Mr. Justice Malouin resigned before the date of the judgment.

(1) [1923] 20 Alta. L.R. 114; [1924] 1 W.W.R. 155.

1924

GLASGOW UNDERWRITERS v. SMITH.

ences had arisen between himself and the appellants as to the value of the property insured and the amount of the loss, these questions were referred to arbitration, pursuant to the provisions of statutory condition no. 22. The respondent and the appellants each appointed an arbitrator, and the two so appointed selected a third arbitrator. The three arbitrators were unable to agree, and an award was made by two of them only. Immediately after the award was made, the present action was commenced by the respondent for the recovery of the amounts awarded against the several appellants. The appellants allege that the arbitrators have not made any award and claim that the document signed by the two arbitrators is not an award of the arbitrators, as it was made and signed by two arbitrators only, and not by three arbitrators as required by statutory condition 22, and by the Arbitration Act of the province of Alberta. The appellant then applied to the Master in Chambers for an order striking out these and certain other paragraphs of the defence relating to the arbitration and award. The Master in Chambers dismissed the application. An appeal was then taken by the respondent to a judge in chambers, and the appeal was heard by the Honourable Mr. Justice Ives, by whom it was dismissed. The respondent then appealed to the Appellate Division of the Supreme Court of Alberta. The appeal was allowed, and the paragraphs of the defence struck out.

Lafleur K.C. for the appellants.
Bennett K.C. for the respondent.

IDINGTON J.—For the reasons assigned by Mr. Justice Stuart and Mr. Justice Beck, with which I fully agree, I think this appeal should be dismissed with costs.

I cannot imagine that all the members of the legislature were entirely ignorant of the numerous decisions prior to the enactment now in question and now relied upon herein by the appellants, and intended, when imposing the legislative condition, now in question herein, upon every fire insurance contract that it might be nullified at the will of either party by appointing a partizan arbitrator who was ready to refuse to sign the award agreed upon.

I would rather attribute to the legislature some knowledge of the existent law and that it intended to enact some-

thing useful as this enactment evidently would be if upheld as it has been by the Appellate Division.

Hence I concur in the reasons that court has given.

To say that it might have been made more clear is no answer if the language used is capable of the construction so given it, as I hold it is.

Nor is it any answer to suggest that the insured and insurers might have entered into an entirely different contract, distinctly discarding all legislation on the subject of fire insurance.

The respondent's counsel relied somewhat upon the Interpretation Act in the Revised Statutes of Alberta, 1922, citing s. 29 of c. 1 thereof, which reads as follows:—

29. Whenever by any Act anything is required to be done by more than two persons a majority of them may do it.

I think that certainly supports the contention of respondent and removes all doubt, for the condition in question is, by the very terms of the Insurance Act, part thereof when the Insurance Act is adopted as the basis of the policy in question herein.

Section 9 of the said Interpretation Act supports also that way of interpreting and applying said Act.

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

DUFF J.—The question is one of difficulty, and I am unable to say that I am entirely satisfied with the conclusion at which I have arrived. It is, however, the same in effect as the view taken by the Appellate Division in Alberta; and on the whole I think the considerations in favour of it ought to preponderate over those which can be adduced in opposition to it.

It has been laid down more than once, and it was expressly held by Mathew J., in *United Kingdom Mutual Steamship Assur. Assc.* v. *Houston* (1), that where, in an instrument *inter partes,* persons are named to do an act of private concern only, they all must concur in doing the act if it is to be validly done; and that this principle applies where by agreement the parties have provided for the determination of disputes between them by three arbitrators, one to be nominated by each of the parties, and the third to be

(1) [1896] 1 Q.B. 567.

1924
GLASGOW UNDERWRITERS v. SMITH.
Duff J.

selected in some other way, where it is quite clear that the third person so selected is an arbitrator, and not an umpire. Now it is argued, and there is a great deal of force in the argument, that the Alberta Insurance Act, c. 171, R.S.A., 1922, in laying down (ss. 69 *et seq.*) that certain conditions, usually called "statutory" conditions, set forth in schedule "C" of the Act are a part of every contract of fire insurance, unless otherwise provided for, in the form and manner prescribed by the statute, is merely annexing to the contract certain contractual stipulations which must take effect and must be construed and interpreted as stipulations *inter partes;* although, admittedly, subject to the right of variation reserved by the statute, these contractual conditions are imposed *ab extra* by the law, and only indirectly come into operation through the consent of the parties. The rule, therefore, above referred to, governing arbitration in matters of private concern and provided for by private documents taking effect *inter partes* only, it is argued, is the rule which must be applied in ascertaining the construction and effect of condition 22.

As against this it is said, to quote the language of an eminent judge, Mr. Justice Lawrence, in *Withnell* v. *Gartham* (1):

> In general, it would be the understanding of a plain man that, where a body of persons is to do an act, a majority of that body would bind the rest;

and that to construe the condition in conformity with the rule would probably have the effect of defeating the intention of the legislature, whose interpretation of its own language is probably best to be gathered from the provision of the Interpretation Act, expressed in these words:

> Where by any act anything is required to be done by more than two persons, the majority of them do it. (R.S.A., 1922, c. 1, s. 29).

I am disposed to think that, strictly, this clause of the Interpretation Act does not apply. While I agree with the view of Boyd C., to which he gave effect in his decision in *Re Harding* (2), that a thing prescribed by statute as a condition of the acquisition of a right given by statute may very well be a thing "required to be done," within the meaning of the Interpretation Act, I think it requires some straining of the language to bring the provision of condition

(1) [1795] 6 T.R., 388 at p. 398. (2) [1889] 13 Ont. P.R. 112.

22 within the description "anything required to be done" by "an Act of the legislature."

This, however, by no means concludes the matter. The rule of construction, upon which Matthew J. acted, is not an absolutely rigorous rule in the sense that only an express provision to the contrary can vary it. It is not a rule which has had the effect of imparting to the language of such a clause a generally recognized meaning in the sense of the rule; it is not a rule of interpretation which has become recognized in common speech. It is strictly a rule of law which gives way when inconsistent with the intention of the author of the instrument as gathered from the language or from the nature of the subject matter or from the circumstances in which the power is to be put into execution. In *Grindley* v. *Barker* (1), Buller J., said:

> One thing is clear from this authority

(referring to *Withnell* v. *Gartham*) (2),

> that a deed which speaks in general terms, giving a power to a certain number of persons, does not necessarily import that all these persons shall concur;

and he adds:

> The case, therefore, is open to the argument of inconvenience;

and in that case one distinction was recognized as well settled, which is expressed in these words by Eyre C.J., at p. 236:

> I think it is now pretty well established that where a number of persons are entrusted with powers * * * in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole.

The opinions of Lord Cairns and Lord Selborne in relation to the arbitration between Ontario and Quebec under sec. 142 of the British North America Act illustrate the application of the principle (3).

The provision of the Interpretation Act above quoted seems to treat the principle as applicable in all cases where arbitration machinery is set up by statute, and I think this may fairly be considered a recognition that such would be the interpretation of such statutory provisions by Mr. Justice Lawrence's "plain man."

While it is quite true that in form the statutory conditions of the Insurance Act are contractual stipulations,

(1) [1798] 1 B. & P. 229. (2) 6 T.R 388.
(3) *In re Ontario and Quebec Arbitration*, 4 Cartwright 712.

1924
GLASGOW UNDERWRITERS v. SMITH.
Duff J.

and while I agree that as a rule they must be construed and given effect to as stipulations *inter partes,* it is nevertheless also true, as pointed out by Mr. Justice Beck in the court below, that the parties are not entirely free as to variations, such variations taking effect only to the extent to which the court considers them reasonable; and as regards the insured, upon whom the statutory conditions are binding unless effectively varied (*The Citizens Ins. Co. of Canada* v. *Parsons* (1), one cannot fairly ascribe to the legislature ignorance of the fact that as a rule, when the conditions do take effect as against him, they take effect quite independently of any choice exercised in fact on his part, and by force by the statute.

The fact that the legislature has dealt with the subject of insurance contracts in this way seems in itself to imply that such contracts are affected with a public interest, and the fact that the condition in question derives its existence from this legislative intervention seems to afford some substantial ground for bringing into play the principle laid down by Eyre C.J. For these reasons I would dismiss the appeal with costs.

MIGNAULT J. (dissenting).—The respondent objects to our jurisdiction to hear this appeal on the ground that the judgment appealed from is not a final judgment.

The action claims indemnity under several fire insurance policies alleging that as required by the conditions of each policy an arbitration had taken place and that the majority of the arbitrators had awarded him the amount claimed. The defence is that the three arbitrators not having agreed on the award the decision relied on by the respondent is not binding on the appellants.

The respondent moved before the master for leave to enter judgment against the appellants for the amount of his claim, but his motion was dismissed on the ground that the award was void because all the arbitrators had not joined in it.

This decision was affirmed on appeal by Mr. Justice Ives from whose judgment the respondent appealed to the Appellate Division of the Supreme Court of Alberta. The appellants had also moved for leave to amend their state-

(1) [1881] 7 App. Cas. 96, at pp. 121 and 122

ments of defence by alleging, as a further ground of nullity of the award, that the majority of the arbitrators had granted the respondent the replacement instead of the real value of his buildings.

The judgment of the Appellate Division reversed the judgment of Mr. Justice Ives and set aside the master's order. It also allowed the amendment.

The effect of this latter judgment is that the award is held to be validly rendered, although all the arbitrators did not join therein, but the appellants are allowed to amend their defence so that the case goes back for trial. Under these circumstances, the respondent contends that the judgment appealed from is not a final judgment from which an appeal lies to this court.

"Final judgment" is defined by s. 2 of the Supreme Court Act, as amended by 10-11 Geo. V, c. 32, as meaning any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding.

I think the judgment which holds that the award could be rendered by two of the arbitrators, without the concurrence of the third, determines a substantive right of the respondent within the meaning of this section, and is therefore a final judgment appealable to this court. The objection of the respondent fails.

Coming now to the merits, the question to be determined is whether, under the conditions of the policies, the so-called award rendered by two of the arbitrators without the concurrence of the third is conclusive and binding on the parties.

Condition 22 of the policies, which is one of the statutory conditions under the Alberta Insurance law, is as follows:

If any difference arises as to the value of the property insured, the property saved, or the amount of the loss, such value and amount and the proportion thereof (if any) to be paid by the company, shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then to two persons, one to be chosen by the party insured and the other by the company, and a third to be appointed by the persons so chosen, or in their failing to agree, then by a judge of the district court of the district in which the loss has happened; and such reference shall be subject to the provisions of "The Arbitration Act," and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and the proportion to be paid by the company; where the full amount

1924

GLASGOW UNDERWRITERS v. SMITH.

Mignault J.

of the claim is awarded the costs shall follow the event, and in other cases all questions of costs shall be in the discretion of the arbitrators.

There is no provision here for a majority award. The reference to The Arbitration Act (R.S.A., c. 98) is of no help, for the condition does not provide for the appointment of an umpire, and the provisions of schedule A which would allow the naming of an umpire do not apply because the reference is not to two arbitrators, but to one, and if the parties cannot agree on one person, then to two persons, one chosen by the assured and the other by the company and a third appointed by the two, or if they fail to agree, by a judge of the district court. This is a submission to three arbitrators, and not to two arbitrators and an umpire. It follows that no award can be rendered unless all the arbitrators join therein. (See cases cited in Russell on Arbitrations, 10th ed. pp. 408, 409).

I may add that in the report of their Lordships of the Privy Council on the reference to them of certain questions arising under *The Irish Free State Agreement Act, 1922*, better known as *The Irish Boundary Commission Case*, which I find in the London Times of August 2nd, 1924, p. 15, their Lordships say:

> Although in private arbitrations unanimity is necessary, it is otherwise when the matter to be determined is of public concern.

This is undoubtedly a private arbitration resulting from a contract of a private nature; and, in the absence of any clause giving to the majority of the arbitrators the power to make an award, no decision of the arbitrators is binding on the parties unless all the arbitrators join therein.

The argument that this is a statutory condition or that it is a contract which the statute makes for the parties does not appear to be conclusive. The parties can vary any of the statutory conditions by agreement and if they do not do so effect must be given to these conditions as in an ordinary contract. I could not therefore say that condition 22 is practically, as Mr. Justice Stuart suggests, a legislative enactment. Nor do I think that s. 29 of the Alberta Interpretation Act relied on by the respondent can be appealed to in order to read into the condition a provision for a majority award.

This does not mean that the respondent has no remedy. He can ask the court to determine the value of the de-

stroyed property, the submission to arbitration having proved abortive. I may perhaps be permitted to cite here what Lord Shaw of Dumfermline, speaking for the Judicial Committee, said in *Cameron* v. *Cuddy* (1):

> When an arbitration for any reason becomes abortive, it is the duty of a court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is its duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and it furnishes by an appeal to a court of justice the means of working out and of preventing the defeat of bargains between parties. It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery* (2) might be referred to.

It would seem very desirable that the legislature should amend statutory condition 22 so as to provide for a majority award. In the province of Quebec, the arbitration condition refers to the code of civil procedure which permits a majority of the arbitrators to make an award. (Article 1441). There is no reason why the condition should not be made to operate in the same manner elsewhere.

On the ground therefore that the so-called award is invalid, I would, with respect, allow the appeal with costs here and in the appellate court and restore the judgment of the learned trial judge. The case must go back for trial and, the submission to arbitration having proved abortive, the trial court will determine the value of the property insured and the amount of the loss.

MACLEAN J.—Upon the conclusion of the argument I was strongly of the view that the appeal should prevail. However, upon a further and careful review of the reasons for judgment rendered in the Appellate Division, and after a careful consideration of the judgment prepared by Mr. Justice Duff which I have had the privilege of reading, I have reached the conclusion, though not quite free from doubt, that the judgment of the court below should be sustained. I adopt the line of reasoning to be found in the judgment of Mr. Justice Duff, and cannot usefully add thereto.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Savary, Fenerty & McLaurin.*
Solicitors for the respondent: *Charman & Corey.*

(1) [1914] A.C. 651, at p. 656. (2) [1894] A.C. 202.

1924
*June 4.
*Oct. 14.

THE QUEBEC LIQUOR COMMISSION (DEFENDANT) ..... } APPELLANT;

AND

W. H. MOORE (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Contract—Work ordered by owner of building to employees of contractor—Accident—Temporary control—Absence of warning as to possible danger—Liability of Quebec Liquor Commission for tort, Arts. 1053, 1054 C.C.—The Alcoholic Liquor Act (1921) (Q.) 11 Geo. V, c. 24.

The appellant was owner of a building used as a warehouse and had let through its manager A. a contract to H. for repairing the water spouts of the roof, including the erecting and demolition of the necessary scaffolding. The work being nearly done, A. notified directly some employees of H. then on the premises that the windows must be closed for the protection of the stores against a possible fall in temperature during some coming holidays. Although forbidden to do so except by the orders of their immediate employer, the employees of H. started to remove the scaffolding in order to fulfil the request of A. who had no knowledge of the above prohibition. The respondent while entering the building on business with the commission was injured through the fall of a plank and sued the appellant to recover damages.

Held, Idington J. dissenting, that the appellant was not liable.

Per Anglin and Mignault JJ.—Under the circumstances of this case the employees of H., in dismantling the scaffolding, did not pass under the temporary control of the appellant and the latter did not become their *patron momentané*. Idington and Duff JJ. *contra.*

Per Duff J.—Upon the facts the appellant would have been liable owing to its default in neglecting to give warning of a possible danger to wayfarers in the street and particularly to persons entering and leaving the premises on business with the commission; but

Per Duff J.—The Quebec Liquor Commission, being an instrumentality of the Crown in right of the province of Quebec, is not answerable in an action for a delict committed by its servants. Idington J. *contra* and Anglin and Mignault JJ. expressing no opinion.

Judgment of the Court of King's Bench (Q.R. 36 K.B. 494) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, Duclos J., with a jury and maintaining the respondent's action for damages.

---

*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

Reporter's Note.—Mr. Justice Malouin resigned before the date of the judgment.

(1) [1924] Q.R. 36 K.B. 494.

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

Geoffrion K.C. and *De Serres K.C.* for the appellant.

Holden K.C. for the respondent.

IDINGTON *J.* (dissenting).—This appeal arises out of an action brought by the respondent against the appellant for damages suffered by reason of the negligence and improper conduct of the appellant's manager, and others employed by it in and about the building in Montreal wherein its business at said branch was being carried on, resulting in a plank falling upon the respondent.

The building needed some repairs for which the appellant let the contract to a firm, Hickey & Aubut, who sub-let the needed work of erecting the scaffolding necessary to enable the repairs to be done to a carpenter who was to do also the work of tearing it down, when the repairs were finished.

Aubut forbade any one to take it down without his instructions and never gave an order or assent thereto.

Notwithstanding all that, the appellant's managers induced, by their and others of appellant's employees' instructions, one Simard, a tinsmith working there, to take it down because the appellant's manager and his assistants wanted to shut out the cool air lest it should injure the liquor inside during some coming holidays.

Simard had no more right to do so than any one on the street requested by said manager, or others of appellant's employees, to do so.

Such improper conduct on the part of said manager, and others for whom appellant is responsible, it seems to have been surmised, may have been traceable to Aubut who was made a party defendant along with the appellant.

The respondent as a messenger in the service of an express company had occasion to go into the building to receive something in way of packages addressed by the appellant to customers, and pursued his errand there quite properly, and yet no one took the precaution to warn him against the possible danger of entering under such circumstances.

1924

THE QUEBEC LIQUOR COMMISSION v. MOORE

Idington J.

A plank fell down on him from said scaffold as the result of Simard doing above part of what the said manager had requested.

The case was tried before Acting Chief Justice Martin with a jury.

There were a number of questions submitted to the jury who found in answer to the second question as follows:

> The answer to No. 2 is: We find the Quebec Liquor Commission at fault and solely responsible because of taking temporary control of the employees of Hickey & Aubut, and ordering them to close the windows necessitating the removal of some scaffolding, due to which the accident occurred and by reason of the negligence of the defendant, Quebec Liquor Commission, in handling the plank that caused the damage. Unanimous.

And to my mind there was ample evidence for such finding. Aubut was found in no way to blame. The jury rendered a verdict in favour of the respondent and assessed his damages at $8,121.25, for which the learned trial judge entered judgment.

From that the appellant appealed to the Court of King's Bench at Montreal.

That court unanimously, and I think quite correctly, dismissed the appeal with costs.

From that judgment this appeal is brought.

Three grounds are taken in the appellant's factum for holding that the appellant is not responsible, and are stated as follows:—

> 1. Because the accident occurred by the fault of a workman in the employ of the contractor to whom the appellant had entrusted certain works of repair and in the course of this work.
>
> 2. Because the workman who committed the fault never ceased to be under the control of his employer, the defendant Aubut, and to act for him and, particularly at the moment of the accident, he was not acting for the appellant and had not passed under its control.
>
> 3. No fact was proven establishing a contractual relation of such a nature that this workman could be held to have passed from the control of his employer to that of the appellant.

I respectfully submit that as the said workman, or assistants, had never been entrusted by the contractor with regard to the building or removing said scaffold, and never got the slightest right from any one excepting appellant's taking control by its manager and employees and unwarrantably directing its removal, these contentions are entirely without foundation in law or fact.

The appellant's agents pretended that in order to avoid injury to its goods it was deemed by them to be necessary

to have that done, the doing of which resulted in the accident in question, and took the necessary control without the necessary precaution.

It is possible that a proprietor as, for example, in case of fire, may be driven to such an exercise of authority to protect his property, but he cannot shift the incidental risks attendant thereon on to others.

The said factum proceeds to suggest some other things quite true, and some not so apparent, and indirectly thus to shelter the appellant from liability by reason of acting for the Crown.

I cannot see any pleading of the appellant setting up such a defence in law upon such facts as in question, and submit such a defence is not now open to it.

Moreover the appellant is incorporated by "The Alcoholic Liquor Act" for the express purpose of carrying on the business of buying and selling liquor and reaping a profit therefrom and doing all such things as are found necessary for the success of said business.

Section 12 of said Act of incorporation provides as follows:—

> 12. No member of the Commission may be prosecuted for doing or omitting to do any act in the performance of his duties as prescribed by this Act, unless by the Provincial Government.
>
> The Commission itself may be prosecuted only with the consent of the Attorney General.

I submit that whilst the first part of this section protects and is intended to protect from litigation those carrying on the business of the corporate respondent, the second part is given as substitute therefor and subject to only one condition, the consent of the Attorney-General.

That consent is indorsed on the declaration and signed by his assistant, Mr. Lanctot, whose authority to do so has not been questioned.

This form of procedure is clearly designed for the purpose of avoiding the circuitous necessities, adopted by many English Acts to give effect to the English Petition of Right in its manifold applications and needs of giving relief, has so long given rise to.

The Parliament of the Dominion with the like object in view constituted the Exchequer Court of Canada to try such like cases.

1924

THE QUEBEC LIQUOR COMMISSION v. MOORE

Idington J.

And in the course of its administration that court has decided many cases which came to this court by way of appeal.

The jurisprudence that has arisen as the result thereof has not been uniformly consistent, or such as always to meet with my concurrence.

I might be permitted to refer to the authorities I cited in my dissenting judgment in the case of *Ryder* v. *The King* (1), and especially the quotation from the judgment of the late Chief Justice Strong, in the case of the *City of Quebec* v. *The Queen* (2).

I submit that the view of said Chief Justice that

> the Act (there in question) was intended to impose a liability and confer a jurisdiction by which a remedy for such liability might be administered

may well be taken of the said section 12, especially when read in light of the decision of the Judicial Committee of the Privy Council in the case he cites of *The Attorney-General of the Straits Settlement* v. *Wemyss* (3).

Then we have the decision of this court in the case of *The King* v. *Desrosiers* (4), unanimously holding that the law of Quebec where an accident happened on the Intercolonial Railway in that province, must be allowed full effect and govern the rights of the parties though the Intercolonial was a corporate company created by the Parliament of Canada and managed by those appointed by its Government, and the Exchequer Court had tried the case under petition of right provisions of the Act creating said court.

The judgment of the learned Chief Justice which was assented to by the then other members of the court, expressly held that all there in question had been decided in the case of *The King* v. *Armstrong* (5).

One of the points so treated was the fact that a tort was the basis of the action.

The mere suggestion in *Ryder* v. *The King* (6), and many other cases previously, that tort was the basis in fact on which the action founded seemed fatal by reason of the

(1) [1905] 36 Can. S.C.R. 462 at pp. 466 *et seq.*
(2) [1894] 24 Can. S.C.R. 420
(3) [1888] 13 App. Cas. 192.
(4) [1908] 41 Can. S.C.R. 71.
(5) [1908] 40 Can. S.C.R. 229.

maxim that " The King can do wrong ". I submit that the judgment in said case has been decisively overruled by these later decisions.

The very early case of *Lane* v. *Cotton* (1), holding that the Postmaster-General could not be held responsible for the torts of those under him, is the basis of the doctrine so long maintained. And that was followed in the late case of *Bainbridge* v. *The Postmaster-General* (2), although he had long before and meantime been created as such a corporation.

The modern commercial development of many branches of business carried on under the supervision of some Minister of State tended to impair the general recognition of the doctrine.

As already pointed out the Dominion Parliament passed an Act to remedy such a state of the law and that found its latest judicial interpretation in the cases I have just cited.

The article 1011 of the Quebec Code of Civil Procedure is much more comprehensive in regard to the liability of the Provincial Government than the said Dominion Act in expressly creating a liability, and though that article is followed by provisions indicating, as matter of procedure, that a formal petition should be first presented for leave, yet, by the jurisprudence of that province, unless objection is taken, the ordinary procedure as between private individuals cannot be objected to after trial and judgment.

That question of procedure is all, I submit, substituted by said section 12 of the Alcoholic Act quoted above.

And the whole basis of this appeal resolves itself, so far as procedure is or can be relied upon, into one with which this court has uniformly refused to interfere, and such appeals have accordingly been dismissed.

And in the case of *Graham et al* v. *His Majesty's Commissioners of Public Works and Building* (3), where, on the facts stated, it appeared that the respondents were (as here in question the appellant is) shewn to have been incorporated, it was held on appeal that the doctrine could not be longer observed as it had been.

(1) [1701] 1 Ld. Raymond 646; 12 Mod. 472.
(2) [1906] 1 K.B. 178.
(3) [1901] 2 K.B. 781.

1924

THE QUEBEC LIQUOR COMMISSION v. MOORE

Idington J.

The action arose out of a contract between the parties plaintiffs and respondent, to build a post-office, and plaintiffs proceeded with the work, and whilst it was in progress the defendant respondent wrongfully determining and repudiating it was sued for damages.

Surely that was pretty close to this in its facts and principle, yet damages were held recoverable despite the talk about torts.

In that as in all other cases I have seen, if my memory serves me, the objection was taken by way of pleading or motion before trial.

I have not discovered a case where the defendant failed to move or plead the objection before the trial was finished, and yet had the temerity of appellant herein to remain silent until coming to this court.

The factum does not even state it in the three grounds taken, but merely incidentally in the course of the argument therein, though its counsel enlarged it somewhat in their argument before us yet failed to cite any Quebec case, or elsewhere, justifying the consideration of the point stated for the first time by said argument in the factum.

I cannot maintain such an appeal or entertain the contention.

Then subsidiarily as it is put in factum and argument, appellant complains of the damages allowed being excessive.

I can see no ground for departing herein from our usual practice of refusing to review the assessment of damages.

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

DUFF J.—Moore was a driver in the employ of the Canadian National Express Company, and on the afternoon of the 12th of April, 1922, he drove his wagon to the premises of the appellants to collect some parcels. He backed his wagon up to the delivery platform, and entered the premises, and after receiving his parcels, carried an armful across this platform to the rear of his wagon. As he was stooping down to place them in the wagon, he was struck by a heavy plank dropped from the top of the building, where workmen were employed in dismantling some scaffolding. His back was broken by the blow, he was totally incapacitated

for over a year, and suffers a very serious permanent disablement. The appellants were tenants of the premises.

In the month preceding the accident, March, 1922, the appellants' manager, Archambault, had let a contract to Hickey & Aubut for repairing the water spouts on the roof, including the erection and demolition of the necessary scaffolding. The contractors entrusted this latter part of the work to a sub-contractor, Ryan. On the 12th of April, the day of the accident, the work on the Commissioners street side of the building had been finished. As that day was Wednesday of Holy Week, and the warehouse would be closed from the ensuing Good Friday to Easter Monday, it was considered desirable that the scaffolding should be removed so that the windows, through which the joists of the scaffolding passed, might be closed, for the protection of the stores against a possible fall in temperature. Without going into details, it is sufficient to say that there was evidence warranting the jury in concluding that with Archambault's authority the roofers employed by Hickey & Aubut in executing the repairs were informed that the windows must be closed, and that it was quite well understood by all parties that this necessarily involved taking down the scaffolding. These workmen, the roofers, had nothing to do with the scaffolding, and indeed had been specifically instructed not to interfere with it Ryan, the sub-contractor having assumed all responsibility, both for its erection and its removal. Archambault having given orders direct to workmen in the employ of his contractor without communicating with the contractor, the jury, I think, in the circumstances, might properly find that these workmen, as they were directed to do something which by the orders of their immediate employer they were not permitted to do, would naturally assume that the orders were given by Archambault under his own responsibility: indeed, I think the proper inference is that that is precisely the view upon which they acted. In such circumstances the jury were entitled to find, as they did, that there was such an interference in the execution of the contract by Archambault as to make him and his principals responsible for the consequences; in other words, to constitute the negligent workmen the servants of the Commission for the time being. It

1924

THE QUEBEC LIQUOR COMMISSION v. MOORE

Duff J.

was on this ground that the case proceeded at the trial. I think the case, in this aspect of it, was rightly left to the jury by Martin J., and that, subject to a question of law to be discussed, the verdict is sufficiently supported by the evidence.

But there is another ground upon which subject to the question of law I think it would have been improper for the Court of King's Bench to set aside the judgment of the trial judge. The operation of dismantling the scaffolding was one obviously attended with risk to wayfarers in the street below, and particularly to persons entering and leaving the premises of the Liquor Commission at its delivery platform. This fact is undisputed; indeed, it is in evidence that nearly an hour before Moore was injured, one of the employees of the Commission warned an automobile driver in the same employ to remove his automobile to the other side of the street. There is also evidence, uncontradicted, that another employee of the Commission sent a similar warning to another automobile driver. On the facts in evidence it seems undeniable that the risk, though real and patent to those aware of what was going on, was not necessarily perceptible by persons entering or leaving the premises of the Liquor Commission at the delivery platform without warning. In these circumstances, the duty of the Liquor Commission to warn persons who might be at the delivery platform on business with them, impliedly by their invitation, would seem to be a self-evident one. I should be sorry indeed to think that the scope of Art. 1053 C. C. could be so restricted as to exclude the responsibility of occupiers of business premises for failure to give warning of traps known by them to exist, exposing persons invited by them to enter the premises for the purposes of their business to injury in consequence thereof.

The Roman law recognized the responsibility of occupiers of property in respect of the condition of the property or acts done on the property constituting a public danger; wild animals kept near a public thoroughfare; beams placed in such a position as to endanger the travellers on a public way; things thrown from the premises, even by strangers. The absolute responsibility enforced in the *actio de dejectis et effusis* is not recognized in the modern law, but the com-

mon law recognizes the responsibility of the occupant for a dangerous condition exposing the travellers on an adjoining highway or persons on the frequented part of a neighbour's property to unreasonable risks, such as an unfenced excavation in close proximity to the line of the street or the line of the neighbour's property, as well as responsibility generally for works executed by an independent contractor when of such a character as in themselves to expose the public to risk of injury. It is not in every case that a person who creates a dangerous situation is at the common law responsible for injuries which ensue; as a rule trespassers take the risk of the situation as it is. But persons invited by the occupier in the ordinary course of business are entitled to assume that they will not encounter perils not apparent to persons exercising such care as in the circumstances would be reasonable; and the actual ignorance of the occupier is immaterial if he or his servants ought to have known of the danger. I am not suggesting that these rules of the common law should be regarded as furnishing the principle for the determination of a controversy governed by the law of Quebec, but the existence of such rules is certainly not a ground for assuming that the principle of them finds no analogy in the law of Quebec. In the present case, not only was the dangerous situation created at the request of the appellants, and for their profit; not only was it known to the appellants' servants; it was a situation imperiling the public, as well as persons invited by the Commission to their premises to do business with them. I have the greatest difficulty in assuming that Art. 1053 C. C. does not contemplate as an act of negligence involving fault an invitation to customers by a shopkeeper who is aware that on entering his shop they will, if not warned, be exposed to serious risk of grave injury, without a suspicion of the existence of it, and who presents this invitation without any warning as to the existence of the risk. I cannot but think that to state the proposition is sufficient.

The responsibility of a contractor not in exclusive occupation of the premises where he is executing his contract for a dangerous situation amounting to a trap, created by his employees, his responsibility, that is to say, to strangers visiting the premises on business, was recognized in *The*

1924

THE QUEBEC LIQUOR COMMISSION v. MOORE

Duff J.

W. J. McGuire Co. v. *Bridger* (1) . One finds it difficult to distinguish between the position of the author of the trap and the responsibility of the author of the invitation, who is the occupant of the premises and knows of the trap and gives no warning of it. I have seen no express decision to this effect in the Quebec courts, but, as a great judge once said,

> the plainer a proposition, the harder it often is to find judicial authority for it;

and the principle seems to be recognized by La Cour de Cassation in D. 1879-1-254.

Responsibility on this principle is not a responsibility for the act of the workman who carelessly dropped the plank. It does not rest upon McCarthy's act or default. It rests upon the default of the Commission and the Commission's servants in their neglect to give warning; and would arise although the fall of the plank had been a mere accident involving no legal responsibility on the part of the workman or his immediate employers.

It is quite true that the jury was not asked to pass upon the negligence of the appellants under this head. On the facts in evidence, however, the respondent's claim, when presented in this way, cannot be said to have been met by any serious defence. The existence of the facts constituting the elements of responsibility is really not disputed, and I assume that the Commission would not desire in such a case as this to have a new trial with the vain object of investigating the obvious. In any case, assuming a legal responsibility of the Commission for the faults of its servants, the action could not be properly dismissed, in view of the evidence to which I have referred.

But a much more serious question is raised by the appellants now for the first time, and that is, whether the Commission is answerable in an action for a delict committed by its servants. That question may be conveniently considered in two ways: First, is the Liquor Commission, in the relevant sense, an organ of the Quebec Government? And, secondly, does the statute by which the Commission is constituted (11 Geo. V, c. 24), manifest a legislative intention that the commission shall be responsible for such delicts?

(1) [1914] 49 Can. S.C.R. 632.

That the Commission is an instrumentality of government is clear from the circumstances that the members of the Commission are appointed by the Governor in Council and are removable at pleasure (s. 6); that all property in the possession of or under the control of the Commission is expressly declared to be the property of the Crown; and that all moneys received by the Commission at the discretion of the Provincial Treasurer are remissible to him, and, on receipt by him, become part of the consolidated funds of the province (s. 18); that the Commission is accountable to the Treasurer in the manner and at the times indicated by the latter (s. 19). The Commission, moreover, exercises authority respecting the sale of liquor in the province, and infractions of the law dealing with that subject are prosecuted in the name of the Commission or of the municipality where the infraction occured. By s. 13, the employees of the Commission are declared to be public officers, and they are required to take the oath of public service as such.

The broad principle, of course, is that the liability of a body created by statute must be determined by the true interpretation of the statute. It is desirable, perhaps, to advert first of all to a discussion of the subject in *The Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1). Mr. Justice Blackburn, delivering the opinion of the judges in that case, proceeded upon the principle stated by him in these words (p. 107):

> It is well observed by Mr. Justice Mellor in *Coe* v. *Wise* (2), of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the legislature, the true rule of construction is, that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works.

An exception is recognized, however, in the judgment of Mr. Justice Blackburn, as well as in the speeches of the Lords in the case of public officers who are servants of the Government; that is to say, officers fulfilling a public duty, appointed directly by the Crown and acting as officers of

(1) [1864] L. R. 1 H.L. 93.

(2) [1864] 5 B. & S. 440; 4 New Rep. 352.

1924

THE QUEBEC LIQUOR COMMISSION v. MOORE

Duff J.

the Crown. Such a public officer is not responsible for the acts of inferior servants or officials merely because the superior officer has the right of the selection and appointment, as well as the right of removal at pleasure. *Canterbury* v. *The Attorney-General* (1). It is now recognized also that there is nothing to prevent the Crown being served by a corporation, and nothing to prevent such a corporation claiming the same immunity as an individual. *Bainbridge* v. *The Postmaster General* (2), and *Roper* v. *The Commissioners of His Majesty's Works and Public Buildings* (3).

Much can certainly be said in favour of the view that by s. 9 of the Act there is implied authority to incur contractual responsibility in the ordinary way and, consequently, liability to suit for the enforcement of contracts entered into. But it does not follow that there is responsibilicts for delicts. *Roper* v. *The Commissioners of His Majesty's Works and Public Buildings* (4) at p. 52.

A judgment against the Commission, if it is to be effective, must be satisfied out of Crown funds; funds, that is to say, which are explicitly declared by the statute to be the funds of the Crown and which are under the control of the Provincial Treasurer. Responsibility of the Commission must, moreover, arise, if it arise at all, from the act of an employee who by the statute is explicitly declared to be a public servant. The responsibility, then, if it exists, is a responsibility of the Commission in its official capacity as manager of a branch of the Government business, and is a responsibility for a wrong committed by a subordinate public official. Such is not a class of cases contemplated by the judgment of Blackburn, J., or by the speeches of the Lords in *The Mersey Docks Case* (5). To affirm the responsibility of the Commission is in effect to affirm the responsibility of the Crown for a tort. Not only does the statute fail to disclose any expression of an intention that the Commission shall be subject to such a principle of responsibility, but the explicit affirmations as to the property in possession of the Commission being the property of

(1) [1842] 1 Ph. 306 at p. 324.
(2) [1906] 1 K.B. 178 at pp. 191-192.
(3) [1915] 1 K.B. 45.
(4) [1915] 1 K.B. 45 at p. 52.
(5) L.R. 1 H.L. 93.

the Crown, as to the accountability of the Commission to the Provincial Treasurer and the Provincial Treasurer's control over its funds, and especially the explicit declaration as to the status of the employees of the Commission as public officers, would appear to indicate with not much uncertainty an intention to the contrary.

The appeal should, in my opinion, be allowed and the action dismissed, but without costs.

ANGLIN J.—The plaintiff (respondent), a servant of the Canadian National Express Company, sues to recover damages for injuries sustained by him while calling for parcels at the appellant's warehouse through the fall of a plank in the course of removing a scaffolding erected in front of the building upon which it was having some repairs done by the firm of Hickey & Aubut. The plank fell through the negligence of one Simard, an employee of Hickey & Aubut, and the appellant has been held liable solely on the ground that it had taken temporary control of the workmen of Hickey & Aubut engaged on the building by ordering them to close certain windows, which necessitated removal of the scaffolding. With profound respect I am of the opinion that there was no evidence to warrant this finding of assumption of control.

Hickey & Aubut were independent contractors. It was a part of their contractual undertaking with the appellant to remove the scaffolding in question. The time for such removal had arrived. The defendant was entirely within its rights in insisting on the closing of the windows in its building and on having the scaffolding removed to permit of that being done. The only direction given by its officers was that the windows must be closed. There is nothing to indicate that in communicating that direction to the workmen of Hickey & Aubut who were on the premises the officers of the appellant were doing more than merely intimating to the representatives of that firm that it was called upon to carry out its contractual obligation. There is nothing to warrant an inference that they dealt with Hickey & Aubut's employees in anywise as persons over whom they had, or professed, or intended to exercise, any control. It was fully competent for those employees to

1924
THE QUEBEC LIQUOR COMMISSION v. MOORE
Anglin J.

decline to do anything towards removing the scaffolding until and unless instructed by their employers. That they understood that they were addressed as employees of, and representing, Hickey & Aubut, and not as persons asked to do something for and on behalf of the appellant commission, is indicated by the telephone communication they had with McGovern, Hickey & Aubut's superintendent, and by his abortive attempt to communicate with the sub-contractor Ryan, to whom Hickey & Aubut had entrusted the work of erecting and removing the scaffolding. The proper inference from the evidence, in my opinion, is that when Simard and his companions proceeded to remove the scaffolding they acted not as persons under the control of the defendant, but as employees of Hickey & Aubut doing what the latter were bound by their contract to do, or have done, and presumably because they conceived that they were acting in their employers' interest and that the urgency of the circumstances justified their disregarding the instructions not to do anything in connection with the scaffolding. It is trite law that, although a workman may act in direct contravention of his master's orders, the latter is not necessarily relieved from responsibilty for the consequence of his acts if done in the course of his employment. Moreover, it does not at all follow that if Hickey & Aubut were not liable, the appellant must be so. Under the circumstances Simard alone may be answerable for his negligent act. But, in any event, I can discover nothing in the record to support the finding that Simard and his associates, who were on the building as employees of Hickey & Aubut, in handling the scaffolding passed under the control of the appellant so that it became their *patron momentané.*

Other possible bases of liability were suggested in argument and may be sufficiently covered by facts alleged in the declaration. But they were not submitted to the jury and the plaintiff has not secured a finding upon them.

The appeal, in my opinion, must be allowed and the action against the appellant dismissed—with costs throughout, if insisted upon.

MIGNAULT J.—Bien qu'en principe on ne soit responsable que de sa propre faute, dans quelques cas la loi veut que

l'on réponde de la faute d'autrui, et c'est par sa volonté expresse que les maîtres et commettants sont responsables du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés (art. 1054 C.C.). Cette responsabilité a pour motif d'abord le choix du préposé et ensuite et surtout l'autorité et le droit de surveillance que le maître a sur lui. D'une manière générale, elle pèse sur le patron, mais si un tiers prend momentanément la direction du préposé, soit en vertu d'une entente avec le patron, soit par sa propre ingérence dans la conduite d'une entreprise, il devient responsable de la faute du préposé tout comme s'il en était le patron. C'est la distinction entre le *patron habituel* et le *patron momentané* qui souvent permet au patron habituel d'échapper à toute responsabilité, comme dans la cause de *The Central Vermont Railway Company* v. *Bain* (1). Voy. aussi Sirey, 1923-1-115, et la note.

L'appelante, The Quebec Liquor Commission, avait loué pour les fins de son commerce un immeuble ayant front sur la rue des Commissaires et sur la rue Saint-Paul en la cité de Montréal. Elle voulait faire faire certaines réparations à la toiture de cet immeuble; et, ayant demandé des soumissions pour les travaux, elle accepta celle du nommé Aubut, entrepreneur plombier et ferblantier, faisant affaires sous la raison de Hickey et Aubut, lequel s'engagea à faire les travaux pour la somme de $450. La soumission disait:

In order to carry out this work, it will be necessary to erect scaffolding which is included in this tender.

Aubut s'arrangea avec un autre entrepreneur, le nommé Ryan, pour la confection des échafaudages sur paiement de $120, ce qui comprenait, dit Ryan, leur démolition, mais ce sous-contrat ne paraît pas avoir été à la connaissance de l'appelante. Ryan posa l'échafaudage sur le côté de la rue des Commissaires et il devait l'enlever de là quand les travaux y seraient terminés pour l'installer sur le côté de la rue Saint-Paul.

Les travaux se faisaient au mois d'avril 1922, dans la semaine précédant Pâques, et la partie des travaux sur le front de la rue des Commissaires se trouvait terminée le 12 avril, le mercredi de la semaine sainte. Comme l'édifice,

(1) [1919] 58 Can. S.C.R. 433; [1921] 2 A.C. 412.

1924

THE QUEBEC LIQUOR COMMISSION v. MOORE

Mignault J.

qui n'était pas chauffé, devait être fermé le vendredi-saint et le lundi de Pâques, les employés de l'appelante, pour prévenir tout dommage à leurs vins par le froid, demandèrent aux ouvriers d'Aubut de fermer les fenêtres. Pour cela, vu que les poutres sur lesquelles l'échafaudage s'appuyait entraient dans l'étage supérieur par les fenêtres, il fallait que l'échafaudage fût démoli, et les ouvriers d'Aubut y procédèrent. Pendant la démolition, l'un des ouvriers laissa tomber une planche qui blessa grièvement l'intimé, et celui-ci a poursuivi la Commission appelante ainsi qu'Aubut, les tenant conjointement et solidairement responsables des dommages qu'il avait éprouvés.

Par sa déclaration, l'intimé fait reposer la responsabilité d'Aubut sur le fait qu'il était le patron de l'ouvrier négligent et celle de la Commission des liqueurs sur le motif qu'elle était, dit-il, propriétaire de l'édifice et que la planche qui le frappa était sous sa garde. Au procès, cependant, cela est évident par les instructions du juge au jury, c'est la responsabilité du patron pour la faute de son préposé que l'intimé a invoquée, et c'est comme patron momentané que le jury a répondu que l'appelante était responsable de l'accident, alors qu'il a déchargé le patron habituel, Aubut, de toute responsabilité.

Je vais citer textuellement la réponse du jury à la deuxième question qui demandait si l'accident était dû à la faute de l'un ou de l'autre des défendeurs ou de tous les deux. Le jury répond:

> The answer to no. 2 is: we find the Quebec Liquor Commission at fault and solely responsible because of taking temporary control of the employees of Hickey & Aubut and ordering them to close the windows necessitating the removal of some scaffolding due to which the accident occurred and by reason of the negligence of the defendant Quebec Liquor Commission in handling the plank that caused the damage. Unanimous.

Il n'y a aucune preuve de négligence de la part de la Commission ni de ses employés et elle ne peut être tenue responsable de l'accident que si elle s'est constituée le patron momentané des ouvriers d'Aubut selon la doctrine exposée plus haut.

Tout ce qui est prouvé contre l'appelante, c'est qu'elle a demandé, avec insistance même, que les fenêtres fussent fermées, ce qui, il est vrai, nécessitait l'enlèvement des poutres qu'on avait placées dans les fenêtres; elle n'a pas pris la

direction des travaux de démolition, et n'avait aucun droit de donner des ordres aux ouvriers quant à l'exécution des travaux. Du reste, nous avons vu qu'Aubut avait assumé, dans son contrat avec l'appelante, l'obligation de construire l'échafaudage. Quand l'ouvrage était terminé, et il l'était sur la rue des Commissaires, l'appelante pouvait exiger qu'Aubut enlevât cet échafaudage, et elle n'avait pas d'affaire à Ryan dont le sous-contrat ne lui avait pas été dénoncé. Dans les relations entre l'appelante et Aubut, l'enlèvement des échafaudages était l'obligation contractuelle de ce dernier, et l'appelante n'aurait pas engagé sa responsabilité en l'exigeant des ouvriers qui représentaient l'entrepreneur.

D'autre part, Aubut étant un entrepreneur indépendant, et l'appelante n'ayant pas la direction des travaux, celle-ci n'est pas responsable de la faute d'Aubut ou de ses ouvriers (Carpentier et du Saint, Répertoire, Vo. Responsabilité civile, n° 593 et suiv.) On objecte qu'Aubut avait défendu à ses hommes de toucher à l'échafaudage, mais il n'est pas en preuve que cette défense fût à la connaissance de l'appelante, et on ne peut dire, comme l'un des honorables juges de la cour d'appel paraît l'avoir cru, que l'appelante ait induit les ouvriers à manquer à leur devoir envers leur patron.

Posant donc la question comme elle l'a été au procès, je ne vois rien dans la preuve qui pût justifier le jury à dire que l'appelante s'est constituée le patron momentané des ouvriers d'Aubut, ou qu'elle en a pris la direction et le contrôle. C'est comme préposés de l'entrepreneur que ces ouvriers ont démoli l'échafaudage, et Aubut ne pouvait opposer à l'intimé la défense qu'il avait faite à ses ouvriers d'y toucher. Cette cause ne ressemble en rien à la cause de *The Central Vermont Railway Company* v. *Bain* (1), où par une convention expresse entre deux compagnies de chemins de fer les employés de l'une des compagnies devenaient sujets aux ordres de l'autre dès qu'ils entraient sur la ligne de celle-ci. C'est cette circonstance que le tiers acquiert le droit de donner des ordres au préposé d'un patron, et qu'il a, lors de l'accident, une autorité exclusive

(1) 58 Can. S.C.R. 433; [1921] 2 A.C. 412.

1924

THE QUEBEC LIQUOR COMMISSION v. MOORE

Mignault J.

sur lui, qui déplace la responsabilité du patron habituel et crée celle du patron momentané (Sirey, 1903-1-104). Il n'y a rien de tel dans l'espèce.

J'ajoute que si le jugement était maintenu il deviendrait très dangereux pour un propriétaire d'adresser une demande aux ouvriers de son entrepreneur, même si, comme dans l'espèce, cette demande consistait à exiger l'accomplissement des obligations de l'entrepreneur.

Il est malheureux que l'intimé n'ait pas appelé de la partie du jugement qui a renvoyé son action quant à l'entrepreneur Aubut, car celui-ci seul devait être condamné à l'indemniser. Avec beaucoup de déférence pour les honorables juges de la cour d'appel, je suis d'opinion que le verdict ne peut être soutenu. Il me paraît clair que les jurés n'ont pas compris ce qui, en droit, fait déplacer la responsabilité du patron habituel et crée celle du patron momentané.

Je suis donc d'avis d'accorder l'appel et de renvoyer l'action de l'intimé avec dépens de toutes les cours si l'appelante veut les exiger de l'intimé. Je n'exprime aucune opinion sur la prétention de l'appelante qu'à raison des dispositions de la loi qui la régit elle n'est pas responsable de la faute de ses employés.

Appeal allowed.

Solicitor for the appellant: *Jules Desmarais.*

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

THE BAYER COMPANY, LIMITED.....APPELLANT;

AND

THE AMERICAN DRUGGISTS' SYNDICATE, LIMITED ..... } RESPONDENT.

1924

*Mar. 24, 27-28, 31, April 1-3. *June 8.

IN THE MATTER OF THE TRADE MARK "ASPIRIN"

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-Mark—Descriptive term—Mode of selling product—Acquiring distinctiveness—Validity of mark—Validity at registration—Subsequent right of public user—Removal from register—Trade-Mark and Design Act, R.S.C. [1906] c. 71, s. 42.

A trade-mark properly registered cannot be expunged under the provisions of section 42 of the Trade-Mark Act if it ceases to be used as a

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc.*

trade-mark and becomes merely descriptive of the article to which it has been applied. The authority to expunge "any entry made without sufficient cause" means without sufficient cause at the time of registration.

Judgment of the Exchequer Court ([1923] Ex. C.R. 65) reversed, Idington and Malouin JJ. dissenting.

APPEAL from a decision of the Exchequer Court of Canada (1) ordering that the entry of "Aspirin" as a trade-mark be removed from the registry.

In 1899 the Bayer Company of Germany registered in Canada the word "Aspirin" as a trade-mark to be applied to pharmaceutical preparations, and in 1913 assigned all its Canadian trade-marks to the Bayer Company of New York which assignment was registered in Canada in 1819 and the New York company shortly after assigned the trade-mark "Aspirin" and the goodwill and business connected therewith to the appellant Bayer Co., Ltd., of Canada.

The respondent applied to the Exchequer Court to have this trade-mark expunged from the registry and the court so ordered. The main question to be decided on the appeal from the judgment was whether or not the trade-mark, having been valid when registered, could afterwards be expunged because it had lost its distinctive character and become incapable of registration then.

Nesbitt K.C. and *Christopher Robinson K.C.* for the appellant. Aspirin is a distinctive word as describing the compound manufactured by the appellant and after the long period of user all presumptions will favour its validity; moreover if there is doubt the appellant should have the benefit of it, the onus being on respondent to prove that it should not have been registered. See *Wellcome* v. *Thompson* (2) at pages 749, 750, 757; *In re Cheeseborough's Trade-Mark "Vaseline"* (3) at page 8.

If "Aspirin" was distinctive when registered it cannot be expunged if it ceases to be so. See remarks of Parker J. in *In re Gramophone Company's Application* (4) at page 436.

(1) [1923] Ex. C.R. 65.
(2) [1904] 1 Ch. 736.
(3) [1902] 2 Ch. 1.
(4) [1910] 2 Ch. 423.

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Chipman K.C. and *Smart* for the respondent. Aspirin was always used as the name of the article, not the product. See *Linoleum Mfg. Co.* v. *Nairn* (1).

The appellant's product is merely a form of acetyl salicylic acid which has been patented by name in the United States. The patent having expired aspirin as describing the patented article has become *publici juris. Linoleum Case* (1). And the same holds where the article is itself *publici juris; Leonard & Ellis Trade-Mark* v. *Wells* (2). And see *Philippart* v. *Wm. Whiteley, Ltd.* (3).

IDINGTON J. (dissenting).—This is an appeal from the judgment of Mr. Justice Audette of the Exchequer Court of Canada whereby that court directed that the specific trademark registered on the 28th April, A.D. 1899, by Farbenfabriken vormals Friedrich Bayer and Company of Elberfeld, Kingdom of Prussia, Empire of Germany, in the Department of Agriculture, now the Department of Trade and Commerce, in Register No. 29, Folio 6889, consisting of the word "Aspirin" as applied to the sale of pharmaceutical preparations, should be expunged.

On the hearing of this appeal the argument was allowed to extend beyond the usual limits and indeed gave us every opportunity the evidence affords of understanding the basis of the respective contentions on each side.

I have given the case, since then, much serious consideration, and have come to the conclusion that for the reasons assigned by the learned trial judge this appeal should be dismissed with costs.

I am not disposed to write a treatise on the several subjects presented for consideration, but may be permitted to add to the foregoing a few remarks.

It would have been much more satisfactory to me had proof been adduced that one Bayer, in Germany, had invented "Aspirin," or its mode of production, and then coined this word "Aspirin" (as we have been told was the case) to represent it by way of a registered trademark, and if, as is likely, a patent was got in Germany for the invention, and has probably expired, and all that had

(1) 7 Ch. D. 834. (2) 26 Ch. D. 288.
(3) [1908] 2 Ch. 274.

been proven, such facts would, in all probability, have ended this long-drawn-out story by the application of the law both here and in England as well as in the United States.

By reason of want thereof I do not attach quite as much importance as the learned trial judge does in his reasons so far as founded upon a United States patent brought into this case, and the legal consequences flowing from its expiration.

In many indirect ways, however, that story is very important as showing how others of that early period thought it for their interest to register the word "Aspirin" in Washington, as a trade-mark.

How did he who registered the trade-mark now in question herein allow such a thing to be done?

Why did he not, by a little energy, get the counterpart of the one in question herein registered in Washington, and thereby forestall the Farbenfabriken of Elberfeld Company of New York, who deposited theirs in the Washington office on the 3rd of April, 1899, though only registered on the 2nd of May, 1899.

Meantime the trade mark "Aspirin" was on its way from the German Farbenfabriken Company to be registered in Canada, and got so, on the 28th of April, 1899, as above stated.

Shortly before, on the 1st August, 1898, one Felix Hoffman of Elberfield, Germany, the home town of the said company which registered the trade-mark in question herein and where it manufactured "Aspirin," was pushing his way to get a patent from the United States for the manufacture of "Acetyl salicylic acid," and got it on the 27th February, 1900, and assigned it to the said Farbenfabriken of Elberfeld Company of New York.

What is the true inside meaning of all these movements?

Was the registration now in question herein but a part of a scheme of the German company to get control of the entire American market, including Canada?

On his examination for discovery Frederick Weiss, the president of the appellant company, testifies as follows:—

Q. What is the nature of the business of the company?—A. The manufacture and sale of Bayer Tablets of Aspirin.

Q. Is that their only business?—A. They are acting as agents for the Winthrop Chemical Company of New York.

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Idington J.

Q. That is the only manufacturing business you carry on?—A. Yes, that is the only manufacturing business we carry on.

Q. You have a plant?—A. Yes.

Q. Where is that?—A. Windsor, Ontario.

Q. How long have you had that plant?—A. Well, you mean how long have we owned the property?

Q. How long have you operated the plant?—A. Since the beginning of the company.

Q. Did the company succeed to the business of any other firm or corporation?—A. No; it was organized.

Mr. Osler: That is rather ambiguous.

Q. Did they succeed to the active manufacturing or selling business of any other company?—A. No.

* * * * * *

Q. What line of business were you in previous to that?—A. I was employed by the Sterling Products Inc.

Q. Dealing with a different line of goods?—A. Yes.

Q. And in a different market?—A. In the United States.

Q. Who are the other officers of the Canadian Company at the present time?—A. Mr. William A. Sloan, he is just a director, Mr. B. W. Tobin, he is a director of the company, and he also acts as salesman for the Bayer Company Limited.

Q. Any others?—A. Just the three directors.

Q. What shareholders besides the directors, are in the Bayer Company Ltd.?—A. Just the qualifying shareholders in Canada.

Q. Who owns the stock?—A. The Bayer Company Inc., of New York.

Q. During the last two years you have been carrying on an advertising campaign in Canada with reference to the Bayer Aspirin, have you not?—A. The company has.

Q. The representations contained in the advertisement are the representations which the Bayer Company are making to the public at the present time, and during that campaign?—A. I do not see anything there as being different from the representations made.

* * * * * *

Q. That leaflet, Exhibit 3, contains the phrase: "Only tablets with the Bayer Cross are Aspirin—no other"—has that always been on?—A. Yes.

Q. Since when?—A. Ever since we started using the circular.

Q. That was at the beginning of the company two and one-half years ago?—A. Well, I would not say positively that we have been using them that long—we have been using them for quite a while.

Q. Has that phrase: "If it is not Bayer, it is not Aspirin" always been on since you have been president of the company?—A. Yes.

Q. Has this further phrase: "Get genuine Bayer tablets of Aspirin in a Bayer package, plainly marked with a Bayer Cross because the Bayer Cross is your only way of knowing you are getting genuine Aspirin prescribed by physicians for over 19 years, and proved safe by millions," been on this circular since your connection with the company?—A. Since the circular was used.

Q. I observe at the bottom of the circular it refers to the product as Monoasceticacidester of Salicylic acid—can you tell me whether that product is the product described in United States patent 644074 to Felix Hoffman of February 27, 1900—copy of which I shew you? (Exhibit 4).—

A. I am not a chemist, but it is my understanding that it is identical with the Bayer Manufacture.

Q. Who is your chemist?—A. The chemist of the Sterling Products Limited.

Q. Not of the Canadian company?—A. We have no chemist.

Q. Who supervises the manufacture in Canada?—A. Of what?

Q. Of Bayer's Aspirin?—A. Tablets?

Q. Yes?—A. It is manufactured under the druggist or—the registered man is B. W. Tobin.

Exhibit No. 8.—Copy of United States Patent (Hoffman) No. 644077, being said Exhibit No. 4 on examination of Mr. Weiss.

Q. That is the patent which described the process under which Bayer Tablets of Aspirin are made?

Mr. Osler: The Aspirin; not Bayer Tablets. The tablets are the tablet form of the Salicylic Acid which is called Aspirin when manufactured by the Bayer Company as we like to put it.—A. We do not say Bayer Aspirin—we say Bayer Tablets.

And the suspicion is not only strengthened by this evidence as to the identity of the goods patented by Hoffman with those for which protection is now being sought by the use in an advertising campaign of what is practically an amended edition of the registration now in question, which to me seems bordering on fraud.

Is the appellant to be permitted to manufacture in Canada such goods as advertised and pass them off as if manufactured by those who got the registration in the first place?

Nor does the story end there, for later on he testifies as follows:—

Q. Is all your product which you sell in Canada, manufactured in Canada?

Mr. Osler: You mean everything they sell?

Mr. Smart: No; all the Bayer Tablets of Aspirin.—A. Yes.

Q. None of it is purchased from any other firm?—A. No.

Then let us come to the actual wording of the claim for registration and what was done by the claimant thereof and see what, if anything, done thereunder, and goodwill, if any, is assignable.

In specifying, its claim is written thus:—

The Farbenfabriken vormals Freidrich Bayer and Company * * * hereby furnishes a duplicate copy of a specific trade-mark to be applied to the sale of pharmaceutical preparations in accordance with sections 4 and 9 of the "Trade-Mark and Design Act," which mark belongs to the Farbenfabriken vormals Friedrich Bayer & Company, by reason of said company having been the first to make use of the same.

The said specific trade-mark consists of the arbitrary word "Aspirin." This has been generally arranged as shewn in the accompanying facsimile, in which it appears in plain block letters arranged on a horizontal line; but

1924

THE BAYER CO. v. AMERICAN SYNDICATE DRUGGISTS

Idington J.

other forms or type may be employed, or the word may be differently arranged or coloured.

The manufacturing, if any, was supposed to have been carried on in Germany but it is to be observed that it does not say, as the terms of section 5 of the Act seem to imply it should, in what way applicable

to the manufactured product or article of any description manufactured, produced, compounded, packed or offered for sale by him, etc.

And when we come to consider the assignment by said company to the Bayer Company Inc. of New York on the 12th day of June, 1913, we find appended thereto a list of articles with numbers and dates of which "Aspirin, No. 6889, dated April 28, 1899," appears the fourth in said list.

This seems to me to indicate that the parties concerned do not seem to have understood the meaning of the trade-mark in question as covering all pharmaceutical preparations, as it professes to do. And moreover, that it in truth may have been intended to cover only the goods known as "Aspirin" at the time.

If the latter, then it would seem void *ab initio* as an attempt to forestall all others then dealing in aspirin and hence void.

If it was intended to cover only "aspirin" of its own manufacture, it should have been so designated as section 5 of the Act seems to contemplate and provide, and hence is not protected by the Act.

I make these observations as worthy of consideration, in passing on to the story of the alleged goodwill.

The German company pretending to register something, never carried on business in Canada, either as manufacturers of Aspirin or selling it there.

I asked appellant's counsel and they could only refer to the following evidence of Hargreaves, a witness, who testifies as follows:—

Q. Have you ever at any time met that acetyl salicylic referred to under any other term than the chemical name?—A. Well, yes. We handled aspirin and recognized it was the same composition, the same chemical.

Q. And where did you get your aspirin?—A. We got it first, to the best of my recollection, through John Taylor & Co. At that time they were the Canadian agents for the Bayer people.

His Lordship: For the Bayer people?—A. For the Bayer people—that would be prior to 1905 first.

The only goodwill, if any, that the German company could have to assign was derived from and founded upon orders sent it direct from Canada and filled by it with goods manufactured by it in Germany.

Can anything therein be a foundation for helping the appellant to acquire the trade-mark of said German company, and use it for goods not manufactured by it, but by appellant in Canada, of same kind as made by virtue of the Hoffman patent, and common to all the world?

I take it that there must be a goodwill passed to render an assignment of a trade-mark valid.

Section 15 of the Act is pointed to as of so general a character as to entitle the transfer of that which covers nothing—but the decisions cited to us clearly decide otherwise. A collection of those, and many others, appears on page 9 of Sebastian, 5th ed.

Anything done as herein by way of ordering from the German company some of its make of aspirin, would not, I submit, constitute, even if acted on then, such a goodwill in it as to lay a foundation for the assignment of 12th June, 1913, under which alone appellant can claim.

Indeed the privilege would exist in common with all others in the appellant to enable it to make such orders without such assignments.

That is not what it wants, but to terrorize others from doing likewise and, by virtue thereof, palm off upon the Canadian public its own aspirin manufactured in Canada.

I submit the continuation of a trade-mark for such a purpose is not within the scope of the Act, and seems to me such an improper use of it as to alone justify the expunging of the trade-mark as directed by the judgment complained of.

The appellant seems to desire to register its own mark, as I understand it has done, and cover it up by the trade-mark of another. Surely that involves a clear abandonment of the original claimant.

I am only making the foregoing several suggestions as result of my consideration of a curious case lest some of them may not have been presented at the same angle in the reasons of the learned trial judge, adopted as above.

DUFF J.—This is an appeal from a judgment of Audette J., in proceedings commenced by the respondent, the

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Duff J.

American Druggists' Syndicate, Limited, by a petition praying for an order expunging from the register of trade-marks the trade-mark "Aspirin," of which the appellant, the Bayer Company, Limited, is the registered owner. This trade-mark was registered on the 28th April, 1899, as a specific trade-mark on the application of Farbenfabriken vorm. Fried. Bayer & Co., which may be referred to as the Bayer Company of Germany, under which the applicant asked for the registration of a specific trade-mark, consisting of the arbitrary word "Aspirin," to be applied to the sale of pharmaceutical preparations. The Bayer Company was engaged in a large way in the business of manufacturing dyes and chemicals at Elberfeld and Leverkusen, in Germany. It and its successors entitled to the Canadian trade-mark have used the mark almost entirely in connection with a preparation made and sold by many others, a chemical compound of which the name is acetyl salicylic acid. On the 12th June, 1913, the Bayer Company of Germany assigned its Canadian trade-marks and the goodwill and business in connection therewith to the Bayer Company, Inc., a corporation incorporated in the State of New York, the trade-marks so assigned including the trade-mark "Aspirin." In October, 1914, an application was made for the registration of this assignment, but the assignment was not then registered, and by arrangement was retained by the Department of Agriculture for action after the termination of the war. On the 12th December, 1918, the Alien Property Custodian of the United States sold all the issued capital stock of the Bayer Company, Inc., to the Sterling Products, Inc., an American corporation. On the 26th March, 1919, the assignment from the Bayer Company, Inc., was registered in the Canadian Trade-Mark office. In May, 1919, the appellant, the Bayer Company, Limited, was incorporated as a Dominion company, and the whole of the issued capital stock of the company is owned by the Bayer Company, Inc. On the 30th May, 1919, the Bayer Company, Inc., assigned to the appellant the Canadian trade-mark "Aspirin" and all the goodwill and business in connection therewith; and on the 31st May, 1919, this assignment was recorded in the Canadian register. In the United Kingdom the Bayer Company of Germany ob-

tained, on the 22nd October, 1899, registration of the word "Aspirin" as a trade-mark. In the United States, the Farbenfabriken of Elberfeld, a company incorporated in the State of New York, applied on the 3rd April, 1899, and obtained on the 2nd May, 1899, the registration of the word "Aspirin" as a trade-mark under the provisions of the United States Trade-Mark Act. On the 1st August, 1898, Felix Hoffman applied in the United States for a patent for acetyl salicylic acid of which he had invented, as he stated in his specification, a new and a useful improvement. This patent was issued on the 22nd February, 1900, to the Farbenfabriken of Elberfeld of New York, to which Hoffman had previously assigned his rights.

Acetyl salicylic acid does not appear to have been manufactured in a commercial way until the year 1899. Early in that year the commercial manufacture of the product appears to have begun, the Bayer Company of Germany being one of the earliest of the manufacturers. The article first appeared in Canada in the form of a powder or crystals; later it was sold in the form of compressed tablets; and in recent years its use in the latter form has far exceeded its use in the form of a powder. For many years it was used either as powder or in tablet form in dispensing medical prescriptions, but after the appearance of the article in tablet form a trade which is described by the witness as "over the counter trade" began; the customers, that is to say, began to prescribe for themselves and to buy from the druggist without a physician's prescription. The evidence shows that various words have been coined and used as trade names to distinguish a particular manufacture of acetyl salicylic acid; Burroughs Wellcome Co., for example, using the word "Empirin," having formerly used the word "Xaxa"; Charles E. Frosst & Co., the word "Acetophen;" the National Drug Company, "Seetosal"; Henry Wampole & Co., "Ceteloyd."

In 1915, the Board of Trade cancelled the registration of the trade-mark "Aspirin" in the United Kingdom as from the 22nd December, 1914, under the provisions of special war legislation; and on the 27th February, 1917, Hoffman's patent expired. Thereafter the word "Aspirin" came to be used freely by English and American manufacturers as designating acetyl salicylic acid. On the

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Duff J.

8th March, 1919, the registration in the United States of the trade-mark "Aspirin" was cancelled by the United States Commissioner. After the termination of the war, upon the registration in 1919 of the assignment to the appellant, the appellant began to advertise extensively the sale of acetyl salicylic acid on the Canadian market under the trade name "Aspirin" and to assert its rights to the exclusive use of that name as a trade name.

Audette J. gave judgment in favour of the respondents, expunging the trade-mark. He identified the German Bayer Company, the predecessor of the appellant, with the American company, who became proprietors of the Hoffmann patent, and took the view that from its origin the word "Aspirin" had by the Bayers been applied to designate the product protected by the Hoffman patent. The trade, he said, and the public, as a consequence of the issue of the patent, treated the word "Aspirin" as a word descriptive of acetyl salicylic acid, a word which he thought had become a common English word. In his view, this was the state of facts at the time of the application of the appellant's predecessors in Canada; and consequently the word "Aspirin" was incapable of being registered as a trade-mark. "No man can get a monopoly of the English language," he says.

He also held that the case came within the principle that the word, having been applied by the owner of a patent to designate the product protected by the patent, and the name having thus become descriptive of the thing, everybody in Canada and the United States and elsewhere became entitled in point of law, upon the expiration of the patent, to employ the word to designate the substance. Further, the learned trial judge took the view that the evidence sufficiently established an intention on part of the appellant to abandon "Aspirin" as a trade-mark.

The Trade-Marks Act provides for a register of trade-marks. Sec. 5 describes "trade-mark" for the purposes of the Act, and is in these words:—

5. All marks, names, labels, brands, packages, or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or

other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade-marks.

The applicant for registration must declare that the trade-mark

was not in use to his knowledge by any other person than himself

at the time of his adoption of it. By sec. 11, the Minister may refuse to register a trade-mark on certain specified grounds, the only material ones being, first, if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark; and secondly, if the so-called trade-mark does not contain the essentials necessary to constitute a "trade-mark properly speaking." By sec. 13, the applicant, on complying with the provisions of the Act, may

have such trade-mark registered for his own exclusive use.

By the same section it is provided that upon registration the

proprietor shall have the exclusive right to use the trade-mark to designate articles manufactured or sold by him.

By sec. 17, a specific trade-mark, when registered, is to endure for the term of twenty-five years, but is renewable from time to time for the like term. By sec. 19, a right of action is given to the proprietor against any person who "uses the registered trade-mark of such proprietor" or who sells any article bearing the trade-mark; and by sec. 20 it is provided that nobody shall institute any proceedings to prevent the infringement of any trade-mark unless such trade-mark is registered in pursuance of the Act. It is sufficiently clear that a trade-mark, in order to be registrable under the Act, must be something which the applicant is entitled to adopt as distinguishing the articles to which it is applied as his own; and it was not disputed on argument that the trial judge was entirely right in assuming that words merely descriptive at the time of the application could not properly be registered as a trade-mark. Adoption by the applicant for the purpose of distinguishing his goods is the ruling condition. There must, moreover, be adoption for use as a distinguishing mark implying a present *bona fide* intention to use the mark for such purposes; and indeed the affidavit in the form prescribed by the rules could hardly be made by an applicant who has not, in however limited a degree, actually made use

1924
THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE
Duff J.

of the mark in respect of which the application is made. If the learned trial judge has correctly appreciated the effect of the evidence adduced in holding that the respondents have established that the word "Aspirin" at the time of the application had been given to the world by the applicant as exclusively descriptive of the article and that at that date the word was in fact a word in common use as such, then he was indubitably right in his conclusion that the entry ought to be expunged as having been made without sufficient cause.

In considering this question it is not a little important to remember that the onus is upon the respondents. Many decisions might be cited in support of this, but it will be sufficient to mention two: *Cheeseboro's Case* (1); *Wellcome* v. *Thomson* (2). It is for the respondents to establish to the satisfaction of the tribunal of fact that for the reasons relied upon the trade-mark was registered "without sufficient cause"; that is to say, it is for the respondents to show that "Aspirin" had not been adopted as a distinctive name in the relevant sense, but was a descriptive name in current use designating the compound to which the appellants seek to apply it as a trade name. If, as Stirling L.J., says in the case last cited,

> any doubt exists, the doubt must be resolved in favour of the trade-mark.

The respondents have not, I think, acquitted themselves of this onus.

The evidence bearing directly on the state of affairs in 1899 is, as might be expected, very meagre, but there is a mass of evidence derived from the practice of the trade from 1900 or 1902 to 1915, and from medical and pharmaceutical literature published during that period, and from this evidence I draw the conclusion that during that period, to the medical profession, to the wholesale dealers and to manufacturers, "Aspirin" was known as a trade name for acetyl salicylic acid, and a trade name owned by the Bayers. There is a good deal of ground, no doubt, for the contention that during the later part of the same period "Aspirin" in a loose way was often used as designating the product itself; but nevertheless I think the evidence does

(1) [1902] 2 Ch. 1 at pages 8 and 9.
(2) [1904] 1 Ch. 736 at page 757.

establish the proposition that during this period, among the classes of persons I have mentioned, "Aspirin" was always known to be, and was recognized as, the trade name of the Bayers.

Important evidence is given by wholesale dealers to the effect that Bayers' product, and Bayers' product only, was sold by them under the name of "Aspirin," down to the time when, during the war, the stock of Bayers' product became exhausted. In their price lists, acetyl salicylic acid was listed at one price and "Aspirin" at another price, the price of "Aspirin" being very much greater, some of the witnesses say four or five times as great, as the price of acetyl salicylic acid. The evidence of Mr. Grant, the Canadian manager of Parke, Davis & Company, and of Mr. Lang, the Canadian manager of Burroughs Wellcome, should be mentioned specially. Parke, Davis & Company did not manufacture acetyl salicylic acid in Canada. They acquired the compound from various sources and compressed it into tablets for the retail trade. It was first bought under the name of "Aspirin" in 1906 from the Bayer Company of Germany, and in 1908 acetyl salicylic acid was bought under that name. Down to 1916, when the stock of the Bayer product became exhausted, they listed in their price lists "Aspirin" and acetyl salicylic acid. Since then they have listed only acetyl salicylic acid. Mr. Grant says that "Aspirin" was recognized as the trade name of the Bayers and scrupulously respected as such. Out of 45,000,000 tablets compressed by them for the Canadian market, only 6,000,000 have been composed of the Bayer product. These have been listed and sold as "Aspirin," the remainder being listed and sold as acetyl salicylic acid, at a much lower price. Mr. Lang says that Burroughs Wellcome Co. from 1906 have listed and sold in Canada tabloid aspirin. These tablets were made exclusively from the Bayer product of acetyl salicylic acid. They sold acetyl salicylic acid during the same period in tabloid form under their own trade name, "Xaxa." Since 1915 they have struck Aspirin from their price list, and replaced it by their own manufacture of acetyl salicylic acid, under a trade name of their own, "Empirin." Other witnesses are quite explicit in the same sense. These witnesses agree

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Duff J.

that the distinction was well recognized in the trade, as indeed it could hardly fail to be, having regard to the difference in price.

The respondents rely chiefly upon the evidence of retail dealers, some of whom say that aspirin and acetyl salicylic acid were used convertibly; that they were accustomed to order acetyl salicylic acid from the wholesalers and get it under the name "Aspirin"; that when aspirin was prescribed, acetyl salicylic acid was used to fill the prescription. They also say that in the "over the counter trade," from about 1908 onwards, customers did not distinguish between aspirin and other products. This, however, must be observed, the evidence given by the wholesale dealers referred to shows that when aspirin was ordered from them, aspirin and aspirin only was supplied except in the few cases where it was plain that what was really wanted was acetyl salicylic acid, and not necessarily aspirin. With hardly an exception, the wholesale dealers who gave evidence say that they did not sell acetyl salicylic acid, other than the Bayer product, under the name of aspirin. Moreover, all of the retail dealers but one purchased from Parke, Davis & Co., and had Parke, Davis & Co's. price lists, and must have known that aspirin was sold at a much higher price than other manufactures of acetyl salicylic acid. The practice of the other large dealers was similar. It is highly improbable, if, indeed, it is at all credible, that a dealer to whom the distinction between aspirin and acetyl salicylic acid was of no importance would knowingly order aspirin and pay the higher price for it, or that the distinction was not perfectly well understood by the retail dealers, as well as the wholesale dealers. Moreover, the price lists filed show in nearly half of them aspirin distinguished from acetyl salicylic acid, with widely differing prices. In the others, aspirin alone is given, but at prices which, when compared with the others, suggest, in a large number of these, that it is the Bayer product which is indicated. As to prescriptions, a majority of prescription druggists undoubtedly do say that they used the product of any manufacturer to fill a prescription. About one-third of them, however, declare that they used the Bayer product so long as it was available. Most of the retailers say that their first knowledge of acetyl salicylic acid was of the Bayer pro-

duct, which they received in one-ounce packages of powder, marked "Bayer & Co.," and "Aspirin." Many of these witnesses say that very shortly afterwards, almost simultaneously, they acquired a knowledge of other manufactures of acetyl salicylic acid, while the remainder, with two or three exceptions, say that they acquired that knowledge from two to three years afterwards. There is another observation which must be made with regard to the evidence of these witnesses: It is quite plain that a marked change took place after the commencement of the war, and especially after the cancellation of the British trade-mark and the expiry of the Hoffman patent. From that time on, in England and the United States, as well as in Canada, the free use of the word "Aspirin" no doubt greatly expanded; in Canada the German company was still the registered owner of the trade-mark and could not, of course, maintain during the war an action for infringement; and all the witnesses were speaking under impressions derived from the experiences of the preceding five to eight years. Allowance must be made for this; indeed, all the evidence of these witnesses must be read in light of it. Even then it should be observed that one of the respondents' witnesses, Henry Willis, who has been in business for twenty-two years in Quebec and is one of the Board of Commissioners of the Pharmaceutical Society, says that every druggist knows that "Aspirin" is only a trade name or coined name, applied to acetyl salicylic acid. The conclusion which I draw from the evidence given from the practice of the wholesale dealers, the book of publications and the price lists, is, as I have stated above, that "Aspirin" was understood to be a distinctive name for the Bayer product; that other producers recognized it as such, and adopted their own distinctive names; that, generally, the distinction must have been known to the medical profession. In the early years, that is to say before 1908, it must also, I think, have been recognized by the retail dealers. Although there is some disagreement, there is a preponderance of evidence by such dealers pointing to the year 1900 as marking the beginning of the period when acetyl salicylic acid began to be widely known to the trade in Canada. As I have said, these witnesses usually say that it was through the Bayer

1924
THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE
Duff J.

product, and under the name "Aspirin," that acetyl salicylic acid was first brought to their attention.

As already observed, the onus is upon the appellants to establish their contention that at the date of registration, in the year 1899, "Aspirin" was a term descriptive of the compound acetyl salicylic acid, and as such, incapable of being registered as a trade-mark. The general recognition of the name as the trade name of the Bayers by the classes of persons specially interested in the subject over a considerable period of years beginning soon after registration, coupled with the lapse of time, greatly augments the weight of the presumption which the respondents must overcome.

There is some evidence that acetyl salicylic acid was imported from Switzerland under the name "Aspirin," but the source of production is not identified, and the evidence as to date is very vague and unreliable. Two witnesses mentioned the year 1898 as the year of their first acquaintance with the word "Aspirin" as designating a.s.a. The testimony of these witnesses is most unsatisfactory, and there is not a scrap of documentary or other evidence to support their recollection. The only label of the earlier years which is connected with a European product other than Bayers' is one of the year 1904, a label for the product of a Swiss firm in Bâsle; and on it the word "Aspirin" does not appear. Generally it may be said, as to the evidence by retail witnesses who speak of sales of acetyl salicylic acid, other than the Bayer product, under the name "Aspirin," that besides the difficulty of drawing anything like a confident conclusion as to dates, there was the circumstance that few of the witnesses saw the drug so labelled in the original package, and the original source of supply is consequently left in doubt. The evidence is altogether too vague and unsatisfactory to form the basis of a judicial decision that the respondents have established the use of the name as a descriptive name prior to registration in 1899 or have established that the appellants' predecessors were not the first to adopt and use "Aspirin" as a trade name.

In deciding that, at the time of the application the name "Aspirin" was descriptive of the thing in such a way as to exclude distinctiveness in the pertinent sense, the learned judge bases his view mainly upon the Hoff-

man patent. The fact that the patent having been granted in the year in which application for the Canadian trade-mark was made, appears to the learned judge to be conclusive against the appellants in two ways: First, as establishing conclusively the fact that the name "Aspirin" was at the date of the application descriptive of the drug in such a way as to exclude distinctiveness; and secondly, as bringing into operation a supposed rule of law that in such circumstances the appellant is in point of law precluded from asserting proprietorship of the name.

Neither in the application for the Hoffman patent nor in the specification is there any reference to the word "Aspirin." The patent is a patent for acetyl salicylic acid. Even in the United States, the territory in which the patent ran, I do not think it would have been theoretically impossible for the patentee to assert and maintain his right to the exclusive use of "Aspirin" as a trade name. The practical difficulty, of course, might have been insuperable, but if they could have succeeded in controlling the use of the word "Aspirin" and the signification attached to it by the public generally in such a way that, while signifying acetyl salicylic acid, it at the same time connoted the fact that it was made by the patentee—in other words, if he had succeeded in controlling the use of the word in such a way that in the minds of people seeing the word, it denoted acetyl salicylic acid, made by them—I do not know why, at the expiration of the patent, he should not be still entitled to say that this word was his word. Parker J., said in *Burberry* v. *Cording & Co.* (1)

> I do not agree with the argument that a word cannot be at the same time both descriptive and distinctive.

If "Aspirin" had been the only word which could be used for the purpose of denoting the patented article, the respondents' contention might have been well-nigh unanswerable. But here we are confronted by a very different state of facts. Both in the application and in the specification, the name given to the patented compound is "acetyl salicylic acid," and the word "Aspirin" nowhere appears. During the currency of the patent, as already observed, "acetyl salicylic acid" was constantly used as descriptive of the

(1) 26 Cut. P.R. 693 at p. 704.

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Duff J.

article. In the British Pharmacopœia, for example, aspirin is not mentioned. In the Encyclopædia Britannica (1911), aspirin is only mentioned as one of a number of trade names; and where, as here, the patent runs in a limited territory, and that a foreign territory, while the article is an article known the world over by a designation other than the alleged trade name, the argument relied on seems to have little cogency.

In the *Vaseline Case* (1) which apparently did not attract the attention of the learned trial judge at all, there was a patent in the United States, and during the life of it the patented product was produced in England, not only by the owner of the patent, who sold it under the name of "Vaseline," which he had given to it in his American patent, but by others, and it was sold under different names; and it was held that the name was not incapable of being owned as a trade name. By Cozens Hardy L.J., as well as by the other Lords Justices, the question whether or not "Vaseline" had become the name of the article in such a way as to exclude the possibility of using it distinctively as the product of the manufacturer, and whether the manufacturer, by attaching it to the patented article in his specification, had precluded himself from claiming a title to it as a trade name, were treated as questions of fact. Whether on the facts that case was rightly or wrongly decided is of very little importance here. It is conclusive against the contention that, by virtue of the fact alone that the appellant's predecessors had patented the article in the United States, the appellant is precluded from claiming the exclusive right to use the word here as a distinctive name.

I turn now to the important question of the authority of the Exchequer Court under section 42 of the Trade-Marks Act, which is as follows:

42. The Exchequer Court of Canada may, on the information of the Attorney General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the register of trade-marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the court thinks fit; or the court may refuse the application.

2. In either case, the court may make such order with respect to the costs of the proceedings as the court thinks fit.

(1) [1902] 2 Ch. 1.

3. The court may in any proceedings under this section, decide any question that may be necessary or expedient to decide for the rectification of any such register.

The authority to expunge entries in the register arises from this section, and from this section alone; and in order to bring a case within the section it must, it would appear, rest upon the allegation that the entry sought to be expunged is an " entry made without sufficient cause." On behalf of the appellants it is contended that the jurisdiction arises only when it appears that the entry was one which, on the facts existing at the time it was made, can be held to have been made without sufficient cause. On behalf of the respondents it is contended, and the learned trial judge has held, that although a trade-mark has been properly registered if, after the registration, a state of facts comes into existence and it can truly be said that, on that state of facts, the trade-mark is one which ought not to be on the register, then there is jurisdiction to expunge it under this section. The learned trial judge relies upon some observations of Lindley M.R., in a case of *In re Batt & Co.* (1). In that case Romer J., before whom the application came in the first instance, found as a fact that the trade-mark in dispute had been placed upon the register by a person who had in fact no intention to use it as a trade-mark at all; and on the principle that it is a condition of the right to register a trade-mark that there should be a user in fact or a *bona fide* intention to use the trade-mark as such, he held that the trade-mark had not been properly registered, and that the entry ought therefore to be expunged. This was decided upon the authority of *Edwards* v. *Dennis* (2). In the Court of Appeal Romer J's. findings on the facts were affirmed and his judgment was upheld on the principle just mentioned. The Master of the Rolls, however, speaking for the court, dealing with sec. 90 of the English Act of 1883, which corresponds in all pertinent respects with sec. 42 of the Canadian Act, said that the court was not disposed to put a narrow construction on the expression, " entry made without sufficient cause in the register," nor to read it as if the word " made " were the all-important word, and as if the words, " made without sufficient cause,"

(1) [1898] 2 Ch. 432. (2) 30 Ch. D. 454.

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Duff J.

were, "made without sufficient cause at the time of registration," so as to be confined to that precise time. He added:

> If any entry is at that time on the register without sufficient cause, however it got there, it ought, in our opinion, to be treated as covered by the words of the section. The continuance there can answer no legitimate purpose; its existence is purely baneful to trade, and in our opinion in the case supposed, the court has power to expunge or vary it.

This is, of course, a very weighty opinion, and it was unquestionably one of the grounds of the decision, but there was an appeal to the House of Lords, and on that appeal, while the judgment was affirmed upon the ground on which the judgment of Romer J., was based, it is a fair conclusion I think, from the language of Lord Halsbury, that their lordships were by no means convinced that the principle laid down in the passage cited above from the judgment of the Court of Appeal was one which ought to have the assent of their lordships. The learned trial judge is evidently under a misapprehension as to what occurred in the House of Lords, because he states or implies that the passage in the judgment of the Master of the Rolls which I have epitomized was approved by the Lord Chancellor and the Law Lords.

In England, by the Trade-Marks Act of 1905, specific authority was given to the court on the application of any aggrieved person to remove a registered trade-mark from the register on the ground that it was registered by the proprietor or his predecessor without any *bona fide* intention to use it, and there is in fact no *bona fide* use of it in the goods in respect to which it has been registered, or on the ground that there has been no *bona fide* use of any such connection within five years immediately preceding the application. And there is general authority to remove any entry wrongfully remaining on the register. This legislation, it will be observed, (in a limited degree only) applies the principle laid down by Lindley M.R., in the passage quoted above. But I have been unable to discover any satisfactory evidence that the views expressed by the Master of the Rolls in *Batt's Case* (1) have been accepted as enunciating a rule which can be derived from a proper interpretation of the statute law as it stood under the Act of 1883. In the fifth edition of Kerly on Trade-Marks it is stated, at p. 344, that

(1) [1898] 2 Ch. 432.

no order was made, it is believed, under the earlier Acts, for the removal of a trade-mark originally rightly registered,

and there appears to be a concurrence of rather weighty opinion that on an application under the Act of 1883 to remove a mark from the register, the question whether the mark was entitled to registration must be decided as at the date when registration was effected. Sebastian on Trade-Marks, p. 634; *Wood* v. *Lambert* (1); *Barlow & Jones* v. *Johnson & Co.* (2); *In re Appolinaris Co.* (3); *In re Bovril T.M.* (4); *In re Burroughs Wellcome Co.* (5). Whatever be the rule in other cases, particularly in cases of non-user—that is to say, where there has not been any user or where there has been no user in connection with the goods in respect of which the mark is registered—it seems clear that loss of distinctiveness because of the trade-mark becoming descriptive after registration, by reason of causes arising in the ordinary course of trade, is not a ground for rectifying the register under sec. 42.

There are some observations of Lord Parker, then Mr. Justice Parker, which may properly be read in this connection: First, I refer to his judgment in *Philippart* v. *Whiteley* (6):

> Under the principles of law applicable to trade-marks before any legislation on the subject, no mark was protected unless at the time of the alleged infringement it was being used for the purpose of distinguishing, and did distinguish, the goods of the owner from the goods of other people. By reason of the difficulty, if not the impossibility, of taking a mark off the register when once it has been properly put on under the Acts, it became possible for a trader to cease using his registered mark for its legitimate purpose as a trade-mark without losing the benefit of his registration. Indeed, if he could identify his mark in the public mind with the article sold, it was to his advantage so to do, for he could thus, by preventing the sale of the article under the name by which it was known to the public, obtain a practical monopoly. I am inclined to think that the Act of 1905 has in part provided a remedy for this indirect result of trade-mark legislation. For by virtue of the definition clause a registrable mark must, at the date of the application for registration, if not used at any rate be intended to be used for the purpose for which alone, prior to the Acts, the courts would have given a mark protection; and on the principle of *In re Batt & Co's. Trade-Marks* (7), the intention of the application for registration may be gathered from his subsequent conduct;

(1) 32 Ch. D. 247.
(2) 7 Cut. P.R. 395, 400.
(3) [1891] 2 Ch. 186 at page 230.
(4) [1896] 2 Ch. 600.
(5) [1904] 1 Ch. 736.
(6) [1908] 2 Ch. 274 at pp. 285-6.
(7) [1898] 2 Ch. 432.

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Duff J.

and again it may be that s. 37 will be construed as enabling the courts to remove a mark which has ceased to be used, or has never been used, for the legitimate purposes of a trade-mark.

Then, in *The Gramophone Company's application* (1) there is this passage:—

None of the trade-marks Acts have provided machinery for taking a mark off the register if once it has been properly put on, and it is quite unnecessary in an action for infringement of a registered mark to prove that such mark still remains distinctive of the goods of the registered proprietor. It may, therefore, be to the interest of the registered proprietor of a word mark that the word should lose its distinctiveness so far as the public are concerned and become the popular name for the article. He thus obtains a practical and perpetual monopoly of the article itself, other manufacturers being precluded by the mark on the register from selling their goods under the name by which they are commonly known. To induce the public to adopt a catching word as the name of the article to which it is applied, especially if the article be comparatively new, it is only necessary to advertise the article on a sufficiently large scale under that name, and this can be done by any rich corporation. Such a procedure would, or might, have been fatal to any remedy based upon common law rights, but does not affect the value of a registered mark the distinctiveness of which is assumed and need never be proved. Indeed, no evidence to prove that a registered mark was no longer distinctive would be in any way relevant. The old action for infringement of a common law trade-mark was based only on the duty of the court to prevent fraud and deceit, and the loss of distinctiveness was, therefore, fatal to its success. It is, however, one thing to put a word mark on the register and then proceed to induce the public to use it as the name of the article to which it is applied, and quite another thing to adopt a word already used to denote a particular article, and then proceed to identify it among the trade with the goods of a particular manufacturer, relying on such identification as a reason for registration.

And again, on p. 437, he observes that a registered trade-mark cannot be taken off the register,

though it has ceased to be used for the legitimate purpose of a trade-mark and has become merely the name of an article.

In *Burberry* v. *J. C. Cording Co.* (2), Lord Parker (then Parker J.) reverts to the subject in these words:—

With the example before them of a foreigner who, by the judicious choosing of a likely word, the word "vaseline," by registering it under the Trade-Marks Act, and by subsequently advertising and using it as the name of the preparation from petroleum to which it was applied, has secured a practical monopoly in that preparation in the United Kingdom, it is not unlikely that the ingenuity of manufacturers or traders should be devoted to devising a similar mode of procedure in the case of their own goods, for a monopoly thus obtained may be more valuable than any patent. It is well to remember, however, that apart from registration under the Acts, this mode of procedure may have its own disadvantages. Apart from those Acts, it is dangerous for a trader to allow the word he

(1) [1910] 2 Ch. 423 at pp. 436-7. (2) 26 Cut. P. R. 693 at p. 708.

chooses to become the popular name of the article to which it is applied, and it is dangerous to choose a descriptive word. If the word is descriptive or becomes the name of the article, it will be difficult, if not impossible, to prove that it is distinctive of his own goods or that there will be any deception in its use by others, and apart from the Trade-Marks Acts, the right of any one to the exclusive use of a word is always limited by the possibilities of its use by others without any risk of deception.

My conclusion is that *Batt's Case* (1) has not been considered an authority for the proposition for which it is cited, and having regard to what occurred in the House of Lords, I think we are not strictly bound by it. *Hack* v. *The London and Provident Building Society* (2).

On behalf of the respondent it is suggested that the rights of the respondent are not limited by the language of sec. 42. Sec. 23 of the Exchequer Court Act is invoked. It is argued that the effect of this section is to give an unlimited discretion to the court to correct the register. The section itself does not profess to deal with substantive law; it is an enactment conferring jurisdiction; and the rule by which the court is to be guided in exercising its jurisdiction is, in cases such as that now before us, to be found in sec. 42 of the Trade-Marks Act. The proceeding is a statutory proceeding, and the right of the respondent is a special statutory right, and the conditions of the right must be sought in the terms of the enactment out of which it arises.

What I have said has an important bearing upon the only remaining contention I think it necessary to discuss, that, namely, the respondent was entitled to succeed on the ground that the registered trade-mark had been abandoned; first, because for many years, to the knowledge, and inferentially with the acquiescence of the appellant's predecessors, the name "Aspirin" had been used by the druggists and the public as descriptive of the drug acetyl salicylic acid without any connotation connecting it with the proprietors of the trade-mark as producers or sellers; secondly, because of various dealings with the trade-mark since 1913 and public advertising by the respondents since 1919, and because of the action of the respondents in obtaining certain trade-marks in the year 1920.

With respect to all these contentions there is, I think, the insuperable objection that sec. 42 of the Trade-Marks

(1) [1898] 2 Ch. 432. (2) 23 Ch. D. 103 at p. 112.

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Duff J.

Act confers no authority to give effect to them in a proceeding for expunging an entry in the register. I will not repeat what I have already said, but it is proper to observe that *Bowden Wire Co.* v. *Bowden Drake Co.* (1), a decision upon which the respondents largely rely, appears to have proceeded upon the authority given by sec. 35 of the Act of 1905; an authority which, as already mentioned, is much more comprehensive than that under sec. 42. In the Court of Appeal (2) Lord Sumner (then Hamilton L.J.) emphasizes the circumstance that the application is an application under sec. 35, a circumstance which is also mentioned in the argument of Sir Alfred Cripps, at p. 586.

The first argument advanced by the respondents in support of their theory of abandonment is, I think, completely answered by what I have already said. The observations of Parker J., in the cases above cited, are sufficient to refute any suggestion that the fact that the name "Aspirin" became in the minds of the general public descriptive is in itself satisfactory evidence of an intention to abandon the trade-mark. And these observations, moreover, establish, in my opinion, that in the existing state of law the facts relied upon cannot constitute a proper ground for expunging the trade-mark from the register.

As to the second contention, it has already been observed that the assignment from the German company to the New York company was only registered in 1919. During the whole of the period of the war the German company was the registered proprietor of the trade-mark and, as mentioned above, obviously during that period could not have maintained an action for infringement. In point of fact, therefore, there would appear to be, to put it at the lowest, a great deal of difficulty in inferring from the free use of "Aspirin," which no doubt did occur during that period as a name descriptive of acetyl salicylic acid, any intention on the part of the proprietors of the trade-mark to abandon their rights. The learned trial judge observes upon the fact that during this time the proprietor was an American company which refused to furnish aspirin; but in the absence of some evidence as to the real owners of the

(1) 31 Cut. P.R. 385. (2) 30 Cut P.R. 580 at p. 594.

business of this company that circumstance can be regarded as of very little significance; and it is to be noted in this connection that, as above mentioned, in December, 1918, the Alien Property Custodian of the United States sold the shares of the New York company. Having regard to the order on the subject of industrial property made pursuant to the Treaty of Peace in 1920, the respondents cannot, I think, gain any advantage from the occurrences during the period of the war relied upon by the learned trial judge.

Then it is argued that the assignment to the New York company in 1913, and again the assignment to the Canadian company in 1920, had the effect of separating the ownership of the trade-mark from the ownership of the goodwill which, on the principle of *Bowden's Case* (1), gives, it is said, a right to require the cancellation of the trade-mark. I have already mentioned that this case proceeded on the authority given by sec. 35 of the Act of 1905. Then the principle of *Bowden's Case* (1) is, that under that section the registered proprietor of a trade-mark who, representing to the public by registering the mark and retaining it on the register, that the goods bearing the mark are goods manufactured and sold by him, and who does nevertheless enter into an arrangement by which he precludes himself from using the mark to distinguish his own goods, while authorizing another to use it for distinguishing his manufacture, is thereby wrongfully misusing the rights conferred upon him by the Act, and his trade-mark may be expunged as one which is wrongfully remaining on the register. In the House of Lords the principle is affirmed. The gist of the offence was, as Lord Loreburn says:—

> It is enough that they, the registered proprietors, enabled or allowed people who were not registered for it to use the trade-mark on a substantial scale for their make of a description of goods dealt with habitually in the same class of business.

The speeches of the Law Lords are to the same effect. I think there is no evidence to support a conclusion that any such offence has been committed by the appellants or their predecessors. It is entirely consistent with any evidence in the record that the New York Company and the German company were under a common control at the time

(1) 31 Cut. P. R. 385.

1924
THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE
Duff J.

of the assignment in 1913. There is no evidence that in the commercial sense there was any separation of the proprietorship of the trade-mark from the ownership of the business, including the goodwill of the business. The sale of the shares of the New York company by the Alien Property Custodian cannot, I think, affect the matter. The whole of the business and assets of the New York company, including its goodwill and trade-marks, came under the control of the purchaser of the shares. There is nothing to show that production was not carried on in New York. Nor, again, can we on the evidence attach any importance to the assignment in 1920 to the Canadian company. The shares of the Canadian company were owned by the New York company. There was common control of the New York company and the Canadian company, and again, in substance, no such severance as that struck at by the decision in *Bowden's Case* (1) and the cases which preceded it.

As to the conduct of the appellants in 1919 and 1920, which establishes, in the opinion of the learned trial judge, an intention to abandon their rights, his view can best be gathered from one or two paragraphs of his judgment, which I quote:—

> Looking into this literature and advertising campaign of the objecting party, the new Canadian company, one is primarily struck with the total absence of the word "Aspirin" appearing by itself. Numerous samples of such advertising have been produced as Exhibit No. 19, and from the perusal of this very literature is found an admission of the general existence of the drug "Aspirin" as distinct from the "Aspirin" that is being sold by the objecting party.
>
> Taken at random, one finds one sample stating: "There is only one genuine 'Aspirin'"—and that genuine Aspirin has Bayer cross and that indeed is accompanied by a label showing a round tablet with the word BAYER written perpendicularly and horizontally within the circle. There can only be one meaning resulting from such language, and that is there exists some other "Aspirin" besides the one sold by us with our trade-mark of the Bayer cross, and that these advertisements claim that the "Aspirin" manufactured and sold by Bayer is better and preferable, from their own standpoint, from the other "Aspirin" on the market, manufactured or sold by anybody else.
>
> And these samples which are numerous and varied but all to the same effect, are in the aggregate a distinct and definite manifestation of the real and intentional abandonment of the use of the word "Aspirin" alone and by itself, as registered, and further, a declaration or notice to the public that in future they intend to use the word as the name of the drug but

(1) 31 Cut. P.R. 385.

with their own name attached thereto to show it has been manufactured by them.

This intention is further manifested in a tangible and open manner by, I may say, the objecting party in 1919. Indeed, on the 8th August, 1919, the Bayer Co., Inc., of New York, registered two new trade-marks: one registered in Register No. 105, folio 24895 (Exhibit No. 96), and the other in the same register but under folio No. 24896 (Exhibit No. 95). These trade-marks also registered by the Bayer Co. of New York in August, 1919, were respectively assigned to the present objecting party, the Bayer Co., Ltd., of the city of Toronto, on the 15th May, 1920.

The trade-mark registered under folio No. 24895 is a specific trade-mark to be applied to the sale of synthetic coal-tar remedies, chemicals, medicines and pharmaceutical preparations of every kind and description, and which consists of the word "BAYER."

The other trade-mark under folio No. 24896 is also a specific trade-mark to be applied to the sale of synthetic coal-tar remedies, chemicals, medicines and pharmaceutical preparations of every kind and description, and which consists of a conjunction of letters in the form of a cross having four arms of equal length, the said letters being "BAYER," arranged horizontally and vertically at right angles in the form of a cross, the letter "Y" forming the centre of such cross.

It is quite significant, indeed, that these two trade-marks should be taken and registered with respect to synthetic coal-tar remedies. Aspirin is a coal-tar drug.

These two new trade-marks can readily be applied to coal-tar drugs, and ever since 1919, by reference to Exhibit No. 19, it will be seen that they were used with the word "Aspirin." The only deduction and inference to be drawn from the fact of getting these two new trade-marks and using them ever since 1919, as shown by Exhibit No. 19, in union and with the trade-mark for the word "Aspirin" alone, in 1899, is a clear manifestation of the intention of the objecting party (presumably acknowledging it has no right to) not to use the word "Aspirin" by itself, but to associate it, as it has done, with both trade-marks taken out in 1919 and assigned to it in 1920. The label with the combined words of "Bayer" and "Aspirin" never appeared on the Canadian market until 1919.

First, as to the advertising, I find myself unable to accept the view that the public announcements that the only "genuine Aspirin" is Aspirin sold under a given label, manifest a "real and intentional abandonment" of the appellant's right in the word "Aspirin" as registered. If "Aspirin" denotes and distinguishes acetyl salicylic acid made by the registered proprietors, which is the claim involved in the maintenance of the name on the Trade-Mark Register, then the assertion that their manufacture of acetyl salicylic acid is the only genuine Aspirin is strictly and literally true. The assertion is only one way of affirming their claim to the exclusive use of the word in connection with acetyl salicylic acid. If, on the other hand, the appellant has no such rights, and if the word "Aspirin"

1924
THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE
Duff J.

has acquired *droit de cité* as descriptive of the product as a chemical compound or article of commerce, then the assertion that its make is the only genuine aspirin is only a rather discreditable and futile puff, if not patently untruthful.

As to the trade-marks, I cannot agree that in applying for and obtaining registration of other trade-marks for coal-tar products the appellant was necessarily disclosing an intention to abandon their rights in relation to "Aspirin"; nor do I think that their conduct in so doing in the circumstances is a satisfactory foundation for inferring the existence of such an intention.

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

MIGNAULT J.—The situation graphically depicted by Parker J. (afterwards Lord Parker of Waddington) in the *Gramophone Case* (1), would aptly describe that which, according to the evidence, exists to-day with respect to the drug "aspirin." The only difference—but of course it is a vital one—is that in the *Gramophone Case* (1) this situation preceded the application for registration of the trade-mark, whereas in this case it is subsequent thereto, so that the problem now under consideration is the converse of that dealt with in the *Gramophone Case* (1). It is shewn that since a.s.a. was put on the market, while the wholesale and probably also the retail trade has associated the word "aspirin" with the manufacture of the owners of the trade-mark, the public—by which I mean those who purchase from retail druggists in what has been described as an "over the counter trade"—looks on "aspirin" as the name of a popular drug, without any reference to a particular manufacturer. Such a situation, which, in the *Gramophone Case* (1) was fatal to the application for registration, as a trade-mark, of the word "gramophone," is not, the appellant contends, for it was subsequent to registration, a sufficient cause to have the registration of its trade-mark "aspirin" expunged from the register.

The appellant's proposition is that the question as to the distinctiveness of its trade-mark should be formulated as

(1) [1910] 2 Ch. 423.

follows: Was the word " aspirin " distinctive of the manufacture of the registrant at the date of registration? It may be observed that the distinctiveness of a registered trade-mark is assumed in the sense that the onus of proving that it was not, when registered, a distinctive trade-mark, is upon any person questioning its validity. So here the onus is on the respondent, the petitioner, of shewing that the word " aspirin " was not distinctive at the date of registration. That date, in my opinion, is the only one to be considered in such an inquiry, and the situation which subsequently developed, and the fact that now the trade-mark may have lost its distinctiveness in the eyes of the public, are not reasons for deciding that the registration, when made, was not a proper registration.

Bearing this in mind, we find that, at the date of registration, the drug itself, " acetyl salicylic acid," which will be more conveniently referred to as " a.s.a.," was a comparatively newly discovered drug, and the German manufacturers coined the fancy word " aspirin " to distinguish their manufacture. When this word was registered in Canada, it was not in connection with " a.s.a." or any particular drug, but it was a specific trade-mark to be applied to the sale of pharmaceutical preparations. The feature of specific as opposed to general trade-marks is, I understand, peculiar to the Canadian trade-mark Act, and under such a registration the word " aspirin " could have been used in connection with the sale of pharmaceutical preparations of various kinds. But from the first it appears to have been exclusively applied to the drug " a.s.a." And there is a preponderance of evidence that with the trade, particularly the wholesale trade, " aspirin " was understood as meaning the " a.s.a." manufactured by the Bayer company. The two terms " acetyl salicylic acid " and " aspirin " co-existed and were employed for the same drug, and what is rather significant from the point of view of distinctiveness is that the Bayer product was sold under the name of " aspirin," at from two to three times the price of " a.s.a." There was obviously something in the name, as the uninformed public found to its cost.

I do not think therefore that the respondent has made out a case of improper registration.

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Mignault J.

On the issue of abandonment, its evidence seems much stronger; but its misfortune is that section 42 of the Canadian Act, unlike section 35 of the English Act of 1905, does not provide for the removal from the register of marks which, although entitled to registration when the trade-mark was obtained, can be said to be "wrongly remaining on the register." I am not dealing here with defences to an action for infringement, but with an application for the removal of the trade-mark from the register. And whatever effect, if any, abandonment and non-user may have as against an action for infringement, a point on which it is unnecessary to express an opinion, I do not find that section 42 has provided for the removal from the register of a trade-mark, properly registered, by reason of subsequent abandonment or non-user.

The respondents rely on the dictum of Lindley M.R., in the *Batt Case* (1), that if an entry is at any time on the register without sufficient cause, however it got there, it ought to be treated as covered by the words of the section. It was not, however, necessary in that case to place this construction on section 90 of the English Act of 1883, similar to our section 42, for the trial judge had found that there was no *bona fide* intention to use the mark at the time the registration was effected, and when the case went to the House of Lords (2), the dictum in question was not mentioned, although the decision was affirmed on the facts. I have been unable to read this meaning into section 42 of the Canadian Act.

All this shews that a practically perpetual monopoly is secured to the owner of a trade-mark validly registered although in the eyes of the public it has come to signify the thing itself and not the manufacturer. The appellant company has no exclusive right to the use of the word "aspirin" in Great Britain and the United States, but this judgment will give it in Canada a monopoly of the sale of "a.s.a." when sold under the name of "aspirin." In that way a registered trade-mark, which has become descriptive by reason of dealings with the public or an advertising campaign, is more valuable than a patent the life of which is limited. Such a situation could well be considered by Parliament.

(1) [1898] 2 Ch. 432, at p. 441. (2) [1899] A.C. 428.

On the whole I think the appeal should be allowed and the petition dismissed. The appellant is entitled to its costs throughout.

MALOUIN J. (dissenting).—I would dismiss this appeal with costs for the reasons stated by Mr. Justice Audette in the Exchequer Court.

MACLEAN J.—These proceedings were commenced by the respondent as petitioner, under the provisions of sec. 42 of the Trade-Marks and Designs Act to expunge from the register the word " Aspirin " registered as a specific trade-mark by the appellant's predecessors in title in April, 1899. The history of the title of this registered mark has already been stated and I need not repeat it, and it appears as well in the judgment of the learned trial judge.

The respondent's principal contention is that this trade-mark was originally made without sufficient cause, and alternatively that if the mark ever had any validity, it has since ceased to be a trade-mark and should now be expunged. The appellant submits that it is a valid and subsisting trade-mark, and particularly urges as the important consideration, the question whether or not at the time of registration the word " Aspirin " was properly registered, and if so the appellant submits it cannot now be removed from the register even if it has since become to denote to the public the name of a chemical compound, and not to distinguish the article itself as manufactured by the proprietor of the registered trade-mark. This I think reveals the substantial issue, although other and perhaps quite important points have been put before us.

The case is not without its difficulties both as to the law and the facts, and the latter are before us in confusing abundance. I confess that at first I was much impressed by the conclusions of the trial judge, and the submissions of the respondent's counsel, but a later review of the authorities and the evidence, leads me to the conclusion that the appeal should be allowed.

The substantial issue for determination in my opinion is, whether the word " Aspirin " at the time of registration in Canada as a trade-mark, was also adopted as the name of the patented chemical compound, acetyl salicylic acid, or descriptive of it; or whether it was a mark proposed to be

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Duff J.

used in connection with certain goods, for the purpose of distinguishing the goods of the proprietor of such mark, and further, if this registered mark has subsequently ceased to be used for the legitimate purposes of a trade-mark, and has owing to one cause or another become known to the trade or the public as the name of the article itself, may it now be expunged from the register.

Under our Trade-Marks and Designs Act a specific trade-mark, when registered, shall endure for the term of twenty-five years, but may be renewed by the proprietor for further twenty-five year periods. The Minister in whose department is administered the Trade-Marks and Designs Act may refuse registration if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark, or if it resembles a trade-mark already issued, or if it is calculated to deceive or mislead the public, or if the mark does not contain the essentials necessary to constitute a trade-mark properly speaking. Then section 42 which authorizes proceedings for the rectification of the register is as follows:—

42. The Exchequer Court of Canada may, on the information of the Attorney General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the register of trade-marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the court thinks fit; or the court may refuse the application.

3. The court may in any proceedings under this section, decide any question that may be necessary or expedient to decide for the rectification of any such register. 54-55 V., c. 35, s. 1.

There are no other provisions in this statute providing for rectification of the register. It is contended that this section provides no machinery for expunging or varying any trade-mark except one registered originally without sufficient cause, and that the validity of a trade-mark is to be determined as and of the date of registration.

The statute which concerns us here is an old one; sec. 42, having been enacted in 1891, did not I think anticipate the trend of trade-mark uses and practices of recent years, and the influence of modern advertising in converting, perhaps, a word, being a proper trade-mark when registered and distinguishing merely the goods of the proprietor from the goods of another, into a word denoting to the public mind the name of the article itself. No pro-

vision seems to have been made for removing a mark from the register when gradually or suddenly, by lawful business processes and influences, it has grown to become the popular name of the article, and would have been refused registration had the application for registration been made when the word had taken in its later significance.

There can be but one moment when an entry is made; it is not by any legal fiction, or in fact, a continuing process. It appears to me that " entry " and " without cause " must be read to mean a ministerial act synchronising with an existing set of facts in law or in fact fatal to the validity of a trade-mark, and not severed by time from the genesis of that set of facts. If the " cause " putting the trade-mark without the spirit of the statute develops subsequent to the "entry," the "entry" would have no relation to the "cause," and one could hardly say it was an entry made without cause, but rather a registration which possibly on the grounds of public policy should be removed, but for which at the present time the statutes makes no provision. I think the phrase " entry made without cause " was intended when enacted to bear the construction I give it.

Under the English Trade-Marks Act of 1883, the Court of Appeal expressed the view that an order could be made to remove from the register a trade-mark even although the original registration was proper. In the *Batt Trade-Mark Case* (1), Lindley M.R., delivering the judgment of the court and referring to the words " entry made without sufficient cause " said:—

> If any entry is at any time on the register without sufficient cause, however it got there, it ought in our opinion to be treated as covered by the words of the section.

The motion was to remove from the register a trade-mark not registered by the proprietor with a *bona fide* intention of using it, and it was found that the proprietor never had any intention to use the mark. As pointed out in the judgment, in the view taken by the court of the facts, the decision of the point was not necessary to the decision of the case. The judgment was affirmed in the House of Lords but no decision was given on this point. I do not consider this a decision binding upon that point, nor was

(1) [1898] 2 Ch. 432.

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Maclean J.

it so regarded in England. It is perhaps significant that since then there has been express legislation providing for the removal from the registry of trade-marks registered without *bona fide* intention to use, or where there is not a *bona fide* user of the same, and up to that time no order had ever been made for the removal of a mark originally rightly registered. In the *Batt Trade-Mark Case* (1) the defendant would seem to have been registering trade-marks to cover contingent needs, and at the time of entry had no *bona fide* intention of user. Possibly, in such case, a portion of the evidence to establish that absence of *bona fide* intention of user at the time of entry, would be properly extracted from the subsequent course of action of the defendant and not limited to his intentions at the time of registration.

A great number of English decisions were submitted to us by both sides in support of their several positions. Having in mind the then existing English statutes upon trade-marks it appears to me, after a perusal of such authorities, that throughout them all is to be found the assertion of the principle, that the validity of a registered trade-mark is to be determined as and of the date of registration. Any taint of impropriety as a registerable mark then attaching adheres, and may always be invoked, in any proceedings to expunge. From such judicial authorities it is also to be inferred that if a mark was at the time of registration a proper one, and within the terms of the statute, it cannot be expunged without express legislative authority, even if in the course of time it takes on that quality which, if existent at the time of registration, would make it an improper entry. The uniformity of decisions in this direction is very marked. In fact our attention has not been directed to any decision in the English courts expressly deciding to the contrary.

This view of the law is, I think, expressed with great clarity and force by Parker J. in the *Gramaphone Case* (1). Here the court was considering an application to register as a trade-mark the word " Gramaphone." It was admitted on behalf of the applicant that the word had some direct reference to the character or quality of the

(1) [1910] 2 Ch.D. 423.

goods in respect of which it was proposed to be registered. The name "Gramaphone" had been given to a patented talking machine in 1882 to distinguish it from phonographs or graphophones which operated a cylinder record, as opposed to disc records operated by the gramaphone. Parker J. concluded from the evidence that the word "gramaphone" had direct reference to the character of the goods, and while at the start the word was used to denote a particular sort of article, and the word while still retaining its original signification had become so popularized owing to wide advertising by the manufacturing company that it came to denote the article, and that the applicant used the word as the name of the article and not to distinguish the article when made by it from the same article made by others. He refused the application to register on the ground that the name by which an article is popularly known ought not to be admitted to registration as a trade-mark for that article. In other words he held that the word was not at that date, the date of the application, a proper trade-mark for registration. It is however the discussion by Parker J. of the case where a registered trade-mark is later adopted by the public as the name of the article which is of interest. He said:—

> It may be asked, and was in effect asked at the trial, why such words as, for example, "pianola" or "vaseline" should be on the register as trade-marks if "gramaphone" were refused registration. The answer is not far to seek. None of the Trade-Mark Acts have provided machinery for taking a mark off the register if once it has been properly put on, and it is quite unnecessary in an action for infringement of a registered mark to prove that such mark still remains distinctive of the goods of the registered proprietor. It may, therefore, be to the interest of the registered proprietor of a word mark that the word should lose its distinctiveness so far as the public are concerned and become the popular name for the article. He thus obtains a practical and perpetual monopoly in the article itself, other manufacturers being precluded by the mark on the register from selling their goods under the name by which they are commonly known. To induce the public to adopt a catching word as the name of the article to which it is applied, especially if the article be comparatively new, it is only necessary to advertise the article on a sufficiently large scale under that name, and this can be done by any rich corporation.
>
> It is, however, one thing to put a word mark on the register and then proceed to induce the public to use it as the name of the article to which it is applied, and quite another thing to adopt a word already used to denote an article, and then proceed to identify it among the trade with the goods of a particular manufacturer, relying on such identification as a reason for registration. For the purpose of putting a mark on the register

1924

THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE

Maclean J.

distinctiveness is the all-important point, and in my opinion, if a word which has once been the name of an article ought ever to be registered as a trade-mark for that article, it can only be when the word has lost, or practically lost, its original meaning

That a registered mark cannot be taken off the register, even though it has ceased to be used for the legitimate purpose of a trade-mark and has become merely the name of an article, is, I think, no reason for allowing one trader to register and secure a monopoly in what is already the name of an article although every trader in the kingdom might for one reason or another have already recognized or been willing to recognize such monopoly.

This appears to me incontrovertible and conclusive reasoning, and is entirely applicable to the case now before us, having in mind our statute. Upon the findings of fact made by Parker J. clearly the word was not a proper one for registration. In similar circumstances under our statute the Minister would have been justified in refusing registration. It is one thing, as that learned judge said, to put a word mark on the register and induce the public to adopt it as the name of the article, but it is another to adopt a word already used to denote a particular article, and then proceed to identify it among the trade with the goods of a particular manufacturer, relying on such identification as a reason for registration. In other words this decision is to the effect that "Gramaphone" might have been a registerable word mark if at the time of application for registration it was not the name of and did not denote the article itself.

In re Woodward's Trade-Marks (1) was decided in 1915. Here one part of the proceedings was to expunge the trade-mark "Gripe Water." Eve J. found that the word mark had become in one sense public property, and for some years had been used as descriptive of the article, and said that if the present time was the moment of time at which he was to decide if the mark was distinctive of the goods, he could see substantial reasons for removing the registration. He held, however, that the moment was the moment of registration, and that it had not been shewn that the trade-mark at that time was not distinctive.

The *Linoleum Case* (2) is much relied on by the respondent. In reality it decided exactly what was decided in the *Gramaphone Case* (3). Here a new substance

(1) 32 Cut. P.R. 173. (2) [1877] 7 Ch. D. 834.
(3) [1910] 2 Ch. D. 423.

having been invented the name of Linoleum was admittedly given to it by the patentee, and it never had any other name. The plaintiff, in this case, also used a trade-mark containing the word linoleum and the action was to restrain the use of that word as applied to floor-cloth, the patent having expired. The court held that the plaintiff having invented a new subject matter, used merely the name Linoleum as distinguishing that subject matter, but did not use the word to distinguish the subject matter as made by them, from the same subject matter as made by other persons. I construe this case to decide that when the trade-mark was registered it was not properly made at the time, because it was not a distinctive mark, but was the admittedly adopted name of the article itself and therefore not properly registerable. The same principle was laid down in the later case of *Redaway* v. *Barnham* (1), by Lord Hershell, who said:—

> Where a patentee attaches a particular name to the production he patents, that name becomes common property as the name of the patented article. It possesses indeed no other name. That name would be applied to it by all persons desiring to purchase the article. It is not descriptive of the production of a particular manufacturer but of the article itself by whomsoever it is manufactured.

It is always a question of fact what falls within the principle decided in these cases. If, clearly, an invented name is the name of an article, it cannot properly be registered as a trade-mark, but that fact must be established. This would not appear to be in conflict with the principle laid down by Parker J. in the *Gramaphone Case* (2) above referred to.

That the view expressed by Parker J. in the *Gramaphone Case* (2) represented the accepted jurisprudence in England, on the point of the statute there providing no machinery for expunging a mark which was orginally a proper registration, is to be inferred from enabling legislation enacted in 1919. The Trade-Marks Act, 1919, provides that where in the case of an article or substance manufactured under any patent in force, a word trade-mark registered is the name or only practical name of the article or substance so manufactured, all rights to the exclusive use of such trade-mark shall cease upon the ex-

(1) [1896] A.C. 214. (2) [1910] 2 Ch. D. 423.

1924
THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE
Maclean J.

piration or determination of the patent, and thereafter such word shall not be deemed a distinctive mark and may be removed by the court from the register, on the application of any person aggrieved. By another provision of the same statute the only practical name or description of any single chemical element, or single chemical compound as distinguished from a mixture, is prohibited from registration, subject to certain provisions.

The American authorities cited by the respondent are not I think helpful. A part of the appeal case is the finding of an officer of the United States Patent Office upon an application of the United Drug Company to cancel in that country the registration of the word "Aspirin" as a trade-mark, which application was granted in 1918. The United States Trade-Mark Act (1905) provides that if it appears that

> the registrant was not entitled to the use of the mark at the date of his application for registration thereof, or that the mark is not used by the registrant, or that it has been abandoned,

the commissioner of patents may cancel the registration. The words "used by the registrant" have been construed by the United States courts and by the United States Patent Office to mean "used as a trade-mark" and the official known as the Examiner of Interferences found that it was not so used upon the evidence submitted. The distinction between the United States Patent Act and our own statute on the same subject is, of course, obvious, and altogether the findings of the United States Patent Office in this application are not of assistance here.

In the *Bovril Case* (1) the action was to expunge the word "Bovril" from the register. The trade-mark was registered on November 2, 1886, and the question was whether the word "Bovril" was at that date a distinctive "fancy word not in common use." It was admitted that the word was new and was one that had never been heard of before. The plaintiff contended the word was a highly descriptive word, the defendant contending that the real question was whether the word was descriptive at the date of registration. In rendering judgment Lindley J. said:—

(1) [1896] 2 Ch. 600.

I think it is eminently and purely a question of fact. Now I ask myself this: Supposing that a jury were asked to say whether on November 2, 1886 Bovril was a fancy word not in common use, and supposing they said upon a direction from the judge, which I think it would be the duty of the judge to give, that if they were of the opinion that it really intelligibly described the thing sold it would not do, could they with that direction reasonably say it was not a fancy word not in common use? I do not think they could.

That really expresses my own way of looking at the substantial point in this appeal. The question is one of fact. I do not think the evidence supports the contention that the word "Aspirin" at the date of registration was descriptive of Acetyl Salicylic Acid, and to the trade or the public denoted that article, and by that name. If in this respect the situation has since changed in so far as the public is concerned, it did not I think substantially occur until some years after the registration. At least the respondent has failed to show, in my opinion, that at the time of registration the mark was not distinctive. If at that time the registrant secured by statute a right to a proper trade-mark the statute and not the courts should deprive him of it.

In the view I take of the law I need only inquire if, at the time of registration, the word "Aspirin" was a proper and valid trade-mark. In my opinion the respondent has failed to prove that at the time of registration the word was not a proper and valid trade-mark. It is not necessary for me to quote from the evidence. In the first place Acetyl Salicylic Acid was the name given to the patented article, and before the patent a chemical compound by that name was not unknown to the chemist. The patent was limited only to the United States, and the article was manufactured in other countries during the life time of the patent in the United States, and sold to the public under various word marks, or names, and is so being sold to-day in Canada and elsewhere. For many years after the registration of aspirin, to manufacturing chemists, wholesale druggists, chemists and physicians, there was a chemical compound known as Acetyl Salicylic Acid, and aspirin was known to them as the Bayer production of that compound. The evidence supports this conclusion, and it would be difficult to imagine such not being the fact.

1924
THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE
Maclean J.

The same section of the public, in Canada, would no doubt to-day, identify aspirin as the Bayer production of acetyl salicylic acid and, to that extent at least, the word aspirin does not denote the name of the article. It was through the sale of acetyl salicylic acid in tablet form under the name of " Aspirin " first by manufacturing chemists and later by the Bayer Company itself, that the public began to purchase direct from retail druggists, instead of through the physician's prescription. Owing to this fact, possibly another section of the public, consumers of aspirin, gradually came to identify that word as the name of the article. But all this has occurred in recent years. Much advertising has brought this about and produced the strange situation, if the respondents' contention be sound, that the more successful the manufacturer of a product, identified by some registered word mark, is in inducing the public to consume his product, the nearer he approaches the end of the user of his trade-mark even though originally it was a proper entry. The implications from such a state of the law are considerable and serious, and even with statutory authority existing to expunge trade-marks in such a condition of facts, one can readily perceive the difficulties in justly resolving the many complex issues which might arise. However, I am not obliged to decide whether the word aspirin now denotes to any section of the public the name of an article, but if that were in point of fact my conclusion I do not see how the mark could be expunged, or its exclusive use by its proprietors in any way limited, because there is no authority for so doing in the statute. It is unlikely the omission was accidental, but rather that Parliament did not anticipate, when the enactment was made, the effect of much advertising upon a portion of the public.

It is contended also that this trade-mark has been lost by non-user and abandonment and the period referred to is 1913 to 1919. Mere disuse does not amount to abandonment, and abandonment is a question of intention. If a proprietor of a trade-mark ceases to have an intention of dealing in the goods for which the mark is registered, that would establish abandonment so far as such goods were concerned. I think one may safely conclude that no such in-

tention of abandonment has been established in evidence, on the part of the appellant or its predecessors. The fact is that during the war it was not possible for the owners of the mark to manufacture or sell the product but that is not evidence of intention of abandonment. The war period must be disregarded altogether in an inquiry as to whether or not there was intention of abandonment. That there was an intention of abandonment is not proven, nor can it be inferred from the evidence, and I think it is quite an improbable assumption. Then, abandonment is also claimed by the respondent on account of the dealings between the predecessors of the appellant and the tablet makers, in which the manufacturing chemists were permitted to manufacture the crystals into tablets, with the trade-mark in question placed thereon. The purpose of a trade-mark is to indicate that the goods are of the make of the proprietor of the mark, and the tablets were in reality but a manipulation of the form only of the goods purchased from the proprietor of the mark. It appears to me that, in this case, it was quite in harmony with the real purposes of the mark to permit its use upon the tablets made by the manufacturing chemists, and in the absence of an agreement to the contrary I think the tablet manufacturers would have the right of user of the mark. There would be an implied licence for so doing. Any one using the owners' mark on the owners' goods would hardly be infringing nor would it in any respect be deception. The wholesaler or retailer of goods purchased from the maker might, I think, safely print labels which are the trade-marks of the maker of the goods, if for cause they had to be replaced.

The only other point to which I shall refer is the advertising in 1919 and 1920, and the registration of the word Bayer as a mark to be applied to pharmaceutical preparations, which it is claimed is indicative of an intention of abandonment. In respect of the laudatory advertising from which we are asked to infer abandonment, it is to be observed that the war had a destructive effect for one reason or another upon the appellant's position in the market. The inference I draw from this advertising is that the appellant was determined, even at a considerable cost, to regain its lost ground, and the advertising negatives the inference of abandonment. In the circumstances I do not

1924
THE BAYER CO. v. AMERICAN DRUGGISTS SYNDICATE
Maclean J.

think we are called upon to examine microscopically this advertising in order to discover an intention of abandonment. Conceivably the adoption of a new mark might be evidence of abandonment of an old mark. It is not clear to me that because an owner of a word mark adopts a second mark that he has waived his rights under the other. The nature of the user of each or both would have to be known before any judicial determination could be made upon the matter, and therefore I do not think there is sufficient evidence before us to conclude that from adoption of the new mark we are to infer an abandonment of the mark "Aspirin."

With great respect therefore I think the appeal should be allowed.

Appeal allowed with costs.

Solicitors for the appellant: *Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

1924
*Oct. 21.
*Nov. 11.

CHANNELL LIMITED AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS;

AND

M. A. ROMBOUGH AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Trade-mark—Common descriptive word—Right to exclusive use—Trade-Mark "O'Cedar."

A person cannot obtain an exclusive right to use, by registering it as a trade-mark, a word in common use as a descriptive word of the character and quality of the goods in connection with which it is used.

The registration of such a word as "O'Cedar" as a trade-mark does not prevent the use by another person of the word "Cedar" as applied to goods manufactured for a similar purpose.

Judgment of the Court of Appeal (33 B.C. Rep. 452) affirmed.

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

1924

CHANNELL CO. v. ROMBOUGH.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge (2) and dismissing the appellants' action for damages for alleged infringement of a trade-mark.

The appellants manufacture a polish and mop which they distinguish by a combination of a letter and word, " O'Cedar," for which they have a trade-mark. The respondents, before the institution of the action, were manufacturing and selling similar articles under the name of " Cedar," and since the commencement of the action, under the name of " Cedarbrite." The appellants claim that this is an infringement of their trade-mark.

Geo. F. Henderson K.C. for the appellants.

R. M. Macdonald for the respondents.

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

MIGNAULT J.—The appellants' action is against the respondents who carry on business under the firm name of Dust Control Company, the latter company being also a defendant. The appellants claim to be the owners of the trade-mark " O'Cedar " registered both in Canada and the United States as applied to the sale of furniture polish, polish mops and dusters. They allege that the respondents have infringed their trade-mark by the use of the word " Cedar " as applied to the same products, and that since the commencement of the action they have also infringed it by using in the same connection the word " Cedarbrite." They further pretend that the respondents are fraudulently passing-off their goods as and for the appellants', by employing the same words on similar articles and similar packages. They ask for an injunction, the destruction of the respondents' polishes, mops and oils, and claim damages or, in the alternative, an account of profits.

The defence denies the passing-off and alleges that the appellants' so-called trade-mark is invalid, being a descriptive and not an arbitrary or fanciful name, and consequently not registrable as a trade-mark.

(1) [1924] 33 B.C. Rep. 452; [1924] 2 W.W.R. 28.

(2) [1924] 33 B.C. Rep. 65; [1923] 3 W.W.R. 1041.

1924
CHANNELL CO. v. ROMBOUGH.
Mignault J.

The learned trial judge found against the appellants on the issue of passing-off and also came to the conclusion that the name "O'Cedar" was descriptive of a quality of the appellants' goods and did not constitute a valid trade-mark. The appellants' action was dismissed and the judgment was unanimously affirmed by the British Columbia Court of Appeal. The appellants now seek the reversal of these two judgments.

On the issue of fraudulent passing-off, while at first sight the similarity of the name used by the respondents to the trade name of the appellants may seem to furnish some foundation for the suggestion that the respondents are seeking to pass off their goods for those of the appellants, the evidence appears to support the conclusion of the learned trial judge that the appellants have failed to make out a sufficient case. The respondents' witnesses all say that there has been no confusion between the goods of the respondents and those of the appellants. Certainly no fraudulent intention has been brought home to the respondents, and there is only one instance where a purchaser asking for "O'Cedar" polish was given "Cedar" polish, and this was the act of an independent dealer who does not appear to have been in any way connected with the respondents.

Before this court, the argument centred chiefly on the question whether "O'Cedar," as applied to polishes and mops, is a valid trade-mark and is infringed by the use of the words "Cedar" or "Cedarbrite" in connection with the same description of goods.

The evidence is that the Channell Chemical Company, a Chicago corporation, first used the word "O'Cedar" in connection with a polish manufactured by it in 1907. It registered the word in 1912 in the United States and in 1913 in Canada, as a specific trade-mark. Channell Limited is an Ontario company and by an assignment in 1915 obtained the right to use the trade-mark in Canada. There is no doubt that the appellants have spent considerable sums of money in advertising their goods under the name "O'Cedar." The respondents do not appear to have carried on business outside of British Columbia, and their operations in that province are not on a considerable scale.

Both the appellants and the respondents scent their polishes and their mops with the oil produced from the cedar leaf, the proportion of this oil to the mineral oil composing the polish being one per cent. of the mixture. The inference that the name of "O'Cedar" or "Cedar" was suggested by the odour of oil of cedar does not seem an unfair one, for this scent was featured by both parties in selling their goods, and the respondents also recommended it as being a repellent for insects.

In 1913 one Trail, then the husband of the respondent Madeline Rombough, began manufacturing a polish under the name of "oil of joy," and subsequently described it as "Cedar polish." Trail is now dead and, as this action was taken in September, 1922, there is no evidence available as to his motive which the appellants suggest was to avail himself of the reputation they had secured for their goods by their extensive advertising. Madeline Rombough, the widow, took over the business under her husband's will and disposed of it to a concern which failed to fulfil its obligations, so that the business, carried on under the style of "Dust Control Company" came back to her. She married the respondent, Marshall Anson Rombough, who as her manager carries on the business for her.

It appears by the testimony of one James O. R. Newman, a dealer during a number of years in janitors' supplies and requisites, that prior to 1917 other manufacturers made polishes or similar goods under the name of "Cedar," such as "Imperial cedar polish," and that he himself sold a product he called "Cederolia spray," one of the ingredients used being oil of cedar. His testimony shows that this oil, which is not useful as a polish, was employed on account of its peculiar odour, and probably as a preservative against insects. And for this reason the word "cedar" may have been a convenient name to designate polishes having this odour as well as mops saturated, as are the mops of the parties, with oil of cedar.

We think it is clear that the word "cedar," being a word in common use, could, notwithstanding the registration of the trade-mark "O'Cedar," be employed for the sale of goods of which the oil of cedar was a component part. It would be in this connection a word descriptive of a quality or of the character of the goods.

1924

CHANNELL Co. v. ROMBOUGH.

Mignault J.

It does not appear necessary to refer to many authorities in support of this proposition. They are quoted in abundance in the judgments under appeal. That a word in common use as the name of a thing cannot be appropriated as a trade-mark is shown by the decision of the Judicial Committee in *Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.* (1). As was said in that case, a common English word having reference to the character and quality of the goods cannot be an apt or an appropriate instrument for distinguishing the goods of one trader from those of another. And the mere prefixing of the letter " O " to such a word as cedar certainly does not make it so distinctive that registration gives to the appellants the right to complain of the use of it by another manufacturer to describe a polish whereof oil of cedar is one of the ingredients.

Mr. Henderson argued that the word " cedar " used in the trade-mark in question had acquired a secondary meaning as signifying the appellants' goods. We have carefully read the evidence and can find nothing in support of this contention. No doubt the trade knew that the appellants were manufacturing a polish under the name " O'Cedar," as they were aware that other manufacturers were using the word " cedar," but there is nothing here to indicate that the latter word as used had become in any way distinctive of the appellants' goods.

We can see no sufficient reason to disturb the judgment under appeal and would therefore dismiss the appeal with costs.

IDINGTON J.—I am of the opinion that this action was properly dismissed by the learned trial judge for reasons assigned by him; and that the appeal therefrom by the appellants was properly dismissed, unanimously, by the Court of Appeal for British Columbia for the respective reasons assigned by the several judges giving written reasons therefor.

I, therefore, think this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *A. H. MacNeill.*

Solicitors for the respondents: *Bird, Macdonald, Bird & Collins.*

(1) [1911] A.C. 78.

T. A. LIVESLEY AND OTHER (DEFENDANTS) ..... APPELLANTS;

AND

E. CLEMENS HORST COMPANY (PLAINTIFF) ..... RESPONDENT.

1924
*Oct. 16, 17.
*Nov. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Conflict of laws—Foreign contract—Damages for breach—Assessment of damages—Application of foreign law—Sale of Goods Act, R.S.B.C. (1911), c. 203, s. 64.

The right to damages for breach of a contract made in a foreign country and to be executed there is governed by the *lex loci contractus* and not by the *lex fori*.

Judgment of the Court of Appeal (34 B.C. Rep. 19) affirmed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge (2) and maintaining the respondent's action.

The action was brought by the respondent against the appellants for damages for breach of contract to purchase hops. The main point in issue is that of the measure of damages. The contract was made in California and was to be performed there. If the damages are to be measured by the laws of California, then the measure of damages is that which had been proven by the legal gentleman called to give evidence of that law and is that applied by the trial judge. But it was argued on behalf of the appellant that the action having been brought in British Columbia, the measure of damages should be ascertained by the law of British Columbia and that the rule to be applied is that contained in s. 64 of the "Sale of Goods Act," c. 203, R.S.B.C. 1911. The questions at issue are: if the right to damages for breach of a contract is a substantive right, the *lex loci contractus* must be applied; if it is a question of procedure, the *lex fori* must be followed.

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

E. P. Davis K.C. and *R. L. Reid K.C.* for the respondent.

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

(1) 34 B.C. Rep. 19; [1924] 2 W.W.R. 443.

(2) [1923] 2 W.W.R. 987.

1924

LIVESLEY v. HORST. CO.

The judgment of the court was delivered by

DUFF J.—This is in part an attempt to set aside findings of fact pronounced by the trial judge and concurred in without dissent by the Court of Appeal. There were two actions, which were tried together, for the enforcement against the appellants of contracts for the purchase of hops from the respondents. Hops tendered by the respondents in execution of their respective contracts were in large part rejected as not answering in point of quality the descriptions of the contracts.

Whether the quality of the hops tendered conformed to the contract standard or did not was the question of fact with the determination of which the trial judge was charged, and his view necessarily turned in large measure upon the weight to be attached to the oral testimony of the witnesses examined at the trial. The learned trial judge explicitly declared that in deciding against the appellants he was, at least in part, influenced by the favourable impression he had received as regards the candour of the witnesses called by the respondent and the general weight of their testimony, while commenting, as he no doubt esteemed it his duty to do, rather unfavourably upon some of the testimony adduced by the appellants.

In these circumstances, the appellants must fail unless they can make it appear that the judgments below are characterized by some aberration from principle or affected by some error at once radical and demonstrable in the appreciation of the evidence adduced or in the method by which the consideration of it has been approached. It is sufficient to say in a word that no such error has been established.

The only question requiring discussion is the question raised by the appellant's contention that, as to the measure of damages, the rights of the plaintiff are governed by the law of British Columbia, and not by the law of California. There is not and, in view of the evidence there could not be, any serious controversy, either as to the law of California or as to its application to the facts. The expert witnesses are in agreement upon the point that, by virtue of the rules laid down in the California code, the plaintiffs acquired, under each of the contracts we are concerned

with, a lien upon the subject matter of the sale as soon as it was identified, for a sum equivalent to the purchase price; that, accessory to this lien, there is given by the same provisions a power of sale by auction on default of payment; and that, if a sum equal to the amount of the purchase money is not realized from the sale, the vendor also becomes entitled to require from the purchaser payment of the difference between the amount so realized and the sum due to the vendor under the contract of sale. The vendor is entitled to bid at the sale. And again there could be no dispute, in view of what occurred at the trial, that each of the sales by the plaintiff was a sale valid in California; or that under the law and in the courts of that state the plaintiff if entitled to recover at all would be entitled to the amounts which have been awarded by the judgments appealed from.

But damages are not exigible, the appellants argue, under the terms of the contract itself, but under a new obligation, which, with its accessory right of action, springs from the breach of contract; and this right, being strictly remedial in its nature, must on principle, it is said, be derived from and ruled by the *lex fori* and not the proper law of the contract.

There is singularly little express authority in English law upon the broad question whether in an action on a foreign contract—that is, a contract made abroad, and to be executed abroad—the right to unliquidated damages for breach of it is a right determined and measured by English law or by the appropriate foreign law; although, as we shall presently see, judicial *dicta,* the opinions of text-writers and the analogy of decided cases, all appear to point to a conclusion in a sense opposed to the contention of the appellants.

In principle, it is difficult to discover a solid ground for refusing to classify the right to damages for breach of contract with other rights arising under the proper law of the contract, and recognizable and enforceable as such.

Where rights are acquired under the laws of foreign states (said Turner L.J., in *Hooper* v. *Gumm*) (1), the law of this country recognizes and gives effect to those rights, unless it is contrary to the law and policy of this country to do so.

(1) [1866] 2 Ch. App. 282 at p. 289.

1924

LIVESLEY v. HORST. CO.

Duff J.

The exception embraces a very wide field, and among other things excludes procedure, because the policy of the English law recognizes no vested rights in procedure, and a party invoking the jurisdiction of the courts must take procedure as he finds it. The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence, methods of execution, rules of limitation affecting the remedy and the course of the court with regard to the kind of relief that can be granted to a suitor. But it does not, of course, extend to substantive rights; and here questions as to substantive rights include all questions as to the "nature and extent of the obligation" under the foreign contract. *Fergusson* v. *Fyffe* (1) per Cottenham L.C.

It is most important to observe that it is not the foreign agreement to which effect is given by English law but, as the language of the accurate judge, whose judgment is quoted, suggests, it is the civil or legal right generated by the contract. The right of action, as Willes J., said in *Phillips* v. *Eyre* (2), is a "creature" of the law by which the contract is governed. Applying the principle to the circumstances of the case before us, the lien given to the vendor, and the accessory right of sale, are obviously substantive rights given by the law of California to the vendor as such; in his capacity, that is to say, as seller under a contract of sale. And the right to recover the difference between the contract price and the moneys realized on the sale would seem to be not less so. The provisions of the code could, no doubt, be varied or entirely eliminated by express stipulation; and it seems plain enough, therefore, that indirectly, at all events, they take effect by consent of the parties. But, however that may be, the vendor's rights under these provisions accrue to him by reason of the contract, and may without impropriety be described as rights implied by law as terms of the contract. *Attorney General of Victoria* v. *Ettershank* (3). On principle, since it is the right created by the contract, and not the agreement itself

(1) [1840] 8 Cl. & F. 121 at p. 140.

(2) [1870] L.R. 6 Q.B. 1 at p. 28.

(3) [1875] L.R. 6 P.C. 354 at p. 372.

which is enforced, there would appear to be no pertinent distinction between rights arising under terms thus implied by law and rights arising by force of the general law from express stipulations *inter partes* formally embodied in the record of the agreement.

Our attention has not been called to any Canadian decision or English decision inconsistent with this conclusion, and, so far as can be ascertained, there appears to be no such authority. The relevant decisions are nearly all concerned with bills of exchange and, as regards these, the effect of the decisions prior to the Bills of Exchange Act appears to be that, by the law of England, interest by way of damages will be given according to the law of the place where the party charged has contracted to pay the bill; that is to say, according to the proper law of his contract. *Cooper* v. *Earl of Waldegrave* (1); *Allen* v. *Kemble* (2); *Gibbs* v. *Fremont* (3); *In re Commercial Bank of South Australia* (4); *The Queen* v. *Grand Trunk Ry. Co.* (5); *Fergusson* v. *Fyffe* (6).

As a rule the place of payment under each of the contracts embodied in the bill will be the place where the contracting party has become a party to the bill; and this accounts for the fact that the rule is sometimes stated as if the governing law, as regards interest, were the *lex loci contractus;* as, for example, in *Gibbs* v. *Fremont* (3) at page 484 and *In re Commercial Bank of South Australia* (4) at pages 525-6.

In the United States divergent views have been held, and the decisions are not in agreement upon the question whether, in such cases, it is the law of the place where the contract is made or of the place where the money is to be paid which determines the liability and the measure of it in respect of interest. But in one state only, Massachusetts, is the rule followed that the *lex fori* governs. The overwhelming preponderance of authority in the United States in both the federal and the state courts is against

(1) [1840] 2 Beav. 282.
(2) [1848] 6 Moore P.C. 314.
(3) 22 L.J. Ex. 302.
(4) [1887] 36 Ch. D. 522.
(5) [1890] 2 Can. Ex. R. 132.
(6) 8 Cl. & F. 121.

1924
LIVESLEY v. HORST. CO.
Duff J.

that view: *Gilpins* v. *Consequa* (1); *Mills* v. *Dow* (2); *Dyke* v. *Erie Ry. Co.* (3); *Philadelphia Loan Co.* v. *Towner* (4).

The same rule prevails in actions upon foreign judgments. The principle upon which such judgments are enforced by the English courts, as stated by Blackburn J. delivering the judgments of the Court of Queen's Bench in *Godard* v. *Gray* (5); and in *Schibsby* v. *Westenholz* (6),—following the judgments of Parke B., in *Russell* v. *Smyth* (7), and *Williams* v. *Jones* (8)—is that the judgment of a court of competent jurisdiction gives rise to a legal obligation to pay the judgment debt; and in an action upon such a judgment in an English court interest, if by the law of the judgment itself it carries interest, is treated as an integral part of the judgment debt, and the rate is accordingly calculated in conformity with the requirements of that law, whatever that rate may be. If no interest is given by the foreign law, none can be recovered in an action on the judgment in an English court unless, of course, interest, being specified in the judgment, is, by the terms of the judgment itself, part of the judgment debt. *Arnott* v. *Redfern* (9); *Douglas* v. *Forrest* (10); *Hawksford* v. *Giffard* (11). In the case last mentioned, the Judicial Committee of the Privy Council held that, in an action in Jersey upon a judgment recovered in the Queen's Bench Division in England, the plaintiff was entitled to recover interest at the English statutory rate of four per cent upon the judgment debt from the date of the judgment and not at the Jersey rate of five per cent.

That contractual stipulations as to the measure of damages embodied in the agreement itself are governed as to validity and effect by the proper law of the contract, seems to follow as a corollary from the principle that the cause of action rests upon the rights given by that law; and this is the sense of the decision of the Privy Council in *Peninsular & Oriental Steam Navigation Co.* v. *Shand* (12). The

(1) Peters Cir. Ct. 225.
(2) [1890] 133 U.S.R. 423.
(3) [1871] 45 N.Y. 113.
(4) 13 Conn. 249, 257.
(5) [1870] L.R. 6 Q.B. 139.
(6) [1870] L.R. 6 Q.B. 155.
(7) [1842] 9 M. & W. 809 at p. 819.
(8) [1845] 13 M. & W. 628 at p. 633.
(9) [1826] 3 Bing. 353.
(10) [1828] 4 Bing. 686.
(11) [1866] 12 App. Cas. 122.
(12) [1865] 3 Moore P.C.N.S. 272.

conclusion to which these decisions and dicta point has been formally adopted in the opinions of text-writers of repute; Story, sec. 307; Wharton, secs. 427 and 513; Westlake, sec. 225; Dicey, sec. 646.

An argument was advanced by the appellant, based upon the decisions touching the enforceability of causes of action arising from torts committed abroad, which both deserves and requires notice.

Authority can be cited, of the greatest weight, for the proposition that the right of action in respect of a foreign tort is ultimately based upon the obligation *ex delicto* attaching by the law of the *locus commissi* to the wrongful act; Willes J., speaking for the Exchequer Chamber in *Phillips* v. *Eyre* (1), and Holmes J., speaking for the Supreme Court of the United States, in the case of *The Titanic* (*Oceanic Steam Navigation Company* v. *Mellor*) (2). The policy of the English law does not permit the plaintiff to recover in an action upon a tort committed abroad, unless the wrongful act, if done in England, would have been actionable by the law of that country. It was held in *Machado* v. *Fontes* (3), that an action will lie in England in respect of an act committed abroad, if the act is wrongful by the law of England and not justifiable by the law of the country where it is committed, although, by the law of the foreign country, the wrongdoer is not subject to liability enforceable in civil proceedings. It is argued that the decision in *Machado* v. *Fontes* (3) necessarily proceeds upon the hypothesis that the right to recover damages, as well as the measure of damages, is, by English law, matter for the *lex fori*.

There is authority, both unmistakable in effect, and of a high order, for the proposition that the measure of damages in an action for reparation in respect of a tort in a foreign country is not matter of procedure, but matter of the substance of liability; per Turner L.J., *Cope* v. *Doherty* (4); and per Wood V.C. in the same case (5); but it is not necessary, for the purposes of the present appeal, to consider the decision in *Machado* v. *Fontes* (3). The doc-

(1) L.R. 6 Q.B. 1.
(2) [1914] 233 U.S.R. 718 at p. 732.
(3) [1897] 2 Q.B. 231.
(4) [1858] 2 De G. & J. 614 at p. 626.
(5) 4 K. & J. 367 at p. 384.

1924
LIVESLEY v. HORST. CO.
Duff J.

trine of that case, according to which the law of England gives a right of action in respect of a foreign tort for damages, when no such right is given by the foreign law, is not necessarily incompatible with the rule which appears to prevail without material qualification as regards contracts, that where rights are given by foreign law, these rights are recognized and enforced by the law of England, except in those cases in which the policy of the law of England forbids it.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Dickie & De Beck.*

Solicitors for the respondent: *Reid, Wallbridge, Douglas & Gibson.*

1924
*Oct. 14, 15.
*Nov. 19.

DAVID LEW (PLAINTIFF) .....APPELLANT;

AND

WING LEE (DEFENDANT) .....RESPONDENT.

Action—Malicious prosecution—Jury awarding greater damages than claimed—Trial judge reducing amount—Judgment reversed by appellate court—Appeal to Supreme Court of Canada—Death of plaintiff—Revivor of appeal by representative—New trial—Order conditional.

The appellant sued the respondent for malicious prosecution claiming $490 as special damages and $5,000 as general damages. At the trial, the jury rendered a verdict awarding the appellant $490 as special damages and $10,000 as general damages. The appellant did not ask to amend his claim, but, through his counsel, requested that his recovery be restricted to the amount demanded in his statement of claim. Thereupon, without consent of the respondent, the trial judge entered judgment for $490 special damages and $5,000 general damages. The Court of Appeal set aside this judgment and ordered a new trial. The appellant appealed to this court and obtained stay of proceedings on giving security for costs. Before his appeal came on for hearing, the appellant died. His personal representative moved to be allowed to enter a suggestion of death in order to continue the prosecution of the appeal. The respondent contested the application upon the maxim *actio personalis moritur cum persona.*

Held, that the application should be granted. The personal cause of action of the appellant for tort was merged in the judgment of the trial court; and although that judgment had been vacated on appeal,

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

the effect of the merger was not entirely gone. The "cause of action" preferred in this appeal is not the *injuria plus damnum* which the appellant originally asserted in the action, but his right to have restored the judgment of which he complains that he has been wrongly deprived and that "cause of action" survives to and is enforceable by his personal representative.

Held also that the judgment of the trial judge for $490 for special damages should be restored. As to general damages, the court may require the defendant, as a condition of affirming the order for a new trial, to undertake not to raise the objection that the original cause of action was extinguished by the plaintiff's death. Should that undertaking be refused, the appeal should be allowed with costs and the judgment of the trial court restored *in toto*.

Judgment of the Court of Appeal (33 B.C. Rep. 271) varied.

APPEAL from the decision of the Court of Appeal for British Columbia, (1) reversing the judgment of the trial judge with a jury and ordering a new trial.

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

E. Lafleur K.C. for the appellant.

Sir Chs. H. Tupper K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—In this action for malicious prosecution the plaintiff claimed $490 as special damages and $5,000 general damages. At the trial the jury rendered a verdict in his favour awarding the $490 special damages claimed and $10,000 general damages. The plaintiff did not ask to amend his claim, but, through his counsel, requested that his recovery be restricted to the amount demanded in his statement of claim. Thereupon, without consent of the defendant, the learned trial judge entered judgment for $490 special damages and for $5,000 general damages.

On appeal by the defendant the Court of Appeal of British Columbia (Macdonald C.J., Martin and Galliher JJ.A.) set aside this judgment, Mr. Justice Martin dissenting, and directed a new trial.

The plaintiff appealed to this court asking the restoration of the judgment of the trial court. He obtained the

(1) [1924] 33 B.C. Rep. 271; [1924] 1 W.W.R. 744.

1924
LEW
v.
LEE.
Anglin C.J.C.

usual stay of proceedings on giving security for costs. Before his appeal came on for hearing, however, he was murdered.

Instead of entering a suggestion of death as provided for by Supreme Court rule No. 50, whereupon the respondent might have moved under rule 51 to set such suggestion aside, the appellant moved before a judge in chambers to be allowed to enter the suggestion. The judge applied to directed that the motion should be brought before the court when the appeal should be reached on the docket on which it had been inscribed and the court accordingly heard the motion. It may, we think, conveniently be dealt with as if the respondent were moving under rule 51 to set aside a suggestion entered under rule 50.

The maxim *actio personalis moritur cum persona* is no doubt applicable to an action for malicious prosecution and, so far as we are aware, there is no legislation in force in British Columbia restricting its application before verdict. A cause of action for malicious prosecution is not one which survives. But by order XVII, rule 1, of the rules of the Supreme Court of British Columbia (which embodies s. 139 of the Imperial statutes 15-16 Vict., c. 76; 17 Car. 2, c. 8, s. 1), it is provided that

> whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death.

A fortiori the right of enforcing a judgment obtained before a plaintiff's death will survive to his personal representative; so too the right of defending such a judgment if subsequently attacked. Had the Court of Appeal affirmed the judgment of the trial court there could have been no doubt either as to the right of the defendant to prosecute an appeal to this court, notwithstanding the plaintiff's death, or as to the right of the personal representative of the latter to uphold the judgment if attacked. The purely personal cause of action for the tort had become merged in the judgment and the issue on such an appeal would be the legality and validity of that judgment and of the further judgment affirming it. (*Cox's Administrator* vs. *Whitfield* (1).

(1) [1851] 18 Ala. R. 738.

But it is urged that where, as here, the verdict for the plaintiff at the trial and the judgment founded on it had been set aside and vacated on appeal, the effect of the merger was gone and the plaintiff had been remitted to his original cause of action—and that died with him. No doubt if he had acquiesced in the judgment of the Court of Appeal that would have been his position. His personal representative could not prosecute the new trial ordered; that would be a proceeding on the original cause of action which had died with the plaintiff.

Where, however, there has not been such acquiescence but, on the contrary, an appeal to this court has been launched in due course to have the vacated verdict and judgment restored, the " cause of action " preferred in such an appeal is not the *injuria plus damnum* which the plaintiff originally asserted in the action, but his right to have restored the judgment of which he complains that he has been wrongly deprived, and that " cause of action " in our opinion, survives to and is enforceable by his personal representative. Although the converse case of the death of a sole plaintiff respondent is covered by the authority of *Stace* v. *Griffith* (1), we have found no English or Canadian decision dealing with the point now before us. *White* v. *Parker* (2) is not in point. It was directly involved, however, in the case of *Ellis* v. *Brooks* (3). The right of the personal representative of a plaintiff, who had died after a judgment had been rendered in her favour based on a " cause of action " for tort, to prosecute an appeal to have that judgment restored by a second appellate court on the ground that it had been erroneously set aside by the first appellate court, was there upheld. The reasoning of the court in that case commends itself to us. In the case of *Coughlin* vs. *District of Columbia,* before the Supreme Court of the United States (4), the syllabus in part reads as follows:—

3. When a judgment for the plaintiff in a personal action was erroneously set aside, and a subsequent final judgment against him is brought up by writ of error, pending which he dies, this court will affirm the first judgment *nunc pro tunc.*

(1) [1869] 6 Moore P.C. N.S., 18 at p. 23.
(2) [1889] 16 Can. S.C.R. 699.
(3) [1908] 101 Tex. 591 at p. 594.
(4) [1882] 106 U.S.R. 7 at p. 11.

1924
LEW
v.
LEE.
Anglin C.J.C.

The practice of the House of Lords appears to be to require revivor of the cause in the court below before entertaining a petition for revivor of an appeal abated by the death of a party whose interests are not fully represented by other parties to the appeal. Denison and Scott's House of Lords' Appeal Practice, 95, 199; Macqueen's House of Lords' Practice, pp. 241 et seq. The modern practice in the Privy Council is similar. Beckwith, Privy Council Practice (1912), 305. Our rules 50 and 51 do not contemplate such a procedure. They provide for the matter of revivor being dealt with here.

An appeal to this court is not a step in the cause (Supreme Court Act, s. 73), as is usually the case with appeals to a provincial appellate court. *Grasett* v. *Carter* (1). Entertaining the view that the issue before this court is not that determined by the verdict at the trial, but rather is whether sufficient grounds existed for setting aside that verdict and the judgment based upon it; that if that judgment should be restored it will operate as if it had never been set aside and *proprio vigore* as of its original date; and that the appellant's "cause of action" before this court is in substance and reality the alleged error that intervened in the Court of Appeal and induced that tribunal to vacate a judgment which he maintains had been rightly entered by the trial court, we are of the opinion that that "cause of action" is not subject to the operation of the maxim *actio personalis moritur cum persona*. In the judgment obtained from the trial court the plaintiff had an asset. The defendant thereby became bound to pay him $5,490 and costs. Deprived of that asset by the Court of Appeal the plaintiff by his appeal to this court sought to recover it. The right to prosecute that appeal survives to his personal representative. See note to *Wheatley* vs. *Lane* (2). A suggestion of the appellant's death may, therefore, rightly be entered under rule 50 and when so entered will not be set aside under rule 51.

Subject to the disposition of the motion just dealt with the merits of the appeal were argued.

(1) [1884] 6 O.R. 584.

(2) 1 Wm. Saun. 216.

In directing judgment for the plaintiff the learned trial judge said that the amount of it ($5,490)

> is much greater than would have been rendered by a judge trying the case without a jury.

In the Court of Appeal the learned Chief Justice said:—

> The jury, I think, showed a decided bias against the defendant; their verdict was for $10,000 damages, whereas the plaintiff claimed but $5,000.

Martin J.A. thought "the reduced amount not unreasonable"; Galliher J.A. said:—

> I have no hesitation in saying that the verdict brought in by the jury as to the amount of damages is wholly unwarranted by the evidence and shows on its face bias and prejudice * * * The very unreasonableness of the amount awarded by the jury answers itself, and I think it is a proper case for a new trial.

Although, with the exception of Mr. Justice Galliher, none of them says so explicitly, it would seem that all of the judges below regarded the verdict of $10,000 for general damages as excessive—so grossly excessive that it showed that the jury had been misled by prejudice or passion and that it therefore could not be maintained. No other ground for setting it aside is suggested. After a study of the record we are of the opinion that as to the general damages that view is correct. Indeed $5,000 would seem a large recovery having regard to all the circumstances of the case, and especially to the intervention and advice of Mr. Arthur Leighton, which, however open to criticism, it must not be forgotten was that of a solicitor of the Supreme Court of British Columbia, and of Alfred G. King who was a provincial land surveyor.

While of the opinion that had the verdict been sustainable for the sum for which it was rendered it would have been within the power of the learned trial judge to accept the plaintiff's renunciation of the excess over the amount of his claim and to enter judgment for the latter sum, we are equally satisfied that the verdict being bad because it was grossly excessive he had not that power. The doctrine of *Watt* v. *Watt* (1), and *Bray* v. *Ford* (2), is, we think, conclusive on this point. The defendant had a statutory right to have the general damages again assessed by a jury, R.S.B.C. 1911, c. 58, s. 53; O. 36, r. 2. The case, therefore, does not fall within order LVIII, rule 5a.

But the award of $490 for special damages is severable from that for $10,000 special damages. The allowance of

(1) [1905] A.C. 115. (2) [1896] A.C. 44.

1924
LEW
v.
LEE.
Anglin C.J.C.

$490 is not open to attack for excess. Other grounds upon which the defendant sought to impeach the verdict cannot prevail. There was evidence on which a jury might well find the other elements in the cause of action in favour of the plaintiff.

There is, therefore, no reason why, upon the proper suggestion being entered under our rule 50, the verdict finding the defendant liable and awarding $490 as special damages should not be restored and with it the judgment for the plaintiff for that amount and for the costs of the action down to and inclusive of the judgment of the trial court. *Barber & Co.* v. *Deutsche Bank* (1).

Moreover, under all the circumstances disclosed in the record, it seems eminently proper that the granting of a new trial for a re-assessment of the general damages should be subject to terms which will preclude the defendant escaping, by reason of the plaintiff's death, liability for whatever amount a jury might properly award. Direct authority for what we propose to do is somewhat meagre. But it is well established that in granting a new trial the court exercises a judicial discretion and may impose terms as to any matter within its jurisdiction. (*Watt* v. *Watt* (2), per Lord Davey.) Notwithstanding the absence from the British Columbia statutes and rules of provisions corresponding to the English rules 6 and 7 of order XXXIX, the Court of Appeal of that province is, in our opinion, clothed with a like discretion. So far as we are aware doubt has never been thrown on the view expressed by the Court of Exchequer in *Griffith* v. *Williams* (3) (a case of breach of promise of marriage where the plaintiff had died after a rule nisi for a new trial had been obtained but before argument), that a court of appeal may, in order to prevent a defeat of justice, make its order for a new trial conditional upon the defendant undertaking not to raise the objection that the cause of action was extinguished by the plaintiff's death and may direct that the verdict at such new trial be entered as of the date of that set aside. On the contrary that decision seems to have

(1) [1919] A.C. 304. (2) [1905] A.C. 115, at p. 122.
(3) [1830] 1 Cromp. & J. 47.

had the assent of Lord Tenterden C.J. in *Palmer* v. *Cohen* (1). Garrow B. in the *Griffith Case* also referred to a precedent for such a conditional order in an earlier case in the Court of King's Bench in which he had been of counsel.

If the plaintiff's death had occurred while this action was pending in the Court of Appeal there can be little doubt that that court would have assented to an application for the imposition of terms similar to those indicated in the *Griffiths Case* (1). We are by s. 51 of the Supreme Court Act empowered to give the judgment which the Court of Appeal should have given. In the exercise of the jurisdiction thus conferred we deem it proper, in varying the judgment of the Court of Appeal by restoring the judgment of the trial court for special damages and costs as above indicated, and limiting the new trial which it directs to a re-assessment of the general damages, to impose on the defendant, as a condition of maintaining the order for a new trial to that extent, that he shall give the undertaking above indicated. If this alternative is accepted by written election filed with the registrar within one month there will be no costs to either party of the appeals to this court and the Court of Appeal. But should such election not be made, upon the proper suggestion being entered under rule 50, the appeal will be allowed with costs here and in the Court of Appeal and the judgment of the learned trial judge restored.

The direction for the entry of the formal judgment of the court was in these terms:

"Revivor of appeal allowed.

"On a proper suggestion being entered under rule 50 the appeal will be allowed with costs here and in the Court of Appeal and the judgment of the learned trial judge restored, unless the defendant shall elect, by writing to be filed with the registrar within one month, for a new trial limited to a re-assessment of the general damages claimed and subject to the condition that no exception based on the death of the plaintiff will be taken to such new trial proceeding and that judgment may thereafter be entered for the amount awarded on such new trial as of the date

(1) [1831] 2 B. & Ad. 966.

1924
LEW
v.
LEE.
Anglin C.J.C.

of the verdict in part set aside. Should the defendant so elect for such new trial, upon entry of the aforesaid suggestion the judgment of the Court of Appeal will be varied accordingly and the judgment of the learned trial judge will be restored for the sum of $490 special damages and costs of action down to and inclusive of the judgment at the trial court and there will be no costs to either party of the appeals to this court and to the Court of Appeal."

Appeal allowed in part.

Solicitor for the appellant: *F. S. Cunliffe.*
Solicitor for the respondent: *Arthur Leighton.*

1924
*Oct. 22.
*Nov. 19.

THE RUTHENIAN CATHOLIC MISSION OF ST. BASIL THE GREAT IN CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE MUNDARE SCHOOL DISTRICT No. 1603 (DEFENDANT).... RESPONDENT.

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

Taxation—Exemption—"Building used for church purposes"—School Assessment Act, R.S.A. (1922), c. 52, s. 24 (d).—Appeal against assessment—Right of further appeal.

A building was owned by a religious order incorporated by Act of Parliament whose members were priests of the Greek Ruthenian Church Rite. It was used and occupied as a seminary for the education of missionary priests, no charge being made for their education and maintenance, and at one end thereof on the first floor was a chapel where the parish mass was usually celebrated daily except on Sundays when it was held in a church of the order on the opposite side of the road.

Per Idington, Duff and Newcombe JJ.—The building could not be deemed to be one "used for church purposes" within the meaning of s. 24 (*d*) of "The School Assessment Act, R.S.A. (1922), c. 52 and was not exempt from taxation. Anglin C.J.C. and Mignault and Rinfret JJ. *contra.*

Held, also, that, although the appellant had already submitted its assessment to the Court of Revision, as provided for by the School Assessment Act of Alberta and had further appealed from that decision to

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

the District Court, it had still the right to institute the present action, as the question involved concerns the jurisdiction to assess. *Toronto Railway Co.* v. *City of Toronto* ([1904] A.C. 809) followed. Idington J. dissenting.

Judgment of the Appellate Division (20 Alta. L.R. 338) affirmed, the court being equally divided.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge and dismissing appellant's claim for a declaration that a certain building and the land on which it stands is exempt from taxation and for an injunction restraining its being sold or forfeited for arrears of taxes.

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

W. L. Scott K.C. for the appellant. The building in question is used for church purposes and not used for any other purpose for hire or reward. The word "church" has two meanings: (1) It may be employed in a material sense to indicate an edifice of ecclesiastical character. (2) It may be employed in a spiritual sense, as in the phrases: "the Church of God," "the Presbyterian Church," and so on. Obviously, it is in the latter sense that the word is employed in the statute in question. The word "purposes" being in the plural makes this certain. By no ingenuity can the sentences be made intelligible if the word "church" means an edifice. The sentence must undergo complete metamorphosis if it is to mean "any building used for divine worship"; and the plural "purposes" must be cut down to a single "purpose." The phrase "for church purposes" is the precise equivalent of for the purposes of a church, just as for "national purposes" is equivalent to for the purposes of a nation.

C. C. McCaul K.C. for the respondent. The object and the purpose of the seminary is first to give a general education, secondly, to train and develop instruments to effectuate the purpose and objects of the church. And the building of the appellant is not intended for public worship.

(1) [1924] 20 Alta. L.R. 338.

1924

RUTHENIAN CATHOLIC MISSION v. MUNDARE SCHOOL DISTRICT.

ANGLIN C.J.C.—I concur with Mr. Justice Rinfret.

IDINGTON J.—The appellant is a corporation created by the Dominion Parliament and possessed of 14·78 acres, part of the northeast quarter of section 19, township 53, range 16, west of the 4th meridian, in the province of Alberta, whereon is erected a building in which to carry on a seminary.

The respondent is, as its name implies, a corporate school district in Alberta which comprises, amongst many other parcels of land, that above referred to organized under the School Act of said province to levy rates for the maintenance of its school.

That Act provides for the appointment of an assessor to make an assessment roll for the purposes of such levy.

Section 24 of said Assessment Act provides as follows:—

24. (1) All property real and personal in any village or consolidated district not herein declared exempt from taxation shall be subject to assessment and taxation for school purposes.

The second subsection of said section 24 provides as follows:—

(2) The property exempt from taxation under the provisions of this Act shall be * * *

and then proceeds to define by subsections many properties so exempted.

By subsection (*d*) it provides as follows:—

(*d*) any building used for church purposes, and not used for any other purpose for hire or reward, and the lot or lots whereon it stands, not exceeding one-half acre, except such part as may have any other building thereon.

The appellant was assessed for its said land for the year 1923, and, deeming its assessment too high, gave the following notice of appeal from said assessment:—

To the Secretary-Treasurer of School District, No. 1603:

Sir,—I hereby appeal against Assessment No. 4052422 on the following grounds: That the said assessment is too high.

Rev. N. Kryanowsky, appellant,
P.O. Mundare,
17th day of April, 1923.

To the Secretary-Treasurer of School District No. 1603:

Sir,—I hereby appeal against Assessment No. 3132348 on the following grounds: That the said assessment is too high.

Rev. N. Kryanowsky, appellant,
P.O. Mundare,
17th day of April, 1923.

By admissions made at the trial said Rev. Father Kryanowsky was admitted to be the duly authorized agent of appellant, and was so during the said year 1923, when notice of assessment was given the plaintiff (now appellant); and further:—

That notice of assessment was given to the plaintiff;

It appealed to the Court of Revision;

That a Court of Revision was duly held and reduced the assessment of the building in question from $35,000 to the final assessment;

That the plaintiff appealed to the judge of the District Court in accordance with the Act in that regard who dismissed the same;

That the grounds for the appeal to the judge of the District Court as in the said notice of appeal set out, were as follows:

"That the property consisting of the Ruthenian Seminary and the land upon which the same is situated is under the school assessment ordinance exempt from taxation, in that the said building is used or to be used for church purposes and not used for any other purpose for hire or reward."

That the judgment of the judge aforesaid is as follows:—

"The appellant asks for exemption from school tax on a building and one-half acre, under section 24, subsection "D" School Assessment Act, chapter 52, R.S.A.

"The main purpose of the buildings I understood from the evidence was for the education of young men for the priesthood, for which no charge is made. There is a public chapel for children to learn the catechism and for public services. There is no letting for hire. There was no evidence as to how often public service was held in the chapel and I would consider from the fact that there was a church just across the road that the chapel would not be used very often for public church services. The section says that 'any building used for church purposes, and not used for any other purpose, for hire or reward, etc.' shall be exempt.

"As I understand the evidence, the building was erected and is used as a theological college. As such it is not exempt under the Act. The fact that it was a chapel for holding religious services would not bring it under the exemption. While the public on certain occasions might use the chapel, I do not think that this could be construed to exempt the whole building as being used for church purposes.

"While I recognize the fact that education of the candidates for the priesthood is essential for the proper carrying out of the work of any church, yet if the Act had intended such to be exempt such would have been specially mentioned.

"I would dismiss the appeal."

This seems to me to conclude this case as against the appellant.

There was thus brought before the Court of Revision not only the merits of the assessment as made, but also, in course of the appeal to the district judge, due consideration was had of the right to exemption as now claimed herein, and the decision above quoted duly reached as provided for by the said School Assessment Act.

1924

RUTHENIAN CATHOLIC MISSION v. MUNDARE SCHOOL DISTRICT.

Idington J.

Section 38 thereof expressly provides for such a proceeding before the district judge. Subsection 11 of said section 38 declares as follows:—

> The decision and judgment of the judge shall be final and conclusive in every case adjudicated upon.

I am, with great respect, of the opinion on the foregoing facts that the said judgment was as expressed in said subsection 11 final and conclusive in law and should have been so held by the learned trial judge and those in the Appellate Division.

When the case of the *Toronto Railway Company* v. *The City of Toronto* (1), cited by Mr. Justice Hyndman, and the relevant facts are closely examined and the law bearing upon this case is also closely examined, and due comparison made, it will be seen that the said decision does not interfere with giving due effect to the said subsection 11 and thereby disposing of this appeal.

The pretension set up herein that the property in question was exempt from assessment, is to my mind so entirely without foundation in law, that I do not feel disposed to follow up the opinion I have just expressed as to the effect of said subsection 11, with prolonged argument in support thereof.

I prefer, having so expressed my opinion on said subsection 11, going direct to the question chiefly discussed in the reasons assigned in the court below in support of appellant's pretension.

I submit that the interpretation given by such an educated man as I assume the Reverend Father Kryanowsky to be, when he gave the said notices of appeal on the ground of the assessment being too high, was the correct interpretation.

It does not seem ever to have occurred to him that the legislature of Alberta could imagine such a ground of exemption as that of a seminary, much less of a purely theological seminary for the selection and training and education of priests of any church. Such a conception I rather imagine to have been the product of some legal mind, fertile in resources when driven by desperate necessities.

(1) [1904] A.C. 809.

The suggestion is a straining of the language used. An exemption from taxation should never be carried further than what is beyond doubt the clearly expressed intention of the legislature and so restricted it is impossible, I submit with great respect, correctly, to turn a very common ground of exemption in favour of buildings used for churches into what is contended for by appellant.

The counsel for appellant could not point to any such exemption as put forward herein ever having taken place in favour of any other religious denomination in Alberta.

In default of any such precedent I can see no justification for supposing that the Alberta legislature could have any such intention.

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

DUFF J.—I concur with Mr. Justice Newcombe.

MIGNAULT J.—I concur with Mr. Justice Rinfret.

NEWCOMBE J.—The confusion in this case arises because of the equivocal meaning of the word "church"; it is necessary to interpret the word as found in the School Assessment Act of Alberta, R.S.A. 1922, c. 52, s. 24, which is the beginning of a group of sections relating to assessment and taxation for school purposes in village and consolidated districts. Section 24 provides that all property real and personal in any village or consolidated district not declared exempt from taxation shall be subject to assessment and taxation for school purposes; then follows an enumeration of property which is declared exempt, including

any building used for church purposes and not used for any other purpose for hire or reward, and the lot or lots whereon it stands, not exceeding one-half acre, except such part as may have any other building thereon.

It will be observed that the exemption includes only a building and the land whereon it stands, not exceeding one-half acre, if used for church purposes; the words are certainly not inapt to describe a building used as a place of ministration of divine service, or as a church in the sense of a meeting house for public worship; moreover the area of land which goes with the building, limited to one-half acre, is not unlike that which would be required for a church site and a churchyard in a locality populous

1924

RUTHENIAN CATHOLIC MISSION v. MUNDARE SCHOOL DISTRICT.

Newcombe J.

enough to be a village or consolidated district. The question is whether these " church purposes " are so comprehensive as to embrace those of a theological college or seminary.

The exemptions provided by a preceding group of sections, which relate to rural districts or portions thereof situated in a non-collecting municipal district or in the extra municipal area, are naturally somewhat more generous to the churches so far as concerns the extent of land. The church exemption in these localities is thus defined by s. 6:—

> The land to the extent of three acres held by or for the use of any church on which there is a building used for church purposes.

It will be perceived that the exemption is here somewhat differently expressed, and that the word " church " which appears twice in one line has different meanings; in the first place, the body which uses; in the second place, to qualify or describe the use of a building which is requisite for its exemption, while in s. 24 the term is used only in the latter sense; but, for the rural as well as for the village districts, the land exempted is of small area, such as would be required for the churchyard, having regard to the locality.

The plaintiff order was incorporated in Canada by c. 152 of 1908, " An Act to incorporate the Ruthenian Catholic Mission of the Order of St. Basil the Great in Canada." The Act proceeds upon the preamble that the Reverend Fathers, who are named as the corporators, are members of the Order of St. Basil the Great, an order of religious in communion with the See of Rome, that they are the only members of the Order in Canada and have for several years been engaged in pursuing the objects of their Order in the establishing and carrying on of parishes or missions, and the erection and conduct of churches, schools, colleges, orphanages and hospitals, in the provinces of Manitoba, Saskatchewan and Alberta; the objects of the corporation are declared to be:—

> the maintenance and carrying on of parishes or missions, the erection, maintenance and conduct of churches, cemeteries, schools, colleges, orphanages and hospitals in any of the provinces of Canada, and the advancement in other ways of education and religion, charity and benevolence.

The Superior of the Order for Canada testifies that the members of the Order are priests of the Greek Ruthenian

Catholic Church, that he resides at the village of Mundare, where the Order has a ministry, a convent and a church, and where the Mission is the proprietor of 14·78 acres of land upon which it has built a seminary. This building was begun in 1922 and finished in August 1923 at a cost of nearly $30,000. The building is 120 ft. long by 40 ft. in width, having a basement and two floors above, and it is used as a place for the training and education of those who are to become missionary priests of the Order. It contains dormitories, school room and one large room used as a chapel where mass is said. The building was opened for use in September, 1923, and at the time of trial there were only a few boys or young men in attendance, but the building is designed for the accommodation and use of thirty or forty students. There is a church belonging to and used by the Mission on the opposite side of the street where the Sunday services are held.

It is argued that because it is necessary that young men should be trained for the ministry or priesthood, and because the seminary is a building used for this purpose, therefore it is used for church purposes, and is consequently exempt from taxation. In order to justify this contention it is necessary to interpret the word "church" as connoting not, or not only, in its primary sense, the Lord's house, but a church in the sense of an organized body of christians possessing the same or similar symbols of doctrine and forms of worship, united as a christian denomination, and "purposes" as including any purpose which the competent authority of the church may formulate and adopt. If the word be intended to convey that meaning it may be observed that there is no proof in the case that it is a purpose of the Roman Catholic Church to maintain or to use the seminary for any purpose, although it is well established that the purpose of the appellant Order in the construction and use of the seminary is the training and education of young men to become priests of the Order. I do not think, however, with the utmost respect for the opinion of my learned brothers from whom I am sorry to differ, that education, even for the priesthood, is within the natural, common and ordinary meaning of the expression "church purposes" in the use and context in which it here finds itself. The purposes designed and adopted

1924

RUTHENIAN CATHOLIC MISSION v. MUNDARE SCHOOL DISTRICT.

Newcombe J.

by a body of christians organized as a church in the execution of the general policy of the organization or society might obviously include purposes very remote from those intended by s. 24; for example it might be a purpose of a church organization to establish and maintain an orphanage, or a hospital, or a house of refuge. These and other worthy or benevolent projects, if made part of the general policy of a church, may appropriately be described as church purposes in one sense; but I think a definition which would admit these to the benefit of the exemption would be giving a broader effect to the language than can be reasonably found to have been intended by the legislature.

The words are of popular meaning and should be taken in their popular sense. *The Board of Works for the Wandsworth District* v. *United Telephone Company* (1). Plainly what the legislature intended to exempt was a building in an Alberta village, standing on half an acre of land, used for church purposes, and the inquiry suggests itself as to whether an assessor for a village or consolidated district would regard buildings occupied by colleges for the teaching of Divinity, such as for example, Knox, Wycliffe, or Pine Hill, as within the description, or as used for church purposes. The exemption as already said is concerned with a building and a small area of land, such as is usually appurtenant to a meeting house; in my judgment the sort of building which is intended to be exempt is a building used for the purposes for which a church is used, and therefore I do not doubt that the assessor when determining whether a building should be assessed or exempt would naturally have regard to the use for which a church edifice is designed and to which it is commonly put; he would ascertain the purposes for which the building is used, and the determining fact would be whether or not the ascertained use of the building is that which is peculiar to a church or meeting house; a place set apart and devoted to public worship. The building, of course, may not have the appearance or architectural qualities of a church, though if these indications be present they might not improbably be accepted

(1) [1884] 13 Q.B.D. 904, at pp. 919, 920.

by the assessor as indicative of the apparent use of the building, but it is only a building, satisfying the definition in other respects, which is used as a church edifice is used, according to the common and popular understanding of the nature of such use, that is within the meaning of the exempting clause.

Moreover, there is a principle which finds expression in a recent judgment of the Judicial Committee of the Privy Council that it is incumbent upon those who claim to be exempt from a tax which is generally imposed clearly to establish their immunity. In *City of Montreal* v. *Collège Sainte Marie* (1) my learned brother Duff J. sitting as a member of the Board and pronouncing its judgment, said:—

> Their Lordships are not disposed to differ from the view pressed upon them that an agreement in order to receive effect under the statute must be very clearly made out; such an agreement, if effective, establishes a privilege in respect of taxation, and the principle is not only well settled, but rests upon obvious considerations, that those who advance a claim to special treatment in such matters must show that the privilege invoked has unquestionably been created.

That the interpretation upon which the appellant relies is at best of a dubious and questionable character is shown by the fact that the learned Chief Justice, who tried the case, and three of the learned Judges of the Appellate Division have interpreted the exemption as not including the seminary, while the other two learned Judges of the Appellate Division have come to the opposite conclusion.

I would dismiss the appeal.

RINFRET J.—This appeal turns upon the construction to be put on the words " church purposes."

It comes in this way:

Section 24 of an Act respecting assessment and taxation for school purposes, being chapter 52 of the Revised Statutes of Alberta, 1922, provides as follows:—

> 24. (1) All property real and personal in any village or consolidated district not herein declared exempt from taxation shall be subject to assessment and taxation for school purposes.
>
> (2) The property exempt from taxation under the provisions of this Act shall be,—
>
> (*d*) Any building used for church purposes, and not used for any other purpose for hire or reward, and the lot or lots whereon it stands, not exceeding one-half acre, except such part as may have any other building thereon.

(1) [1921] 1 A.C. 288 at p. 290.

1924

RUTHENIAN CATHOLIC MISSION v. MUNDARE SCHOOL DISTRICT.

Rinfret J.

The appellant is the registered owner of a certain building standing on a portion of the northeast quarter of section 19, township 53, range 16, west of the fourth meridian, which is within the public school district of the respondent established under the "School Act," c. 51 of the Consolidated Statutes of Alberta, 1922. This school district has assessed this building and lands for the year 1923 and has demanded taxes from the appellant in respect thereof. On the ground that they are used for church purposes and not for any other purpose for hire or reward, the appellant now claims a declaratory judgment that the said building and the said lands to the extent of one-half an acre are exempt from assessment and taxation by the respondent as well for the year 1923 as for the future, so long as they are used for the purposes aforesaid. It also prays for an injunction restraining the defendant, its servants and agents from selling or forfeiting or in any other way interfering with the said building and the said lands to the extent aforesaid for arrears of taxes or otherwise howsoever and from assessing the said building and lands in future so long as they are used for the purpose aforesaid.

The facts are undisputed. The building in question contains a chapel, class rooms, dormitories, kitchens, etc. The chapel is used exclusively for divine worship. The building is used solely as a seminary for the education and training of young men for the priesthood. After a year's novitiate or probation, they become members of the Order, are educated for the priesthood, and, after ordination, serve as priests in the parishes and missions in charge of the Order. The building is used for no other purpose. It is not used for any purpose for hire or reward. The students are maintained or educated entirely free of any charge and the building is kept up by free-will offerings and contributions.

Appellant does not make the contention that its building is entitled to exemption under the Act by reason of the fact that it contains a chapel and that therefore the exemption must be extended to the whole building. Its submission is that the building itself, in view of the use to which it is exclusively put, comes under the purview of the statutory exemption.

In order to reach the proper conclusion, the intention of the legislature of Alberta must be looked for as disclosed by the language of the statute.

It is true that a statutory exemption must be strictly construed; but, as was pointed out in *St. Paul's Church* v. *City of Concord* (1),

> while the rule serves to express a principle governing the court in this jurisdiction when passing upon the question of the intention of the legislature in tax-exemption statutes, it is not so narrow and rigid in its application as to defeat the lawmakers' intention ascertained from all the competent evidence. Though called a rule, for convenience of expression, it is merely evidence to be weighed; and its weight depends upon its reasonableness, and not alone upon its verbal applicability. In other words, it is the duty of the court to ascertain and carry out the intention of the legislature; and that fact (*sic*) is to be found, not by mechanical or formal application of words and phrases, but by the exercise of reason and judgment. If the literal significance of statutory language as applied to the facts of a particular case, makes the meaning absurd, strange, or inexplicable, it cannot be adopted as the only test of the legislative purpose, without either imputing to the legislature a senseless design, or judicially evading the duty of ascertaining the intent. If the so-called "rule of strict construction," as applied to statutes exempting certain property from taxation, is so strictly applied as to render the exempting language so narrow and restricted as to defeat the apparent legislative purpose, it is clear that too much sacredness is attached to a mere rule and that it should be either abrogated or applied with more liberality and reason.

The only safe rule in construing statutes and, in fact, the great fundamental principle is that

> the grammatical and ordinary sense of the words is to be adhered to unless that would lead to absurdity, or some repugnancy or inconsistency with the rest of the instrument; in which case, the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnancy, or inconsistency, but no further. (Maxwell On Statutes, 5th ed. p. 4).

This was also the language of Lord Parmoor in *Rex* v. *Canadian Northern Railway Co.* (2); and we are reminded of it by Lord MacNaughton in *Vacher & Sons* v. *London Society of Compositors* (3), where he says, at p. 118, that, in the absence of a preamble, one should depart from the ordinary and common sense of the words in an enactment only where it would lead to some absurdity or it is inconsistent with some other clause in the body of the enactment.

(1) [1910] 27 L.R.A. N.S. 910, at p. 912.
(2) [1923] A.C. 714 at p. 718.
(3) [1913] A.C. 107.

1924

RUTHENIAN CATHOLIC MISSION v. MUNDARE SCHOOL DISTRICT.

Rinfret J.

This leads us to consider the grammatical and ordinary sense of the words used by the legislature of Alberta, and it may be convenient to examine them separately.

There is no doubt that the word "church" was originally used as a name for a house of worship; but, as pointed out in Halsbury's Laws of England, vol. II, p. 355, paragraph 688:—

> The change from a narrower to a wider meaning of the word "ecclesiastical" has been accompanied by a similar change in the meaning of the word "church" when used of a religious body, and the very wide signification given in ordinary legal parlance to that word when so used makes it advisable to base any propositions as to the relations between the state and a church on a careful definition of what that word when so used connotes. Although the words "church" and "denomination" are sometimes used in juxtaposition in a manner which appears to imply that a "church" is to be distinguished from a "denomination," there is no legal definition of the word "denomination" which would enable any useful inference to be drawn from this implication, and the word "church" is in fact used of any ecclesiastical organism which is complete within itself and separate from other churches.

And Fitzgibbon L.J., in *McLaughlin* v. *Campbell* (1), says:—

> "Church" has two different meanings: it may mean the aggregate of the individual members of the "church"; or it may mean the quasi-corporate institution which carries on the religious work of the denomination whose name it bears (e.g. the "Church of Rome" or the "Church of Ireland").

As for the word "purpose," it has been defined:—

> An object to be kept in view or subserved in operation or course of action; end proposed; aim. (Century Dictionary). The object for which anything is done or for which it exists; the result or effect intended, or sought; end, aim. (Murray's New Dictionary, vol. VII).

It would follow therefore that the grammatical and ordinary sense of the words "church" and "purposes" when joined together is the objects for which the religious body exists, the result intended or sought by such body; its ends or aims.

Applying now this meaning to the use which is made by appellant of the building for which it seeks exemption from taxation, it is to be noticed that the appellant was incorporated under the name of "The Ruthenian Catholic Mission of the Order of St. Basil the Great in Canada" by the Dominion Parliament in 1908, chapter 152 of the statute 7-8 Edward VII. It is stated in the preamble of that statute that the incorporators have

(1) [1906] 1 Ir. R. 588 at p. 597.

represented that they are members of the Order of St. Basil the Great, an order of religious in communion with the See of Rome;

and, since incorporation ensued, it follows that this representation was found to be true by Parliament. The appellant is therefore an order forming part of an

ecclesiastical organism which is complete within itself

and which is one of the great religious organizations of the world. Its primary and predominant object, as given in section 4 of its incorporating statute, is

the maintenance and carrying on of parishes and missions (and also) the advancement in other ways of * * * religion.

The words "the advancement of religion" do not call for any special explanation. The alternative use of the expressions "parishes" and "missions" is well known in Alberta, as can be seen by reference to *The Purdy & Henderson Company, Ltd.*, v. *The Corporation of the Parish of St. Patrick* (1), and *Leonard* v. *Corporation* of the *Parish of St. Patrick* (2). A man carrying on a mission, or a missionary, is one sent to propagate religion and to administer its rites and sacraments.

The evidence is that the building now in question is a seminary for the education of young men for the priesthood and that the object of teaching the priests is

for the purpose of carrying on the work of their religion.

The students come there with that sole object in view, that is to be trained in order to become instruments to effectuate the purpose and object of the church.

Preaching the Gospel is one of the commands of Jesus to his Apostles:—

Go ye therefore and teach all nations, baptizing them in the name of the Father and of the Son and of the Holy Ghost, teaching them to observe all things whatsoever I have commanded you; and behold I am with you alway even unto the end of the world (St. Matthew, xxviii, 19-20).

In obeying this command the priests of the Order of St. Basil the Great in Canada are carrying on their missionary work for the advancement of religion; and it is with that object in view that they are trained in the religious establishment for which they now seek exemption from taxation.

Moreover they are also educated in the seminary in question for the purpose of being ordained priests and as such

(1) [1917] 12 Alta. L.R. 263. (2) [1922] 17 Alta. L.R. 262.

1924

RUTHENIAN CATHOLIC MISSION v. MUNDARE SCHOOL DISTRICT.

Rinfret J.

of celebrating (in the words of Lord Birkenhead), the central sacrament in a creed which commands the assent of many millions of our Christian fellow-countrymen (*Bourne* v. *Keane*) (1),

As Mr. Justice Beck justly remarks:—

It is practically the universal practice of Catholic priests to say mass every day and for priests in charge of a parish to say it in a church or chapel open to the entire congregation and to which a considerable number of the congregation daily resort for the purpose of assisting at Mass —to use the fuller expression used by Catholics: "The Holy Sacrifice of the Mass"—a service of worship—no preaching—no singing."

The appellants here would certainly accept, as correctly characterizing the holy sacrifice of the mass, the following exposition made by Lord Birkenhead:—

* * * the sacrament of the mass was, and is, a sacrifice propitiatory of the whole church, both living and dead. The celebration of mass, according to Roman Catholic doctrine, is by no means a benefit entirely confined to the soul or souls of the persons for whom it is directly designed; it benefits (such is the conception) the whole of the living community as well as the dead (*Bourne* v. *Keane*) (1), at page 833.

Now that sacrament

is fundamental in the belief of Roman Catholics, and without which the church and the altar would alike be useless (Lord Birkenhead, loc. cit., at p. 861).

It is

a sacred and sacramental rite, which is an essential and integral part of a service of great solemnity in the liturgy of the Roman Catholic Church (Lord Parmoor in *Bourne* v. *Keane* (1)) at page 917.

The solemnization of this sacred and sacramental rite cannot take place without the priest, who is the essential minister exclusively authorized to celebrate mass. For that end, the Catholic church needs ordained priests, and it is for that purpose also that, in the building in question, young Catholics of Ukrainian nationality are being trained

to become priests of the Greek Ruthenian rite in order that they may serve their fellow Catholics of that rite.

This institution's existence therefore is exclusively and solely for the essential purposes of their church, which

prima facie imports the operative institution which ministers religion and gives spiritual edification to its members. *McLaughlin* v. *Campbell* (2),

It would not be representing the true character of such a seminary to class it among mere educational establishments and to say that as such it cannot claim exemption under the Act, because only the buildings and grounds of public and separate schools which are under the man-

(1) [1919] A.C. 815, at p. 831. (2) [1906] 1 Ir. R. 588, at p. 597

agement of the Department of Education shall be exempt. The schools contemplated by the Act have for their object the education of students for their own individual and personal ends and benefit, whilst the students in the seminary in question are trained exclusively with the view of promoting the ends and aims of their religion, quite independently of any resulting benefit to themselves; and it is this distinction which takes the seminary out of the category of schools and classifies it as an establishment maintained for church purposes.

In the case of *The People* v. *Muldoon* (1), to which reference is made by Stuart J. in the Appellate Division, it is pointed out that

> exemption from taxation rests on a general public benefit and that in the case of property used for religious purposes a compensation is afforded for the exemption which is not a mere gift to religion, but for a public purpose.

In that particular case it was proven that the nuns engaged in

> prayer and meditation, practices of penance and contemplation, but that they had "no relation near or remote to the public" and were "completely separated and secluded from the world and not in any manner connected with public worship, or public religious observances.

For that reason, it was held that their property should not be exempt. But the distinction upon which the judgment rested in that case would, I think, apply here in favour of the appellant.

Reverting therefore to the purposes for which the building in question is used by the appellant, it would appear that they are entirely covered by the words "church purposes," as expressed in the statute, and even that that is grammatically the meaning which these words convey.

Now the legislature of Alberta must be held to have intended what the words it has used mean, as there is no reason here to depart from their ordinary and common sense, since they lead to no absurdity and are not inconsistent with any clause in the body of the enactment. It is only by so construing the statute that effect will be given to the full meaning of the words "church purposes." I therefore come to the conclusion that by using the word "church" the legislature intended to refer to the whole

(1) [1923] 137 N.E.R. 863.

1924

RUTHENIAN CATHOLIC MISSION v. MUNDARE SCHOOL DISTRICT.

Rinfret J.

body of the religious institution, and not to a mere physical structure or building used exclusively as a place of public worship.

One cannot escape the impression that if the legislature of Alberta had intended to use this word in such a narrow sense and to confine the exemption to a place of public worship, it would have said so in plain words. That impression is strengthened by the use in the charter of the City of Edmonton (1913, c. 23, s. 320 (4)) of the phrase

any building used as a place of worship.

Other legislatures throughout Canada have used similar expressions in corresponding statutes.

British Columbia, Revised Statutes of 1911, vol. 3, p. 2778:—

every place of public worship with the site thereof.

Revised Statutes of Manitoba, 1913, c. 134, s. 4 (p):—

buildings commonly called churches erected and used for the regular stated places of worship of any religious denomination and the lands in connection therewith not exceeding two acres in extent.

R.S.O. 195, s. 5 (2):—

every place of public worship.

R.S. Quebec, art. 5729:—

property held and occupied for public worship, presbyteries, parsonages and cemeteries.

R.S.N.S. (1923), c. 86, s. 4:—

every church and place of worship, the land used in connection therewith and every churchyard and burial ground.

On the other hand, the Saskatchewan statutes use the same language as is used in Alberta (R.S.S., c. 112, s. 5), and we may also refer to the terms of the R.S. Quebec, art. 2897:—

No religious, charitable or educational institution or corporation shall be assessed under this title on the property occupied by them for the object for which they were instituted.

The comparisons just made will tend to show that the legislatures to restrict the exemption to the physical structure or building used for religious worship, have used the words "place of worship"; and one is led to the conclusion that by the broader expression "any building used for church purposes," the legislature of Alberta had in view more than the buildings used merely as churches (in the narrow sense), and must have intended to include all that such wider expression covers.

Before concluding, reference ought to be made to an objection which was taken by the respondent, although not pressed very forcibly that the assessability of the property in question is " res judicata " because the appellant had already submitted its assessment to the Court of Revision, as provided for by the School Assessment Act of Alberta, and further had appealed from the decision of the Court of Revision to the District Court of Edmonton, where its appeal was dismissed.

This objection has been overruled in the courts below; and it should be sufficient to state here that the question involved being one with regard to the jurisdiction to assess, it is concluded adversely to the contention of the respondent by the decision of the Judicial Committee in *Toronto Railway Company* v. *City of Toronto* (1).

In that case the action was for a declaration that the appellants' cars were personal property and, as such, were not liable for $8,775 sought to be levied as taxes thereon by respondents. The latter relied on a plea of *res judicata.* On an appeal from the assessment the cars had been determined by the Court of Appeal to be real estate, and that decision had not been appealed from. The law of Ontario applicable to the point submitted to the Judicial Committee was then contained in the Revised Statutes of Ontario of 1897. There is no substantial difference between that law and the statute of Alberta which applies in the present case, as a comparison between the relevant sections will show.

By section 62 of c. 224, R.S.O. (1897), a revision court of three persons was constituted and their jurisdiction was defined by section 68 as follows:—

> 68. At the times or time appointed, the court shall meet and try all complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum.
>
> 71 (1). Any person complaining of an error or omission in regard to himself, as having been wrongfully inserted in or omitted from the roll, or as having been undercharged or overcharged by the assessor in the roll, may personally, or by his agent give notice in writing to the clerk of the municipality (or assessment commissioner, if any there be), that he considers himself aggrieved for any or all of the causes aforesaid, and shall give a name and address where notices can be served by the clerk as hereinafter provided.

(1) [1904] A.C. 809.

1924

RUTHENIAN CATHOLIC MISSION v. MUNDARE SCHOOL DISTRICT.

Rinfret J.

72. The roll, as finally passed by the court, and certified by the clerk as passed, shall, except in so far as the same may be further amended on appeal to the judge of the County Court, be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in the notice required by section 51 of this Act, or the omission to deliver or transmit such notice.

75 (1). An appeal to the County Judge shall lie, not only against a decision of the Court of Revision on an appeal to said court, but also against the omission, neglect or refusal of said court to hear or decide an appeal.

82. The decision and judgment of the judge or acting judge shall be final and conclusive in every case adjudicated, and the clerk of the municipality shall amend the rolls accordingly.

Similar provisions, with a further appeal to the Court of Appeal, are to be found in section 84 of the Ontario Act when the assessment was to an amount agregating $20,000.

In Alberta the Board, by sections 33 (1) and 37 (1) of c. 52 of the Revised Statutes of 1922, is constituted "as a court of revision to hear all appeals and complaints."

35 (1). Any person complaining of an error or omission in that his name has been wrongfully inserted in or omitted from the roll, or in that he has been overcharged by the assessor in the roll may personally or by his agent give notice in writing to the secretary that he considers himself aggrieved for any of the causes aforesaid.

37 (3). The roll as finally passed by the court and certified by the secretary as passed shall, except in so far as the same may be further amended on appeal to a District Court, be valid and bind all parties concerned notwithstanding any defect or error committed in or with regard to such roll, or any defect or error or misstatement in the notices required by any of the four next preceding sections, or the omission to deliver or transmit such notices.

38 (1). If any person is dissatisfied with the decision of the court of revision he may appeal therefore to the District Court.

38 (11). The decision and judgment of the judge shall be final and conclusive in every case adjudicated upon.

In the *Toronto Railway Company Case* (1), the appellants had appealed to the Court of Revision against the assessment on the ground, amongst others, that the property was not liable to assessment as real property. The Court of Revision dismissed the appeal and its decision was affirmed by the County Court Judge and subsequently by the Court of Appeal. Lord Davey, in delivering the judgments of their Lordships of the Judicial Committee (1), at p. 815 said:—

(1) [1904] A.C. 809.

It appears to their Lordships that the jurisdiction of the Court of Revision and of the courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

It may be stated that this decision was in accordance with the opinion already expressed in this court in the case of *City of London* v. *Watt & Sons* (1), where the Chief Justice said, at p. 302:—

I agree with the Court of Appeal in holding that the 65th section of the Ontario Assessment Act (R.S.O. 193) does not make the roll, as finally passed by the Court of Revision, conclusive as regards question of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it.

In the *City of London* v. *Watt & Sons* (1), the court construed the revised statutes of Ontario of 1887, where the relevant provisions were similar to those of the Revised Statutes of Ontario of 1897.

I have therefore reached the conclusion that the views of Mr. Justice Beck and Mr. Justice Hyndman, in the Appellate Division of the Supreme Court of Alberta, were right and, with deference, I am of opinion that the appeal should be allowed with costs and that judgment should be entered declaring that the building in question and the one-half acre of land upon which it stands are exempt from taxation under the Act respecting assessment and taxation for school purposes (R.S.A., c. 52).

Appeal dismissed.

Solicitors for the appellant: *Cormack, Sawnla & Basarab.*

Solicitor for the respondent: *H. A. White.*

(1) [1893] 22 Can. S.C.R. 300.

1924
*Oct. 21.
*Nov. 11.

WILLIAM DIXON AND UXOR (PLAINTIFFS) . APPELLANTS;

AND

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

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

Negligence—City operating winter slide—Accident—Liability—Ultra vires.

In January, 1923, the city respondent at the occasion of a winter carnival converted a portion of a street into a coasting slide for bobsleighs. At the head of the slide the city placed one of its employees in charge with instructions to see to the starting of sleighs and to collect the tolls prescribed for the use of the slide. The city had also there other men employed generally in connection with the slide. The appellants, Dr. Dixon and his wife, went down the slide in a bobsleigh until they reached a curve on the roadway where the city had constructed an embankment and then a rut caused the sleigh to upset, its occupants falling off and finding themselves sprawling on the slide. The appellants then attempted to go off the path of the slide by crossing the embankment, but the footing being found practically impassable on account of soft snow several feet in depth, they crossed the slide again in order to go out on the other side. Just then another sleigh coming down upset with its occupants in front of the appellants further up. It was followed at a short interval by a third sleigh which, while apparently trying to avoid the second overturned sleigh, came into contact with Mrs. Dixon, who sustained serious injuries. The appellants brought action against the city respondent to recover damages.

Held, that the city was responsible not only for the preparation of the slide but also, having assumed its control, it was its duty to see that no sleigh would be started from the top until the slide was clear; and that the city was negligent in not having a signal man stationed at a convenient point of observation to give notice or warning to the starter of any obstruction on the part of the slide which the starter could not see on account of the curve of the roadway.

The city of Edmonton, by s. 221 of its charter (Alta. [1913], c. 23), is authorized to "make by-laws and regulations for the peace, order, good government and welfare of the city of Edmonton."

Held that the city had authority under that section to pass a by-law in order to operate the slide; and, as the question of *ultra vires* had for the first time been raised before this court, it must be assumed that such a by-law had been passed.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta, reversing the judgment of the trial judge and dismissing the appellants' action.

---

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

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

C. C. McCaul K.C. for the appellants.

Eug. Lafleur K.C. for the respondent.

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

NEWCOMBE J.—The plaintiffs, husband and wife, brought this action against the defendant corporation, the city of Edmonton, to recover damages sustained by reason of injuries to the wife. It is alleged by the pleadings on behalf of the plaintiffs that the accident causing these injuries was due to the defendant's negligence; on the part of the defendant negligence is denied, and it is alleged in effect that the accident was due to the plaintiffs' negligence. Upon these issues the parties proceeded to trial and the learned trial judge found for the plaintiffs, assessing the damages at $1,200 for the husband and $6,000 for the wife. Upon the appeal the Appellate Division, composed of five judges, with two dissents, set aside the judgment of the trial judge and dismissed the plaintiffs' action.

It appears that in January, 1923, there was a winter carnival held at the city of Edmonton by decision and under the direction of the city authorities, and as one of the features of this carnival the city temporarily converted portions of 107th street and the roadway leading to 96th avenue into a coasting slide for bobsleighs. From where 107th street intersects 98th avenue going southerly on the first named street and by the roadway to 96th avenue, there is a natural declivity steep enough to afford an attractive slide, and this course in its ordinary condition had on occasions, albeit illegally, been used by the young people for coasting. From the point where 107th street or the prolongation of it, after crossing 97th Ave., turns in a southwesterly direction it passes through the park or grounds of the provincial government where the public buildings are situated, and the city obtained permission from the government temporarily to convert and to use this portion of the street for the purposes of the slide. Then the city

1924
DIXON
v.
CITY OF
EDMONTON.
Newcombe J.

authorities closed the street and roadway for general traffic between 98th avenue and the point of intersection of 96th avenue and 106th street where the slide terminated, and, in order to improve the sliding, constructed an embankment of snow on the westerly side where the roadway turns to the eastward, passing through the government grounds to 96th avenue, thus raising the level on the westerly side so as to compensate for the curve and to prevent the sleighs when reaching and traversing the curve from going off at a tangent, as they would otherwise be liable to do, and moreover they caused the surface to be iced at bare patches or where it was thought desirable to improve it. The roadway for its entire width was thus prepared for the sliding, and the area of the intersection of 107th street and 98th avenue became the head of the slide and the place of gathering for the adventurers in the sport. Here the city stationed Godfrey Morris, one of its employees, and placed him in charge, with instructions to see to the starting of sleighs and to collect the tolls prescribed for the use of the slide. The city also had three other men employed in connection with the slide; the manager of the carnival says:

> There was no actual place for them to be, they were to be spread over the slide at different points; * * * they were working on the slide.

Moreover, at the head of the slide the city also provided sleighs and steersmen for the use of persons in attendance who did not bring their own sleighs, or were not skilled in the sport.

The plaintiffs, Dr. Dixon and his wife, who resided in the immediate vicinity of the starting place, attended there on the evening of 24th January, with others, to slide with a boy named Gallinger, 14 years of age, a friend of the plaintiffs' son, who was in attendance with his own bobsleigh, and who apparently had acquired considerable experience in the management of it; his skill or capacity as a driver is not in question. Dr. Dixon paid the requisite toll of 25 cents to the man in charge, known in the case as the starter, and he, with his companions, his wife and Gallinger steering, were by the starter despatched in their turn. They proceeded down the slide until they reached the government grounds where they took the curve to the eastward which has been described. They were going on the westerly or right hand side upon the

upper part of the slope of the embankment, and at this point the sleigh was unfortunately caught in a rut, causing it to upset or to tilt over to the left to such a degree that the occupants fell off and found themselves sprawling on the slide. Nobody was hurt, they got up and realized immediately that they must quit the slide. The boy pulled his sleigh out of the rut and proceeded to cross with it to the east side, but the plaintiffs made an attempt to go off by crossing the embankment on the west side, nearer to which the upset had occurred. The footing was, however, found to be such that the lady, although a strong, active woman, could not comfortably or conveniently cross the embankment, which at the apex was composed of soft or lumpy snow several feet in depth and very difficult to cross, or for a matron of middle age practically impassable. Then, having proceeded up the slide in a northerly direction for a few steps looking for an opening or a convenient or possible place of exit to the left, and the lady having informed her husband that it was impossible for her to negotiate the embankment, they turned to the right crossing the slide which was very slippery in a northeasterly direction with a view to going out on the east side. At this time another sleigh with several occupants which was coming down the slide upset in front of them further up. It was followed at a short interval by a third sleigh, in charge of one of the city's employees, which, pursuing the usual course of the sliding on the upper side of the curve, and apparently being disturbed in its course by the upset of the second sleigh which had taken place between it and the plaintiffs who were making the crossing, swung to the left to avoid the overturned sleigh and its occupants and, having passed these, came into contact with Mrs. Dixon who had by this time reached a point two or three feet from the easterly limit of the slide which she was about to quit. It would appear that very little time could have elapsed between the upset of the plaintiffs and the passing of the third sleigh which caused the injury, because it is in proof that Gallinger who had disengaged his sleigh from the rut which had caused the upset proceeded immediately to the eastward, and that Dr. Dixon, who had assisted his wife in the crossing, was at the moment of the impact engaged in

1924
DIXON
v.
CITY OF
EDMONTON.
Newcombe J.

assisting Gallinger to lift his sleigh off the slide, and therefore that the plaintiffs must have arrived at the place very little later than the boy Gallinger who, so far as is known, had made all due haste to cross. When Mrs. Dixon was struck by the oncoming sleigh she sustained very serious injuries which will presently be described.

It is clear that the defendant corporation was responsible not only for the preparation, opening and working of the slide, but also that it assumed the control and direction of the sliding and established and collected tolls to be taken from the passengers.

No doubt sliding is, as observed by the learned judges in the Appellate Division, a somewhat dangerous amusement, and of course those who engage in it must assume the risks that are incidental to and inseparable from the sport. Accidents are liable to occur on the best constructed and regulated slides; the coasters take the risk of these; but it is the duty of those who construct and operate a slide, and assume the charge and regulation of it, to see that prudent and reasonable measures are taken for the prevention of accidents which may be avoided by proper regulation, and prevent the exposure of the participants in the sport to unnecessary and unexpected perils. Moreover, the operator as well as the user of the slide must be charged with knowledge of the incidents and dangers of the sport, and therefore is presumed to know that sleighs are liable to upset; consequently when midway of the slide a participant meets with this mischance he should at least be entitled to assume that he will not be overrun by an employee of the operator despatched by the operator's manager before he has time and opportunity, in the exercise of reasonable judgment and due expedition, to extricate himself from the unfortunate situation in which he is placed by common misadventure of the sport. On the Edmonton slide upsets were not uncommon, especially at the curve, and in the short space of time during which these plaintiffs were using the slide two sleighs parted with their occupants in this locality. It is maintained on behalf of the plaintiffs that in these circumstances it was negligence on the part of the city to permit a sleigh to start from the top until the slide was clear. It is said that in so far as the

starter could see the course, he ought to have seen that it was clear, and that, for the lower part of the course which he could not see, a signal man should have been stationed at a convenient point of observation to give notice or warning to the starter of any obstruction or of the absence of any obstruction which might interfere with the safety of the coasters. The learned trial judge found in effect that the city was negligent in this particular and that this negligence was the proximate cause of the accident. In my judgment his finding ought not to have been disturbed. I would apply the law as stated by Blackburn J., pronouncing the opinion of the judges, in the well known case of *The Mersey Docks* v. *Gibbs* (1), where he says:—

> In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things.

When the defendant corporation closed the public highway and converted it to the extraordinary purpose of a place of dangerous amusement for the residents of the city and the patrons of the fair, and assumed the charge and direction of the sport for which the street and roadway had been adapted, they should have exercised their powers in a manner not inconsistent with the general safety, and it was by failure in this that the accident happened. It is not suggested that the corporation enjoyed any legislative immunity.

There is evidence that the city determined to put a man in charge at the top for several purposes, namely, to see to the collection of the prescribed tolls, to see that each sleigh was in charge of a person competent to manage it, and to regulate the despatch of the sleighs so that there should be no competition or conflict for place, and so that a reasonable time might elapse between each descent and the following one. The precise time usually occupied in going down is not proved. Doubtless it might vary somewhat in different cases, but at most it would be very short. According to the plan produced the slide was about 450 yards in length, and one of the defendant's witnesses estimates the speed at fifteen to twenty miles. There is

(1) L.R. 1 H.L. 93, at p. 110.

1924
DIXON
v.
CITY OF
EDMONTON.
Newcombe J.

no certain evidence as to the time which was in practice required to intervene between the departure of one sleigh and that of the next. Godfrey Morris did not testify; it was said that he had gone north. McClung, a witness for the defence, who was employed by the city to run one of the bobsleighs, and who was in charge of the sleigh which collided with Mrs. Dixon, says:

> When sleighs were lined up and people waiting I believe they went down about a minute apart.

This is the only testimony by which any attempt was made to fix the length of the interval of safety; and admittedly there was no system whereby, when a start was to be made, the starter could be informed of the condition of the slide beyond that part of it which he himself could see, or that he paid any regard to the possibility of sliders being in difficulties there. He was thus acting without the necessary knowledge for the discharge of his duties in a matter that directly affected the safety of those whom he started upon the slide. I have no doubt that this was negligent operation for which a private person operating the slide would have been liable and for which the city was answerable, in the event of an accident in which passengers upset upon the slide were run over by those following before the former had had reasonable time or opportunity to get out of the way.

In the Appellate Division, Stuart J. was not satisfied that the plaintiffs made sufficient haste to leave the slide, and Hyndman J. considered that the accident was due entirely to the lack of prudence and care on the part of the plaintiffs in not quitting the slide as soon as they should have done. I was at first disposed to think that the defence of contributory negligence might prevail, upon the view that the plaintiffs after the occurrence of the first accident had placed themselves in a position of safety from the down-coming sleighs by ascending to a portion of the westerly embankment which was not traversed by them; that they deliberately abandoned this position of safety in pursuance of a hazardous resolve to cross to the opposite side for their own convenience, when they should have found their way out by way of the embankment and not have attempted to cross the slide; the testimony of Mrs. Dixon as quoted in the judgment of Hyndman J. gives

some support to that view of the facts; but, upon a careful review of the whole evidence, I am convinced that the plaintiffs were not dilatory in their efforts to leave the slide, and moreover that the proof is utterly unconvincing to show that they had been able to find any place of safety. Also I think they pursued the course which might reasonably have been foreseen when they attempted, first to escape the dangerous position in which they were by the shorter way, and then, finding this impracticable, to cross to the eastward which was the alternative and really the method of exit which was advisable and prudent in the circumstances. One would think that at the trial the absence of any practicable exit to the westward was common ground. When Dr. Dixon was brought to this point in cross examination and had stated that they tried to go straight towards the west, defendant's counsel rejoins:—

Then you found you could not get out that way. (Answer): We could not get out that way,

and there is no further inquiry as to the project of crossing to the westward. In like manner when Mrs. Dixon was cross-examined, upon reference to the attempt to go to the westward, defendant's counsel says:—

And you found you couldn't? (Answer): We found we couldn't and went to the north. (Question): On account of the embankment? (Answer): Yes.

These are the only references in the cross-examination of the two plaintiffs to the attempt to cross to the westward, and it was not in any manner suggested to either of them that the westerly embankment formed a safe, convenient or possible way of leaving the slide; nor, as is now contended, that they had actually ascended the embankment to a place where they were not in danger from the coasters, and that the subsequent accident which occurred was due to an imprudent and unnecessary attempt to return and cross the slide. What was suggested at the trial was not that the plaintiffs should not have crossed the slide but that they should have crossed in a direct line rather than obliquely to the northeast; they explained that by reference to the condition of the slide, which was very icy at this place, and it is noteworthy that the boy, Gallinger, who was acting independently of the plaintiffs, went in the same direction in order to leave the slide with his sleigh. It must be remembered that these people were

1924
DIXON
v.
CITY OF
EDMONTON.
Newcombe J

using a slide which they knew was regulated by city authority; that they had been started by an employee of the city, and that they were entitled reasonably to assume that the dispositions made by the city for the safety of the coasters would not fail to provide for the holding up of those at the top until the way was clear, and particularly until the curve, which was productive of accidents, was found to be free for the passage of the next party who were disposed to venture. Therefore, I do not think that the plaintiffs acted unreasonably or imprudently, or unnecessarily exposed themselves to danger in their efforts to extricate themselves, and in my judgment the defence of contributory negligence fails.

Stuart J., at the conclusion of his judgment, suggested a doubt as to whether the city council had power to close the streets, or as the learned judge aptly expressed it,

> to turn a street into an amusement park and to operate it and charge fees therefor,

and he said it was only because the point was not referred to that he did not expressly conclude on this ground that the corporation was not liable. This defence was not pleaded, neither was it raised in the argument before the Appellate Division, but it now finds place in the respondent's factum, where the point is taken that under the charter of the city of Edmonton, c. 23 of 1913 of Alberta, the city had no authority to operate the slide. It will be observed, however, that by s. 221 of this statute, the council is authorized to

> make by-laws and regulations for the peace, order, good government and welfare of the city of Edmonton,

and I think this court must assume in considering the point, which is taken for the first time on behalf of the city in its factum, that the city did pass any by-law which was requisite in the execution of the powers so conferred for the establishment, preparation and working of the slide. *City of Victoria* v. *Patterson* (1). The city not having pleaded nor suggested the defence of *ultra vires*, it was not incumbent upon the plaintiffs to produce or prove the by-laws; for the purposes of the trial the authority of the city was taken as admitted, or as not disputed, and it is therefore now too late to raise the point,

(1) [1899] A.C. 615, at pp. 619, 624.

unless it be that the general powers of the city to make by-laws do not extend to the making of a by-law which would have authorized the works in question.

These words "for the peace, order, good government and welfare," in the creation of colonial Governments, have been held

> apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to;

Riel v. *Reg.* (1); and in their use describe the powers of a municipal corporation, it is impossible to give them a meaning which would deny to the council the power to authorize the holding of a winter carnival or the establishment, maintenance and operation of a coasting slide as one of its attractions, incidents or features.

There remains the question of the amount of the damages which the plaintiffs are entitled to recover. The learned judge at the trial expressed his finding of damages as follows:—

> There will be judgment for the plaintiff, husband, in the sum of $1,200, made up by the out-of-pocket expenses, which may be termed those of medical necessity, $835, and loss of his wife's services and consortium, $365. As to the damages to be awarded to Mrs. Dixon, it is always an exceedingly difficult thing to arrive at compensation in money for personal injuries. One must discard and exclude sympathy, which is a difficult thing to do, and one must endeavour to value a broken hip or a broken leg, and the results that have been shown in evidence here. On the other hand these things actually and in fact cannot be compensated for; one can just do the best they can, that is all.
>
> I think that on the ground of compensation to her, the fairest sum I can arrive at is the sum of $6,000.

Upon the appeal Walsh J. in the minority, with whom Clarke J. concurred, considered that damages had been awarded to Mrs. Dixon upon a scale too generous. The learned judge says:

> Her actual physical injuries have, with one exception, all healed satisfactorily. That one exception is what the doctors think is an obstruction of the circulation of the blood. In addition, she suffers from traumatic neurosis. Her doctors' prognosis is that these two conditions will clear up and disappear in from two to three years from the date of the accident. The award to her is only for her pain and suffering and the inconvenience resulting to her from her injuries. All of the expenses are included in the amount awarded her husband. I think $4,000 a fair and reasonable assessment of her damages.

(1) [1895] 10 App. Cas. 675, at p. 678.

1924
DIXON
v.
CITY OF
EDMONTON.
Newcombe J.

Mrs. Dixon, before her unfortunate accident, was a healthy, active woman. She has three children aged respectively ten, twelve and fourteen years; her age is not directly stated in the evidence; she suffered double fracture of the left leg below the knee, severe contusion of the head, rendering her unconscious, profound nervous shock, and other injuries the nature and consequences of which had not at the time of the trial been precisely ascertained. She gives her testimony very intelligently and clearly; she was hurt on 24th January, and the trial took place upwards of nine months later. She had apparently not suffered from lack of surgical and medical treatment; but while she had made a good recovery with respect to her fractured leg, in that there had been a good reunion of the bones and the fractures were thought to have healed satisfactorily, she describes her condition as follows:—

Q. Is the leg strong; are you able to use it the same as you could before?

A. The broken part, where the bones were broken has set all right.

Q. What about the use of the left leg?

A. I haven't the use of it because of the swelling and the pain in it.

Q. Because of the pain?

A. Yes, the swelling and the pain.

Q. And where do you find that pain most intense?

A. Between my knee and hip.

Q. Up the thigh; up the left thigh?

A. Yes, that is the greatest amount.

Q. And in the hip?

A. Not in the joint.

Q. Not in the joint?

A. No, if I am on my foot on any account at all it swells badly in my ankle and in the leg, but that is not intense.

Q. How does that affect you when you walk; how do you get along when you try to walk?

A. Well, I do not get along very well.

Q. Well, just tell me how; why, what happens, if anything?

A. My leg gets numb and feels helpless, numb, dead; it is sort of something there, I do not quite know, I can't wield it, or just what I can do with it; helpless; I can't stand on it. Last night I fell with rather a bad fall because I forgot for an instant and put too much weight on it, and over I went.

Q. Are there any other times you find inconvenience from that thigh or leg?

A. If I lay on it a while and sleep it cramps so terribly. I can't turn myself in bed. I have to get the doctor or my girl, when the doctor was away in Chicago I had to get my girl to help me turn in bed. It cramps so badly when I lie on this side; then when I lie on the other side it is this arm and this thumb; I can't lie on my back because of the pain there and I can't lie on my head because it is a physical impossibility, and so there I am.

Q. Were you a good sleeper before the accident; did you sleep well?
A. Perfect; all I had to do was to go to bed and go to sleep.
Q. How has that been affected one way or the other since the accident?
A. That I can't sleep; I sleep maybe one or two hours or three hours; about three hours is the most sleep that I get in a night; no matter what time I retire it usually gets on to be one, two, three, four, five o'clock before I go to sleep.

She is unable or afraid to go out without an attendant. The doctors suggest a severe injury to the tissues of the thigh, but express uncertainty as to the precise nature of the trouble, although no doubt it resulted from the accident. While Dr. Conn thinks

it would be at least two or three years before she is going to begin to come back,

he adds that he doubts if she will be as well as she was before the accident. Medical testimony was introduced for the defence, based upon one examination just before the trial, which expresses a more hopeful view of Mrs. Dixon's condition and chances for speedy and permanent recovery; but upon the whole case her complete restoration to her former good health and activities is to my mind subject to very grave doubt, and I am not disposed to reduce the estimate of her damages to which the learned trial judge gave effect; I do not perceive that he misdirected himself, or that he proceeded upon any erroneous principle, and I do not think it can be said that the damages found are unreasonable or so excessive as to justify interference with the findings. No question is raised as to the amount of the recovery to which Dr. Dixon is entitled.

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

IDINGTON J.—This action arises out of an action which took place in the respondent city which undertook, as part of a winter carnival, to organize a bob-sleigh slide on ground partly consisting of part of a highway belonging to the city, and partly over adjacent ground belonging to the Alberta Government.

The respondent barred ordinary travel over said part of its highway to be used for the occasion and obtained the consent of the Government to use that part of the ground owned by it for the said purpose on the said occasion.

1924

DIXON v. CITY OF EDMONTON.

Idington J.

The said parties had bob-sleighs to hire or lend (with drivers) to those who had none; and others who had their own bob-sleighs were invited, upon payment of a fee, to use the said slide.

The appellants (who are husband and wife) had their own bob-sleigh and a friend as driver and they paid the fee required.

The man in charge of the operation was called the starter and seems to have been allowed to do as he pleased in regard to the time of starting one set of bob-sleighs after another, about one minute apart.

For the first six or seven hundred feet from the starting point of the slide, which was prepared by being frozen over so as to render it very slippery, it may have been possible to pass in safety, but beyond that distance, or less, there was a curve at such an angle as to make it highly probable that in steering round and through it an upset would occur.

It was impossible for any one at the starting point to see what happened in rounding that curve and yet no precautions of any kind were taken to protect those invited to use, and using, the said slide, in case of being upset at said curve or beyond that point.

It seems almost incredible that such reckless negligence on the part of those in charge could have been tolerated; for the probability of there being upsets at such a point was very great.

Someone, I admit, should have been stationed at such curve to warn the starter by some means against letting others start unless and until those happening to be upset had got clear of any danger of being run over, and also to direct those upset how to get out of the way as quickly as possible.

The starting began, we are told, after eight o'clock on the night of the 24th of January, 1923, when there could be no light except lamp light at certain points to help those engaged in the sport to see their way into or out of trouble.

The appellants upset just at said curve and tried to get off at a point near them to the west side of the slide, but found that had been banked up with loads of snow and ice to a height of from three to four feet. They found it

impossible to get out on that side for there was no opening of any sort, or path.

They turned back, therefore, and tried to get out on the east side and, owing to the slippery condition of the slide, had to climb as it were obliquely towards the east side.

Meantime another party had upset, and that led to the third party, the starter had let go, steering slightly towards the east side to avoid these upsets.

The result was that said third bob-sleigh struck the female appellant and threw her up in the air and thus inflicted most serious injuries, including breaking the bones of her leg, and rendering it necessary for her to be taken in an ambulance to the hospital.

The learned trial judge found the respondent guilty of negligence and responsible for the damages the appellant had suffered.

The respondent, on appeal to the Court of Appeal for Alberta, succeeded in convincing three of the five judges hearing the appeal that respondent was not liable.

Hence this appeal.

I am, with great respect, quite unable to agree with said majority, and indeed cannot understand why in so clear a case of negligence such reckless management should, in this reckless age, be tolerated or at all countenanced.

There was, I respectfully submit, no proper ground for interfering with the findings of fact by the learned trial judge, if we are to accord to the verdict of a trial judge that weight it must be given according to settled jurisprudence on the point, though perhaps easier to overrule than that of a jury.

There was a point started by Mr. Justice Stuart as to the responsibility of a municipal corporation for entering upon such an enterprise, which, if it had been pleaded, might have created some legal difficulties.

In my opinion there are two complete answers to that: In the first place, not having been pleaded, it cannot be raised here for the first time. But even if it had been pleaded, I cannot understand how a municipal corporation can create such a nuisance without being liable for its consequences.

Nor can I say off-hand, without evidence of all the facts which probably would have been developed if the plead-

1924
DIXON
v.
CITY OF EDMONTON.
Idington J.

ing had called therefor, that it was not within the public welfare powers assigned to respondent, to have, in the spirit of modern municipal management, undertaken such an enterprise as the respondent's council apparently did.

I would, for the foregoing reasons, allow this appeal with costs here and in the court below, and restore the judgment of the learned trial judge.

As to the measure of damages, we have refused for at least twenty years or more to entertain any such grounds of appeal and, unless much more excessive than indicated herein, we have refused to interfere, holding that those on the spot are much more competent than we are to determine such a question.

Appeal allowed with costs.

Solicitors for the appellant: *Dickson & Paterson.*
Solicitors for the respondent: *J. C. F. Bown.*

1924
*Oct. 27, 28.
*Nov. 19.

THE GRAND COUNCIL OF THE CANADIAN ORDER OF CHOSEN FRIENDS ..... APPELLANT;

AND

THE LOCAL GOVERNMENT BOARD AND THE TOWN OF HUMBOLDT. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Statute—Interpretation—Local Government Board—Order under The Local Government Board (Special Powers) Act, (Sask.) 1922, c. 13——Right of appeal.

There is no right of appeal from an order of the Local Government Board made under the Local Government Board (Special Powers) Act. Sask., 1922, c. 13.

Judgment of the Court of Appeal (18 Sask. L.R. 280) affirmed, Idington J. *dubitante.*

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) allowing an appeal by the town of Humboldt from an order of Embury J. giving leave to appeal

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

(1) [1924] 18 Sask. L.R. 280; [1924] 1 W.W.R. 1244.

against an order of the Local Government Board made under the provisions of The Local Government Board (Special Powers) Act.

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

Bastedo for the appellant. The Court of Appeal of Saskatchewan has jurisdiction to hear the appeal from the order of the Local Government Board.

The Local Government Board had no jurisdiction to make the order complained of.

Sections 26 and 27 of the Local Government Board (Special Powers) Act are *ultra vires* of the Legislature of Saskatchewan.

Blackwood K.C. for the Attorney General for Saskatchewan. The question of the *vires* of section 26 of The Special Powers Act does not arise at this stage, because even assuming that by wholly removing orders of the Local Government Board from review by the courts the legislature has exceeded its jurisdiction, nevertheless the provisions of section 26 of The Special Powers Act are separable, and it was clearly within the competence of the legislature to enact the opening words thereof, namely: "Every order of the Board or of the Master of Titles shall be final and without appeal." *In re Muir* (1); *Re The Initiative and Referendum Act* (2); Clement's Canadian Constitution, 3rd ed., pp. 490 and 491; CYC vol. 26, p. 571. Therefore, in view of the opening words of section 26 of The Special Powers Act, the statutory right of appeal given by section 50 of The Local Government Board Act cannot be read into the Local Government Board (Special Powers) Act, 1922. It is under section 50 of The Local Government Board Act that the existing proceedings have been taken by the appellant, and by virtue of which section alone and not otherwise, it has based its right of appeal, which clearly it is not entitled to do.

Blair for the respondent, the town of Humboldt.

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

(1) 51 Can. S.C.R. 428.

(2) [1919] A.C. 935.

1924

GRAND COUNCIL OF THE CAN. ORD. CHOSEN FRIENDS. v. THE LOCAL GOV'T. BOARD AND THE TOWN OF HUMBOLDT.

Newcombe J.

NEWCOMBE J.—Upon this appeal the Grand Council of the Canadian Order of Chosen Friends, the appellant, submits that an order of the Local Government Board of Saskatchewan of 28th December, 1923, was made by the board in excess of its powers, and seeks to have the order reviewed and declared inoperative or set aside.

The Local Government Board was constituted by c. 41 of 1913 of the province, and subsequently by c. 11 of 1916, "An Act to grant special powers to the Local Government Board," additional powers were conferred upon the board. The Act of 1913 was repealed and reproduced with amendments by c. 8 of 1917, and, when the public statutes of Saskatchewan were consolidated in 1920, the two statutes relating to the constitution and powers of the Local Government Board, namely, c. 8 of 1917 and c. 11 of 1916, the latter conferring the special powers, were brought into c. 23 of the revision in separate parts I and II, under the title of "An Act respecting the Local Government Board." By c. 13 of 1922, Part II of c. 23 of the Revised Statutes was repealed and separately re-enacted with amendments under the title of "The Local Government Board (Special Powers) Act, 1922."

By the Local Government Board Act, as it appears in c. 23 of the Revised Statutes, "local authority" is defined to mean

> the council of a city, town, village or rural municipality, the board of trustees of a school district and the directors of a rural telephone company;

provision is made for the appointment of a Local Government Board by the Governor-in-Council, and the Board is empowered to inquire into the merits of any application of a local authority for permission to raise money by way of debenture or upon the security of stock, and to grant or refuse such permission; to manage the sinking fund of any local authority which desires to entrust the same to the board for management; to supervise the expenditure of moneys borrowed by a local authority under the Act; to obtain from any local authority at any time a statement of its affairs; to revise the assessment of certain rural municipalities; to administer the Sale of Shares Act; to hear assessment appeals; to grant permission for extension of time for the repaying of indebtedness incurred by the municipalities

for municipal public works as provided by the Municipal Debentures Repayment Act, and to perform such other duties as may be assigned to the board by statutory authority. The special powers conferred by the Local Government Board (Special Powers) Act, 1922, extend to the retirement of outstanding debentures and accounts in exchange for new debentures; the fixing of terms and conditions upon which the exchange shall be made; the rebating or funding of arrears of interest or the variation of the rate of interest payable on any debt of the municipality; the consolidation of existing debentures; and other comprehensive powers intended to enable the board to control municipal finance and to modify or affect by its orders the rights of the municipal debenture holders.

It was in pursuance or intended execution of the powers conferred by the last mentioned Act that the Local Government Board made the order of 28th December, 1923, with reference to the outstanding debentures of the respondent municipality of Humboldt. This order proceeded upon recital of a petition complaining that debenture coupons of the town of Humboldt had become due and payable which upon presentation had not been paid, and requesting the board to make inquiry into the affairs of the town and to take such steps as it might deem adequate and expedient for the proper and satisfactory adjustment of the town's finances in accordance with the powers conferred by the Special Powers Act. There were directions that the holders of the debentures, debenture coupons or accounts of the town, maturing before 1st January, 1924, should deposit them with the Union Bank of Canada and receive certificates to be issued by the bank in lieu thereof; that the Union Bank, with which the town was to open a debenture trust account, should thereout pay the principal of these debentures, coupons and accounts without interest; that the payments of principal should be considered in satisfaction of both principal and interest, and that all payments made by the town as interest subsequent to 1st January, 1919, should be considered as having been made on account of principal and should be credited as such; moreover, that as to debentures and coupons maturing after 1st January, 1924, the interest should be at the rate of 2

1924

GRAND COUNCIL OF THE CAN. ORD. CHOSEN FRIENDS. v. THE LOCAL GOV'T. BOARD AND THE TOWN OF HUMBOLDT.

Newcombe J.

per cent. The order thus professed to reduce or otherwise to modify or affect the rights of the debenture holders, and the appellant, being a holder of a number of these debentures, and being dissatisfied with the order, sought to appeal therefrom to the Court of Appeal of Saskatchewan. The appellant accordingly applied to Embury J., one of the learned judges of the Court of King's Bench, for leave to appeal, and upon the hearing of the application it was objected by the respondents, the Local Government Board and the town of Humboldt, that no appeal lies from any order of the Local Government Board under the Local Government Board (Special Powers) Act, 1922, and that consequently there was no jurisdiction to grant leave in the case. The learned judge considered, however, that inasmuch as by s. 50 of the Local Government Board Act, R.S.S. 1920, c. 23, an appeal is given from the board to the Court of Appeal upon a question of jurisdiction, and as that provision was in his view incorporated in the Local Government Board (Special Powers) Act, 1922, the objection should be overruled, and he therefore granted leave to appeal.

The appellant asserted its appeal in pursuance of the leave so granted, and the respondents, the Local Government Board and the town of Humboldt, also appealed to the Court of Appeal from the order of Embury J. Before the hearing of these appeals the appellant, the Grand Council of the Canadian Order of Chosen Friends, gave notice to the Attorney General of Saskatchewan that, upon the hearing of the appeal of the Local Government Board and the town of Humboldt, the Grand Council would bring into question the constitutional validity of ss. 26 and 27 of the Local Government Board (Special Powers) Act, 1922, upon which, as will be hereinafter shown, was thought to depend the absence of the right of appeal invoked by the Grand Council of the order; similar notice was given to the Attorney General in the appeal of the Grand Council from the order of the Local Government Board.

The two appeals came on for hearing at the same time and the learned Chief Justice pronounced the judgment of the Court of Appeal allowing the appeal of the town of Humboldt upon the ground that the statute gave no right

of appeal from the order of the Local Government Board of 28th December, 1923, and he held, moreover, that the appeal of the Grand Council from the said order should be dismissed. Thus both appeals were disposed of unfavourably to the Grand Council of the order which now appeals to this court upon the whole case by leave of the Court of Appeal, and upon this appeal not only are the parties represented but the Attorney General of Saskatchewan has appeared and he maintains the validity of the legislation.

The appellant has stated serious objections to the order of the Local Government Board. It is said that the order is not authorized by the provisions of the statute because preliminary requirements were not satisfied, and, moreover, it is suggested that it was incompetent to the legislature to empower the board to make the order. Reluctantly I have come to the conclusion that these objections cannot be determined upon this appeal, because it appears upon the true interpretation of the Local Government Board (Special Powers) Act, 1922, that no appeal lies from the board's order to the Court of Appeal.

It is provided by s. 50, subs. 1 of the Local Government Board Act, R.S.S. 1920, c. 23, that:

> 50. (1) An appeal shall lie from the board to the Court of Appeal upon a question of jurisdiction, but such appeal shall not lie unless leave to appeal is obtained from a judge of the Court of King's Bench sitting in chambers within one month after the making of the order or decision sought to be appealed from or within such further time as the judge, under the special circumstances of the case, shall allow, after notice to the opposite party stating the grounds of appeal.

Subsections 2, 3, 4, 5 and 6 follow; they regulate the procedure in appeals upon a question of jurisdiction. Subsection 7 provides as follows:

> (7) Save as otherwise specially provided:
> (*a*) every decision or order of the board shall be final; and
> (*b*) no order, decision or proceeding of the board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any court.

It must be remembered that the right of appeal does not exist by the common law; it is statutory. The Local Government Board Act, as enacted in c. 41 of 1913, gave no right of appeal The Special Powers Act, as enacted in c. 11 of 1916, gave no right of appeal. The right of appeal

1924

GRAND COUNCIL OF THE CAN. ORD. CHOSEN FRIENDS. v. THE LOCAL GOV'T. BOARD AND THE TOWN OF HUMBOLDT.

Newcombe J.

which is now expressed by s. 50, subs. 1, above quoted, and which is limited to questions of jurisdiction, was sanctioned by c. 8 of 1917, and, as already stated, after the two last mentioned statutes had been combined to form Parts I and II of c. 23 of the Revised Statutes of 1920, Part II, which enunciates the Special Powers, was repealed, and c. 13 of 1922 was enacted in the place of it. Sections 23, 26 and 27 of the latter Act are as follows:

23. The board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act.

26. Every order of the Board or of the Master of Titles shall be final and without appeal, and no order, decision or proceeding of the Board or Master of Titles shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari, or any other process or proceeding in any court.

27. All orders and directions made by the Board or Master of Titles under the provisions of this Act shall, when published by the Board or by leave of the Board in two successive issues of *The Saskatchewan Gazette* and while the same remain in force, have the like effect as if enacted in an Act of the Legislature, and all courts shall take judicial notice thereof.

It is by s. 26, as so enacted, that the words "and without appeal" are introduced into the legislation respecting the special powers of the board, which is again embodied in a separate chapter.

On behalf of the appellant it was insisted that the Local Government Board Act and the Special Powers Act of 1922 should be read together, and that s. 26 of the latter Act was not intended to take away the right of appeal in matters of jurisdiction which existed under s. 50, subs. 1, of the former Act; and, moreover, it was contended, though not very confidently, that upon any other interpretation ss. 26 and 27 would be in excess of legislative authority, not because the subject matter of these sections would not fall to the province in the distribution of legislative powers as between the Dominion and the provinces, but upon the view that these sections would in effect make the orders of the board absolute, because they withdraw the orders and proceedings of the board from review by prohibition, injunction, *certiorari* or any other process, and give to the orders statutory effect, while denying a right of appeal, and would, therefore, confer upon the board powers which are not subject to judicial determination or control. While doubtless, ss. 26 and 27 are, upon an admissible interpreta-

tion, wholly within the legislative authority of the province, it is not necessary to determine their operation or effect in so far as they are expressed to take away common law remedies, or with relation to those remedies in cases where the board has no jurisdiction upon which to found its order, because it is certain that the right of appeal to the Court of Appeal is within the exclusive gift of the legislature, and if conferred by the legislature, may by the same authority be withdrawn.

Assuming then that ss. 26 and 27 are competent expressions of legislative intention, the question becomes one of interpretation only. Section 28 of the Special Powers Act, 1922, enacts that:

> 28. The provisions of The Local Government Board Act and of The Municipal Debentures Repayment Act, shall, except in so far as inconsistent herewith, be applicable hereto.

It may be assumed that this clause would, if there were no inconsistency, be effective to incorporate in the Special Powers Act, subs. 1 of s. 50 of the Local Government Board Act, which expressly provides that an appeal shall lie from the board to the Court of Appeal upon a question of jurisdiction; but how can it be said that the latter provision is not inconsistent with s. 26 of the Special Powers Act which provides that every order of the board shall be final and without appeal? The words "without appeal" can have no effect unless it be to take away the appeal which would otherwise exist by the operation of s. 28 of the same Act upon questions of jurisdiction. I regret that I see no escape from this conclusion. The court cannot compatibly with established canons of construction reject words which the legislature has introduced if by reasonable interpretation meaning can be given to them. In my judgment the words "and without appeal" are apt for the purpose of taking away the appeal upon jurisdiction which is given by subs. 1 of s. 50 of the Local Government Board Act, and the construction should be *ut res magis valeat quam pereat.*

The conclusion is therefore in agreement with that reached by the court below; and, seeing that the Court of Appeal had no jurisdiction, this appeal should be dismissed with costs.

1924

GRAND COUNCIL OF THE CAN. ORD. CHOSEN FRIENDS. v. THE LOCAL GOV'T. BOARD AND THE TOWN OF HUMBOLDT.

Idington J.

IDINGTON J. (dubitante).—The appellant is a corporation organized for the purpose, amongst others, of conducting a fraternal insurance business under the Insurance Act of the province of Ontario, and, as such, became a holder of debentures of said town of Humboldt, to the amount of over $6,000.

The said town of Humboldt, respondent, is a municipal corporation in Saskatchewan, which would seem to have become so involved in debt as to be practically insolvent, as its counsel seemed in effect to admit on my presenting such a suggestion to him in course of his argument.

The said Local Government Board, its co-respondent herein, is a corporation consisting of three members, created by the Lieutenant-Governor in Council pursuant to the Local Government Board Act, 1916, repealed as to all but section 22, bringing it into force, and now appearing in the Revised Statutes of Saskatchewan, 1920, by which it was given very extensive powers of investigation respecting which no complaint can be reasonably made, and results of which were to be reported to the Lieutenant-Governor and in many instances to those concerned.

In February, 1922, an Act was passed called the Local Government Board (Special Powers) Act, 1922.

Up to the passage of that Act, though there may have been legislation relative to said board and its work of a somewhat doubtful character, there was left open a means of checking the operations thereof in case of its going *ultra vires* of the powers intended to be conferred on it by the legislature, or even that of the legislature itself.

In the course of the board's history the legislature seems to me to have grown continuously bolder by degrees in the way of increasing the powers of the board and rendering it more difficult to test the legality of the legislation or of the board's action thereunder.

At first the legislature seemed content simply to declare such course as laid down binding.

Then a year or two later it provided, in 1917 (by what is now section 50 of the Local Government Board Act, as it appears in the Revised Statutes of Saskatchewan for 1920, c. 23), as a means of keeping it within its jurisdiction, for an appeal to the Court of Appeal, by leave of a judge of the Court of King's Bench, sitting in chambers.

Subsection 7 of said Act as revised is as follows:—

(7) Save as otherwise specially provided:
(a) every decision or order of the board shall be final; and
(b) no order, decision or proceeding of the board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any court.

The Local Government Board having made an order on the 28th of December, 1923, dealing with the indebtedness of the town of Humboldt (one of respondents herein) and a trust account of the latter, and giving orders that if valid would certainly impair very much the rights of the appellant, it sought leave to appeal under said section 50, and was granted such leave.

Upon the said appeal coming up for hearing before said Court of Appeal, the respondents, by their respective counsel, set up as preliminary reply thereto that the right of appeal relied upon, and conferred upon said court, by said section 50 above referred to, had been taken away by section 26 of the Special Powers Act of 1922, which reads as follows:

26. Every order of the board or of the Master of Titles shall be final and without appeal, and no order, decision or proceeding of the board or Master of Titles shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any court.

Upon this section the Court of Appeal held all right of appeal was thereby taken away, and dismissed the appeal.

Thereupon the appellant asked for and was granted by said court leave to appeal to this court. That leave was presumably given by virtue of the new section 41 of the Supreme Court Act, as amended in 1920, which by subsections 1 and (*a*) reads as follows:—

1. (1) Special leave to appeal may be granted in any case within section thirty-six by the highest court of final resort having jurisdiction in the province, in which the judicial proceeding was originally instituted:—

Provided that in any case whatever where the matter in controversy on the appeal will involve,—

(*a*) the validity of an Act of the Parliament of Canada or of the legislature of any province of Canada or of an ordinance or Act of the council or legislative body of any territory of Canada; or,

* * * * *

It is under and by virtue of the leave so given that we have heard this appeal.

1924

GRAND COUNCIL OF THE CAN. ORD. CHOSEN FRIENDS. v. THE LOCAL GOV'T. BOARD AND THE TOWN OF HUMBOLDT.

Idington J.

I have read the judgment of my brother Newcombe J. speaking on behalf of the majority of the court and, as I understand it, the decision is made to turn upon the interpretation of the said section 26 above quoted and assuming, as matter of course, that it must be held valid.

I most respectfully submit that does not necessarily involve the validity of any Act of Parliament or of the legislature, and passing on that minor aspect of the case presented, is not determining what is in dispute.

The claim made by the appellant's counsel throughout has been that, if said section 26 is to be given the interpretation given it below, then the legislature has conclusively handed over to the respondent board such powers of legislating as to take away the rights of the appellant and others similarly situated in relation to any of the towns or school districts it has been given any power in or over, and thereby has acted *ultra vires*.

He has cited, amongst other authorities, the recent decision of the Manitoba Court of Appeal (1), which was upheld by the judicial Committee of the Privy Council in the case of *Re Initiative and Referendum Act* (2).

And I am, from a perusal of the judgment in the case lastly mentioned, and consideration thereof and the far reaching consequences of maintaining such legislation as that attacked herein to be *intra vires* a local legislature, convinced that this court should, under the said circumstances, have considered and passed upon the questions so involved.

It is doubtful if the legislature itself could have enacted, as its deputy the board has done, in the way of winding up a bankrupt corporation unchecked by any possible application to the courts.

I incline to the opinion that appellant's contention on this point and others involving the question of the validity of such legislation is well founded.

I am quite aware of the necessity that has often arisen for local legislation touching upon and perhaps invading contractual rights, but I cannot recall a case going so far as has been done in this instance, in many ways objected to, and, in my view towards taking possession of the field

(1) 27 Man. R. 1. (2) [1919] A.C. 935.

of bankruptcy and insolvency assigned by item No. 21 of section 91 of the British North America Act of 1867 to the Dominion Parliament, much less attempting to delegate such powers of legislation to a creation of its own.

Having come to understand, whilst engaged in the investigation and consideration of the manifold aspects of this by no means simple case, that the majority of this court were likely to be in accord with my brother Newcombe J's. opinion, which I have referred to, I concluded I could see no useful purpose to be served by my following the matter further, except to point out, as I have done, the urgent need there is for having the validity of said legislation determined. Hence I most respectfully point out my doubt as to the correctness of the view taken by the majority and failure to determine what is in question, especially when coming to the conclusion that all right of appeal is taken away and thereby the board is free to go ahead regardless of the limitations imposed upon it by earlier legislation than this Special Power Act.

In referring to the field of bankruptcy and insolvency it is fair to say that counsel on both sides admitted that that aspect of the case had never been presented until I started it in the argument herein. But many other points as above suggested were taken challenging the legislation of the legislature, or its deputy, as *ultra vires*.

In making the foregoing suggestions I am not to be taken as expressing any final opinion.

Appeal dismissed with costs.

Solicitors for the appellant: *MacKenzie, Thom, Bastedo & Jackson.*

Solicitors for the respondent, the town of Humboldt: *Blair, McNeel & Stewart.*

1924
*Oct. 23, 24.
*Nov. 19.

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

AND

D. McPHERSON AND ANOTHER (PLAINTIFFS) ..... RESPONDENTS.

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

Fire insurance—Warranty clause—Variations of statutory conditions—Want of proper form—The Alberta Insurance Act, R.S.A. (1922) c. 171, s. 70.

A fire insurance policy on railway ties issued by the appellant company contained, immediately after the words descriptive of the subject of insurance and its location, a clause reading "warranted by the assured that the property insured is not within 1,000 feet of any scrub or brush nor within 50 feet of any railway track or siding."

Held that this clause was a variation of the statutory condition and, not being indicated as such in the manner required by s. 70 of the Alberta Insurance Act, R.S.A. (1922) c. 171, was ineffective against the insured. The differences between the wording of this clause and the one in *The W. M. Mackay Co.* v. *The British America Assur. Co.* ([1923] S.C.R. 335) are of form merely and not of substance.

Judgment of the Appellate Division ([1924] 2 W.W.R. 1019) affirmed.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge (2) and maintaining the respondents' action to recover under a fire insurance policy.

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

J. A. Mann K.C. for the appellant.

R. B. Bennett K.C. for the respondent.

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

ANGLIN C.J.C.—The defendants appeal from the judgment of the Appellate Division of the Supreme Court of Alberta affirming the judgment of Ives J. holding them liable on a fire insurance policy issued to the plaintiffs.

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

(1) [1924] 2 W.W.R. 1019. (2) [1924] 2 W.W.R. 737.

The sole defence relied upon is the admitted fact that, contrary to a provision of the policy, the property insured was situated within 1,000 feet of some scrub or bush and within fifty feet of a railway track or siding.

Attached to and forming part of the policy was the following wording:

On ties, the property of the assured, or sold but not delivered or for which they may be responsible in case of loss or damage by fire, only while piled in their cleared yard on the west bank of the McLeod river, on timber berth No. 1330 being 8½ miles south of Hargwen station, Canadian National Railway (connected by assured's own railway) in the province of Alberta.

Warranted by the assured that the property insured is not within 1,000 feet of any scrub or bush nor within fifty feet of any railway track or siding.

The appellants assert that the clause

warranted by the assured that the property insured is not within 1,000 feet of any scrub or bush nor within fifty feet of any railway track or siding

formed part of the description of the property insured, or, if not, that it was a warranty of the existence of a certain state of affairs surrounding the insured property at the date of issue of the policy and that in either case its untruth prevented the risk attaching.

The respondents maintain that this clause is inoperative:

(*a*) because it was surreptitiously introduced into the policy by one Slessor, who, they allege, was an agent of the insurers, after the policy had been delivered to them and without their assent or knowledge; the issue on this branch of the case was the agency of Slessor for the insurers;

(*b*) because it is a variation of or an addition to the statutory conditions imposed by the *Alberta Insurance Act* (R.S.A. c. 17, s. 69, s.s. 5) and was not printed as prescribed by s. 70 which reads as follows:

70. If the insurer desires to vary the statutory conditions or to omit any of them, or to add any new condition, there shall be added immediately after such conditions words to the following effect, which with any such variation, addition or reference to omissions, shall be printed in conspicuous type and in red ink:

"Variations in conditions"

"This policy is issued on the above statutory conditions, with the following variations, omissions and additions, which are, by virtue of *The Alberta Insurance Act*, in force so far only as they shall be held to be just and reasonable to be exacted by the company;"

the warranty clause was not printed in red ink nor was it preceded by the words "Variations in conditions," or any equivalent.

1924

FIDELITY-PHENIX INS. CO. OF N.Y. v. MCPHERSON

Anglin C.J.C.

The Appellate Division upheld the latter contention following the decision of this court in *Mackay* v. *British America Assurance Co.* (1).

Mr. Mann for the appellants very ably and ingeniously, but we think unsuccessfully, endeavoured to distinguish between the wording of the so-called warranty clause in *Mackay's Case* (1) and that now before us. In *Mackay's Case* (1) the clause in question read as follows:

> Warranted by the assured that a continuous clear space of 300 feet shall hereafter be maintained between the lumber hereby insured and any standing wood, brush or forest, or any saw mill or other special hazard.

This clause was separated in the policy from the description of the property and of its location by some intervening provisions. The clause now under consideration immediately follows what the respondents admit to be descriptive words of identification—the only description of the risk which the policy contains. The language of the clause in Mackay's policy was that a

> continuous clear space of 300 feet shall be maintained;

whereas in the policy now before us the term reads

> the property insured is not within 1,000 feet of any scrub or bush nor within fifty feet of any railway track or siding.

Upon these differences Mr. Mann rests his submission that the clause with which we have now to deal should be treated either as descriptive or as a warranty not in the nature of a condition, notwithstanding the Mackay decision.

That the differences relied upon were of form merely and not of substance has, we think, been clearly shown by Mr. Justice Hyndman in his carefully prepared opinion. Identification of the goods insured was adequately made in the first paragraph of the policy. That paragraph contained a complete description. The purpose of the insertion of the warranty clause which followed it was to stipulate a term or condition of the risk attaching—and, as the appellants, we think properly, admitted, also of its continuing during the period of the policy. That such a "warranty" is an addition to the statutory conditions within the meaning of s. 71 is in our opinion concluded by *Mackay's Case* (1)—a decision which we would unhesitatingly re-affirm. The distinction between a condition imposed on the risk attach-

(1) [1923] S.C.R. 335.

ing or continuing and a proviso limiting the peril insured against (such as was dealt with in *Curtis's and Harvey (Canada) Ltd.* v. *North British and Mercantile Ins. Co.*) (1), was sufficiently indicated in the *Mackay Case* (2).

We are, therefore, of the opinion that the clause invoked is not binding on the assured under s.s. 5 of s. 69 of *The Alberta Insurance Act.*

It is unnecessary, in view of this conclusion, to pass upon the question of Slessor's agency.

IDINGTON J.—This appeal arises out of an action brought by the respondents against the appellant upon a policy of insurance in favour of the respondents as owners of certain railway ties.

There were attached to the said policy the following clauses amongst others:—

Assured: Messrs. McPherson and Quigley.

Seven thousand five hundred dollars on ties, the property of assured or sold but not delivered or for which they may be responsible in case of loss or damage by fire, only while piled in their cleared yard on the west bank of the McLeod river, on timber berth No. 1330 being 8½ miles miles south of Hargwen station, Canadian National Railway (connected by assured's own railway) in the province of Alberta.

Warranted by the assured that the property insured is not within 1,000 feet of any scrub or bush nor within fifty feet of any railway track or siding.

The appellant set this up as a defence.

The learned trial judge and the Appellate Division for Alberta unanimously held that this warranty clause was a variation of or addition to the statutory conditions provided by the Alberta Insurance Act, R.S.A., c. 171, and by reason of its not being printed in red ink and otherwise in conformity with the relevant requirements of said statute as set forth in section 70 of said Act, it was, by section 71, null and void and hence no defence.

Said sections 70 and 71 are as follows:—

70. If the insurer desires to vary the statutory conditions or to omit any of them, or to add any new condition, there shall be added immediately after such conditions words to the following effect, which with any such variation, addition or reference to omissions, shall be printed in conspicuous type and in red ink:

"Variations in conditions"

"This policy is issued on the above statutory conditions, with the following variations, omissions and additions, which are, by virtue of *The*

(1) [1921] 1 A.C. 303. (2) [1923] S.C.R. 335.

1924

FIDELITY-PHENIX INS. CO. OF N.Y. v. MCPHERSON

Idington J.

Alberta Insurance Act, in force so far only as they shall be held to be just and reasonable to be exacted by the company."

71. No such variation, omission or addition, unless the same is distinctly indicated and set forth in the manner above prescribed, shall be binding on the assured; but on the contrary the policy shall, as against the insurer, be subject to the statutory conditions only.

In so holding the said courts adopted our ruling in the case of *Mackay* v. *The British America Assurance Company* (1), and I am of the decided opinion that they were right in so doing.

There is no reasonable ground for distinguishing the two cases.

There can be distinctions attempted, and often are, between any two decisions or cases, which look clever to those adopting them, but I submit the facts in this case render it a stronger case for the application of said statute than did those in the *Mackay Case* (1). There as here there was no written application by the assured. There was not in that case any such excuse for confusion of thought on the part of the assured such as likely to arise on the facts, as they existed in this case.

The insurer herein got the benefit of that, by the court holding that the broker was the agent of the insured and not the insurer.

I pass no legal opinion upon that aspect of this case for it is not necessary herein to do so, taking the view I do as to the applicability of the said section.

But the circumstances shew how necessary it is to bring home to the mind of the insured exactly what he is getting.

The distinction sought in argument to be made between this case and said *Mackay Case* (1) arising out of the fact that in this case there had been no examination by the insurer, whilst in that of the latter there had been, does not appeal to me.

If it were rendered an imperative duty by law for insurers to inspect before insuring whenever possible and practicable, there would be vastly fewer losses by fire. I need not elaborate that, for inspection or no inspection does not, to my mind, make any difference in law. All I mean to say is that the insurer inspecting is better entitled to due consideration if open to him in law, than is he who indulges

(1) [1923] S.C.R. 335.

in the reckless gambling kind of insurance that so often prevails with some insurers.

The strictly legal aspect of the case is, however, all we have to deal with, and, having dealt with it so recently in the *Mackay Case* (1) I see no need for enlarging or repeating elaborate argument herein.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wallbridge, Henwood & Cairns.*

Solicitors for the respondents: *Milner, Matheson, Carr & Dafoe.*

VANCOUVER MILLING AND GRAIN COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE C. C. RANCH COMPANY (DEFENDANT) ..... RESPONDENT.

1924
*Oct. 22, 23.
*Nov. 19.

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

Sale of goods—Contract to supply f.o.b. at point of shipment—Liability to obtain cars—Rights and obligations of seller and buyer—Implied condition as to cars being obtainable.

On September 11, 1922, the respondent, of Cayley, Alberta, contracted to supply to the appellant, of Vancouver, 30,000 bushels of wheat f.o.b. cars, Cayley, shipment to be made during September and October. Four shipments to Vancouver were made, but the Canadian Pacific Railway Company, the only railway at Cayley, refused, from October 19 to October 30, to accept shipments of wheat to Vancouver. The respondent notified the railway company of its requirements of cars, and was ready, able and willing to deliver the balance of the wheat on the cars at Cayley before the end of October if cars could have been obtained. The appellants claimed damages for non-delivery.

Held that the respondent was not liable as delivery within the stipulated period was excused to the extent to which it was prevented by the railway company's inability or refusal to supply necessary cars.

Per Anglin C.J.C. and Idington, Mignault, Newcombe and Rinfret JJ.—Where from the nature of the contract and the circumstances under which it was made it is apparent that the parties must have proceeded on the footing that certain conditions, without which performance

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

(1) [1923] S.C.R. 335.

1924

VANCOUVER MILLING AND GRAIN CO. v. C. C. RANCH CO.

would be impossible, should exist, their existence may be regarded as an implied term of the obligation undertaken and non-performance due to their non-existence, without default of the obligor, will relieve him from performance.

Judgment of the Appellate Division (20 Alta. L.R. 307) affirmed.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge and dismissing the appellant's action for damages for non-delivery of a quantity of wheat under an agreement of sale.

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

R. B. Bennett K.C. for the appellant. The contract of sale was formed by the Canada Grain Act ((C.) 1919, c. 27) and the respondent having failed to observe the provisions of s. 196 of said Act respecting the ordering of cars by him cannot escape liability for failure to deliver the grain within the time limited by such contract, even when assuming that it was the appellant's duty to supply cars.

The respondent by consigning the grain to its own agent, the bank, at Vancouver, retained the possession of the grain. The respondent by retaining control over and possession of the grain until it was delivered to the appellant at Vancouver on payment of the 80 per cent of the purchase price, must be taken to have accepted the responsibility of finding the cars for its grain, which grain remained its property until delivered in Vancouver on the order of the bank, by the delivery of the bills of lading.

Eug. Lafleur K.C. for the respondent. In a contract for the sale of goods to be delivered " f.o.b. cars," the obligation is upon the purchaser to provide cars to receive the goods.

The absolute refusal of the Canadian Pacific Railway Co. to accept shipments of grain for Vancouver during the period from October 19 to 31 when the respondent was able, ready and willing to deliver, and the absence of any authority from the appellant to ship elsewhere, prevented and precluded the respondent from completing fulfilment of the contract.

(1) [1924] 20 Alta. L.R. 307; [1924] 2 W.W.R. 150.

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

ANGLIN C.J.C.—By a contract made through a broker the defendants (respondents) sold to the plaintiffs (appellants) 30,000 bushels of wheat to be delivered during the months of September and October, 1922, f.o.b. cars Cayley, Alberta, 80 per cent of the price to be advanced against bills of lading. Although the broker's note is silent on the point, both parties treated the contract which it evidences as providing for shipment to Vancouver—and that should, we think, be deemed one of its terms.

It is common ground that the Canadian Pacific Railway is the only railway at Cayley and was the carrier contemplated by the contract. The evidence abundantly establishes that the defendants had wheat ready for delivery to meet the obligation of their contract, which they were anxious to fulfil, that they made every effort to obtain cars, but could procure only four during the period fixed for shipment and those cars were duly loaded and forwarded; that, but for the shortage of cars, in no wise attributable to any fault of the defendants, and the absolute refusal of the railway company to accept grain for shipment to Vancouver during a considerable period in the month of October, owing to congestion at that port, the defendants would have carried out their contract and that their failure to do so is ascribable solely to the inability or unwillingness of the railway company to supply cars to take their wheat available for shipment to the plaintiffs.

Under these circumstances is the defendants' obligation to deliver the wheat so absolute that, although not at all at fault, they must pay damages for failure to implement it? Or, having regard to the fact known to both parties that the only available carrier was the Canadian Pacific Railway Co. and to the further fact that the defendants exhausted every reasonable means to obtain cars from it, should that obligation be so qualified that, to the extent to which it was prevented by the railway company's inability or refusal to supply the necessary cars, delivery within the stipulated period was excused? The Appellate Division has taken the latter view (Hyndman J. dissenting) and we

1924

VANCOUVER MILLING AND GRAIN CO. v. C.C. RANCH CO.

Anglin C.J.C.

are, with respect, of the opinion that its judgment was right and should be affirmed.

It is well established that where from the nature of the contract and the circumstances under which it was made it is apparent that the parties must have proceeded on the footing that certain conditions, without which performance would be impossible, should exist their existence may be regarded as an implied term of the obligation undertaken and non-performance due to their non-existence, without default of the obligor, will relieve him from performance. *Taylor* v. *Caldwell* (1) and *Krell* v. *Henry* (2) afford illustrations of this doctrine. Such a term will no doubt be admitted only where the court thinks it necessarily implied in the nature of the contract and having regard to the surrounding circumstances. *Hamlyn* v. *Wood* (3); *Lazarus* v. *Cairn Line of Steamships* (4). There is also authority, both strong and abundant, that if an unforeseen contingency arises which renders performance impossible, and if it can be confidently said that had the parties contemplated that contingency they would as sensible men have provided that upon its happening performance would be excused, such a term may and should be implied in the contract. *Reigate* v. *Union Mfg. Co.* (5); *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (6). That in our opinion is this case. That the defendants would have undertaken to pay damages for failure to deliver the wheat in question f.o.b. cars in the contingency which arose, or that the plaintiffs would have been so unreasonable as to ask them to assume such a risk, we regard as practically inconceivable. Had the impossibility of shipment to Vancouver, which actually happened, been anticipated, we are satisfied that the defendants would have insisted upon, and the plaintiffs would have acceded to, a provision either that the contract in so far as performance of it was thus rendered impossible should be abrogated, or that there should be a reasonable extension of the time stipulated for delivery.

(1) [1863] 3 B. & S. 826.
(2) [1903] 2 K.B. 740.
(3) [1891] 2 Q.B. 488, at pp. 491-2.
(4) [1912] 106 L.T. 378.
(5) [1918] 1 K.B. 592, at p. 605.
(6) [1916] 2 A.C. 397, at p. 404.

There may be some ground for Mr. Bennett's contention that the authorities holding that under a contract for the sale and delivery of goods f.o.b. a vessel the purchaser is bound to have a ship ready to receive the goods at the designated place of shipment do not govern such a case as this. The number of owners having ships open for charter is large; here Canadian Pacific Railway Co's cars were the only available means of carriage. There is a dearth of English authority on the question immediately under investigation. But the weight of American authority appears to favour the view that under a contract for the sale of a quantity of goods to be delivered during a specified period "f.o.b. cars" at the place where the vendor carries on business, which is silent as to the duty of providing such cars, he is not under an obligation to supply them, but is required only to be ready to load them when supplied. *Evanston Elevator and Coal Co.* v. *Castner* (1); *Hocking* v. *Hamilton et al* (2); *Chicago Lumber Co.* v. *Comstock* (3). A case closely in point where that view prevailed in regard to the respective obligations of vendor and purchaser is *Baltimore and Lehigh Ry. Co.* v. *Steel Rail Supply Co.* (4). See also *Marshall* v. *Jamieson* (5), and *Pullan* v. *Speizman* (6)—both cases in which the principle of the decisions on contracts f.o.b. ships was applied. But it is probably unnecessary to determine this interesting question in this case, and there are undoubtedly cases of contracts similar in their general character to that now before us in which special circumstances impose upon the vendors the obligation of procuring cars, as was held in *Vancouver Milling and Grain Co.* v. *Alberta Pacific Elevator Ry.* (7). While it may be that, apart from s. 31 of the Sales of Goods Act, it was the duty of the defendants, as the parties to the contract who were at the point of shipment, to take all proper measures to secure cars from the railway company to receive the wheat sold to the plaintiffs, under the circumstances of this case that was the utmost obligation they assumed in respect of procuring carriage for the wheat and

(1) [1905] 133 Fed. Rep. 409.
(2) [1893] 158 Pa. 107.
(3) [1896] 71 Fed. Rep. 477.
(4) [1903] 123 Fed. Rep. 655.
(5) [1878] 42 U.C.Q.B. 115.
(6) [1921] 51 Ont. L.R. 386.
(7) [1912] 2 W.W.R. 526 at p. 529.

1924
VANCOUVER MILLING AND GRAIN CO. v. C. C. RANCH CO.
Anglin C.J.C.

that duty, if incumbent upon them, the evidence shews was fully discharged. They did not assume the further obligation of warranting that the railway company over which they had no control would provide the cars they should demand.

It is entirely clear from the evidence that failure to comply literally with the provisions of the Grain Act was not the cause of cars not being available. Had those provisions been carried out to the letter it is more than probable that the defendants would have had fewer cars available to receive their wheat than they actually obtained.

With Mr. Justice Stuart we regard the making to the order of the Bank of Hamilton of the bills of lading for the four cars of wheat that were shipped as of no significance. Both parties clearly regarded that method of carrying out the provision,

> eighty per cent of the price to be advanced against the bills of lading,

as within the contemplation of the contract.

That the contract contemplated that the vendors should retain the right of stoppage *in transitu* until their drafts against the bills of lading had been taken up has no bearing on the questions of the incumbency or the extent of any duty in regard to the procuring of cars.

The case at bar is distinguishable from *Blackburn Bobbin Co.* v. *T. W. Allen & Sons Ltd.* (1), relied on by Mr. Bennett. There the customary mode of conveyance for the goods contracted for was unknown to the purchasers; here the purchasers were aware that shipment on cars of the Canadian Pacific Railway Co. was the only possible means of performance. That shipment was what was contracted for and both parties knew that unless cars from that railway company were available it could not be made, and that the railway company alone could provide the cars—the vendors could not. Though large enough to include it, the words of the contract were not used with reference to the contingency that happened. The parties contemplated the availability of cars as the foundation of what was to be done under the contract. *Nickoll & Knight* v. *Ashton, Ed-*

(1) [1918] 1 K.B. 540; [1918] 2 K.B. 467.

ridge & Co. (1). There was a failure of something which was at the basis of the contract in the mind and intention of the contracting parties. *Horlock* v. *Beal* (2), per Lord Shaw. The occurrence (i.e. the lack of cars) caused the foundation of the contract to disappear and with it the contract itself vanished. *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (3).

For these reasons the appeal fails.

IDINGTON J.—The appeal herein arises out of an action brought by the appellant against respondent on a contract of which the essential features appear in the broker's note which reads as follows:—

"C" No. 2466.
Phone S. 4849. Broker's Bushels.....

W. E. McGAW & CO.
Grain Brokers

Vancouver, Sept. 11, 1922.

I hereby confirm the following trade:
Sold to Vancouver Milling & Grain Company, Ltd.
From C. C. Ranch Company Ltd.

Cars.	Bushels	Grade	Kind of Grain	Price
	30,000	Basis 1° Wht.	at 83 cents per bushel f.o.b. cars, Cayley, Alta. 2° and 3° to apply to Wpeg. spreads date of inspection. 80 per cent cash to be advanced against Bills of Lading. Shipment to be made during September and October.	

Contents of cars.....
Seller pays brokerage.
Time 8 p.m.

W. E. McGAW & Co.,
Per W. E. McGaw.

The appellant carried on business in Vancouver and the respondent carried on its farming business near Cayley, a station on the C. & E. branch of the Canadian Pacific Railway Co.

On the 21st September the respondent sent a telegram to the appellant at Vancouver, saying

wire instructions for shipping wheat whether export or ordinary.

and received in answer same day a telegram saying

bill all cars to our advice domestic rate.

This arose out of the fact that the rate of export was a lower freight rate than for domestic use at Vancouver.

The respondent shipped accordingly and, as I read the evidence, was ready and willing to ship the entire amount

(1) [1901] 2 K.B. 126, at pp. 132, 139.
(2) [1916] 1 A.C. 486, at p. 512.
(3) [1916] 2 A.C. 397, at p. 406.

1924

VANCOUVER MILLING AND GRAIN CO. v. C. C. RANCH CO.

Idington J.

agreed upon within the term specified in said contract, but was met by the insuperability of getting cars from the Canadian Pacific Railway Co. upon which to ship the same as desired.

The said railway was the only possible road by which to ship from Cayley to Vancouver.

In the earlier part of the period for the shipment the respondent was impeded by reason of weather conditions and only got about seven thousand bushels shipped before the scarcity of cars prevented further shipments and finally the said railway company refused entirely to ship any grain from the said Cayley station to Vancouver for a period from the 19th of October to 30th thereof, and only got one car through on the last day of October.

The question is thus raised whether or not there is, under such circumstances, to be implied in the case of such a contract as in question herein, a condition that the parties are freed from liability for breach thereof when caused solely by such unexpected obstacles in the way of its fulfilment.

The appellant argues there is not and claims damages from respondent for breach of said contract.

It is met in many ways. Amongst others, as pointed out by Mr. Justice Stuart, the contract did not as framed expressly limit shipments thereunder to be made to Vancouver.

In this I think there is considerable force and especially when, as it turned out, cars could have been got for shipments easterly as far as Fort William.

There is, however, much in the surrounding circumstances of the contract, leading to the reasonable conclusion that the parties both seem to have assumed that Vancouver was the point of destination intended.

After all is that assumption not rested upon implied conditions? And is the implied condition of impossibility of due fulfilment, anticipating in such event a release from all responsibility for damages, arising alone from that cause any less a reasonable implication in the contract.

Much was said in argument by counsel for the appellant as to a large number of cars having at an early stage left Cayley; but two complete answers seem to me to exist to such contention.

In the first place it is far from being fully demonstrated by the evidence that on a fair distribution of said cars any single farmer in the district served from the Cayley station, could by any means have got more than respondent got and availed itself of.

In the next place it seems to have been fairly demonstrated by the evidence adduced on behalf of respondent, that of the four elevators at Cayley each got a fair proportion of the cars supplied there to carry away the grain had therein, and that the respondent had as many bins continuously filled therein as it could reasonably be expected to have kept filled for such a dubious emergency as confronted shippers of grain for Vancouver.

Incidentally I may remark, in passing that phase of the case, that there did not seem to me to be any weight in the argument that a shipper situated as respondent was ought to have signed a formal demand such as the law provides in way of foundation for enforcing a fair distribution of the cars available.

Any one trying that on, when all those concerned were agreed to a fair distribution of cars, and were getting it, unless indeed from the friendly spirit exhibited towards the manager of respondent he may have got a trifle more than he was strictly entitled to, would have aroused hostility and gained nothing.

Mr. Justice Stuart and Mr. Justice Beck have each written very fully and ably presenting the case for the respondent on behalf of the majority of the Court of Appeal whose judgment is now appealed from herein, and cited authorities bearing on the questions raised, all of which I need not repeat herein. But the following citations of authority by Mr. Justice Beck are the most recent brought to our attention and seem amply to justify the conclusion the court below reached. See *Krell* v. *Henry* (1); *Reigate* v. *Union Manufacturing Company* (2); *Nickoll & Knight* v. *Ashton, Edridge & Co.* (3); *Jackson* v. *Union Marine Insurance Company* (4), and the older well known leading case of *Taylor* v. *Caldwell* (5).

(1) [1903] 2 K.B. 740.
(2) [1918] 1 K.B. 592 at p. 605.
(3) [1901] 2 K.B. 126.
(4) [1873] L.R. 8 C.P. 572.
(5) 3 B. & S. 826.

1924

VANCOUVER MILLING AND GRAIN CO. v. C. C. RANCH CO.

Idington J.

I am also impressed by Mr. Justice Stuart's reference to the Alberta Sales of Goods Act, referring evidently to the following from s. 31 of c. 146:—

> Where in pursuance of a contract of sale the seller is authorized or required to send goods to the buyer, delivery of the goods to a carrier whether named by the buyer or not for the purpose of transmission to the buyer shall *prima facie* be deemed to be a delivery of goods to the buyer. (2) Unless otherwise authorized by the buyer the seller shall make such contract with the carrier *on behalf of the buyer* as may be reasonable having regard to the nature of the goods and the other circumstances of the case.

I have from the consideration of the foregoing and other authorities, and the relevant evidence herein, reached the conclusion that this appeal should be dismissed with costs.

DUFF J.—The interpretation of f.o.b. contracts has most frequently occurred where carriage from the f.o.b. point was to take place by water. In such a case, in the absence of express or implied agreement to the contrary, it is the duty of the buyer to furnish the ship, and, the ship being furnished, it is the duty of the seller to deliver the goods on board the ship at his own expense,

> upon the terms of a reasonable and ordinary bill of lading or other contract of carriage;

per Hamilton L.J. *Wimble* v. *Rosenberg* (1). The obligation to deliver and to enter into a contract of carriage is obviously conditional upon the ship being furnished and a contract of carriage being possible. No breach of the seller's obligation arises if the ship is not notified, or if, the ship being notified, receipt of the goods is refused. The contract which has given rise to this litigation contemplated shipment by the Canadian Pacific Railway Co., and I think also that it contemplated shipment to Vancouver, although this last is really not material. The critical question is: Did the seller enter upon an obligation to deliver—that is, to deliver effectively—to the railway company, and to enter into a contract of carriage with the railway company, even though the company should decline to furnish cars or to enter into such a contract? There appears to be no basis for such an obligation. None is expressed, and none can be implied when the words of the contract are read in the light of the uniform interpretation of similar words in contracts of sale contemplating delivery on board ship.

(1) [1913] 3 K.B. 743 at p. 757.

Mr. Bennett relied upon a number of American authorities as inconsistent with this conclusion, but on this subject American authority is divided. Without passing upon the relative weight of the decisions which could be cited respectively against and in support of Mr. Bennett's contention, it is sufficient to say that the American authorities yield no decision resultant. They are collected in Professor Williston's book on Sales, in the edition of 1924, at p. 599. Canadian authority, so far as it goes, supports the view just expressed. *Pullan* v. *Speizman* (1); *Marshall* v. *Jamieson* (2). It does not necessarily follow, it should be observed, that under the contract in question it was the duty of the purchaser to provide cars. Upon that point no opinion is expressed.

In this view it is quite unnecessary to consider whether the circumstances of this case bring it within the principle of those cases in which, commercial frustration of the contract having resulted from impossibility of performance by the contemplated means, non-performance has been held to be excused. Here, the respondent company has done everything it was called upon to do in the circumstances. The question whether the failure of the railway company to provide cars would afford an excuse within the principle mentioned might have arisen if the contract sought to be enforced in this action had been a contract f.o.b. Vancouver.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Bennett, Hannah & Sanford.*
Solicitors for the respondent: *Ballachey, Burnet & Spankie.*

(1) 51 Ont. L.R. 386.
(2) 42 U.C.Q.B. 115.

1924
*Oct. 28, 29.
*Nov. 19.

IN RE ESTATE ENOS STONE

THE ATTORNEY GENERAL OF CANADA ..... APPELLANT.

AND

WILLIAM STONE .....
AND
THE ATTORNEY GENERAL OF SASKATCHEWAN ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN

Constitutional law—Devolution of estates—Illegitimate child dying intestate, unmarried and predeceased by mother—Right of other illegitimate child to inherit—The Devolution of Estates Act (Sask. (1907) c. 16)—Ultra vires.

One Sarah Stone who died in 1890 left surviving two illegitimate sons and a number of legitimate children. One of the illegitimate sons, Enos Stone, died in 1918 intestate, unmarried and domiciled in Saskatchewan.

Held that, under the provisions of sections 24 and 25 of The Devolution of Estates Act, Sask. (1907) c. 16, the whole of the property of the deceased, both real and personal, passed to the other illegitimate son.

Sections 24 and 25 of The Devolution of Estates Act enact that illegitimate children shall inherit from the mother as if they were legitimate and through the mother if dead any real or personal property which she would if living have taken by purchase, gift, demise or descent from any other person and that if an intestate, being an illegitimate child, dies leaving no widow or husband or issue the whole of such intestate's property, real and personal, shall go to his or her mother.

Held that these sections, amending the law of descent or inheritance, are *intra vires* of the legislature of Saskatchewan.

Judgment of the Court of Appeal (13 Sask. L.R. 159) affirmed.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge on an application by the administrator of the estate of Enos Stone deceased for the opinion, advice and direction of the court as to claims to the deceased's property.

Enos Stone, an illegitimate son of one Sarah Newton, died on or about the thirteenth January, 1918, intestate and unmarried. At the time of his death he was domiciled in Saskatchewan. His estate consisted of real and personal

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

(1) [1920] 13 Sask. L.R. 159; [1920] 1 W.W.R. 563.

property situated in the province of Saskatchewan. The land comprised in the estate was on the first day of September, 1905, the date of the coming into force of the Saskatchewan Act (4-5 Edward VII (Dom.) c. 42)—Crown land within the province, vested in the Crown and administered by the Government of Canada for the purposes of Canada, and was patented to Stone at a later date. On the 23rd September, 1918, letters of administration to his estate were granted to the Western Trust Company as official administrator for the Judicial District of Swift Current. Sarah Newton, the mother of the intestate, was also the mother of another illegitimate son called William Stone, who is living and resides at Madelia, in the state of Minnesota. After the birth of the two illegitimate sons, Sarah Newton was married to one Walter E. Stone who predeceased her, and bore ten children to him. Eight of these children are still alive. Two of the children are dead, but have left issue surviving them. Sarah (Newton) Stone died on the 16th October, 1890. Claims were made to the estate by William Stone and the legitimate children and grandchildren of Sarah Stone, as well as on behalf of the Attorney General for Canada and the Attorney General for Saskatchewan. An application was made under the rules in that behalf by the administrator for the opinion, advice and direction of the Court of King's Bench on the following questions: (1) What persons, if any, are entitled to share the estate of the said deceased. (2) In the event of none of the said persons being entitled to share the estate of the said deceased, whether the property of the said estate will escheat to the Crown, in the right of the Dominion of Canada, or in the right of the province of Saskatchewan. The matter was heard by Bigelow J., in chambers, who held against the claims of William Stone and the legitimate children of Sarah Stone. The learned judge also held that the lands of the intestate escheated to the Crown in the right of the Dominion. As to the personal property, it was held to be *bona vacantia* and to belong to the Crown in the right of the province, after the payment of all claims of creditors, solicitors' costs and administration fees. The Court of Appeal set aside *in toto* the judgment of Bigelow J. and declared that all the property of Enos Stone had

1924
IN RE STONE.

gone to William Stone, the other illegitimate son of Sarah Newton Stone.

Lafleur K.C. and *Plaxton* for the Attorney General of Canada. The whole estate, personal as well as real, of the deceased Enos Stone, upon his death intestate without heirs or next of kin, *ipso facto* passed to and became vested in the Crown in the right of the Dominion of Canada as *escheat* and *bona vacantia.*

As between the Dominion of Canada and the province of Saskatchewan, sections 102 and 109 of the B.N.A. Act (1867) have no application to the decision of the question at issue; and, on the true construction of the provisions of "The Saskatchewan Act" ((C.) 1905, c. 42) the royal revenues arising from *escheat* and *bona vacantia* within that province belong to the Crown in right of the Dominion.

The provisions of "The Saskatchewan Act" do not give the province power to enact the sections 23, 24 and 25 of the Devolution of Estates Act (R.S.S. 1909, c. 43). Upon their proper construction, these sections do not operate to carry the real and personal property of the deceased to William Stone or to the legitimate children of Sarah Stone, and the said property have consequently escheated to the Crown in the right of the Dominion.

Blackwood and *Haywood* for the Attorney General of Saskatchewan. Sections 23 and 24 of The Devolution of Estates Act are *intra vires* the provincial legislature. In the alternative, if these sections are held to be *ultra vires,* the personal property of the deceased should be declared to have passed on his death to the Crown in right of the province.

Crysler K.C. for the respondent W. Stone. Under the provisions of The Devolution of Estates Act, which the legislature of Saskatchewan was competent to enact, William Stone was entitled to the whole estate of the deceased, real and personal.

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

MIGNAULT J.—This litigation arises out of an originating summons issued at the instance of the Western Trust Company, administrator of the estate of the late Enos Stone, in his lifetime of Cabri, in the province of Saskatchewan, and to which were made parties the Attorney General of the Dominion, the Attorney General of Saskatchewan, William Stone, stated to be the illegitimate son of Sarah Newton, and the children issue of the marriage of the said Sarah Newton and Walter E. Stone. The latter children will be hereafter referred to as the legitimate children of the said Sarah Newton Stone.

Sarah Newton is said to have had two illegitimate children before her marriage with Walter E. Stone, to wit, the deceased Enos Stone, who died unmarried and intestate, and William Stone (neither of whom apparently were children of Stone, although they assumed his name), but the appellant objects that the filiation of William Stone has not been legally proved. Sarah Newton Stone had of her marriage with Walter E. Stone ten children, all now living except two who are represented by their children. She died in 1890, many years before Enos Stone. The estate of the latter is valued at $19,757.33, consisting of real and personal property, his lands having been patented to him by the Crown in the right of the Dominion subsequently to the passing of The Saskatchewan Act, c. 42 of the statutes of Canada, 1905.

Two questions were submitted for the opinion of the court:

1. What persons, if any, are entitled to share the estate of the said deceased?
2. In the event of none of the said persons being entitled to share the estate of the said deceased, whether the property of the said estate will escheat to the Crown in the right of the Dominion of Canada, or in the right of the province of Saskatchewan?

The trial judge, Bigelow J., decided that none of the children, legitimate or illegitimate, of Sarah Newton Stone were entitled to share the estate of Enos Stone; that the land of which he died possessed had escheated to the Crown in the right of the Dominion of Canada and his personal estate as *bona vacantia* had gone to the Crown in the right of the province of Saskatchewan.

1924
IN RE STONE.
Mignault J

The Attorney General of Canada appealed to the Court of Appeal of Saskatchewan from that part of the judgment of Bigelow J. which declared that the personal estate of Enos Stone as *bona vacantia* had gone to the province of Saskatchewan. On this appeal, although the children, legitimate and illegitimate, of Sarah Newton Stone had not themselves appealed, the Court of Appeal intimated that it would consider whether they had any right to the deceased's estate, and no objection appears to have been taken to this course. The judgment set aside *in toto* the judgment of Bigelow J., and declared that all the property of Enos Stone had gone to William Stone, the illegitimate son of Sarah Newton Stone. From this judgment the Attorney General of Canada appealed to this court, and at the hearing the two attorneys general, and William Stone were represented by counsel. The legitimate children of Sarah Newton Stone were not represented by counsel before us, although notice of the appeal was given them.

If William Stone—who, it will be convenient to assume, was the illegitimate son of Sarah Newton Stone, subject to considering later the objection of the appellant that his filiation has not been legally proved—is entitled to the estate of Enos Stone, there can be no question of escheat or of devolution of *bona vacantia* either in favour of the Crown in the right of the Dominion or of the Crown in the right of the province. If he is not entitled to the estate, it is conceded that the lands of Enos Stone, patented to him from the Dominion after the creation of the province of Saskatchewan, escheated to the Crown in the right of the Dominion, and the issue between the Attorney General of the Dominion and the Attorney General of the province is as to which government is entitled to his personal estate. Counsel for the province of Saskatchewan also conceded that if the Dominion takes the lands of Enos Stone by escheat it takes them subject only to such charges as affect them and not to the general debts of Enos Stone.

In declaring William Stone entitled to the estate of Enos Stone, the Court of Appeal based its decision on sections 24 and 25 of The Devolution of Estates Act, c. 16 of the statutes of Saskatchewan, 1907. These sections (carried into the revision of the statutes of the province in 1909, as

ss. 23 and 24 of c. 43, and into the revision of 1920 as ss. 45 and 46 of c. 73), read as follows:—

24. Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any real or personal property which she would, if living, have taken by purchase, gift, demise or descent from any other person.

25. If an intestate being an illegitimate child dies leaving no widow or husband or issue the whole of such intestate's property, real and personal, shall go to his or her mother.

The contentions of the Attorney General of Canada—and much assistance has been derived from the very able and learned factum filed on his behalf—may be briefly stated in the following propositions.

1. Sections 24 and 25 of the Saskatchewan statute, in so far as they purport to add to the persons who at common law are entitled to claim the estate of an intestate in the province, and thus to defeat the right of escheat of the Crown in the right of the Dominion, are *ultra vires* of the province.

2. Properly construed, these sections do not support the claim of William Stone, assuming him to be the illegitimate son of Sarah Newton Stone, to the estate of Enos Stone.

3. The Crown in the right of the Dominion is entitled to take by escheat the lands of Enos Stone and as *bona vacantia* his personal property, and it takes the latter free from the obligation to pay the general debts of the intestate.

First proposition. Very important constitutional problems are involved in the decision of this question.

Under the authority granted it by The British North America Act, 1867, the Parliament of Canada, in 1905, created the new provinces of Alberta and Saskatchewan out of what was known as the North West Territories, which territories were subject to its legislative jurisdiction. The Saskatchewan Act, with which we are concerned here, is c. 42 of the statutes of Canada, 1905.

Very briefly, the effect of this statute is to create a province with the rights and powers of the other provinces of the Dominion. Some important provisions should however be specially noted.

Thus it is provided by section 3 as follows:

3. The provisions of the British North America Acts, 1867 to 1886, shall apply to the province of Saskatchewan in the same way and to the like extent, as they apply to the provinces heretofore comprised in the

1924

IN RE STONE.

Mignault J.

Dominion, as if the said province of Saskatchewan had been one of the provinces originally united, except in so far as varied by this Act. and except such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not the whole of the said provinces.

And by section 21 it is enacted:—

21. All Crown lands, mines and minerals and royalties incident thereto and the interest of the Crown in the waters within the province under The North-West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada subject to the provisions of any Act of the Parliament of Canada, with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the Northwest Territories.

At this late date it would be idle to deny that within the limits of their jurisdiction the provinces of the Dominion possess powers as ample as the Imperial Parliament in the plentitude of its own power possessed and could confer. *Hodge* v. *The Queen* (1); *Liquidators of the Maritime Bank of Canada* v. *The Receiver General of New Brunswick* (2).

Legislation as to rights of succession and devolution of estates on intestacy undoubtedly comes within the 13th heading "property and civil rights in the province" of s. 92 of The British North America Act. And *Attorney General of Quebec* v. *Attorney General of Canada* (3), decided by the Quebec Court of Queen's Bench, is authority for the proposition that the power to extend the degrees of succession so as to comprise illegitimate children is not curtailed by any rights of escheat belonging to the Crown. If therefore s. 92, s.s. 13, of The British North America Act fully applies to Saskatchewan, it seems clear that provincial legislation of the kind in question could not be attacked because in a particular case it may defeat the right of escheat of the Crown, assuming such right to belong to the Crown in the right of the Dominion.

But the appellant relies on s. 21 of The Saskatchewan Act, as restricting the right of Saskatchewan so to extend the degrees of succession as to deprive it of the benefit of an escheat which under the common law and irrespective of this legislation it could have claimed.

(1) [1883] 9 App. Cas. 117. (2) [1892] A.C. 437.
(3) [1876] 2 Q.L.R. 236.

Section 21, no doubt the result of a bargain made with the new province, reserves to the Crown in the right of the Dominion

all Crown lands, mines and minerals *and royalties incident thereto.*

The reservation of royalties, *jura regalia,* is merely of those incident to Crown lands, mines and minerals, and while the province cannot by statute appropriate the right of escheat of the Dominion in respect of Crown lands, mines and minerals in Saskatchewan and Alberta, and it has not done so here, it does not follow that it cannot change its laws of inheritance. The contention of the appellant that ss. 24 and 25 are *ultra vires* should therefore be rejected.

Second proposition. The question here is as to the proper construction of ss. 24 and 25 of the Saskatchewan Devolution of Estates Act.

It will be useful to give in very few words the history of this legislation.

At common law a bastard is *nullius filius* and cannot therefore inherit from ascendants or collaterals, nor can ascendants or collaterals inherit from him. His only heirs are those of his body.

The laws of England relating to civil and criminal matters, as they existed on the 15th of July, 1870, were introduced into the North West Territories (49 Vict. (D.) c. 25, s. 3). Thus the common law as above stated and also the Inheritance Act of 1833 (3-4 William IV, c. 106) became a part of the law of these territories, subject of course to change by competent legislation.

In 1886, by The Territories Real Property Act, c. 26 of the statutes of Canada, 1886, the right of inheritance of and from illegitimate children was first recognized and provisions (ss. 16 and 17) substantially the same as the sections under consideration were enacted by the Parliament of Canada. These provisions, as ss. 14 and 15, were carried into the Dominion Land Titles Act, 1894, c. 28 of the statutes of that year.

The latter statute continued in force after the creation of the new provinces and was repealed as to these provinces on the coming in force of the provincial Land Titles Act. This provincial Act reproduced the provisions to which reference has been made, and they were finally inserted in The

1924
IN RE STONE.
Mignault J.

Devolution of Estates Act of 1907. In passing from one statute to another they have been somewhat broadened out.

Coming now to the construction of ss. 24 and 25 of the Saskatchewan statute, s. 25 can give rise to no difficulty. It means what it says, and under it the whole of the property, real and personal, of an intestate, being an illegitimate child who has left no widow or husband or issue, goes to his or her mother. It will be necessary to determine whether this devolution of the intestate's estate can properly be termed a descent in the sense in which that word is used in s. 24, but for the moment the question is merely as to the meaning of these sections, and the only one that can give us any difficulty is s. 24.

That the language of s. 24, while seemingly clear is in reality somewhat equivocal, is shewn by the different constructions which the two courts below have placed on it. The first member of the phrase stating that

> illegitimate children shall inherit from the mother (their mother) as if they were legitimate,

is sufficiently plain. As far as inheritance from the mother of property belonging to her at her death is concerned, the illegitimate child is placed on the same footing as a legitimate one, and both Mr. Lafleur, representing the appellant, and Mr. Chrysler, who appeared for the respondent William Stone, agreed that the illegitimate child would inherit with the legitimate children property belonging to the mother at her death intestate.

The remainder of s. 24 goes much further and gives to the illegitimate child a right of inheritance through his or her mother which, as expressed, seems greater in extent than that enjoyed by her children born in lawful wedlock. For the illegitimate child inherits

> through the mother, if dead, any real or personal property which she would, if living, have taken by purchase, gift, demise or descent from any other person.

The words " through the mother " are probably used here to indicate the course of descent, although the possibility that the legislature considered this as a case of representation cannot be excluded with any certainty. By a fiction of law, the mother, although dead, is supposed to have been living and to have acquired some property by purchase, gift, demise or descent, and this property the illegitimate

child inherits " through the mother." No such right of inheritance was granted by the Alberta statute to the legitimate child, and in the case of Enos Stone, if there had not been another illegitimate child, no one would have been entitled to claim that he had inherited the estate. Perhaps unwittingly but none the less effectively the legislature has put a premium on illegitimacy.

The appellant, however, contends that the generality of s. 24 is cut down by the use of the terms

> purchase, gift, demise or descent

which he submits should be construed in their strict technical sense. He argues that the only possible title here is one by descent and that descent necessarily supposes that the person taking by this title is the heir of and related by consanguinity to the person from whom he takes.

Descent is defined as taking real estate by inheritance, that is, as heir of the former holder (Halsbury, vo. Descent and Distribution, No 1). The Inheritance Act, 1833, states that it is

> the title to inherit land by reason of consanguinity as well where the heir shall be an ancestor or collateral relation as where he shall be a child or other issue.

As used in olden times it was an apt expression, for it was a maxim of the law that on the death of the tenant in fee the land should *descend* and not *ascend* (Bouvier, Law Dictionary, vo. *Descent and Distribution*), but now a title of inheritance ascends as well as descends, although it is still called a descent. In a legal system like that of Saskatchewan, where the real and personal property of a decedent is vested in his personal representative and where both devolve according to the same rules (R.S.S. c. 73, s. 3), it matters little that in the technical language of the law " descent " is used in respect of real estate and " distribution " for the division of the personal estate of an intestate (Bouvier, *loco citato supra*).

" Purchase " and " descent " are very wide and mutually exclusive terms, and as a purchase includes any title other than one by descent, it could comprise a title, if it be not a title by descent conferred by a statute such as the one in question. But in view of the enactment contained in s. 25, it can be said that in Saskatchewan the mother is the heir-at-law of her illegitimate child who dies intestate and

1924

IN RE STONE.

Mignault J

leaves neither husband or wife, nor issue surviving, and in that respect a modification of the common law is made by the statute to which full effect must be given. So the title conferred by s. 25 can well be considered a title by descent. If therefore the mother takes by descent under s. 25 it would be consistent with the rules of legal interpretation to conclude that the term "descent" in s. 24 comprises a title by descent such as the mother acquires by virtue of s. 25. The conclusion consequently seems inevitable that Sarah Newton Stone, if living, would have inherited the property left by Enos Stone by descent and as a result her illegitimate son William Stone takes this property through her under s. 24.

It is a matter of regret that the legitimate children of Sarah Newton Stone cannot take a share in this property, but while s. 24 remains unamended nothing can go to them, for they are not at common law the heirs of Enos Stone.

Due consideration has been given to the memorandum of additional authorities filed by the appellant some time after the argument. The only case among those cited which appears to call for any comment is the decision of the Supreme Court of Indiana in *Jackson* v. *Hocke* (1). It may be observed however that while s. 2998 of the Indiana statute is somewhat similar to, although not identical with, s. 24 of the Saskatchewan Devolution of Estates Act, there is no provision in the Indiana statute to the same effect as s. 25 of the Saskatchewan Act. The inheritance of the mother under the latter section is certainly an inheritance by descent, and if so it is difficult to appreciate why it should not be considered as an inheritance by descent within the meaning of s. 24.

In view of what has been said, the third proposition of the appellant need not be considered, for there is no escheat and there are no *bona vacantia.*

At this late stage of the proceedings, it does not seem proper to order a reference to determine whether William Stone is really the illegitimate son of Sarah Newton Stone. He was treated as such by the two courts below, and this question should have been tried out before the trial court.

(1) [1908] 171 Indiana R. 371.

The appeal therefore fails and I would dismiss it with costs against the appellant in favour of the respondent William Stone. I would not order these costs to be paid out of the estate, for that virtually would oblige the respondent William Stone to pay them out of his property. I would grant no costs on this appeal to the Attorney General of Saskatchewan.

IDINGTON J.—Enos Stone late of Cabri in the province of Saskatchewan, farmer, was the illegitimate son of Sarah Newton of Lincolnshire, England (later Sarah Stone, wife of Walter E. Stone of the same place), and James Dykens of the same place and died intestate, unmarried, and possessed of real and personal estate.

Letters of administration of all and singular the property of the deceased were duly granted to the Western Trust Company of the city of Regina, in Saskatchewan, as the official administrator of the judicial district of Swift Current, on the 23rd of September, 1918.

There was born to the said Sarah Newton, prior to her marriage to the said Walter E. Stone, another illegitimate son called William Stone. After her marriage she gave birth to a number of legitimate children, some of whom died leaving legitimate issue.

The said Sarah Stone died the 6th October, 1890.

The said Enos Stone was domiciled in Saskatchewan at the time of his death. The lands comprised in his said estate were patented from the Crown subsequent to the passing of the Saskatchewan Act, being c. 42 of the statutes of Canada 4-5 Edw. VII.

An originating summons having been taken out by said administrator to determine who is entitled to the estate of said deceased, the parties were heard by Bigelow J. in Chambers, who held that the land escheated to the Crown in right of the Dominion, and that the goods belonging to the estate of the deceased escheated to the Crown in the right of the province of Saskatchewan, after payment of all claims of creditors, solicitors' costs and administrator's fees out of same.

Upon appeal therefrom by the Crown on behalf of the Dominion to the Court of Appeal for Saskatchewan, that court set aside said judgment and declared that all the pro-

1924
IN RE STONE.
Idington J.

perty of the said deceased, Enos Stone, should go to William Stone, the illegitimate son of Sarah Stone, the mother of the said deceased; subject to payment of debts, succession duty, costs of administration and all other claims and expenses properly chargeable against the estate.

The learned Chief Justice of the Court of Appeal properly points out that though the English law as introduced in the North West Territories might have produced an escheat in favour of the appellant, yet there had been very important changes made by the Territories Real Property Act, c. 26 of the statutes of Canada, 1886 (later R.S.C. 1886, c. 61) in the law relating to inheritance by and from illegitimate children to which I am about to advert, as the continuation thereof is in truth the turning point of this appeal.

I also attach, however, great importance to the ss. 4 and 5 of said Act as consolidated.

S. 4 is as follows:—

4. From and after the commencement of this Act, all lands in the Territories shall be subject to the provisions hereof;

and s. 5 is as follows:—

5. All lands in the Territories which, by common law, are regarded as real estate, shall be held to be chattels real, and shall go to the executor or administrator of any person or persons dying seized or possessed thereof, as personal estate now passes to the personal representatives.

Imagine how this would have shocked the founders of so much of the law cited in many pages of the appellant's factum, as if binding us now.

I most respectfully submit that if we would correctly interpret and construe the later legislation we have to consider as bearing upon the issues raised herein, we must bear in mind the true meaning of s. 5.

The sections following are in harmony therewith but need not be quoted until we come to ss. 16 and 17, which are as follows:—

16. Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother if dead, any property or estate which she would, if living, have taken by purchase, gift, devise, or descent from any other person.

17. When an illegitimate child dies intestate, without issue, the mother of such child shall inherit.

Then we have the Land Titles Act of 1894, of which the general tenor is the same and in that we have ss. 14 and 15, which are as follows:—

14. Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any land which she would, if living, have taken by purchase, gift, devise or descent from any other person.

15. When an illegitimate child dies intestate, without issue, the mother of such child shall inherit any land which the said child was the owner of at the time of his death.

The course of succession generally was also changed by this Act, and the heir was superseded by the next of kin by s. 3, which is as follows:—

3. Land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate.

I agree with the learned Chief Justice of the court below that all this must be taken as an explicit waiver by the Crown of its right of escheat in favour of the mother and I may add that the clear resultant effect of the foregoing helps us to interpret and construe in a wider sense than appellant's counsel urges we can.

I can conceive that the word " descent " might be given a much more limited meaning than has been given it by the Court of Appeal, but I submit that in light of the foregoing history of the legislation, and adding thereto much of the history thereof, given us by the learned Chief Justice, which I have not seen necessary to repeat, we must interpret and construe the said word " descent " as it evidently was intended to be interpreted and construed by the legislators using it.

To discard that, to a Canadian, almost self-evident meaning, and substitute the meaning an English Parliamentary draftsman possibly would have attached thereto, and rejected it, and substituted something else more absolutely accurate, would deprive the legislation of any effect.

I submit we must try to give it some effect and doing so we must adopt the meaning given it in the court below.

When we have done that this appeal in my opinion fails.

All that ensued upon the creation of the province of Saskatchewan was obviously the result of the negotiations between the then Dominion Government and those suppliants desiring the creation of a new province, or indeed two new provinces, for the creation of Alberta as a province was considered and disposed of at the same time.

1924

IN RE STONE.

Idington J.

And the Saskatchewan Act (being 4-5 Edw. VII, c. 42 of the Dominion Parliament) declared by s. 3 thereof as follows:—

3. The provisions of The British North America Acts, 1867 to 1886, shall apply to the province of Saskatchewan in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Saskatchewan had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

And by s. 16 thereof all the laws and regulations made thereunder were, so far as not inconsistent therewith, continued in force.

I see nothing in said Act that interferes with the said enactments in question herein, or the interpretation and construction thereof in the sense I have suggested and which has been adopted by the judgment appealed from.

It so happened that the only large question dealt with by said Act and the only one pretended to be inconsistent with said law, is s. 21 of said Saskatchewan Act, which reads as follows:—

21. All Crown lands, mines and minerals and royalties incident thereto, and the interests of the Crown in the waters within the province under The North-West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North-West Territories.

It has been submitted to us in course of argument herein that inasmuch as the granting of

Crown lands, mines and minerals and royalties incident thereto

were to continue vested in the Crown and be administered by the Government of Canada, the right of escheat was intended to belong to the Crown in right of the Dominion.

I cannot see anything therein to warrant such a pretension. Indeed if such a thing had been thought of I imagine it would, if so decided, have been expressed in entirely different language.

The right of escheat, of course (where existent, as it is not herein), belongs to the Crown, but the question remains whether of the Crown in right of the Dominion or of the province.

The case of *The Trusts & Guarantee Company* v. *The King* (1), does not, whatever it decides, determine that point, for, as Chief Justice Haultain points out, the opinion of our former Chief Justice, Sir Charles Fitzpatrick, held expressly another way, and I, and Mr. Justice Brodeur, certainly were not of the opinion that there was an escheat in favour of the Crown in right of the Dominion.

I may be permitted here, with great respect, to submit that neither the said judgment, nor that in *Attorney General of Ontario* v. *Mercer* (2) goes quite as far as submitted in the judgment appealed from.

For the present I feel no necessity for passing upon the question, inasmuch as there is in the view above expressed, no ground for escheat.

The newly created legislature re-enacted the law as it had stood under Dominion legislation, and with the result that William Stone, according to the opinion of the court below, with which I agree, is the party entitled to receive what remains after the due administration of the estate of the late Enos Stone in the hands of the administrator.

I would therefore dismiss this appeal with costs of all parties to be paid by the appellant.

Appeal dismissed.

Solicitors for the Attorney General of Canada: *Turnbull, Turnbull & Kinsman.*

Solicitor for the Attorney General of Saskatchewan: *H. E. Sampson.*

Solicitors for the respondent W. Stone: *Begg, Hayes & Friesen.*

(1) [1916] 54 Can. S.C.R. 107.

(2) [1883] 8 App. Cas. 767, at pp. 778-9.

INDEX

STATUTES—*Continued*

STATUTES—*Continued*