1926

CANADA
LAW REPORTS

Supreme Court of Canada

REPORTER:
ARMAND GRENIER, K.C.

ASSISTANT REPORTER:
S. EDWARD BOLTON

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
1926

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:
The Hon. ERNEST LAPOINTE K.C.
The Hon. E. L. PATENAUDE K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:
The Hon. LUCIEN CANNON K.C.
The Hon. ANDRÉ FAUTEUX K.C.

29508—1½

ERRATA

Page 27, footnote (2) should read (1925) 29 Ont. W.N. 203; 58 Ont. L.R. 130.

Page 145, twenty-first line—Woods K.C. for the respondents C. R. Tufford Co. Ltd. and C. R. Tufford. C. C. Robinson K.C. for the respondent The Delta Copper Co.

Page 243, footnote (1) should read 29 Ont. W.N. 41; 57 Ont. L.R. 619.—Footnote (2) should read 56 Ont. L.R. 653.

Page 247, fiftieth line—"*ultra vires*" should read "*intra vires.*"

Page 376, twelfth line—"(16)" should be "(14)."

Page 376, footnote (2) should read [1897] 1 Ch. 560.

Page 393, thirty-ninth line—"(7)" should be "(1)".

Page 395, footnote (3) should read 66 L.J. Ch. 225.

Page 479, footnote (4) should read L.R. 3 Q.B. 197.

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.

Bergeon v. *DeKermor Electric Heating Co.* ([1926] S.C.R. 72). Leave to appeal refused, 21st May, 1926.

Canadian National Railway Co. v. *Boland* ([1926] S.C.R. 239). Leave to appeal granted, 15th March, 1926.

Canadian National Railway Co. v. *Fournier.* Appeal dismissed, 21st June, 1926.

Corporation Agencies Ltd. v. *Home Bank of Canada.* ([1925] S.C.R. 706). Leave to appeal granted, 16th December, 1925.

Hirsch v. *Protestant Board of School Commissioners* ([1926] S.C.R. 246). Leave to appeal granted, 13th April, 1926.

King, The, v. *Price Bros.* ([1926] S.C.R. 29). Appeal allowed with costs, 17th June, 1926.

Larue v. *Royal Bank of Canada* ([1926] S.C.R. 218). Leave to appeal granted, 29th March, 1926.

Luscar Collieries Ltd. v. *McDonald* ([1925] S.C.R. 460). Leave to appeal granted, 18th February, 1926.

Montreal Transportation Co. v. *The King.* Appeal dismissed with costs, 5th March, 1926.

Ottawa Electric Ry. Co. v. *Létang* ([1924] S.C.R. 470). Appeal allowed with costs, 20th May, 1926.

Northern Grain Co. v. *Goderich Elevator and Transit Co.* ([1926] S.C.R. 120). Leave to appeal refused, 28th April, 1926.

Reference in re S. 189 Railway Act ([1926] S.C.R. 163). Leave to appeal granted, 11th February, 1926. Appeal dismissed with costs, 17th May, 1926.

Smith v. *The Minister of Finance* ([1925] S.C.R. 405). Appeal allowed, 27th July, 1926.

Stevenson v. *Florant* ([1925] S.C.R. 532). Appeal dismissed with costs, 22nd July, 1926.

Toronto Hockey Club v. *Arena Gardens.* Appeal dismissed with costs, 23rd July, 1926.

Trudel v. *Lemoine* ([1925] S.C.R. 698). Appeal dismissed with costs, 28th June, 1926.

Wright v. *Brake Service Ltd.* ([1926] S.C.R. 434). Leave to appeal refused, 15th June, 1926.

A TABLE

OF THE

NAME OF THE CASES REPORTED

IN THIS VOLUME

TABLE OF CITIES CITED

A

B

B

C

C

D

D

E

F

G

G

H

I

J

J

K

L

L

M

M

Mc

N

O

P

P

Q

R

R

S

T

T

U

V

W

Y

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

THE QUEBEC RAILWAY LIGHT AND POWER COMPANY (DEFENDANT)... } APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF) ..... } RESPONDENT.

1925

*Nov. 6.

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

Appeal—Leave to appeal—Agreement between railways—Order from Board of Railway Commissioners—Interpretation—Future rights —Public interest.

MOTION for special leave to 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 appellant and the respondent companies operate railways in the city of Quebec, the former a tramway service and the latter a transcontinental railway. In June, 1920, the appellant made an application to the Board of Railway Commissioners of Canada for permission to cross the tracks of the respondent; and the Board granted it upon the following condition amongst others: "The Canadian Pacific Railway Company shall employ and pay the signalmen necessary to operate the interlocking plant, at the joint expense of" both companies. In December, 1920, an employee of the respondent met with an accident while operating the semaphore, and as a consequence of the accident, he sued the respondent company under the Workmen's Compensation Act. The respondent, without giving the appellant any notice, contested this action and was condemned to pay the sum of $3,000 with interest

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

1925

QUEBEC R. L. & P. Co. v. CAN. PAC. RY. Co.

and costs. The appellant learned of that judgment only by receiving from the respondent a bill for $1,704.24, being half the capital and interest due under the above judgment; but it refused to pay and the respondent prayed the Board of Railway Commissioners to grant an order forcing the appellant to pay that amount. The respondent's claim was dismissed by the Board on the ground that it was not one which could be attributable to or based upon the order which is alleged to be the foundation for such a claim. Subsequently the respondent brought suit against the appellant in the Superior Court for the sum of $1,852.76. The action was maintained, and this judgment was affirmed by the Court of King's Bench. Both courts held that the words of the agreement above cited covered not only the actual wages of the workmen, or the obligation on the part of the appellant to pay one half of those wages, but also the obligation to pay one half of what might be called an accessory expense of the employment.

The appellant alleged that these judgments did not proceed upon an interpretation which the wording of the order would justify, but had the effect of rendering it liable for expenses which had not been foreseen when the order was issued; that the future rights of the parties were affected; that the decisions involve an interpretation of a public statute, the Railway Act of Canada, and that, as orders of the Board are made only when a matter of public interest is involved, their interpretation constitutes a question of public interest.

The Supreme Court of Canada, after hearing counsel and reserving judgment, granted the motion. Costs in the cause.

Motion granted.

St. Laurent K.C. for motion.
Thomson contra.

LA VILLE DE CHATEAUGUAY (DEFENDANT) ..... APPELLANT;

AND

DAME MARIE VIGNEAULT (PLAINTIFF) ..... RESPONDENT.

1925

*Oct. 6.
*Oct. 20.

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

Appeal—Leave to appeal—Matter in controversy—Debentures over $2,000 —Action for interest coupons—Future rights—Amount exceeding $1,000 —Supreme Court Act, 10-11 Geo. V, c. 32, s. 41.

MOTION for special leave to appeal from the judgment 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 for $180.

The respondent brought an action against the appellant for the recovery of the sum of $180, representing the value of six interest coupons due on two debentures of $1,000 each issued by the appellant.

The appellant moved for special leave to appeal on the ground that, although the amount claimed by the action was only $180, the interest of the parties to the action and the amount in controversy was far in excess of this amount and comprised implicitly the capital amount of the two debentures and the interest coupons from March, 1923, to September, 1955; and that accordingly, "the matter in controversy on the appeal" involved "matters by which rights in future of the parties may be affected" and also consequentially an amount exceeding $1,000.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the motion with costs, the court being of opinion that the circumstances of the case did not justify the granting of special leave to appeal.

Motion dismissed with costs.

Lafleur K.C. and *Desbois K.C.* for motion.
Perrault K.C. contra.

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

(1) [1925] Q.R. 39 K.B. 136.

1925

*Oct. 8.
*Oct. 9.

ISIDORE CLAMAN (PLAINTIFF).....APPELLANT;

AND

MAUD H. CLAMAN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeal—Jurisdiction—Judicial separation—Permanent alimony—Divorce—Matrimonial cause—Jurisdiction affirmed by registrar—Appeal quashed—Question of costs.

APPEAL from the decision of the Court of Appeal for British Columbia, affirming the judgment of the trial court and dismissing the appellant's action.

The action is for a declaration that a decree of judicial separation and one for permanent alimony are null and void on the ground that they were made without jurisdiction. These decrees were made in the court in the province having jurisdiction in divorce and matrimonial causes.

Upon the appeal coming in for hearing the Court of of Appeal was unanimously of the opinion that it ought not to assume jurisdiction as in this case the decrees which were sought to be interfered with clearly dealt with matrimonial issues.

When the case was called before the Supreme Court of Canada, the court of its own motion having raised the question of its jurisdiction and appellant's counsel alleging he had been taken by surprise, as an order in chambers unappealed from had affirmed the jurisdiction, the hearing was adjourned until counsel had an opportunity of considering the question further. Later on, after argument by counsel, the appeal was quashed; and the respondent was allowed same costs as if she had successfully appealed from the order affirming jurisdiction, but no other costs.

Appeal quashed.

Cassidy K.C. for appellant.

Fisher K.C. and *Clarke* for respondent.

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

C. L. HUFFMAN (PLAINTIFF).....APPELLANT;

AND

G. H. ROSS (DEFENDANT).....RESPONDENT.

1925

*Nov. 20.
*Dec. 10.

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

Partnership—Firm of stockbrokers—Retirement of one member of firm—Notice—Continuance of business with firm—Action against former partner—Evidence—Onus—Partnership Act, (Ont.) 10-11 Geo. V, c. 41, s. 37.

R., who was a member of the firm of B. & Co., stockbrokers, retired from the firm in May, 1920. The business was continued by B. alone, under the same firm name. The plaintiff became a customer of the firm in March, 1920, and continued to deal with the firm until it became bankrupt in 1924. The plaintiff filed a claim under the Bankruptcy Act against the insolvent estate of B. & Co.; but, so far as appeared, received no dividend upon his claim. In this action he sought to recover from R. the amount of his claim against the firm, alleging that at the time his claim arose R. was "a known partner of B. & Co. without notice of his retirement as a partner of the firm."

Held, that in the absence of notice to the plaintiff of his retirement, R. would be liable; that the onus did not rest on the plaintiff of establishing that he was unaware of R's retirement from the firm of B. & Co., but that it rested upon R. to prove either direct notice thereof or, at least, facts and circumstances from which knowledge of such retirement might fairly be inferred.

Judgment of the Appellate Division (57 Ont. L.R. 329) reversed and new trial ordered.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of the County Court and dismissing the appellant's action.

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

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

W. Nesbitt K.C. and *J. A. McEvoy* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—From the 31st of May, 1919, to the 31st of May, 1920, the defendant was a member of the brokerage firm of J. G. Beaty & Co. During that period the plaintiff became a customer of the firm. After the defendant had retired from the firm in 1920, a brokerage business

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

(1) [1925] 57 Ont. L.R. 329.

1925

HUFFMAN v. ROSS.

Anglin C.J.C.

was carried on by J. G. Beaty alone under the name of J. G. Beaty & Co. until he became insolvent in 1924. As a result of transactions with J. G. Beaty & Co. entered upon subsequent to the defendant's retirement, the plaintiff became a creditor of J. G. Beaty for $2,818.90, and preferred a claim for that amount with Beaty's assignee in bankruptcy. In this action he sues the defendant for this sum

as a known partner of J. G. Beaty & Co., without notice of his retirement as a partner of the said firm.

In the County Court the action was dismissed on the ground that by making his claim against the insolvent estate of J. G. Beaty & Co. the plaintiff had elected to forego any rights he might have against the defendant. On appeal the judgment dismissing the action was upheld (1), but on the ground that, assuming the circumstances to be such that the plaintiff, if not apprised of the partnership dissolution, would be entitled to recover, he had

not succeeded in satisfying the learned trial judge or (the Appellate Divisional Court) that he did not in any way know of Ross's retirement before 1922, when the transactions in question were had.

For the reasons stated by Mr. Justice Riddell the Divisional Court (in our opinion rightly) rejected the ground on which the judgment of the County Court had been based; but, with deference, we are of the opinion that the onus did not rest on the plaintiff of establishing that he was unaware of the defendant's retirement from the firm of J. G. Beaty & Co., and that the judgment of the Appellate Division, therefore, cannot be supported on the ground on which it has been put. In the absence of notice to the plaintiff of his retirement, the defendant would be liable. It rested upon him to prove either direct notice thereof or, at least, facts and circumstances from which knowledge of such retirement might fairly be inferred. A finding that the plaintiff had such knowledge was essential to the defence.

We do not discern in the circumstances of this case anything which takes it out of the general rule embodied in s. 37 of the Partnership Act, 10-11 Geo. V, (Ont.), c. 41, and thus stated in Lindley on Partnership, 9th Ed., p. 291:

When an apparent partner retires, or when a partnership between several known partners is dissolved * * * those who dealt with the firm

(1) [1925] 57 Ont. L.R. 329.

before the change took place are entitled to assume that no change has occurred until they have notice to the contrary.

On a mere perusal of the evidence in the record (which we advisedly refrain from discussing), we are not prepared to find that notice to the plaintiff of the defendant's retirement in 1920 has been established. But there is some evidence from which notice might be inferred: (*Leeson* v. *Holt* (1); *Barfoot* v. *Goodall* (2); *Hart* v. *Alexander* (3)), and we have not had the advantage of observing the plaintiff's demeanour when under examination in regard to the various matters relied upon as warranting the inference of knowledge which the defendant urges should be drawn. Upon the vital question whether knowledge by the plaintiff of the defendant's retirement at the time the transactions resulting in the present claim took place was established, there is no finding by the tribunal peculiarly competent, under circumstances such as this case presents, to make it—the trial court.

As already stated, when the plaintiff shewed that the defendant had been a member of the firm with which he dealt, the burden rested on the defendant to procure such a finding. He did not obtain it. He can have another opportunity to do so only as a matter of indulgence—and upon proper terms. On the other hand, there is no finding against him on this issue.

Under all the circumstances, we are of the opinion that, while the judgment dismissing the action must be set aside, a new trial should be directed upon payment by the defendant to the plaintiff of his costs of the appeals to the Appellate Division and to this court, and that the costs of the abortive trial should abide the event of the new trial. *Jones* v. *Hough* (4); *Dominion Trust Co.* v *New York Life Ins. Co.* (5); *Cooper* v. *General Accident Fire and Life Ass. Corporation* (6).

Appeal allowed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*
Solicitors for the respondent: *Young & McEvoy.*

(1) [1816] 1 Starkie, 186.
(2) [1811] 3 Camp. 147.
(3) [1837] 7 C. & P., 746.
(4) [1879] 5 Ex. D. 115, at p. 125.
(5) [1919] A.C. 254, at p. 257.
(6) [1922] 2 Ir. R. 214, at pp. 216, 219.

1925

*Nov. 2, 3.
*Dec. 10.

JAMES A. McNAUGHTON (PLAINTIFF) ....APPELLANT;

AND

MURDOCH IRVINE AND OTHER (DEFENDANTS) ..... } RESPONDENTS;

AND

S. M. ADAMS AND OTHERS.....(MIS-EN-CAUSE)

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

Sale—Litigious rights—Retrait—Absolute tender—Conditional tender void —Arts. 1576, 1582, 1583, 1584 C.C.

The debtor wishing to exercise the *retrait* of litigious rights must make an unconditional tender of the amount owed to the buyer in payment of "the price and incidental expenses of the sale, with interest, etc." (Art. 1582 C.C.).

A tender of that amount by the debtor to the buyer so made that it would be paid to him upon his signing a deed of sale of the property acquired, is not valid within the terms of Art. 1582 C.C.

The sole effect of the *retrait* is that the debtor assumes the bargain (*le marché*) of the buyer of the litigious right, so that the debtor is merely substituted for and subrogated to the buyer; therefore, the buyer is not bound to sign a deed of sale, as, in doing so, he would subject himself to legal warranty of the rights sold (Art. 1576 C.C.).

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 respondents' plea, by which they exercised the *retrait* of litigious rights in answer to appellant's action claiming ownership, and asking for the partition, of a certain property.—Appeal allowed with costs.

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

St. Laurent K.C. for the appellant.
Kelly K.C. for the respondents.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from a judgment of the Court of King's Bench confirming, Mr. Justice Allard *dissentiente* and Mr. Justice Flynn *dubitante*, the judgment of the Superior Court, D'Auteuil J., which gave effect to the

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

respondents plea of litigious rights and dismissed the appellant's action.

The facts which gave rise to this litigation are as follows:

David Kaine and his wife Sarah McDonald, it is alleged, were married in Ireland. They came to Canada and settled in Restigouche in the county of Bonaventure, Lower Canada, where their two children, David Kaine, whom I will call David Kaine, Jr., and Margaret Kaine, who subsequently married John McNaughton, were baptized, the former when aged nine months on the 13th of July, 1851, and the latter when aged eight months on the 7th of August, 1853. The filiation and legitimacy of these two children are proved by their acts of birth, inscribed in the registers of civil status (art. 228 C.C.), and of which copies are in the record. It is objected that there is no proof of the marriage of David Kaine, Sr., and Sarah McDonald, but they lived together as man and wife for some thirty years and had undoubtedly the status of married people. I do not think the respondents have any interest to deny the marriage of Kaine, Sr., and Sarah McDonald, for their title to the property comes through David Kaine, Jr., and any title of the latter must have been as heir-at-law of his father and mother, for, as I will show later, he had no title by prescription. David Kaine, Sr., and Sarah McDonald must also be presumed to have married under the matrimonial regime of community of property, nothing to the contrary having been shewn (art. 1260 C.C.). David Kaine, Sr., died on the 14th of November, 1880, and Sarah McDonald on the 13th of October, 1894.

It is alleged that David Kaine, Sr., acquired in 1868 the immovable property here in question, the east half of lot 17, first range, river Metapedia, township of Restigouche, which I will hereafter call the property, under a location ticket, but that this location ticket has been lost. However, on the 15th and 16th of March, 1893, two letters-patent granting the property were issued to David Kaine, Sr., and all the courts have held that this was a grant to David Kaine, the husband of Sarah McDonald (although he was then deceased), and not to his son David Kaine, Jr. Apparently the latter had not advised the Crown Lands department of his father's death, and the letters

1925

MCNAUGHTON v. IRVINE.

Mignault J.

patent would naturally issue to the father, if, as is alleged, he was the holder of the location ticket of 1868. I will, like the courts below, take it as sufficiently established that David Kaine, Sr., was the owner of the property, which fell into the community between his wife and himself, and on his death intestate he left an undivided half of it in his succession. The other undivided half belonged to Sarah McDonald as having been common as to property with her husband, and on her death intestate was also left in her succession. The two children, David, Jr., and Margaret, were the sole heirs of their father and mother, and took the immovable, first as to one half and subsequently as to the other half, in undivided ownership.

On the 26th of November, 1913, David Kaine, Jr., entered into a contract of sale with Sherman Moreland Adams, whereby he purported to sell this property to the latter for $200, declaring that it belonged to him

in virtue of good titles and by thirty-four years of peaceable possession.

He also declared that the property was entirely free from all mortgages and incumbrances whatever. In my opinion, his only title was as heir to his father and mother and extended solely to an undivided half of the property although he purported to sell the whole.

On the 20th of August, 1920, Margaret Kaine, authorized by her husband, John McNaughton, by a writing under private seal, in consideration of the sum of one dollar, sold to the appellant, James McNaughton, all her

right, title and interest in and to this property.

At the time she entered into this contract, Margaret Kaine, as heir of her father and mother, was owner of one undivided half of the property.

S. M. Adams, on the 2nd of September, 1920, sold this property, as if he owned the whole, to the present respondents for $1,000.

The appellant's action was begun on the 30th of April, 1923, by a writ of summons, which was served on the respondents on the 28th of May, 1923. David Kaine, Jr., and Adams were made parties to the case. David Kaine, Jr., contested the action, but his plea was dismissed by the trial court, and as he has not appealed, there is no necessity to consider the position he took.

The appellant's declaration, which is a very long one

containing no less than 67 paragraphs, can be shortly summarized by saying that the appellant asks to be declared owner of an undivided half of the property, and prays that it be partitioned between him and the respondents, with the usual conclusions of an action in partition. He also claims from the respondents $3,000 for his share of the fruits derived from the property.

The respondents in their plea deny most of the averments of the declaration. They allege that the letters patent were issued in favour of David Kaine, Jr., and not David Kaine, Sr.; that Margaret Kaine could not sell the property because it belonged to Adams who subsequently sold it to the respondents, and moreover she sold not the property but only her rights therein which the appellant knew were litigious and had been repudiated by Adams; that the possession of the respondents and that of Adams and David Kaine, Jr., form a total of 44 years, all of which had the necessary requisites for the purpose of prescription; that, if what the appellant states is true (which they deny) then David Kaine, Sr., died intestate and before inheriting the property the appellant and his authors were obliged to cause to be registered a declaration under art. 2098 C.C., and not having done so the transfer set up by the appellant is without effect.

Then follows what the respondents term a "special plea," which is set up "without prejudice in any way to the foregoing." It alleges that the rights acquired by the appellant from Margaret Kaine were to his knowledge litigious rights. The respondents declare that, without prejudice to their foregoing plea, they take advantage of art. 1582 C.C., and,

in order to become wholly discharged towards the plaintiff, they are willing to pay him the price he paid for said litigious rights or property, and all incidental expenses of sale with interest

from date of acquisition, which they calculated at $207.02, subject to completing it, if necessary, and they deposit this sum in court. They add that they annex to their plea

a deed of sale to be signed by plaintiff, and they call upon plaintiff to execute same on his being paid by the court the above amount.

The respondents' conclusions are as follows:

Wherefore defendants pray that act be granted of their declaration that they wish to avoid all litigation by paying the aforesaid sum for the aforesaid reasons to plaintiff; that they call upon plaintiff to sign the deed annexed to this plea; that if plaintiff fails so to do, that the deposit of

1925

MCNAUGHTON v. IRVINE.

Mignault J.

said sum and said deed have the same effect as if the deed were signed by plaintiff, and that said action be therefore dismissed, and in the event of plaintiff further continuing the present action, that it be dismissed with all costs against the plaintiff.

The deed of sale annexed to the plea is an ordinary deed of sale by the appellant to the respondents, in consideration of $207.02 to him paid at or before the signing and delivery of the deed, of

all rights, title and interest in that certain lot, piece or parcel of land and premises situate and lying in the township of Restigouche, known and distinguished as being the east half of lot No. 17 of the first Matapedia range, * * * the whole as conveyed to the said James McNaughton in virtue of a certain deed bearing date the 20th August, 1920, made between himself and Margaret Kaine.

In order properly to discuss the questions involved in this appeal, it has seemed preferable to refer in some detail to the position taken by the respondents in their plea. It is obvious that the respondents cannot, on the one hand, contest the claim of the appellant that he is owner of an undivided half of the property, and, on the other hand, at the same time force him to relinquish his bargain on the ground that the right acquired by him was a litigious one (Baudry-Lacantinerie et Saignat, Vente et Echange, no. 940). The appellant contends that this is precisely what the respondents have done by their plea; the latter say that what was alleged in the first part of the plea was merely to shew the litigious character of the right sued on, and they point to their conclusions to demonstrate that the special plea of litigious rights was not a subsidiary but a principal plea.

Before expressing an opinion on this point, it will be convenient to cite the three articles of the civil code which deal with the *retrait de droits litigieux.*

1582. When a litigious right is sold, he against whom it is claimed is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it.

1583. A right is held to be litigious when it is uncertain, and disputed or disputable by the debtor, whether an action for its recovery is actually pending or is likely to become necessary.

1584. The provisions contained in article 1582 do not apply:

(1) When the sale has been made to a coheir or coproprietor of the right sold;

(2) When it has been made to a creditor in payment of what is due to him;

(3) When it has been made to the possessor of a property subject to the litigious right;

(4) When the judgment of a court has been rendered affirming the right, or when it has been made clear by evidence and is ready for judgment.

In order to be litigious, the right sued on must be "uncertain and disputed or disputable by the debtor"; in the French version of art. 1583, "incertain, disputé ou disputable." The feature that should be emphasized here is the uncertainty of the right; the fact merely that it may be disputed, however frivolously, by the debtor does not suffice to make it litigious. The French code (art. 1700) applies a different test and considers a right litigious

dès qu'il y a procès et contestation sur le fond du droit.

Article 1584 C.C. differs from art. 1701 of the French code in that its fourth paragraph is not found in the latter. The intention of the codifiers, as stated by them in their report, was to extend art. 1701 by the addition of this paragraph.

Mr. Saint-Laurent, on behalf of the appellant, argued that inasmuch as the transfer in question was made by Mrs. McNaughton (Margaret Kaine) to her own son, the appellant, these articles do not apply. He cited some old French decisions which distinguish between a transfer to a relative and a sale to a stranger.

It is of course obvious that what is contemplated here is a right acquired under an onerous title and not by way of gift. In the cases referred to, the transfer was considered as an *avancement d'hoirie* and, as such, not subject to the *retrait*. Apart from such a case, I would not think it permissible to introduce into the articles of the code a distinction which is not justified by their language, the more so as a relative as well as a stranger may purchase a litigious claim as a speculation. Where the claim is litigious within the meaning of article 1583 and is acquired under an onerous title, the law presumes that the purchaser, to use the expressions of Pothier, was an "acheteur de procès" and that his motive was "l'amour des procès." It is as to such purchasers that, subject to art. 1584, the *retrait* is allowed quite irrespective of their relationship to the seller.

Coming now to the present case, the only way the respondents could exercise the *retrait* was

by paying to the buyer (the appellant) the price and incidental expenses of the sale, with interest, etc.

(art. 1582 C.C.). This called for a tender of the sum involved. Have the respondents fulfilled this condition?

By their special plea, as stated above, they made a tender of $207.02, to be paid to the appellant on execution by him of the deed of sale annexed to the plea. This was not an

1925

McNAUGHTON v. IRVINE.

Mignault J.

absolute but a conditional tender, and unless the appellant signed the deed of sale he could not obtain the amount tendered. The learned trial judge, in his judgment, held that the appellant was not obliged to sign this deed, and only after the judgment (and if the respondents acquiesced in the elimination of the condition under which their tender was made, which they were not bound to do) was the tender available to the appellant in payment of the amount due him under art. 1582.

Objection to the respondents' tender as being conditional was taken by the appellant in his factum before this court and also at the hearing. The respondents strongly contended that this objection comes too late. They also stated that the point was not taken in the courts below. I am inclined to think, however, that there must have been some question in the trial court as to the claim of the respondents that the appellant was bound to sign the deed of sale in their favour as a condition of obtaining the amount tendered, for in an express *considérant* of the judgment the trial judge decided that he was not "en droit tenu de signer tel acte." The objection to the tender is apparent on the face of the record, the appellant's factum gave ample notice to the respondents that the point would be raised, and I think, we cannot disregard a question of law which is suggested by the mere reading of the respondents' special plea. There is nothing in the circumstances of this case or in the position taken by the appellant at the trial to show that he acquiesced in the tender as conditionally made by the respondents: *Mile End Milling Co.* v. *Peterborough Cereal Co.* (1).

It is scarcely necessary to say that the appellant was not bound to sign this deed of sale. Had he signed it, he would have subjected himself to legal warranty of the rights sold (art. 1576 C.C.). I cannot escape the conclusion that the respondents entirely misconceived what is incumbent on a debtor who seeks to defeat a claim of litigious rights by exercising the *retrait de droits litigieux*. The effect of the *retrait* is that the debtor assumes the bargain (*le marché*) of the buyer of the litigious right, so that the debtor is substituted for and subrogated to the buyer. The latter con-

(1) [1924] S.C.R. 120.

veys nothing to the debtor, who merely takes his place and obtains a discharge from the claim by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day the buyer paid it. Certainly the debtor cannot demand that the buyer sell him the litigious rights under a deed importing legal warranty.

There is no possible doubt on this point. Pothier, Vente, no. 597, says:—

Le débiteur, en remboursant le cessionnaire, est admis à prendre son marché. L'achat que le cessionnaire avait fait de la dette litigieuse est détruit en la personne de ce cessionnaire, et passe en celle du débiteur, qui est censé avoir lui-même racheté sa dette du créancier, et en avoir transigé avec lui pour la somme portée en la cession.

To the same effect, Aubry & Rau, 5th ed., vol. 5, p. 247, note 14 *bis*, say:—

L'exercice du retrait n'opère pas une rétrocession au profit du retrayant, mais il a pour effet de substituer rétroactivement ce dernier au retrayé. Le cessionnaire est censé n'avoir jamais été créancier, et par suite tous les droits qui avaient pu prendre naissance de son chef sur l'objet cédé s'évanouissent.

I am further of opinion that the respondents really contested (*au fond*) the claim of the appellant that he had acquired the ownership of an undivided half of the property. They allege that the letters patent were granted to David Kaine, Jr., and not to David Kaine, Sr., with the consequence that Margaret Kaine, according to them, never acquired the ownership of an undivided half of the property as heir of her father and mother. They say that the property belonged to David Kaine, Jr., he having acquired it by virtue of his possession dating back over 34 years previous to November 5, 1913, which possession

had all the necessary requisites to prescribe the ownership thereof,

and to that possession they add their own and that of S. M. Adams, making 44 years. They also set up that no declaration of inheritance having been made by the appellant and Margaret Kaine, as required by art. 2098 C.C., the transfer made by the latter to the former is without effect. Their special plea of litigious rights is made "without prejudice in any way to the foregoing."

The respondents claim that in their conclusions they have merely asked to be allowed to exercise the *retrait*. But here again they insist on the appellant signing the deed of sale annexed to their plea as a condition of receiving the amount tendered, and they pray, in the event of the appel-

1925

McNAUGHTON v. IRVINE.

Mignault J.

lant continuing the action, that it be dismissed with costs.

There is the further circumstance that, at the trial, the respondents adduced evidence to shew that David Kaine had acquired the ownership of this property by prescription. That was indeed the purpose of the greater part of their testimony, so much so that the trial judge refused to tax in their favour five witnesses (over and above the five allowed them on a single point) called by them on this question of prescription. So to the end of the trial the respondents persisted in contesting the appellant's title to the rights acquired by him.

The result is that this case comes well within the fourth paragraph of art. 1584 C.C. The trial judge, on the evidence and on this claim of prescription set up by the respondents, found as follows:

> Considérant que David Kaine mis en cause a possédé le dit immeuble depuis la mort de son père en 1880, en commun avec sa mère jusqu'au décès de cette dernière, le 13 octobre 1894; qu'après la mort de sa mère il a paru le posséder seul jusqu'à la vente à Adams le 26 novembre 1913; et qu'il a continué à le posséder ainsi durant les deux années suivantes.

The time during which David Kaine, Jr., possessed the property jointly with his mother cannot be counted for the purposes of prescription. This brings us down to 13th of October, 1894, date of the death of Mrs. David Kaine, Sr., for the beginning of any possession that can be claimed on behalf of David Kaine, Jr. The writ was served on the respondents on the 28th of May, 1923, so that, adding to the possession of David Kaine, Jr., that of Adams and of the respondents, less than thirty years elapsed from October 13, 1894, to the date of service. As a consequence, the plea of prescription is not made out. No prescription of ten years under art. 2251 C.C. was alleged, nor could it be in the absence of ten years possession by the respondents and Adams before the institution of this action.

The objection of the respondents to the appellant's title founded on art. 2098 C.C. would equally apply to the title they obtained from David Kaine, Jr., heir for one-half of his father and mother. Article 2098 C.C. does not say that the transfer by an heir who has not registered a declaration of transmission by succession is void, but states that its registration is without effect so long as the right of the acquirer has not been registered. The respondents derive their title from David Kaine, Jr., whose only right came

1925

MCNAUGHTON v. IRVINE.

Mignault J.

by succession from his father and mother. The appellant gets his title from Margaret Kaine, who also inherited her share from her parents. As I have said, if art. 2098 C.C. is an obstacle for the appellant, it is equally so for the respondents. My opinion, however, is that neither as to the one nor the other is the failure to register the transmission a cause of nullity of the transfers on which they rely, and at any time the required declaration of transmission can be registered, which will give effect to the registration of their transfers.

The right of the appellant, to borrow the language of the fourth paragraph of Art. 1584 C.C., which refers to the particular demand in litigation, or the action wherein the *retrait* is sought to be exercised, *Brady* v. *Stewart* (1), has therefore been made clear by evidence and is ready for judgment. This is in no small degree due to the contestation of his claim by the respondents, and it is now established that David Kaine, Jr., and his successors in title never acquired the whole of this property by prescription. If the right transferred to the appellant was ever litigious within the meaning of art. 1583 C.C., it was not so when the case was ready for judgment after the trial, and up to that moment there had not been made a valid tender to the appellant in order to exercise the *retrait*. The trial court, in my opinion, should not have dismissed the appellant's action.

In his factum, the appellant practically admits that he is not entitled to demand a share of the fruits and revenues of the property on account of the possession in good faith of the respondents (Art. 411 C.C.), but contends that he can claim a half share of the amount received by the respondent for pulpwood cut and removed from the property, this not properly being fruits of the property. Edward Irvine says that he sold from the property about 72 cords of pulpwood at $18 per cord, making in all $1,296. But Irvine also states that he did not make out of the fruits of the land, pulpwood, crops and everything, enough to pay for the work he put on it. I am not therefore disposed to allow this claim.

I have deemed it unnecessary to refer to many questions

(1) [1887] 15 Can. S.C.R. 82.

1925

McNAUGHTON v. IRVINE.

Mignault J.

discussed with great learning by the judges of the Court of King's Bench. What I have said suffices to dispose of the case. Nor do I think it requisite to do more than mention a point discussed by Mr. Justice Howard, as to some uncertainty in the description given to the property by the letters patent. If there be a cloud on the title, it would affect the claim of the respondents as well as of the appellant, but it seems to me that there is no possible doubt with respect to the identity of the property which the parties took under the grant from the Crown.

I would therefore allow the appeal with costs here and in the Court of King's Bench and grant the prayer of the appellant for a partition of the property. The plea of the respondents in the trial court should be dismissed with costs of their contestation of the action, including the costs of *enquête* attributable to this contestation. The other costs of the action, as well as the costs of the partition, should be borne by the appellant and the respondents in equal shares.

Appeal allowed with costs.

Solicitors for the appellant: *St. Laurent, Gagné, Devlin & Taschereau.*

Solicitors for the respondents: *Kelly & Lévesque.*

1925

*Nov. 18.
*Dec. 18.

PENINSULAR SUGAR COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

AND

F. HOWLETT (PLAINTIFF) ..... RESPONDENT.

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

Sale of goods—Contract—Contemplating building a factory—Preliminary order of bricks—"About a million and a half"—Written order—"All brick required"—Breach of contract—Damages.

The defendant, an incorporated company contemplating building a sugar factory at Petrolia, wrote to the plaintiff, on September 29, 1922, asking a price on 500,000 brick f.o.b. Petrolia. In answer to this a price of $19 per thousand was quoted. This was met by a counter offer of $18. The plaintiff then suggested a price of $18.50. An interview followed as to which the only evidence is that of the plaintiff. The plaintiff says that Mr. Schoen, the defendant's president, stated

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

1925

PENINSULAR SUGAR CO. v. HOWLETT.

that he would need about 1,500,000 of brick for the buildings and the plaintiff then agreed to deliver the bricks at $18. Following this interview and after the delivery had started, a letter was sent by the defendant to the plaintiff to confirm the verbal order given. Enclosed with this letter was an order form in which the goods sold were described as "all brick required for the Petrolia Sugar Factory, to be delivered at such time as ordered by us. * * * This is to confirm verbal order given your Mr. Howlett. Price $18 per thousand." Some half million bricks were delivered and paid for. In October, 1923, the defendant wrote to the plaintiff that it had decided not to use brick for the main building and would not be able to take any more. The plaintiff sued for breach of contract, declaring upon the written order.

Held that, although there were several expressions of expectation on the part of the defendant as to the quantity of bricks to be taken, there was no warranty and no fraudulent representations; that the purchase was not of 1,500,000 bricks, but merely of such brick as the defendant should require and order for the building of the factory, and that there had been no breach of the contract.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario, reversing the judgment of the trial judge and maintaining the respondent's action. —Appeal allowed with costs.

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

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

G. W. G. Winnett for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The defendant company (appellant) was proposing to construct a sugar factory at Petrolia, to consist of a main building, sugar warehouse, boiler house, lime house and machine shop. The plaintiff (respondent) was a brick and tile manufacturer at the same place. By letter of 29th September, 1922, the defendant asked the plaintiff for a price for 500,000 bricks, f.o.b. cars at Petrolia, to be delivered that fall. On 30th September, the plaintiff wrote in reply, quoting a price of $19 per thousand, f.o.b. defendant's factory. A short time afterwards Mr. Schoen, the president of the defendant company, went to the plaintiff's brick yard and had a conversation with the plaintiff, of which the latter gives the following account:

He said, "Your price is too high." And I said, "I do not think so, Mr. Schoen. I have been getting $20; the Canadian Oil Company ordered brick from us and they gave us $20 for them." He said, "Oh well, they

1925

PENINSULAR SUGAR CO. v. HOWLETT.

NewcombeJ.

never bought only a few. This is practically—we will need a million and a half of brick. Look at the amount of brick we are using." He talked for a considerable time that way; anyway, before he left I asked him to make me an offer, "if $19 was too much make me an offer for them"; and he said "Well, I will give you $18 and give you the contract for all we need." "We will need about a million and a half," he said, "I have built these factories before and I know just what we will need," and he said "We will need that many anyway"; "but, (he says) you do not need to tell me now, you can sleep over it; let me know in a day or two."

On 28th October, the plaintiff wrote to Mr. Schoen that after considering his offer for $18 he had decided to meet him half way "which would be $18.50, f.o.b. sugar plant." While this letter was in transit Mr. Schoen called the plaintiff on the telephone. The plaintiff testifies to the conversation which then took place:

He asked me what I thought about the $18, and I said "We will split the difference, $18.50"; and he said "No, we will give you $18 and you can furnish all we need." He says "We will need about a million and a half." He said that quite a few times, so I told him "all right, I would accept the order."

The plaintiff says that he commenced to deliver "just a short time afterwards," before he received the written order to which I shall now refer. The date of the conversation by telephone, when the price was agreed upon, is not precisely fixed, but it must have been after the plaintiff's letter of 28th October, and before the letter of 4th November, which was written to the plaintiff by Mr. Schoen in the defendant's name as follows:

Enclosed please find purchase order no. 8 covering brick required for the Petrolia sugar factory. This is to confirm verbal order given you by the writer a few weeks ago. As we want to finish the sugar warehouse by Christmas at the latest, you are supposed to deliver at least 300,000 brick at such times that work may not be interrupted.

The purchase order enclosed was written on a printed form; I quote the material portion of it:

Nov. 4, 1922.

To F. Howlett:

Please ship to Peninsular Sugar Company, Petrolia, Ont., f.o.b. site, the following goods:

All brick required for the Petrolia Sugar Factory; to be of good quality kiln run brick, well burned and of uniform colour. Brick to be uniform in size and to be delivered at such time as ordered by us, so that our work may not be interrupted.

This is to confirm verbal order given your Mr. Howlett.

Price $18 f.o.b. site.

Peninsular Sugar Co., Limited,
Per A. Shoen.

The letter of 4th November, with the confirming written order, was received by the plaintiff, presumably in due course. There is no evidence of any answer to this letter, but the plaintiff says that

everything went along first class, there was no hitch came.

He delivered 504,000 bricks, for which he was paid, and I infer that these satisfied all the orders for delivery which he received. On 21st June, 1923, Mr. Schoen, in the name of the defendant company, wrote to the plaintiff:

As the board of directors of the Peninsular Sugar Company has decided not to start delivering brick again, until the arrangements for financing the company, which are at present pending are concluded, we hope that we will get to work again within two or three weeks.

You do not need to be alarmed about the amount of brick furnished us by J. J. Kerr & Co. as the amount is comparatively small.

There is no desire on our part to curtail your order, but as we could save a little money we purchased this brick. The amount still to be furnished by you is very considerable and am quite sure will keep you busy for quite a while.

And on 12th October, 1923, Mr. Schoen, in the defendant's name, wrote again to the plaintiff:

Kindly refer to our purchase order no. 8, dated November 4, 1922, covering our requirements in the brick for this plant.

Pleased be advised that we have now all the brick on hand that we need for the sugar-warehouse, boiler house, lime house and machine shop. It is not our intention to use brick on the main building, but in all probability will resort to reinforced concrete construction.

We therefore will not be able to take any more brick from your yards.

The action was commenced on 3rd November, 1923. The plaintiff, by his statement of claim, alleges that:

2. On or about the month of October, 1922, the defendant called for tenders for all brick needed for the erection of a factory in the town of Petrolia, estimated at one and a half million brick, f.o.b. their factory.

3. The plaintiff tendered to supply said brick at $19 per thousand.

4. Shortly after the plaintiff's tender was put in, the defendant company, through their president, offered to buy from the plaintiff their total requirements, estimated at one and half million brick, at $18 per thousand, which offer was accepted by the plaintiff, and on the fourth day of November, 1922, the defendant confirmed the said arrangement by giving the plaintiff purchase order no. 8, in the words and figures follows:

The purchase order, of which the material portion has already been quoted, is then set out in full, and, by the next following paragraph, it is alleged that:

5. In pursuance of the said order the plaintiff proceeded to manufacture and did manufacture, 850,000 bricks, of which 550,000 have been delivered to the defendant.

The defendant's letter of 12th October, 1923, is alleged as a breach of the contract, and the plaintiff claims damages for the breach.

1925

PENINSULAR SUGAR CO. v. HOWLETT.

Newcombe J.

The defence is that the defendant engaged to purchase from the plaintiff only such number of bricks, of the description specified, as it might require for its Petrolia sugar factory, to be delivered as ordered, and to be paid for at the rate of $18 per thousand.

There is no dispute about the facts. I have stated in substance all the material evidence for the plaintiff. None was introduced on behalf of the defence.

The action was tried before Riddell J. of the Supreme Court of Ontario who, after consideration, found that:

> The defendants agreed to purchase from the plaintiff the quantity of bricks they should require for their factory—there were several expressions of expectation but nothing binding the defendants to take more than they should require. No fraud is charged, and I remain of the opinion, expressed at the trial, that the plaintiff is not entitled to claim for more bricks than the defendants required, i.e., in good faith determined that they should use. On the main ground therefore the plaintiff fails.

It developed at the trial that the defendant, after the making of its contract with the plaintiff, had purchased for its factory 100,000 second-hand bricks from J. J. Kerr & Co., Ltd., which, if bought from the plaintiff, would have yielded him a profit of $400, and for that amount the defendant was held bound, but as to that part of the claim there is no question upon this appeal. These are the bricks, purchased from J. J. Kerr & Co., referred to in the defendant's letter of 21st June, 1923, above quoted.

The plaintiff appealed from the judgment of Riddell J.; his appeal was heard by the second Divisional Court, and Middleton J.A., pronounced the judgment, reversing the judgment of the learned trial judge. The learned justice of appeal was of the opinion that the contract between the parties was an oral contract for 1,500,000 bricks; that although when the written order went forward the expression used was "all brick required," yet, in view of the fact that to complete the building as contemplated 1,500,000 bricks were necessary and would be required according to the plans,

> the failure of the plaintiff to note and repudiate the change in the expression used is not sufficient to defeat the action. "All brick required" is ambiguous and may as readily mean, as the plaintiff contends, all brick required to complete factory building as per plans and specifications, as all brick which the defendant may choose to use after making changes in their plans and substituting concrete for brick, as contended by the defendants and interpreted by the trial judge.

The appeal was therefore allowed, and the damages were

assessed at $4,000, for which amount the court directed judgment to be entered.

I am disposed, notwithstanding the judgment of the Court of Appeal, for which I entertain very great respect, to accept the findings of the trial judge.

If by the passage which I have quoted from the judgment on appeal it be intended to suggest that the expression "all brick required" was used anywhere in the correspondence or negotiations between the parties with express reference to plans and specifications of the buildings which the defendant proposed to erect, with the intention thereby of affording a means to ascertain a number of bricks which were to be the subject of the order, I must observe that there is no such evidence in the case; neither is there any proof upon which it can reasonably be found that the defendant intended by any stipulation with the plaintiff to restrict or qualify its freedom of design and choice of materials for the construction of its buildings. It would seem improbable that, as a business transaction, the defendant company would make arrangements for the supply of bricks for its projected factory which, in the event of enlarged requirements of material in the course of the work, would leave these requirements unprovided for, and, in case of a diminution of the building project, would involve the company in liability for loss of profit on the material comprised in the reduction. No plans or specifications were produced, and it is not shewn that the plaintiff ever saw any. There was no warranty or representation as to them. The plaintiff knew that some of the works were in course of construction, and that he had an order for 300,000 or perhaps 500,000 bricks, and an estimate that about 1,500,000 would be required altogether. Was it anything more than, as alleged in the statement of claim, an estimate? It would have been very easy for the parties to stipulate for the sale and purchase of 1,500,000 bricks if they had been so minded. When, on 29th September, the defendant wanted to purchase 500,000 bricks it submitted a definite inquiry for so many; there is no proof of any calculations or evidence that any requirements were definitely ascertained in excess of 500,000. Apparently, in 1922, the company had in contemplation to use bricks for the structure of the main building, and it was for this reason

1925

PENINSULAR SUGAR CO. v. HOWLETT.

Newcombe J.

that Mr. Schoen said that they would need about a million and a half, and he fortified his statement by saying that he had built these factories before and knew just what they would need; it may be that the project of supplying the bricks for the main building influenced the defendant's consideration of the price; but there was no fraud, and therefore no representation the breach of which gave the plaintiff a right to damages. It is unlikely that the defendant would warrant the number of bricks to be used in the main building, which, consistently with the proof, had not even been designed; and, seeing that a warranty would have been given for no other purpose than to define or to ascertain the number of bricks to be purchased, it is remarkable that the parties would resort to this roundabout method when it would have been so easy to specify the number in the memorandum, if the company were willing to commit itself to a stated quantity. There is no warranty in the memorandum; the plaintiff made no objection to it as containing a fair statement of the terms agreed upon; he adopted and declared upon it in terms in his statement of claim. I see no ambiguity in its provisions. It calls for

all brick required for the Petrolia sugar factory.

There can be no requirement without a requiring will or intention, and it is expressly stipulated that the bricks are to be delivered at such time as ordered by the defendant. If one attempts to interpret the word "required" in an intransitive or passive sense, as the equivalent of "found requisite" or "necessary," immediately the difficulty is encountered that there is no standard set or defined by which a requisite or necessary quantity can be ascertained; neither the design nor the dimensions of the buildings nor the extent of the brick work have been made known, or are capable of definition or ascertainment, except according to the determination of the builder, and there is no proof of this, save the company's letter of 12th October, 1923, stating that it had then on hand all bricks needed for the structures mentioned, and did not intend to use brick on the main building, a conclusion which I think it was quite competent to the company to reach without incurring any obligation to the plaintiff.

There is a judgment of Lord Justice Bowen, *Fell* v. *The*

1925

PENINSULAR SUGAR CO. v. HOWLETT.

Newcombe J.

Queen (1), where a contract had been made between Her Majesty's Deputy Commissary-General and one Fell for the supply of mealies for the use of the troops in the Transvaal war. It was stipulated that Fell would provide and deliver for the use of Her Majesty's forces at Fort Napier, Natal, all such quantities of mealies as might be required for the period of twelve months from 1st April, 1881, and that the Commissary-General, on behalf of Her Majesty, would pay 11s. 9d. per 100 pounds. Fell, by petition of right, complained that the Government had purchased mealies from other sources during the continuance of his contract, but the learned Lord Justice held that it was for him to say as a judge what in his view was the meaning of the contract, and that, in terms, it imposed upon the Crown no obligation to take any mealies at all. The contract, he said, was in two parts, the first binding the contractor to supply all that was required, the other binding the Crown to pay for all mealies supplied. The question was whether the Crown had, by implication, made a contract certainly not made in terms. He pointed out that the contractor must necessarily receive orders for the quantities required, and he held that there was nothing in the contract, express or implied, binding the Government to take from the contractor all the mealies which might be wanted. See also *Churchward* v. *The Queen* (2); *The Queen* v. *Demers* (3).

It was found at the trial that there were in the negotiations several expressions of expectation, but nothing binding the defendants to take more than they should require. This finding commends itself to my judgment as just and reasonable and it should, I think, be restored. The rule enunciated by Holt C.J., that " an affirmation at the time of the sale is a warranty provided it appear on evidence to be so intended " was quoted with approval and followed in the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton* (4), and Lord Moulton said at the end of his speech that

> it is of the greatest importance in my opinion that this house should maintain in its full integrity the principle that a person is not liable in

(1) [1889] 24 L.J. (Notes of Cases) 420; 87 L.T. 202.
(2) L.R. 1 Q.B. 73.
(3) [1900] A.C. 103.
(4) [1913] A.C. 30.

1925

PENINSULAR SUGAR CO. v. HOWLETT.

NewcombeJ.

damages for an innocent misrepresentation, no matter in what way or in what form the attack is made.

I would allow the appeal with costs, including the costs of the appeal to the Appellate Division.

Appeal allowed with costs.

Solicitor for the appellant: *R. G. R. MacKenzie.*
Solicitor for the respondent: *J. W. G. Winnett.*

1925

*Dec. 31.

IN RE HUDSON FASHION SHOPPE LIMITED ..... } IN BANKRUPTCY

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

Appeal—Jurisdiction—Bankruptcy—Leave to appeal—Statutory rule—Delay—To enlarge or abridge—Bankruptcy Act (D) 9-10 Geo. V, rule 72

The provision contained in par. 1 of rule 72 of the Bankruptcy Act that "notice of an application for special leave to appeal shall be served on the other party at least fourteen days before the hearing thereof" being statutory, there is no jurisdiction in the Supreme Court of Canada or one of its judges to abridge the delay so fixed. Therefore a motion for leave to appeal from a judgment dated 1st December, 1925, although made returnable within the delay of thirty days provided in rule 72, was dismissed as notice of the motion had been served only on the 17th December, 1925. *In re Gilbert* ([1925] S.C.R. 275). complemented

MOTION for leave to appeal to this court in bankruptcy proceedings.

The Hudson Fashion Shoppe, Limited, was an incorporated company carrying on retail businesses in Hamilton and in London, Ontario. On May 22, 1925, an interim receiver in bankruptcy was appointed under an order of the court and took possession of both shops; and thereafter a final receiving order was made on June 1, 1925. The creditors subsequently appointed a trustee and inspectors. All goods not sold thus passed into the possession of the trustee. The Royal Dress Company, Limited, a manufacturing concern doing business in Montreal, Quebec, moved before a judge in the Ontario courts for an order and judgment annulling and resiliating for all purposes, as of right, the sale from that company to the insolvent company of

*PRESENT:—Anglin C.J.C. in chambers.

certain merchandise and for its immediate return and delivery to the applicants. The two main points for determination were: (*a*) was the contract of sale made in the province of Quebec, and (*b*) if made there, do the terms of art. 1998 of the civil code of that province apply to the sale and goods in question and entitle the unpaid vendors to revendicate the latter in the province of Ontario.

The trial judge held that the whole contract of sale was not made in Quebec and that the civil code of that province, having regard to the facts of the case, was not effective or operative in the province of Ontario (1). This judgment was reversed by the Appellate Division on the first day of December, 1925 (2).

The trustee then made a motion for special leave to appeal to this court. The motion was returnable before a judge of this court on the 31st day of December, 1925, being the last day of the thirty days allowed by rule 72 of the Bankruptcy Act for bringing on such a motion; but notice of the motion was served on the counsel for the Royal Dress Company only on the 17th day of December, 1925.

Upon hearing of the motion and after argument by counsel, Anglin C.J.C. in chambers pronounced judgment, dismissing the motion with costs, holding that notice of the motion had not been given at least fourteen days before the date of its return and that a judge of the Supreme Court of Canada was not empowered to abridge that period since it was fixed by a statutory rule.

Motion dismissed with costs.

Singer and *Schroeder* for motion.
Robinson and *Hill contra.*

(1) [1925] 57 Ont. L.R. 505. (2) [1925] 20 Ont. L.R. 203.

1925

*Mar. 3, 4.
*May 20.

HIS MAJESTY THE KING (DEFENDANT) . . APPELLANT;

AND

PRICE BROTHERS AND COMPANY, LIMITED (PLAINTIFF) . . . . . RESPONDENT.

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

Grant—Description—"A lake"—Expanse of water—Construction—Maps—Reliability as evidence—Proof of reputation—Sheriff's sale—Description of the property—Knowledge of buyer as to contents—Art. 1019 CC.—Arts. 688, 648 C.P.C.

A grant was made in 1693 by Frontenac, Intendant of New France and confirmed in 1694 by royal warrant of Louis XIV, King of France, upon the request of Augustin Rouer, for and in the name of Louis Rouer, his son, for the concession of a lake, or one lake (*"d'un lac"*) called Mitis, which discharged itself into a river of the same name, with one league of land all about the lake. This grant was and still is commonly known under the name of the seigniory of Lake Metis. According to the topography, it is not a single body of water which is to be found at the source of the River Metis, but three bodies of water, two of them being approximately of the same altitude above sea level and the third being of an altitude approximately eight feet above the other two; all three discharged naturally, from one to another by channels of flowing water which form no part of the lake expanse. At the time of the grant, these bodies of water were situated in a remote locality and uninhabited unless by Indians. After various changes of ownership, the respondent became the proprietor of the seigniory in 1922 and it then instituted a petition of right for the purpose of determining the extent of the property. It alleged that, at the time of the grant, it was not known that there was any difference of level between the three bodies of water and that what are now shown in the modern maps and known generally as three lake sections with connecting channels were, by the grant, considered and described as a single lake; and it concluded by asking for a declaration that the three bodies of water should be considered as "a lake" within the meaning of that term in the grant. In 1875, the seigniory had been sold under a sheriff's warrant to one B., the respondent's predecessor and the sheriff's deed described the property as follows: "all that tract of land forming and known under the name of seigniory of Lake Metis * * * with one league of land all around the said lake * * *." Prior to the sheriff's sale, from November, 1868, the provincial government had granted to the respondent's predecessors timber licences on two limits which, according to their description, included all the land which would be comprised within the boundaries of the seigniory if they were those as claimed now by the respondent to have been fixed by the grant of 1693; and the respondent's predecessors exercised their rights of cutting timber within these limits. At the trial, the respondent produced a number of maps which were admitted in evidence on its behalf: they came originally from various sources but were mostly selected from the collection of maps at the

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

Dominion Archives. The earliest are of the date of 1765 and in all these maps down to 1863, there is a single lake shown at the head of the River Metis.

Held, Duff J. dissenting, that the area of the grant must be limited to one lake, the upper lake, with the surrounding league, as, upon the evidence, the grant cannot be given an interpretation or construction of wider import than the restricted literal meaning of the language used carries with it.

Per Duff J. (dissenting).—The preponderance of evidence favours the view that, at the beginning of the 19th century and previously as far as known, the expanse of water, consisting of the upper, middle and lower sections, with connecting stretches, from the southern extremity of the upper section to the point where the river proper debouches from the lower section, bore the designation of Lake Metis, the whole expanse being treated as a *unum quid.*

Held, also, that maps generally, are of little or no value to prove the facts which they depict or represent, geographers often laying them down upon incorrect surveys or information and copying the mistakes of one another; but they may be useful as admissions against the party who produces them. Idington J. expressed no opinion. Duff J. *held* that although they may not be conclusive for the purpose of construing the grant of 1693, they are at least very cogent evidence in support of the contention advanced by a report of a surveyor in favour of the respondent as to the denotation of the name Lake Metis according to the contemporary usage of persons familiar with the locality.

Per Anglin C.J.C. and Mignault and Newcombe JJ.—Maps, when they have no conventional or statutory significance, should be regarded merely as representing the opinions of the persons who constructed them; they furnish at best no adequate proof, and none when it appears that they are founded upon misleading or unreliable information or upon reasons which do not go to establish the theory or opinion represented, and when they have not the qualifications requisite to found proof of reputation.

Per Anglin C.J.C. and Mignault and Newcombe JJ.—A map prepared by a private person, although filed with a provincial government, is not admissible as a public document against the Crown; it merely illustrates and the proof must come from sources outside the maps. *Mercer* v. *Denne* ([1904] 2 Ch. 534) disc.

Per Rinfret J.—At the time of the seizure and sale, the sheriff cannot have meant, nor could he have intended the public to understand that he had seized and was selling other than the only lake which then was known by the name Lake Metis, that is the body of water furthest from the St. Lawrence. The buyer B., who was perfectly aware of the whole situation, cannot have imagined that his sheriff's deed granted him rights over the other two lakes; and the respondent's predecessors, when they bought from B. in 1876, cannot have intended, in view of the licences held by them since 1868, that they were getting more than the land around the upper lake, not already covered by their Crown licences.

Per Anglin C.J.C. and Mignault and Newcombe JJ.—The report of a surveyor employed by one of the parties to a dispute affecting the title to land to survey that land, when made *post litem motam,* is not admissible as evidence, either of reputation or of fact; it serves only as notice of the claim.

1925

THE KING v. PRICE BROS.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court (1) and maintaining the respondent's petition of right.

The judgment appealed from was reversed (2).

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

Geoffrion K.C. and *Bouffard K.C.* for the appellant.

Wainwright K.C. and *Vien K.C.* for the respondent.

ANGLIN C.J.C.—I concur with Mr. Justice Newcombe.

IDINGTON J.—This is an appeal from the judgment of the Court of King's Bench, maintaining the judgment of Mr. Justice Gibson the learned trial judge who tried a petition of right presented by the respondent claiming, under and by virtue of a grant made A.D. 1693, by the Intendant of New France to one Louis Rouer, and confirmed in the following year by the Royal Warrant of the King, and successive assignments pursuant thereto of the rights so acquired, and including thereunder a great variety of instruments of which a clear detail is given by the said learned trial judge.

The grant was given of

un lac appellé Mitis qui se décharge dans une rivière du même nom, avec une lieue de terre de profondeur tout autour du lac qui est esloigné d'environ douze ou quinze lieues du fleuve St. Laurens, ensemble les Isles et Islets qui se peuvent trouver en iceluy, etc.

The claim now set up is that not only was there one lake granted thereby, but three.

After considering all the arguments addressed to us and reading all the evidence presented in the case, I, with great respect, am unable to reach the conclusion that such a grant so limited to one lake can be extended further.

It seems to have been impossible to present facts and surrounding circumstances of the time of the date of the said grant, or for seventy years thereafter, as I understand counsel for respondent to admit, which would help out their client's claim.

I am unable to hold, as we are in effect asked to do, that certain circumstances, which arose over a century later than said grant, can help us to give said grant an interpre-

(1) [1924] 3 D.L.R. 817. (2) Appeal to Privy Council.

tation or construction of wider import than the restricted literal meaning of the language used imperatively carries with it.

It seems to me that the evidence of Johnston, a witness of scientific attainments, and Joncas, a surveyor and civil engineer, who were sent to the district in question where Lake Metis is, with instructions to find and to report on the facts tending to determine whether only one lake, or two, or three, as the respective parties hereto had long been contending, and still contend for herein, is conclusive on the question of fact arising in our trying to correctly interpret and construe said grant.

Certainly if Johnston is correct in his estimate of the facts attested by the growth of the trees and vegetation in the locality in question there has been no material change in the levels of the water since the time of the grant in question, and, if Joncas is correct in the evidence he gives, tending to corroborate Johnston's view in that respect, and further that there was a fall of eight feet or more within a stretch of over or about a quarter of a mile in the water flowing from Lake Métis (properly so called) and the next lower lake, known as "Lac à la Croix," I cannot accede to the contention set up by the respondent. For I cannot conceive of a lake having such an outlet and fall having ever been confused with another lake, or river as forming part thereof.

I cannot conceive of people blundering into asserting that two lakes were in fact one.

Such seems to have been the case with the late Mr. Ballantyne, chosen by Mr. Rouville in 1835 to survey the territory he had then acquired under the above mentioned grant of 1693, and successive grants or divisions thereof, by which it was passed on by said grantee and through others to Rouville.

Rouville, apparently, knew as little as the rest of us about this acquisition, and employed Ballantyne as his surveyor to enlighten him.

In the report Ballantyne made he uses the following expression:—

> The whole extent of the lake, i.e., from the point A to the point B, is almost a perfect level.

I am not inclined to believe that Mr. Ballantyne was intentionally dishonest, but I cannot believe that he took

1925

THE KING v. PRICE BROS.

Idington J.

the same pains as either Johnston or Joncas, in 1923, or Breen, in 1870, who arrived at almost exactly the same results in making a survey of said outlet from lake Métis (properly so called) and demonstrating that there was a fall in the level of the water rushing out from that end of lake Métis which absolutely forbade, in my view of such things, anyone, taking due care, from reporting those three sections of water, draining the surrounding country and emptying the results into the so-called river Métis, as one lake.

Owing to the erection of a dam by respondent at the end of these three lakes the level between *Lac à la Croix* and *Lac aux Anguilles* in its natural state was not, and, I imagine, could not possibly be made as clear as the fall from the Métis, properly so called, to La Croix.

But how did the latter get the names they acquired and when?

We were told in argument that La Croix had a tradition attached to it but as I do not find the tradition or its origin clearly testified to by oral evidence, perhaps it resulted from the necessities of those visiting there for business or pleasure promoting in these later times what anyone so doing must have seen necessity for instead of the absurdity of calling the second and third sections, part of lake Métis.

I am quite confident that there must have been some of these people intelligent enough to recognize the absurdity of calling all those stretches of water by one name and as if one lake.

It takes time, under such conditions as existed in that far away district to have each spot given a name which adheres to it.

I have no doubt that as lake Métis, properly so called, was the chief body of water at all like a lake, in 1693, and that no reasonable person could then claim for the other sections, now claimed as lakes, any necessity for having a name given them, there was no grant made of any lake but that I have been designating the one properly so called.

Then the outlet from it at the river Métis was clearly a recognition of the lower parts of its outflow, as part of the river Métis.

Such a view may be said to be unfounded in the evidence. I reply thereto that for such speculation there is

quite as much evidence as for accepting in whole the report of Mr. Ballantyne, as if evidence.

I cannot accept that as evidence of anything but the fact that he had been so retained and so reported.

On that report we have much argument based, as if it proved the facts stated as such, therein, when they are not proven, and are only good for evidence of what occurred relative to the filing of same in the Crown records when all relative to the truth or falsehood of the statements made therein was expressly reserved for future determination.

I cannot, therefore, accede to the respondent's argument based on Mr. Ballantyne's statements of fact. Much less can I as helping to prove the actual facts and circumstances surrounding the execution of the original grant.

Nor can I assent to the suggestion that the commutation deed of 1853 extended, or ever was intended to extend, the rights originally granted.

The mere power given by the imperial statute of 1820, on which the said deed of 1853 rests, never contemplated more than a mere change of tenure.

I observe that the court below seems to have adopted the opinion of Mr. Justice Greenshields who wrote at greater length than some of the others writing; and he certainly seemed to start out in his conclusion as if the statements of Ballantyne were to be accepted as fact, instead of simply proof of his having, acting on behalf of his client Rouville, presented his opinions to the Government, and which were received for future consideration, but not as proven evidence. And that was so clearly put on record at the time as to rather lead one to doubt the sincerity of argument rested thereon.

That argument seems nevertheless to have pervaded the minds of the court below and, without that state of mind I, with great respect, submit that the judgment appealed from would not have been given.

As, with great respect, I cannot accept that view, or any other than as above indicated as briefly as can be at present, I am decidedly of the opinion that this appeal should be allowed with costs throughout, and the petition in question herein dismised with costs.

There are many other grounds taken by respondent which I am of opinion have no evidence to support them, and I have no time to deal with them herein, and yet they

1925

THE KING v. PRICE BROS.

Idington J.

are put forward with apparent confidence which the respondents could not have felt half a century, or more, ago, when accepting licenses from appellant, recognizing his rights, though under protest.

DUFF J. (dissenting).—The crucial question on this appeal is mainly a question of fact, which has been elaborately and ably examined by the trial judge, Mr. Justice Gibson, and by Mr. Justice Greenshields, in the Court of King's Bench. The powerful argument addressed to us for the Crown has not, in my opinion, seriously shaken their conclusion. The consideration of the question can be most conveniently approached by referring first to the report and plan of Ballantyne, of 1836. The report is, in part, in these words:—

Report of the survey of Lake Mitis, surveyed in November and December, 1835, by D. S. Ballantyne, D.P.S.

Pursuant to the instructions directed to me by J. B. Taché, Esq., dated the 8th October, 1835, I have surveyed the Lake Mitis situated about 36 miles south east of the river St. Lawrence, conformable to the plan and field notes hereto annexed, and in the manner hereafter mentioned.

Beginning at the south extremity of the said lake, towards the north extremity of said lake, in scaling the different courses and distances and taking intersections, to the entrance of the river Mitis. The parts surveyed by scaling are coloured on the plan in pink and those by intersections are coloured in yellow.

Remarks

The general features of the county around the lake is level for one mile and from thence begins rising hills.

The average depth of water in the expanded parts may be from 4 to 6 fathoms and in the contracted parts from 4 to 15 feet.

The average breadth of the expanded parts is from 24 to 16 arpens and the contracted parts from 4 to 24 perches. The contracted parts is dead water and the soil on the banks is alluvial for 3 to 5 arpens each side and from thence begins the flats, extending from half a mile to a mile and afterwards begins the rising ground.

Both in the expanded and contracted parts of the lake, the bottom is composed of sand and clay and the bed of the river Mitis, stoney. At the point B, where the river takes the name of river Mitis, the average breadth may be about 3 perches and very rapid, the average fall may also be about forty feet to one mile. The whole extend of the lake, i.e., from the point A to the point B is almost a perfect level.

The river discharging in the lake is small and run with a gentle current, and are not connected with any lakes.

The islands are of a sandy soil rather inclined to be loamy and elevated above the level of the lake about 3 to 4 feet, the timber growing on them is firs and white birch of a middle size.

The hunters and old settlers of Mitis and Rimousky that have often frequented those parts gives the appelation of Lake Mitis to the

whole extend, i.e., from the point A to B and the river takes the name of river Mitis at the point B.

From the features of the country its locality and the tenure of the title of concession, my humble opinion, is that the grant was made for the whole extend, i.e., from the point A to B for the following reasons:

When Mr. Rouer in 1693 made application for a grant of Lake Mitis, he certainly applied for the whole extend, as the aborigines of that part of the country, then and do now consider it to be all Lake Mitis, i.e., the whole extend from the point B to A and as also the south section only; could not induce any person to apply for a grant being such a distance from the St. Lawrence, and also the same reasons only for the second section.

If the intention of the grant was merely for one section, by giving one length in depth round either of the lakes one of the sections most evidently encroach on the other.

Trois Pistoles, 10 January, 1836.

D. S. Ballantyne, D.P.S.

The effect of this report is, when read in light of the plan, that, at the date of the report and previously, so far as known, among the hunters and settlers of Metis and Rimouski, the expanse of water, consisting of the upper, middle and lower sections, with connecting stretches, from the southern extremity of the upper to the point where the river proper debouches from the lower section, bore the designation of "Lake Metis"; the whole expanse being treated as a *unum quid*. The preponderance of evidence favours the view that at the beginning of the nineteenth century it was to this expanse as a whole that the term "Lake Metis" was applied.

Ballantyne's report was referred to Bouchette, the surveyor-general, and Bouchette, whose report is dated about six weeks later than the date of Ballantyne's, while personally not unwilling to accept the view advanced by Ballantyne, advised the executive that this should be subject to verification in the manner suggested by Colonel de Rouville, the owner of the seigniory, in support of whose application Ballantyne's report had been made and filed. De Rouville's application has not been found, and we are ignorant of the nature of his suggestions as to verification. About a month later, the surveyor-general was authorized by the executive to make Ballantyne's report and plan part of the records of the surveyor-general's office, it being understood that Ballantyne's survey was not to be construed as settling "conclusively" the boundaries of lake Métis. The object of Colonel de Rouville's application was, of course, to fix in principle the extent of the seigniory, by

1925

THE KING v. PRICE BROS.

Duff J.

establishing the identity of lake Métis within the meaning of the grant of Louis XIV, in 1693, and this was apparently the question intended to be reserved.

There is no evidence of any formal acceptance of Ballantyne's report and plan as correctly defining lake Métis for the purpose of giving effect to the grant of Louis XIV, except such as may be found in the grant of 1855 and the map of 1853 hereinafter mentioned. The learned trial judge seems rightly to have held that the dominating purpose of this last-mentioned grant was to effect a change of tenure, pursuant to the powers and duties created by the Act of 1822. This, of course, is not necessarily inconsistent with the existence of an intention manifested by that grant to accept Ballantyne's survey as correctly ascertaining the subject of the earlier grant, and rightly construed in light of the facts known to the Crown officials as well as to the grantees this grant of 1855 does appear, inferentially at all events, to involve a declaration upon that subject.

The description of the land which was the subject of the grant in the deed of 1855 is in the following words:—

* * * all that certain tract of waste and uncultivated land, lands and tenements known by the name of the fief and seigniory of the Lake Metis situate in the county of Rimouski in the district of Kamouraska heretofore forming part of the district of Quebec, which said lake, lying on the south bank of the river St. Lawrence, discharges itself into a river of the same name (Metis) emptying itself into the said river St. Lawrence and being at a distance of about ten or eleven leagues from the said river St. Lawrence, together with all the isles, islands and islets which may be found therein and one league of land in depth all round the said lake and the appurtenances bounded on all sides by the waste lands of the Crown.

In the original grant of 1693, the distance of the lake from the river had been given as from twelve to fifteen leagues. There appears to be little doubt that the figures given in each grant are intended to express the distance, reckoned according to the sinuosities of the river, and not in a straight line, and give the length of the river proper, so measured, from the lower end of the lake described as lake Métis to its embouchement at the St. Lawrence. For nearly twenty years before the grant of 1855, the Crown had been in possession of Ballantyne's plan and report, which had been official records of the department of Crown Lands. Ballantyne had reported the "distance" as "thirty-six miles." This was not adopted in preparing the description for the deed of 1855. No doubt in the

meantime more accurate information had been obtained upon this point; and the "ten or eleven leagues," mentioned in the description as the length of the river, accords with the fact as deposed to by Cimon (who, as the result of his measurements, gives the length of the river as thirty-three miles and a fraction), if "Lake Métis," in the description, is to be read as designating the whole expanse which is delineated and so designated in the plan and survey of Ballantyne. That this is the purport of the description is borne out by a map of the west part of Rimouski, which appears to have been returned, in 1853, to the two houses of the Quebec legislature, with a report by the department of Crown Lands. That map professes to give the boundaries of the seigniory; and the lake, as there delineated, obviously comprises all three sections.

This delineation depicts the river proper as debouching from the lake at a point which must obviously be the lower end of the lower section—the lake, as depicted on the map, discharging itself into the river at that point. In this respect, the lake and river as shown in this map, returned to the two houses of the legislature by the department of Crown Lands, answer the description in the grant of 1855, as well as in the grant of 1693, construed according to the contention of the respondents; but does not answer the description in either grant, construed according to the contention of the Crown. The length of the river given, moreover, ten or eleven leagues, is wholly irreconciliable with the contention of the Crown that lac Métis embraces the upper section alone.

The description in the deed of 1855, interpreted in light of these facts—in light, that is to say, of the documents of 1836, of this map of 1853, of the fact that ten or eleven leagues is an approximately correct statement of the actual distance, measured from the lower end of the lower section to the St. Lawrence, according to the sinuosities of the river, and of the adoption of these figures in substitution for the figures in the original grant—appears to afford satisfactory evidence that the Crown and its grantees under the grant of 1855 did accept, for the purposes of the deed, the claim advanced in 1836 as to the identity of the expanse of water designated by the name "Lake Métis."

Assuming that this is not conclusive for the purpose of construing the grant of 1693 (and leaving out of view the

1925

THE KING v. PRICE BROS.

Duff J.

surrender of the earlier grant involved in the acceptance of the grant of 1855), it seems at least to be very cogent evidence in support of the contention advanced by Ballantyne as to the denotation of the name "Lake Métis," according to the contemporary usage of persons familiar with the locality. The admissibility of Ballantyne's survey, plan and report has been challenged, but Bouchette's report upon them, and the letter of advice from the Governor's secretary to M. de Rouville, are indisputably admissible, and the documents to which they relate can unquestionably be referred to for the purpose of explaining them. Moreover, Ballantyne's report and plan, having been received as part of the records of the Crown Lands department, can be inspected for the purpose of estimating the significance of the map returned in 1853; and it is impossible to doubt that they can be referred to for the purpose of construing and applying the description in the grant of 1855.

Ballantyne's report and plan evidently remained a part of the official records in the Crown Lands office, and without official challenge as to their correctness, as representing the state of affairs existing in 1836, and they formed the basis of official and other maps and plans of Rimouski for nearly half a century after the grant of 1855. Ballantyne's boundaries of Lake Métis are reproduced in a series of maps, many of them official, beginning with 1863, and ending about the end of the century.

In 1870, a departmental map was issued, with the authority of the commissioner of Crown Lands and the assistant commissioner, in which the seigniory is shown as embracing all the three sections of the lake with the surrounding land; and again, in 1880, a departmental map, prepared by Mr. Taché, the assistant commissioner, exhibits the boundaries of the seigniory in the same way as the map of 1870. There are similar maps in 1893, 1898, 1904 and 1914. In 1895, for the first time, there is a map issued to the public in which the boundaries of the seigniory are traced in accordance with the view now advocated by the Crown; as circumscribing, that is to say, the upper lake alone. But again, in 1898, an official map, signed by the commissioner of colonization and mines, gives the boundaries of the seigniory according to the plan of Ballantyne. It is not until 1870 that we first hear of the

designations "Lac à la Croix" and "Lac d'Anguilles" as attaching to the middle and lower lakes as quite distinct sheets of water. The latter designation appears in none of the published maps produced, and the former—until 1914—only as an alternative designation in this legend, "Lac Milieu, ou Lac à la Croix."

Then there is another series of maps, beginning with the year 1798 and ending about the year 1830, in which the lake source of the river Métis is shown under the designation of "Lac Métis," and circumscribed by the boundaries of the seigniory, and delineated in such a way as to indicate an intention to include the whole lake source in the body of water so described. From the dimensions, moreover, of this lake source, as delineated on nearly every one of these maps, it must be inferred that the map-maker conceived the body of water delineated as having a much greater longitudinal extent than four and a half miles, the length of the upper lake as ascertained by Johnston's report. As a rule, this body of water is shown as having a length, when scaled, of from ten to fourteen miles. It is quite clear, from the legends on some of these maps, that the delineation of this body of water proceeded on no survey or report but from information gathered from people familiar with the locality.

These maps, however, afford some evidence that Ballantyne's view was in conformity with the general repute and the fair inference appears to be that, at the beginning of the nineteenth century, the whole chain of lakes was the subject designated by the term "Lake Métis," according to the usage of those familiar with the locality.

This, of course, is by no means necessarily conclusive as to the construction of the grant of 1693, but it is sufficient to establish a *prima facie* case in favour of the suppliants on the question of fact as to what was the subject or what were the subjects designated in 1693 by the appellation "Lac Métis."

Nothing in the maps of the eighteenth century is at all inconsistent with this. Against it there can be urged only this, namely, that the grant of 1693 itself describes the subject of it as "un lac," and that this forbids the adoption of a reading of the description as a whole which makes it embrace three distinct bodies of water, each of which might be described in technical, as well as in popu-

1925

THE KING v. PRICE BROS.

Duff J.

lar language, as " un lac." To this the answer appears to be that the phrase of the grant of 1693 " un lac appellé Métis " may not improperly be read as a mere paraphrase of the proper name, Lac Mitis; and if it be true that under this latter description the whole chain or expanse now in question was embraced, then effect ought to be given to the grant according to this nomenclature.

The appeal should be dismised with costs.

MIGNAULT J.—I concur with Mr. Justice Newcombe.

NEWCOMBE J.—I see no reason to doubt the conclusion of the learned trial judge expressed in the finding

that the identification, situation and extent of the lands referred to in the re-grant of 1855 are to be determined from the primordial title, to wit, that of 10th February, 1693.

It is the affirmative determination expressed in the next following paragraph of the judgment which is at the foundation of the respondent company's case:—

Considering that it appears that, at the time of the primordial grant, it was not known that there was any difference of level between the uppermost section of (sic) the other two, and that the intention of the grantor was not affected by the consideration of such circumstance, but, on the contrary, it appears that what are now shown on the maps and plans as three lake sections with connecting channels, were, by the primordial grant, considered and described as a single lake, regardless of there being separate sections, and regardless of there being a difference between the natural level of one section and that of the other two.

I accept the finding that according to the topography it is not a single body of water called " Lake Métis " which is to be found at the source of the river Métis, but three bodies of water; the learned judge says that

travelling up stream there is a first lake, now called *" Lac à l'Anguille "*; connected to it, by a rather widened channel, is, at a distance of about two miles further up stream, a second lake, now called *" Lac à la Croix "*; then further up, connected by the river at its normal width, is a third lake, the distance between the second and the third lake is about one-half mile, the third lake now called *" Lake Mitis."* The first and second lakes are approximately of the same altitude above sea level; the channel between them is sluggish; but the third lake is of an altitude approximately eight feet above the other two, and the stream in the connecting channel has a flow consequent upon the fall of eight feet in the half mile.

It is to be observed however by reference to the report of Mr. Johnston of the Geological Survey, who surveyed these lakes, that he gives the distance between the upper and middle lakes as fifteen hundred feet. He shows moreover that the levels of the middle and lower lakes have been raised by reason of the dam which has been constructed at the discharge of the lower lake, and that

the middle and lower lakes were formerly connected by a channel in which there was probably a small amount of fall, but because of the effects of the dam at the outlet of the lower lake, in raising the level of the water, the two lakes are now at the same level.

Mr. Johnston also found that

the difference in level between the water above and below the dam when the gates were closed varied from 9.7 to 10.2 feet, so that under natural conditions at times of low water there would be a difference of level of 12 to 13 feet, between the level of the water of the lower lake and that of the upper lake.

There are thus three lakes lying at different levels, and these discharge naturally, from one to another, by channels of flowing water which form no part of the lake expanses, and it serves only to misunderstanding and confusion to call these lakes three lake sections or separate sections. This misdescription finds its origin in the report of Mr. Ballantyne, a surveyor, who was sent by the proprietor of the granted rights to survey the seigniory in 1835, at a time when questions had arisen and were pending as between the proprietor and the Crown as to its extent. Unfortunately Ballantyne's survey and plan were permitted to find their way to the records of the Crown Lands office at Quebec, and, although the Government declined to accept or to act upon his report, and has never acquiesced in or become bound by it, it has nevertheless, as a document of reference, exercised a confounding influence upon the subsequent cartography and description.

The grant was made in 1693, upon the request of Augustin Rouer, for and in the name of Louis Rouer, his son, for the concession of a lake, or one lake (*d'un lac*), called Métis, which discharges itself into a river of the same name, with one league of land all about the lake, which is at a distance of about twelve or fifteen leagues from the river St. Lawrence, and the land is granted by the same description *à titre de fief*. This was less than ninety years after the establishment of the first settlement at Quebec. The lakes are situated at the head waters of the river Metis, a stream which flows into the St. Lawrence from the southward, 200 miles or more below Quebec, and which comes down from the height of land or watershed between the St. Lawrence and the Baie des Chaleurs, and has a length, exclusive of the lakes, following its sinuosities, of about 33 miles, or, in a direct line, about 10 miles less. The region was at the time uninhabited, unless by Indians, or at places on the St. Lawrence convenient for the fish-

1925
THE KING
v.
PRICE BROS.
NewcombeJ.

ery; it may be that it was due to the proximity of the natives to a settlement at the estuary that the river Métis derived its name. The chain of lakes, upper, middle and lower, including the connecting channels, is about fifteen miles in length; the upper lake, four and one-half miles; the middle lake, about five miles; the lower lake, about three miles, and the connecting streams about two and one-half miles. There is no evidence except from the grant, and such as comes from the maps to which I shall refer, as to what any of these lakes was called at the time. They were situated in a remote locality and probably not much was known about them. If they were named, it is most unlikely that the three lakes would have the same name; if one of them were named "Métis," it may perhaps have been the lower because the name is French, and the discovery would naturally come from the settlements on the St. Lawrence; or, the existence of the three lakes were known, it may have been the upper one, as the source of the river, which had received the name "*Mitis.*" The application of the name is thus left somewhat to conjecture, but certainly if the grantee before making his application had explored these waters, or caused them to be explored, to the head of the upper lake, and if it had been his intention to obtain a grant of the land surrounding all three, it is inconceivable that he would have described the area in his application as one lake and the surrounding league. He could not have ascended the channel which carried the discharge of the middle lake and was two miles in length without realizing that it was a river or stream, and not a lake, and he would not have thought of using the name "Lac Métis" as descriptive either of it or of the upper channel.

The inference to be drawn from the maps of the 18th and early 19th centuries, which were introduced by the respondent, is that, according to the knowledge or reputation of the time, there was only one lake on the river Métis, and this, as early at least as 1755, bore the name of Lake Métis, and it was from this lake that the river took its rise. I see no evidence to suggest that the name was applied to three lakes; and it is noteworthy that it is the upper lake, the source of the river, to which the name "*Métis*" adheres, and that we find the middle lake known

under the name of "*Lac à La Croix,*" and the lower one as "*Lac à l'Anguille.*"

Ballantyne on his plan puts the letter A at the head of the upper lake, and the letter B at the foot of the lower lake, and he says that the hunters and old settlers of Métis and Rimouski applied the name "Lake Métis" to the whole extent from A to B, and that the river takes the name of Métis at B. Moreover, he says that

> the aborigines of that part of the country then (1693) and do now consider it to be all Lake Metis, that is the whole extent from point B to A.

There are subjoined to Ballantyne's report under the title "remarks" a few paragraphs, the first group of which is descriptive, while the concluding group of paragraphs is evidently designed to set forth his reasons and argument for projecting the boundary lines of the seigniory around all three lakes. It is here that he refers to the hunters and old settlers of the time, and to the aborigines of 1693. In my view, neither one of these declarations or statements can have any probative effect, because of the partizan source from which they come *post litem motam,* and because, seeing that Ballantyne reports as a fact the use which the Indians made of the name "Lake Métis" in 1693, a subject upon which he could possibly have had no information, there is no reason to suppose that he was adequately informed when he tells of the application of the name by the hunters and old settlers of Métis and Rimouski. It is, I think, just, having regard to the occasion and context of Ballantyne's remarks, to consider them as put forward by the surveyor merely as argument to support the case of his employer, and not as evidence which can be permitted to influence the findings.

I am not aware of any principle upon which the self-serving statements in Ballantyne's report can be accepted as evidence for the respondent, either of reputation or of fact. His survey and his enquiries, if he made any, were for the purpose of establishing or supporting this very claim, which was then in controversy. In my view, Ballantyne's report serves as notice of the claim which it was prepared to advocate and may be used only for that purpose.

The respondent produced a number of maps which were admitted in evidence on his behalf. These came originally from various sources, but were mostly selected from

1925
THE KING
v.
PRICE BROS.
NewcombeJ.

the collection of maps at the Dominion Archives. The earliest are of the date 1755 and in all these maps down to 1863 there is a single lake shown at the head of the river Métis. In Holland's map of 1803, the lake is shown under the name "Lake Métis" surrounded by lines presumably drawn to represent the boundaries of the grant, but the lake is according to the scale somewhat less than ten miles in length and has an extreme breadth of upwards of five miles. It was not until 1863 that a map emerged showing a long narrow crescent-shaped lake corresponding somewhat to the lakes depicted upon Ballantyne's plan, but this map makes no attempt to separate the three lakes and shows all of more or less uniform width. Later maps follow Ballantyne's draft more closely.

Maps are from their nature of very slight evidence. Geographers often lay them down upon incorrect surveys or information, copying the mistakes of one another. This may be illustrated by reference to Holland's map of 1803, where it is said, under the figure of Lake Métis, surrounded by lines to represent the boundaries of the seigniory, that

these lakes are laid down not from actual survey but from information of travellers.

Now this drawing which is the first representation of a lake which is of any use for the purpose of realizing its size or shape was certainly laid down without any reliable information; there is no lake of its outline or size upon the ground, and yet the lake as shown here re-appears in subsequent maps with considerable regularity until 1863, a time considerably subsequent to Ballantyne's survey. It must be remembered that these are all maps of an unsurveyed district, and they are really of little or no value to prove the facts which they depict or represent; they may however be useful as admissions against the party who produces them; and, in this aspect, the inference which they support is that, until the time of Ballantyne's survey, everybody, both cartographers and the persons from whom they got their information, were under the impression that the river Métis had its source in one lake only. It may be that the description of the grant is apt or sufficient to include the upper or the lower lake as a lake, or one lake, called " Métis," which is the subject of the grant, but upon what principle the description can be extended to include more lakes than one I am unable to realize. I

see no convincing evidence that the three lakes were called "Métis;" but, if they were, how does that improve the respondent's case? If there were three lakes called "Métis" discharging into the river Métis the grant is surely void for uncertainty, or because it is impossible to apply the description to any defined subject matter; and, if it be only the lower lake which discharges into the river Métis, that fact, while perhaps sufficient to identify the lake as the subject of the grant, does not entitle the respondent to include also two other lakes called "Métis" which do not discharge into the river Métis.

Maps, when they have no conventional or statutory significance, should be regarded merely as representing the opinions of the persons who constructed them, they furnish at best no adequate proof, and none when it appears that they are founded upon misleading or unreliable information or upon reasons which do not go to establish the theory or opinion represented, and when they have not the qualifications requisite to found proof of reputation. Some of the later printed or coloured maps issued by the department of Colonization or of Crown Lands represent the seigniory in accordance with the respondent's contention, others adopt that of the Crown. These maps embrace large districts, if not the whole province; they are issued for departmental use. One realizes that publications, documents and information not infrequently find their way into the Crown Lands and other departments of the Government from which inferences may be drawn adverse to the public right. Claimants are vigilant to avail themselves of any consent which may be afforded to introduce to the records information which may serve their interests. Territorial limits and the boundaries of wilderness grants are, perhaps more frequently than not, lacking in definition or precision of statement, and when a general map of a province or district is in course of preparation, the attention of the departmental draftsman is not apt to be specially directed to careful consideration of the particular features or details upon which claims may depend, and sometimes, not unnaturally, particulars creep into the draft without due consideration of their use or trustworthiness. They are matters of detail, perhaps proper to be shown if verified, but not contributing to the main purpose of the work,

1925

THE KING v. PRICE BROS.

Newcombe J

which is not essentially concerned to verify them. These maps are prepared and issued not for the purpose of establishing facts or as admissions; they merely illustrate, and the proof must come from sources outside the maps. *Mercer* v. *Denne* (1). Neither the minister nor the Governor in Council can in the reasonable course of administration consider and conclude all the particulars or details which find place in a general map, or all the questions which, if the map import admission or proof, it might be used to determine. The map makers of the department use the information which is available, and they in turn, no matter how carefully they execute their work, are not proof against oversight or errors, the consequences of which might be very serious if these erroneous representations are to be taken as determining the facts with relation to pending claims. It is not in this manner that the Crown domain can be alienated.

It is a remarkable fact that whereas, according to the original grant, the distance of the lake called Métis is about 12 or 15 leagues from the St. Lawrence, the grant in free and common soccage of 1855, known as the commutation, gives a distance of about 10 or 11 leagues; and, although nothing else appears by the latter grant to indicate an intention to enlarge or to alter the area or location of the lands granted in 1693, there is no explanation or suggestion of any reason why the statement of the distance from the St. Lawrence is thus varied. It appears in fact that the outlet of the upper lake is about 30 miles from the St. Lawrence, and that of the lower lake about 23 miles, and it may have been that the draftsman of the grant of 1855 considered that, as the distance stated in the original grant was then known to be excessive, it ought to be reduced, and that he stated the distance of 10 or 11 leagues as his appreciation of the true distance, which, in fact, as will have been perceived, corresponds very closely to the actual distance of the outlet of the upper lake from the St. Lawrence. Certainly the distance of 10 or 11 leagues was not taken from Ballantyne's report which states that the lake Métis is situated about 36 miles southeast of the St. Lawrence.

It is the upper lake which the Crown identifies as the

(1) [1904] 2 Ch. 534.

lake Métis of the grant, and expresses its willingness to concede, and it would answer all the requirements not unreasonably if the stream between the upper and middle lakes be regarded as the beginning of the river Métis into which the lake discharges. On the other hand, the lower lake undoubtedly discharges into the river Métis, and if, at the time of the grant, it were called lake Métis, it would satisfy the grant in all particulars, except as to distance from the St. Lawrence. I do not think the grant necessarily fails or is utterly void for uncertainty, or that it is impossible to define the subject of the grant upon the ground. The object of the litigation is to extend the grant, which admittedly and upon the common view includes the upper lake, to the middle and lower lake, and I would reject that contention.

RINFRET J.—Price Brothers & Company, Limited, par sa pétition de droit amendée, conclut:—

That by the judgment to intervene herein your suppliant be declared the true and lawful proprietor and owner of that territory or tract of land, lands and tenements situated and lying within the counties of Rimouski and Matane, in the province of Quebec, commonly known under the name of the seigniory of Lake Metis and comprising that certain body of water at the head of the river Metis in the counties of Rimouski and Matane composed of three sections or parts known collectively as Lac Metis, together with all the isles, islands and islets which may be found therein, and one league of land in depth around the said body of water, together with all rights, members and appurtenances appertaining thereto or in connection therewith.

La compagnie demande, en outre, qu'il soit procédé à un bornage entre le territoire de la seigneurie et celui de la Couronne.

Les parties ont consenti à suspendre l'adjudication sur la question du bornage jusqu'à ce que le jugement final ait été prononcé quant à l'étendue de la seigneurie.

L'acte de concession original du fief à Louis Rouer remonte au 10 février 1693 et fut ratifié par Louis XIV, le 15 avril 1694.

Le plan de D. S. Ballantyne, que la compagnie désire faire accepter, porte la date du 10 janvier 1836.

M. Ballantyne était un arpenteur qui agit sur les instructions de M. Hertel de Rouville, le seigneur d'alors. Il prépara un rapport et un plan dont M. de Rouville voulut faire la base de ses réclamations relatives à la superficie du territoire compris dans la concession originale, et qu'il pria

1925

THE KING v. PRICE BROS.

Rinfret J.

la Couronne d'admettre pour les fins du bornage qu'il sollicitait.

La difficulté peut se résumer comme suit:

La concession originale décrit la seigneurie

Led lac appellé Mitis avec une lieue de terre de profondeur tout autour d'iceluy, à titre de fief.

Ballantyne, en 1836, rapporta qu'il existait en réalité trois nappes d'eau reliées par des bras de rivière; mais qu'elles étaient toutes trois presque sur le même niveau et qu'elles devaient être considérées plutôt comme un seul lac divisé en trois sections qui, de tout temps, avaient été connues par les chasseurs et les indigènes sous l'appellation commune du lac Métis.

Ce que la compagnie demande donc de déterminer, c'est la question de savoir si la désignation dans ses titres couvre les trois nappes d'eau conformément au rapport et au plan de Ballantyne, ou si elle n'en comprend qu'une seule; et, dans ce cas, laquelle doit lui être attribuée.

Il est avéré que les trois sections dont il s'agit sont maintenant connues sous les noms de Lac à l'Anguille, Lac à la Croix et Lac Métis, et que, par rapport au fleuve Saint-Laurent, le Lac à l'Anguille est le plus rapproché et le Lac Métis est le plus éloigné; le Lac à la Croix se trouvant, par conséquent, au milieu. La différence entre les superficies réclamées et concédées de part et d'autre constitue 52,477 acres et représente donc une valeur considérable.

A la fois parce que la compagnie est demanderesse, parce que le texte de son octroi (*"un lac"*) est de prime abord opposé à sa prétention, parce qu'elle réclame à l'encontre de la Couronne, et, au besoin, par application de l'article 1019 du code civil, il ne paraît pas y avoir de doute que le fardeau de la preuve lui incombe.

Le compagnie, dans sa pétition, a énuméré toute la lignée de ses titres depuis 1693; mais, à l'examen, il apparaît très clairement que l'on doit se borner à la considération de trois étapes seulement: la concession originale, la commutation de 1855 et le titre du shérif de 1875.

Il semble que c'est en rétrogradant de la dernière jusqu'à la première de ces étapes que l'on peut le plus avantageusement tirer une conclusion des faits et des nombreux documents qui ont été soumis.

La compagnie pétitionnaire a été incorporée sous le nom qu'elle porte en 1920. Elle succédait à une première com-

pagnie du même nom incorporée en 1904. Le titre en vertu duquel elle détient actuellement la seigneurie du Lac Métis est une vente qui lui a été consentie par la première compagnie le 17 mai 1921.

La première compagnie avait elle-même acquis la seigneurie, le 29 août 1878, d'un monsieur George W. Bartholomew, lequel tenait son titre comme adjudicataire du shérif en vertu d'un acte de vente en date du 6 avril 1875.

L'acte du shérif décrit la seigneurie comme suit:

All that tract of land heretofore forming and known under the name of seigniory of Lake Metis, namely, the said Lake Metis, which discharges itself into the river of the same name (Metis), with one league of land in depth all around the said lake, being distant about twelve or fifteen leagues from the river St. Lawrence, lying within the county of Rimouski, province of Quebec, with all the islands and islets which may be found therein, with all rights belonging thereto, appurtenances and dependencies of any kind, the whole now in free and common succage, bounded on all sides by the waste lands of the Crown.

Cette description a été conservée identiquement dans les titres subséquents; et c'est donc celle qui se trouve dans la vente en vertu de laquelle la compagnie actuelle est devenue propriétaire. Il convient d'ajouter que cette description est conforme à celle du procès-verbal de saisie et de l'avis de vente publié dans la Gazette Officielle.

D'après le code de procédure alors en vigueur (articles 638 et 648), la saisie d'un immeuble était constatée par un procès-verbal contenant

la description des immeubles saisis en indiquant la cité, ville, village, paroisse ou township, ainsi que la rue, le rang ou la concession où ils sont situés, et le numéro de l'immeuble, s'il existe un plan officiel de la localité, sinon les tenants et aboutissants,

et l'annonce dans la Gazette Officielle devait contenir également " la désignation de l'immeuble " de la même façon.

Il ne s'agit pas naturellement d'envisager la désignation, que le shérif a alors donnée à l'immeuble qu'il a saisi et vendu, au point de vue de l'irrigularité qu'elle pouvait comporter. La Couronne ne se prévaut pas de cette insuffisance. Mais la comparaison entre la désignation du shérif et la situation telle qu'elle était alors connue des parties nous semble être de la plus haute importance pour la décision que nous avons à rendre.

En effet, dès 1835, M. de Rouville avait soumis à la Couronne ses prétentions basées sur le plan et le rapport de Ballantyne. Elles démontrent que jusqu'à cette époque les droits du seigneur sur ce que nous appellerons les trois

1925

THE KING v. PRICE BROS.

Rinfret J.

sections en litige n'étaient pas reconnus. Or, ces prétentions ne furent pas alors accueillies. Sur réception de ce rapport et de ce plan, l'arpenteur général, M. Joseph Bouchette, fit rapport au gouverneur que l'éloignement de la seigneurie ne permettait pas de contrôler les données fournies par Ballantyne et recommanda de différer toute décision

until it was the intention of the Government to settle that portion of the waste lands * * * provided the survey of Mr. Ballantyne on which it is based shall have been found upon verification correct and satisfactory, and have been approved by His Majesty's Government.

Sur quoi le Secrétaire Civil écrivit, le 24 mars 1836, à M. de Rouville

that His Excellency will authorize that report and plan (ceux de Ballantyne) to form part of the records of the Surveyor General's office but with the understanding that whenever His Majesty's Government shall see fit to lay out townships to be bounded by the seigniory of Mitis and that the verification of the survey of the lake shall become necessary to establish the boundaries of that seigniory legally—you will be prepared to contribute the proportion of the expense to which you are liable by the law and usage of the province without reference to any disbursement which you may have made for the outline of the lake as laid down on Mr. Ballantyne's survey, which survey is not to be considered as conclusively settling the outline of the lake.

Ce n'est que le 9 mars 1870 que M. Thomas Breen, arpenteur provincial, reçut de l'assistant commissaire des terres instruction de procéder à l'arpentage de la rivière Métis,

the above stated survey having been deemed expedient preliminarily to establishing the position and extent of the seigniory of Lake Mitis in connection with the delimitation of the divisional line of boundary between that seigniory and the adjacent lands of the Crown in rear of the projected township of Massé.

Ces instructions recommandaient à M. Breen de contrôler l'exactitude du rapport de Ballantyne et de vérifier les variations de niveau des trois sections, ainsi que le cours des eaux dans les parties rétrécies par lesquelles ces trois sections communiquaient entre elles. On voit, par une lettre, en date du 23 octobre 1871, écrite par l'assistant-commissaire des terres au procureur général, que cette mission fut confiée à M. Breen parce que M. G. W. Bartholomew avait demandé, par l'entremise de son agent,

que le département des Terres de la Couronne vint à confier au plus tôt à un ou deux arpenteurs compétents, le soin d'établir les limites entre ce territoire et les terres adjacentes du domaine public.

M. Breen fit rapport:

Ayant trouvé un courant très fort dans la décharge du lac de la première section, ou Grand Lac Métis, j'en ai d'abord fait un relevé exact

puis constaté qu'il existe réellement entre les points A et B sur le plan une différence de niveau de huit pieds et demie (8½ pieds) faisant de ce lac un lac tout particulier et ne laissant le nom de lac Métis qu'aux lacs de la Croix et de la Pêche à l'Anguille dont le niveau ne varie que de quelques pouces d'un bout à l'autre.

La lettre de l'assistant-commissaire, M. Taché, à laquelle il vient d'être fait allusion, est un résumé complet de la situation jusqu'à la date de 1871. Elle soumet toute la question au procureur général parce que le commissaire des terres désire obtenir une décision

afin de pouvoir donner à M. Gauvreau (agent de M. Bartholomew) une réponse claire et précise sur la valeur des prétentions de M. Bartholomew.

Elle déclare que, depuis le dépôt aux archives du rapport et du plan Ballantyne

jusqu'à la demande de M. Gauvreau, il n'est plus question au département des Terres de la Couronne de la seigneurie du lac Métis, et les cadastres préparés par les commissaires seigneuriaux n'en font point mention.

Elle ajoute que M. Bartholomew est informé par son agent du résultat des opérations de M. Breen et que néanmoins, dans une lettre adressée, le 30 janvier 1871, à l'honorable commissaire des terres, il persiste à demander que la superficie établie sur le rapport de Ballantyne lui soit reconnue. M. Taché signale les " données gravement en erreur " du rapport de Ballantyne, et dit qu'il

devient nécessaire de déterminer lequel de ces trois lacs doit être reconnu comme étant le lac Métis proprement dit,

et qu'il lui semble

plus rationnel que le troisième, situé à la source de la rivière Métis, sur un plan élevé et portant de plus le nom de grand lac Métis, soit celui autour duquel la seigneurie devrait être limitée.

Nous ignorons si le procureur général a rendu une décision à la suite du rapport que lui a fait alors M. Taché. Le dossier ne le dévoile pas. Il reste acquis cependant que, dès cette époque, M. Bartholomew était en instances pour faire reconnaître des droits à ce que nous continuerons d'appeler les trois sections, et que non seulement le gouvernement refusait d'admettre ses prétentions, mais, au contraire, soumettait que son titre devait se borner au grand lac Métis, c'est-à-dire à celle des trois nappes d'eau qui était la plus éloignée du fleuve Saint-Laurent.

En outre, le rapport de M. Breen et la lettre de M. Taché font voir que, dès lors, les trois nappes d'eau étaient connues comme trois lacs différents, portant respectivement les noms de Grand Lac Métis, Lac à la Croix et Lac de la Pêche à l'Anguille.

1925

THE KING v. PRICE BROS.

Rinfret J.

Cela est d'ailleurs confirmé par un monsieur Israël Fontaine, témoin offert de la part de la compagnie, dont les souvenirs remontent au delà de l'année 1877, et qui parle même d'un quatrième lac connu sous le nom de Trépanier.

D'autre part, vers le 22 novembre 1868, le gouvernement de la province de Québec avait concédé aux auteurs de la pétitionnaire des licences pour l'exploitation de deux limites à bois dans le canton appelé Métis East; et, par leur description, ces limites incluaient tout le territoire situé de chaque côté de la rivière Métis, du lac à l'Anguille et d'une partie du lac à la Croix.

Du 22 novembre 1868 au 6 avril 1875, date de la vente du shérif, les auteurs de la compagnie Price étaient en possession de ce territoire et y avaient pratiqué la coupe du bois en vertu de ces licences qu'ils avaient obtenues de la province.

Au moment de la saisie et de la vente du shérif, par conséquent, ce dernier, en déclarant lui-même qu'il saisissait le territoire autour du lac Métis, ne pouvait pas avoir en vue de saisir et de vendre et ne pouvait donner à entendre au public en général qu'il saisissait et vendait autre chose que le seul lac qui était alors connu sous ce nom, à savoir celle des trois nappes d'eau qui était la plus éloignée du fleuve Saint-Laurent.

Et Bartholomew, qui fut à la fois le créancier saisissant et l'adjudicataire, qui avait été informé du rapport de Breen et des prétentions de la Couronne et qui ne pouvait non plus ignorer l'existence des licences octroyées à Price Bros., n'a pu croire que son acquisition du shérif lui conférait des droits à d'autres lacs qu'à celui qui était alors connu sous le nom de Lac Métis avec une lieue de terre de profondeur tout autour dudit lac. C'est l'interprétation la plus normale que l'on puisse donner au texte de la description dans le titre d'adjudication et à l'intention de l'adjudicataire, qui était alors parfaitement au courant de toute la situation. On ne peut pas supposer autrement que la Couronne et Price Bros eux-mêmes eussent laissé pratiquer une saisie et parfaire un décret dont l'effet eût été de transférer à l'adjudicataire la propriété sur un territoire qui, à ce moment-là même, était depuis 1868 et a continué jusqu'à 1876 à être subordonné à l'exercice des droits de coupe conférés par les licences.

Il convient d'ajouter que Price Brothers, lorsqu'ils achetèrent de Bartholomew, le 29 août 1876, la seigneurie du lac Métis dans les termes mêmes dont le shérif s'était servi dans son acte d'adjudication n'ont pu comprendre, en vue des droits de licences qu'ils exerçaient depuis 1868, qu'ils acquéraient un autre domaine que celui qui encerclait le grand lac Métis et qui n'était pas couvert déjà par ces mêmes licences qu'ils tenaient de la Couronne.

Bien entendu, nous ne voulons par là tenir aucune compte du fait que, postérieurement à leur acquisition de Bartholomew, Price Brothers continuèrent de payer une rente de droit de coupe au gouvernement; car ils prétendent avoir fait ces paiements toujours sous la réserve de leur protêt contenu dans une longue suite de correspondance,
ce que, dans son plaidoyer, la Couronne admet. Mais, de toute évidence, ce protêt ne peut dater que de l'époque de l'acte de vente qui leur a été consenti par Bartholomew. Il ne saurait avoir d'effet pour la période de temps qui s'est écoulée depuis l'octroi des licences, en 1868, jusqu'à ce qu'ils devinssent eux-mêmes propriétaires.

La Couronne s'appuie, dans son plaidoyer, sur l'existence de ces licences, en vertu desquelles Price Brothers ont reconnu son droit de propriété.

Il nous paraît que, dans toutes les circonstances qui ont entouré la vente du shérif, on ne saurait trouver une réponse satisfaisante à l'affirmation que l'adjudication à Bartholomew n'a comporté que le Grand Lac Métis et une lieue de terrain autour; de même que, dans l'intention des parties à l'acte de vente du 29 août 1876, à la lumière des faits tels qu'ils étaient alors connus, Price Brothers, les auteurs de la compagnie pétitionnaire, n'ont pu acquérir de Bartholomew un terrain plus étendu.

La description, aussi claire et aussi précise que possible, de l'immeuble saisi et vendu judiciairement, est une condition impérative de la loi. Le code fixe les éléments essentiels de cette description. Il l'exige non seulement pour les parties immédiatement intéressées, le saisissant et le saisi, dans le procès-verbal du shérif; mais pour l'adjudicataire, dans l'acte de vente; et pour le public en général, dans l'avis qui annonce cette vente.

Sans doute, dans le cas qui nous occupe, le shérif commence par les termes suivants:

1925

THE KING
v.
PRICE BROS.

Rinfret J.

Toute cette étendue de terre ci-devant formant et connue sous le nom de la seigneurie du Lac Métis;

mais ensuite il précise ce qu'il entend dire par là:

savoir: ledit lac Métis qui se décharge dans la rivière du même nom, avec une lieue de terre de profondeur tout autour dudit lac, qui est éloigné de douze à quinze lieues environ du fleuve St. Laurent.

C'est là une définition de la seigneurie adressée au public dans un avis et dans des documents officiels, et destinée à lui décrire la propriété saisie d'après les informations qu'on possédait en 1875. Cette définition devient encore plus importante du fait qu'elle est fournie au nom de ce même M. Bartholomew, qui est le créancier saisissant et qui deviendra l'adjudicataire, puis l'auteur de Price Bros.

Or, le rapport de Breen de 1870 et le témoignage de Fontaine établissent qu'en 1875, d'après la commune renommée et pour le public tout autant que pour le département des Terres, "ledit lac Métis" indiquait le lac le plus au sud, et les deux autres lacs étaient connus par d'autres noms. On savait également que la distance de douze à quinze lieues du fleuve ne pouvait s'appliquer qu'au seul lac supérieur, et que les deux autres ne concordaient pas avec cette désignation.

Le langage du procès-verbal de saisie, de l'annonce de vente et du titre de l'adjudication, interprété à la lumière des connaissances acquises dès 1875 et d'après le sens qu'il comportait à cette époque, délimitait la propriété vendue à une lieue de terre de profondeur autour du seul lac qui était alors désigné dans le public sous le nom de Métis.

Et il semblerait qu'on ne peut légalement soutenir une autre prétention; car si l'avis public de saisie et de vente avait étendu la description de la seigneurie au delà du seul lac du sud et du territoire circonvoisin, il est logique de conclure que la Couronne, qui réclamait la propriété, et Price Brothers, qui en étaient en possession comme détenteurs de licence, n'auraient pas manqué de faire opposition.

Les limites à bois sur lesquelles la Couronne avait octroyé le droit de coupe à Price Bros. sont minutieusement décrites dans les octrois de 1868. Elles couvrent tout le territoire du Lac à l'Anguille et partie du Lac à la Croix, de chaque côté de la Rivière Métis, et y sont catégoriquement indiquées comme suit:

being bounded by the west and south outline of the seigniory of Metis aforesaid, being at the distance of one french league from the lower end of Upper Lake Metis

dans la première; et comme suit dans la seconde:

The northerly outline of the seigniory of Metis Lake aforesaid being at a distance of one french league from the lower end of the upper Lake Metis.

Ces désignations circonscrivent la seigneurie à une lieue de profondeur autour du seul lac supérieur. Le résidu du territoire, qui fait maintenant l'objet de la pétition de droit, était donc alors en la possession de Price Brothers pour le compte de la Couronne et sans aucune objection de la part du seigneur. On ne peut assumer que le shérif aurait saisi et vendu *super non possidente*. La règle veut qu'il ait procédé régulièrement et qu'il se soit confiné à ce qu'il a trouvé en la possession du débiteur.

On est en droit de tirer de tous ces faits l'argument que, en 1876, le vendeur, Bartholomew, et les acheteurs, Price Bros., n'ont pu beaucoup se méprendre sur la portée du titre qui faisait l'objet de leur négociation. Et il n'est pas facile de comprendre comment Price Brothers, les auteurs des pétitionnaires, ont pu penser qu'ils acquéraient de Bartholomew le territoire autour des lacs à l'Anguille et à la Croix (pour partie), lorsque, depuis 1868, ils reconnaissaient pour ce même territoire le domaine supérieur de la Couronne dans des octrois de licences de coupe délimitant la seigneurie d'une façon précise et formelle.

Assumons cependant que (malgré le sens que les circonstances, connues en 1875, imposaient au texte de la description telle qu'on la trouve dans la vente du shérif), on doive quand même, au lieu de l'envisager comme un seul tout, en détacher les mots:

Toute cette étendue de terre ci-devant formant et connue sous le nom de seigneurie du Lac Métis.

Assumons qu'il faille donner effet à cette désignation vague et illégale, indépendamment du second membre de la phrase qui, d'après ce que nous avons dit plus haut, a pour but d'en définir et d'en préciser la première partie, et de la rendre plus conforme à la loi. Acceptons, pour les besoins de l'argument, qu'il en résulte une cession de toute la seigneurie quelle qu'elle fût, et remontons donc à la seconde étape: la commutation de 1855.

D'accord avec le juge de première instance, nous croyons que les lettres patentes alors émises n'ont pas eu d'autre but que de changer, conformément au statut impérial de 1822 (3 Geo. IV, c. 119), la tenure féodale en celle de franc et commun soccage. On y chercherait vainement une décla-

1925

THE KING v. PRICE BROS.

Rinfret J.

ration expresse que la Couronne et le seigneur ont entendu par là régler les questions qui étaient restées en suspens en 1835. Il est impossible d'y voir la moindre intention d'accepter les prétentions émises dans le rapport de Ballantyne.

En 1855, la Couronne n'avait pas encore fait contrôler l'exactitude de ce rapport. Cela n'est venu qu'en 1870, lors des instructions données à M. Breen. La correspondance échangée alors entre le département des Terres et M. Bartholomew le démontre.

Ces lettres patentes, il est vrai, modifient la description du lac autour duquel s'étend la seigneurie en en fixant la distance à " about ten or eleven leagues from the said river Saint-Lawrence "; mais en l'absence d'aucun éclaircissement sur le motif de cette modification, on ne saurait en tirer une conclusion satisfaisante.

Cette diminution de distance ne se retrouve pas dans les actes subséquents. La vente du shérif et celles qui ont suivi conservent la distance indiquée dans la concession originale. A aucun moment, les propriétaires successifs de la seigneurie n'ont prétendu que les lettres patentes de 1855 avaient défini leurs droits. Toute leur conduite incline dans le sens contraire. Ce n'est pas en s'appuyant sur ces lettres patentes, mais en se réclamant du plan de Ballantyne que M. Bartholomew s'est adressé au Commissaire des Terres, en 1871. Et la pétition de droit elle-même n'invoque pas ces lettres patentes comme base de ses revendications. Au contraire, elle affirme d'un bout à l'autre que les territoires respectifs de la seigneurie et du domaine de la Couronne n'ont jamais été délimités.

La commutation de 1855 ne peut donc aider à la solution que nous cherchons.

Il nous reste à considérer la première étape et à nous reporter à l'acte de concession originale.

Il se lit:

> Concédons par ces présentes, en pleine propriété à perpétuité. Le lac appellé Métis, avec une lieue de terre de profondeur tout autour d'iceluy, à titre de fief.

Ce texte n'est pas ambigu et il n'indique qu'un seul lac.

Mais la prétention de la compagnie pétitionnaire est que, en 1693, ce nom s'étendait à ce que Ballantyne a appelé les trois sections.

En plus, on fait remarquer que le préambule de l'acte de concession, qui récite la requête d'Augustin Rouer, parle d'un lac appellé Mitis qui se décharge dans une rivière du mesme nom. L'on ajoute que le lac supérieur ou plus au sud (qui reçoit dans le rapport de M. Breen le nom de Grand Lac Métis) ne se décharge pas apparemment dans la rivière Métis et que l'indication attribuée à la requête ne peut donc s'appliquer à cette dernière section.

La preuve ne permet pas d'admettre les prétentions de la compagnie pétitionnaire. Les rapports de MM. Joncas et Johnston, et les explications verbales qu'ils y ont ajoutées au cours de leur témoignage, établissent que " l'état des lieux au point de vue topographique " était lors de la concession originale, sensiblement le même que celui de l'époque actuelle. Il y avait, alors comme aujourd'hui, trois nappes d'eau à niveaux différents, dont chacune correspondait séparément à l'idée que le langage attribue au mot " lac ". La définition lexicologique d'un lac et sa marque caractéristique proviennent précisément de la fixité de son niveau. A proprement parler, le terme " un lac " ou " ledit lac " peut s'appliquer à chacune des trois sections, mais ne peut signifier les trois sections à la fois.

L'indication supplémentaire du préambule: " qui se décharge dans une rivière du même nom ", quand on l'examine de près, ne complique pas vraiment la situation. Les informations qui nous sont fournies par le dossier ne permettent pas de dire que l'une ou l'autre des étendues d'eau avait reçu un nom antérieurement à la concession; et il est tout aussi logique d'en déduire que le nom Métis aurait pu alors s'appliquer à la section nord autant qu'à la section sud. Si l'on tient absolument à ce que la rivière ne commence qu'à la décharge de la section nord, ce serait alors cette section qui aurait été concédée sous le nom de lac Métis, mais il n'y a pas de difficulté insurmontable à penser que, au contraire, la rivière elle-même sous le nom de Métis était considérée comme remontant jusqu'à la décharge de la section sud. En effet, les deux bras qui relient les trois sections constituent, dans la véritable acception du mot, une rivière. Les exemples sont fréquents dans la province de Québec (pour ne pas parler d'ailleurs) de fleuves ou de rivières qui, à certains endroits, élargissent leurs rives en nappes d'eau auxquelles on a donné le nom de lacs, sans que pour cela ces

1925

THE KING v. PRICE BROS.

Rinfret J.

fleuves ou ces rivières cessent de former une unité conservant le même nom en deçà et au delà de ces lacs. Nous ne voyons pas d'objection sérieuse à dire que la rivière Métis commençait alors et constitue encore aujourd'hui tout le cours d'eau qui s'étend de la décharge de la section sud jusqu'au fleuve Saint-Laurent et qu'elle est entrecoupée, en deux ou peut-être trois endroits distincts, par les lacs Trépanier, à la Croix et à l'Anguille. Il n'y a rien dans la preuve qui impose une conclusion contraire et qui suggère qu'on a donné un nom différent aux deux bras de rivière reliant ces deux ou trois lacs.

En plus, le préambule contient cette autre déclaration que le lac dont il s'agit

est esloigné d'environ douze ou quinze lieues du fleuve St-Laurent.

La section sud est celle qui le plus exactement concorde avec cette désignation.

Il en résulte que les termes mêmes de la concession, en donnant aux mots leur sens usuel, correspondent mieux avec le lac du sud et semblent exclure les deux autres sections ou lacs. On peut douter, dans les circonstances, qu'il fût loisible de chercher à étendre la portée naturelle de ces termes pour leur faire inclure trois lacs, alors que le texte n'en mentionne qu'un et que les deux autres ne remplissent pas les conditions de la description.

Il eut fallu, semble-t-il, une preuve très explicite pour faire adopter une interprétation aussi contraire aux mots employés.

On ne saurait trouver cette preuve dans les seuls plans ou cartes géographiques qui ont été produits et qui vont de l'année 1755 à l'année 1830. Sans discuter pour l'instant la valeur probante de ces plans, il apparaît à leur face même qu'ils ne prétendent en aucune façon représenter la région dont il s'agit. Ce sont plutôt des compilations sans caractère de précision. Quelques-uns d'ailleurs se chargent d'eux mêmes de nous avertir qu'il ne faut pas y chercher l'exactitude. Ils portent les légendes suivantes:

These lakes are laid down not from actual survey, but from information of travellers. (ou) These lakes are described from reports, not having been surveyed.

Il n'est pas même certain qu'on puisse leur accorder le poids restreint d'une preuve de commune renommée: car il est aussi possible que le lac Métis y ait été représenté comme un seul lac à raison même de la mention qui est faite dans

la concession du roi de France. Les prétentions émises dans la pétition de droit apparaissent pour la première fois dans le rapport de Ballantyne, en 1835, soit: cent quarante-deux ans après l'émission du titre du fief. Ce rapport ne peut être qualifié de document scientifique, quoiqu'il soit préparé par un arpenteur-géomètre. Toute la partie qui y concerne la question qui nous occupe est présentée en la forme argumentative et a pour but évident de soumettre une cause et d'appuyer une réclamation. Il est déjà curieux qu'il apparaisse par ce rapport même qu'à cette époque le seigneur de Rouville, au lieu de s'appuyer sur des droits qui auraient été affermis par le consentement public pour toute cette période de cent quarante-deux ans, invoque apparemment des motifs nouveaux pour se faire concéder une étendue de terrain qu'il ne possédait pas déjà.

En plus, l'erreur dans les niveaux, qui se trouve dans le document signé par M. Ballantyne, en diminue considérament la valeur. Il est clair que ce rapport n'est qu'une requête, et que ses données ne peuvent servir de base pour remonter à l'époque de l'octroi original et en déduire des présomptions qui permettent d'interpréter cet octroi dans le sens de la compagnie pétitionnaire. La même chose doit être dite des plans qui l'ont précédé.

Quant aux plans postérieurs à 1835, ce ne sont que des documents émis pour fins départementales. La compagnie ne prétend pas, et on ne pourrait admettre, qu'ils puissent constituer un titre en sa faveur. Ils ne sauraient, en tout cas, avoir l'effet de mettre de côté les réserves qui avaient été faites dans le rapport de l'arpenteur général Bouchette et dans la lettre du secrétaire civil en 1836, dont le seigneur de Rouville avait reçu avis. C'est la pétition de droit elle-même qui se charge de disposer le plus catégoriquement de la prétention qu'aucun de ces plans ou aucune de ces cartes géographiques pourrait équivaloir à une renonciation de la part de la Couronne ou à une admission des droits de la compagnie, en admettant dans presque toutes ses allégations essentielles que la Couronne a toujours maintenu son point de vue.

Il m'est impossible, pour toutes ces raisons, de concourir avec les jugements qui ont été rendus par la Cour Supérieure et par la Cour du Banc du Roi; et je conclurais au maintien de l'appel et au renvoi de la pétition de droit, en

1925

THE KING v. PRICE BROS.

Rinfret J.

autant qu'elle demande de faire accepter le rapport et le plan de M. Ballantyne comme représentant la propriété des intimés et comme devant servir de base au bornage que réclame Price Brothers & Company, Limited.

Appeal allowed with costs.

Solicitor for the appellant: *Pierre Bouffard.*
Solicitor for the respondent: *Thomas Vien.*

1925

*Nov. 6.
*Dec. 10.

MONTREAL ABATTOIRS LIMITED (PLAINTIFF) ..... APPELLANT;

AND

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

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

Statute—Municipal corporation—Amount imposed for inspection of abattoirs—Tax

A statute enabling a municipal corporation to "exact and recover from any person * * * operating * * * abattoirs * * *, in order to pay the salary of the health officers appointed * * * to inspect the cattle and other animals slaughtered * * * a sum, etc. * * *" provides for the imposition of a tax, and not merely for a right to recover compensation for services when performed.

So far as taxation is concerned, there is no vested right to the continuance of a particular tax or particular apportionment of taxes.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and maintaining the respondent's plea of compensation.—Appeal dismissed with costs.

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

Geoffrion K.C., Monty K.C. and *Angers* for the appellant.

Laurendeau K.C. and *Butler K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The Montreal Abattoirs Limited brought an action against the city of Montreal for the sum of $2,333.32 due by virtue of a contract of the 19th June, 1913,

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

for the removal, the incineration and destruction of carrions (charognes), that is to say all dead animals that have not been slaughtered or bled or that may have been slaughtered or bled for the reason that through sickness or otherwise they were in such conditions that they would have died within a short time * * *

The city admitted the claim but set up in compensation *pro tanto* an amount of $2,000 alleged to be due by the company for a tax imposed by a resolution of the 14th May, 1917.

The company answered in substance that the city had no right to claim this tax because it had not complied with the requirements of section 541 of its charter, under the authority of which such tax was stated to have been imposed, and had not fulfilled the conditions therein expressed or implicitly provided.

The company further submitted that, in exacting this tax, the city was disregarding and violating vested rights of the company.

The judgment in the Superior Court, at Montreal, maintained the contentions of the company; but, upon appeal, this judgment was unanimously reversed, except that, for reasons which will later be considered, one dissenting judge would have allowed compensation to the extent of $1,000.

Section 541 of the charter of the city of Montreal (as it stood in 1917) read as follows:

541. The city may exact and recover from any person, partnership, corporation or company operating public or private abattoirs situated in or in the vicinity of the city, in order to pay the salary of the health officers appointed by the council to inspect the cattle and other animals slaughtered at any such abattoirs, a sum of not more than one thousand dollars per annum for each public abattoir, and a sum of not more than two hundred dollars per annum for each private abattoir operated by any such person, partnership, corporation or company.

The amounts to be recovered shall be fixed every year by a resolution of the council, on a report of the board of commissioners before the first of July, and shall be payable on the first of September following.

The city proceeded to exercise the authority thus conferred in the following way.

On the 14th May, 1917, the Board of Commissioners passed a resolution

de fixer à $200 la taxe spéciale à exiger des abattoirs privés et à $1,000 celle à exiger des abattoirs publics, et de faire rapport au conseil conformément à l'article 541 de la charte.

A report in consequence was submitted to the city council, which, on the 23rd May, approved of it and resolved accordingly.

1925

MONTREAL ABATTOIRS LTD. v. THE CITY OF MONTREAL.

Rinfret J.

The company objects that the city neither appointed health officers to make the inspection of cattle and other animals slaughtered in the company's abattoirs, nor fixed any salary or remuneration for them; that it made no inspection of these abattoirs and consequently it has not, under section 541, the right to exact any amount for a service which it did not render.

The strength of this objection depends entirely on the nature of the imposition contemplated by the section referred to: whether it provides for a tax, or for the bare right to recover a compensation for services.

In our opinion, it provides for a tax.

In construing tax statutes, the substance and not the form is to be considered, so as to carry into effect the legislative intent. (Cooley—Taxation—4th ed. parag. 502). The substance of the enactment in section 541 is that the city may enforce from any abattoir a contribution towards its expenditure for the preservation of public health. It has no relation to the value of the services performed. It does not call for the organization of a special system of supervision. No obligation is placed upon the municipality to visit the abattoirs of the company or any such establishment in particular " situated in or in the vicinity of the city." The motive of the section is not to meet the request or to serve the interest of the company, but to help the city in carrying out a public purpose of prime importance. It is therefore a burden which comes properly under the definition of a tax (Dillon, Municipal Corporations, 5th ed., vol. IV, par. 1351; *Les Ecclésiastiques de St. Sulpice* v. *The City of Montreal* (1)).

It follows that the company cannot object to it on the ground that it receives no direct benefit from the application of its proceeds or that it is not as much benefited as others (Cooley, 4th ed., vol. 1, pars. 20 and 89).

Les revenus de l'état (says Montesquieu (De l'esprit des lois, Liv. XIII, c. 1er)) sont une portion que chaque citoyen donne de son bien, pour avoir la sureté de l'autre ou pour en jouir agréablement.

Taxes are sacrifices for the public good (Mill, Political Economy, vol. 11, pp. 370, 372) and for their contribution the government or the municipal corporation

renders no return of special benefit to any property, but only secures to

(1) [1889] 16 Can. S.C.R. 399.

the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. *Illinois Central Ry.* v. *Decatur* (1).

It is no defence to the collection of a tax that a ratepayer liable for it is not benefited by the expenditure of the proceeds of the tax. The distribution of these proceeds rests in the discretion of the municipal corporation; and if it is unwisely exercised, the remedy is with the electors and not with the court. Moreover, taxes are generally collected in advance of the requirements (and such is the case in Montreal charter, ss. 332 and foll.). The distribution is therefore quite independent of the levy of the tax, and the former cannot affect the validity of the latter (Cooley, pars. 89 and 1813).

While, however, these considerations on the legal aspect of the taxing power would be sufficient to defeat the contentions put forward by the company, it was shown in this case that there are, in the city of Montreal, by-laws concerning public health. The city keeps a regular staff of employees and inspectors, whose duties are to carry out the provisions of these by-laws. Their salary is voted every year in the budget; and it is not insignificant to point to the fact that, during the relevant years, the amount spent in that connection was substantially in proportion with the total imposts levied on the abattoirs.

The company further insists that by force of two contracts, to which the city was a party, it must be regarded as exempt from the operation of section 541.

The first contract was made on the 16th January, 1903, with the Montreal Stock Yards Company. It is not lightly to be assumed that the advantages therein conferred by the city, principally in respect of the establishment of a "live stock market for the city of Montreal," enured to the benefit of the appellant, since it purchased only the abattoir business of the Montreal Stock Yards Co. However, it is admitted that this contract concerns solely what is known as the western abattoir. Amongst other stipulations, it provides that

> the officials of said city shall at all times be at liberty to inspect the same, the said company also agrees to allow the meat inspectors of the city to inspect the cattle at all times whenever desired before being slaughtered

(1) 147 U.S. 190, at p. 198.

1925

MONTREAL ABATTOIRS LTD. v. THE CITY OF MONTREAL.

Rinfret J.

as well as to make inspection after the cattle have been slaughtered; the said meat inspector to be paid by the city.

The city does not seek to recover from the company an amount paid to its meat inspector to examine " the cattle brought to the yards of the company." It does not pray for the reimbursement of money spent for the inspection at the company's premises. It claims a tax levied on its abattoirs for public purposes.

There cannot be read into the contract an undertaking on the part of the city not to impose such a tax on the company. This would be tantamount to an exemption from taxation which can there be found neither in clear and unmistakable terms nor by necessary implication from the language used.

But the contract furnishes an additional reply to the contention of the company. The power to exact a charge from abattoirs situated in the city was not delegated to it for the first time in 1916, by the statute 7 Geo. V, c. 60, s. 10. It dates back to 1899, when the present charter of the city of Montreal was granted by the provincial parliament. The only material difference between the section as it was then enacted and the present section 541 lies in the maximum amount of the charge per annum. It was then $500; by the amendment of 1916, it was increased to $1,000.

As a result of what has already been said and by force of section 366 of the charter, this charge is a tax. At the date of the contract of 1903, the city had already full authority to levy this tax and, far from contracting itself out of that authority, it carefully avoided to make any express stipulation having the effect of excluding it.

As for the second contract, it is a deed of the 22nd July, 1885, between La Compagnie des Abattoirs de Montréal, The Dominion Abattoirs & Stock Yards Limited, the city of Montreal and l'Union des Abattoirs de Montréal. When this deed was passed, a certain by-law no. 129 was in existence and provided that charges for the slaughtering and dressing of animals at public abattoirs were not to exceed those contained in a subjoined tariff. It is claimed that the parties to this deed took this tariff into consideration when executing it, that they were entitled to rely upon receiving the fees mentioned therein and that the imposition of the tax under section 541 had the effect of reducing these fees and thereby infringes vested rights.

The appellant has certainly not made clear its right to invoke any benefit under the deed in question. Whatever privileges it may have acquired from The Montreal Stock Yards Limited by the contract already considered, it is manifest that the mere holding of a controlling interest, however extensive, in l'Union des Abattoirs de Montréal cannot have the effect of vesting the rights of that company in the appellant. But, moreover, there is in the contract of the 22nd July, 1885, no reference to by-law 129 or to the annexed tariff. The city did not guarantee that it would maintain the charges for slaughtering at the maximum rates fixed in such tariff, still less that it would never do any act of a nature indirectly to affect these rates. So far as taxation is concerned, there is no vested right to the continuance of any particular tax or particular apportionment of taxes. (Cooley, par. 134.) We therefore think that these contracts fail to support the appellant's contentions.

On the whole, the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Monty, Duranleau, Ross & Angers.*

Solicitors for the respondent: *Damphousse, Butler & St.-Pierre.*

LA CITE DE LEVIS (DEFENDANT).....APPELLANT;

AND

ARTHUR BEGIN (PLAINTIFF).....RESPONDENT.

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

Municipal corporation—Annexation—Condition—Construction of aqueduct —Discretion—Mandamus.

By an Act of the legislature (7 Geo. V, c. 85), the municipality of Notre Dame de la Victoire was annexed to the city of Lévis; and it was stipulated that the city, within two years from the date of the annexation, should provide systems of aqueduct and drainage for the annexed municipality. The city of Lévis introduced these systems into the populated part of the annexed territory, but did not extend them as far as the appellant's property, which was the most distant lot built upon and was situated at a considerable distance from the nearest house. The appellant, by way of mandamus, prayed for an order from the court to compel the city respondent to supply his house with the water and drainage systems.

1925

LA CITÉ DE LÉVIS v. BÉGIN.

Rinfret J.

Held that this special Act did not impose upon the city of Lévis the obligation to establish systems of aqueduct and drainage indiscriminately throughout the whole annexed territory, and had not deprived the council of the city of its discretion in exceptional cases. The respondent could not compel it to supply him by way of mandamus; the city of Lévis, in refusing to do so, having exercised, in good faith and without discrimination, the discretion conferred upon it by the general law as contained in the Cities and Towns Act and by its own charter.

Judgment of the Court of King's Bench (Q.R. 39 K.B. 545) reversed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court and dismissing 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.

De Billy K.C. for the appellant.
Bélanger for the respondent.

The judgment of the court was delivered by

RINFRET J.—M. Arthur Bégin, qui est propriétaire dans le quartier Villemay de la cité de Lévis, demande par voie de mandamus que la cité soit contrainte à faire faire les travaux nécessaires pour lui procurer le service de l'aqueduc et des égouts, tel que, suivant lui, elle y est obligée par le statut de Québec, 7 Geo. V, c. 85.

Ce statut a annexé le territoire de la municipalité de Notre-Dame-de-la-Victoire à celui de la cité de Lévis. Cette municipalité est par là devenue un quartier de la cité désigné sous le nom de quartier Villemay. Le préambule de cette loi d'annexion énonce

que le conseil supérieur d'hygiène de la province de Québec recommande que la dite municipalité soit annexée à la cité de Lévis, dans le but de la pourvoir d'un aqueduc et d'un réseau d'égouts.

C'est ce qui a donné lieu à l'insertion dans la loi de la disposition sur laquelle s'appuie M. Bégin et dont la partie essentielle à la décision de cette cause se lit comme suit:

La cité de Lévis introduira, dans les deux ans de ladite date de l'annexion, l'eau de l'aqueduc et construira des canaux d'égouts pour le drainage et posera des bornes-fontaines dans les rues et avenues du nouveau quartier.

(1) [1925] Q.R. 39 K.B. 545.

Toutes les rues et avenues du nouveau quartier seront aussi bien éclairées que celles des autres quartiers de la cité.

Dans l'année qui suivra l'annexion, ladite cité de Lévis établira dans ledit nouveau quartier un poste de police et de pompiers pour la protection dudit quartier.

La cité se défend en alléguant que les travaux d'un système municipal d'aqueduc et d'égouts sont toujours subordonnés à la discrétion du conseil, qui juge de leur nécessité, et qui doit tenir compte des difficultés particulières de la construction et des dépenses que ces travaux entraîneront en proportion des revenus qui en proviendront. Elle explique pourquoi, alors qu'elle a procuré ce service au quartier Villemay en général, elle a dû en omettre le requérant à cause de circonstances spéciales qu'il n'est pas nécessaire d'énumérer ici parce qu'elles relèvent de questions d'administration.

Elle prétend que la loi annexant la municipalité de Notre-Dame-de-la-Victoire ne la contraint pas à donner le service de l'eau et des égouts à toutes les maisons du nouveau quartier.

La Cour Supérieure a débouté M. Bégin des fins de sa requête. La Cour du Banc du Roi, composée de trois juges (1), a ordonné l'émission du bref péremptoire; mais l'honorable juge Rivard était dissident, étant d'avis que le jugement *a quo* devait être confirmé avec dépens.

Il en résulte que cette cause nous est maintenant soumise après un partage égal d'opinion entre les savants juges qui l'ont entendue dans la province de Québec. Cette divergence de vues n'existe cependant qu'à l'égard de l'interprétation qu'il faut donner à la disposition du statut d'annexion.

Il est reconnu que ni la *Loi des Cités et Villes*, à laquelle Lévis est subordonée, ni la charte de la cité, ne l'obligent à fournir le service d'aqueduc et de drainage à chacune des maisons ou dans chaque portion de son territoire, mais que le conseil a là-dessus une discrétion à exercer qui dépend de l'opportunité et des circonstances. *Thémens* v. *Cité de Montréal* (2). Nous avons d'ailleurs l'avantage de trouver dans la jurisprudence de la province de Québec deux arrêts qui se sont prononcés sur ce point dans des cas où il s'agissait précisément de définir les devoirs statutaires de la cité

(1) Q.R. 39 K.B. 545.

(2) [1922] Q.R. 61 S.C. 411.

1925

LA CITÉ DE LÉVIS v. BÉGIN.

Rinfret J.

de Lévis: *Juneau* v. *La Corporation de la Ville de Lévis* (1), où il a été jugé que:

Une corporation municipale autorisée par sa charte à faire des travaux d'utilité publique (dans l'espèce établir un système d'égouts), peut y procéder pour le tout à la fois, ou par parties, et dans les subdivisions de son territoire qu'elle juge convenable, le mode à suivre étant laissé à sa discrétion. Est partant valable, un règlement de la ville de Lévis pour établir un système d'égouts dans la ville, excepté dans un de ses quartiers.

Minister of Justice for the Dominion of Canada v. *City of Levis* (2), où lord Parmoor, prononçant le jugement du Conseil Privé, dit (p. 511):

There is no article which in terms imposes upon the respondents an obligation to give a water supply to any of the houses or other buildings within the area of supply and there is an absence of any general provision either as to the method or system of supply or as to the quality of the water.

Après avoir ainsi interprété les lois qui régissent la cité de Lévis, il en arrive à la conclusion que cette dernière ne pourrait refuser le service de l'eau aux propriétaires et occupants de maisons situées sur le parcours de l'aqueduc; mais il répète jusqu'à satiété que ce devoir se limite aux constructions " within the area of supply ".

Sans doute, les motifs de la décision du conseil doivent être sages, inspirés par la bonne foi et justifiés par les conditions particulières. Il ne saurait agir avec partialité. Il doit traiter sur un pied d'égalité tous les contribuables qui se trouvent placés dans une situation semblable. Il ne pourrait accorder le service aux uns et le refuser aux autres, si cette distinction entre les contribuables n'était pas basée sur de justes raisons. Dillon, Municipal Corporations, 5th ed., vol. 3, par. 1317.

Mais là s'arrêtent les obligations du conseil en vertu de la loi générale. Si aucune injustice n'a été commise, si aucun droit n'a été violé, les tribunaux ne doivent pas intervenir dans l'exercice de la discrétion des autorités municipales, ni mettre de côté la décision qui en a été la conséquence. *Mayor, etc., of Westminster* v. *London and North Western Ry. Co.* (3).

Ces principes, qui sont de jurisprudence constante, ont toujours été admis pour arrêter l'action des tribunaux dans l'emploi de leur juridiction ordinaire; à plus forte raison, doivent-ils recevoir leur application lorsqu'il s'agit d'une

(1) [1905] Q.R. 14 K.B. 104. (2) [1919] A.C. 505.
(3) [1905] A.C. 426.

procédure par voie de mandamus, qui est un bref de prérogative auquel le code de procédure civile (art. 992) permet de recourir seulement

lorsqu'il n'y a pas d'autre remède également approprié, avantageux et efficace.

En effet, l'octroi de ce bref dépend essentiellement de l'omission, de la négligence ou du refus par une corporation " d'accomplir un devoir que la loi lui impose ou un acte auquel la loi l'oblige ". Il ne saurait jamais être accordé lorsque la loi laisse la décision à la discrétion du corps public. High, Extraordinary Legal Remedies, 3ème éd., par. 24, 325, 418, 419; Dillon, Municipal Corporations, 5ème éd., vol. 4, par. 1489 à 1494; Tiedman, Municipal Corporations, par. 362; *Laberge* v. *Cité de Montréal* (1); *Pagé* v. *La Ville de Longueuil* (2); *Carrier* v. *Corporation de la paroisse de Saint-Henri* (3); *Gourdeau* v. *Cité de Québec* (4); *Villeneuve* v. *Corporation of the Parish of Saint-Alexandre* (5); *Trudeau* v. *Labelle* (6); *Marsil* v. *Lanctôt* (7).

Or, il n'est pas nié que, si la décision de ne pas prolonger le système d'égouts et d'aqueduc jusqu'à la résidence de M. Bégin est discrétionnaire, le conseil de la cité de Lévis, en l'espèce, a agi avec sagesse.

Voici comment la Cour Supérieure apprécie les circonstances spéciales de cette cause:

Il appert que la propriété du requérant est située sur la route de St-Henri et elle se trouve à l'extrémité de la ville sur cette route, savoir qu'elle est à environ 1886 pieds de la rue St-Georges; et il appert que les services d'eau et d'égout sont installés sur la route St-Henri seulement jusqu'à chez un nommé P. Carrier, savoir: une distance d'environ 830 pieds de la rue St-Georges et que chez Carrier les tuyaux sont à environ 4 pieds de la surface; que la propriété du requérant est située à environ 1050 pieds plus loin que chez Carrier et qu'il ne serait guère possible étant donné que le terrain du requérant est moins élevé que celui chez Carrier, de prolonger le tuyau d'égout actuel; que le coût d'installer les services jusqu'à chez le requérant serait de pas moins de $3,000 d'après les preuves ou requérant et de pas moins de $7,000 d'après les preuves le l'intimée; que la seule propriété à desservir au delà de chez Carrier serait la propriété du requérant dont la contribution serait environ $30 par année, que ce sont ces circonstances qui ont déterminé l'intimée de ne pas se rendre aux demandes du requérant;

Le juge de première instance ajoute ensuite

(1) 9 R. de J. 31.
(2) [1897] Q.R. 7 K.B. 262.
(3) [1906] Q.R. 30 S.C. 45.
(4) [1911] Q.R. 40 S.C. 388.
(5) [1912] Q.R. 42 S.C. 487.
(6) [1907] Q.R. 32 S.C. 42.
(7) [1914] 20 R.L. n.s. 237.

1925

LA CITÉ DE LÉVIS v. BÉGIN.

Rinfret J.

que la décision adoptée par (la cité) est une décision juste, adoptée de bonne foi, et que cette cour n'aurait aucune justification pour la mettre de côté à moins que le statut d'annexion ne l'y contraigne.

Il est confirmé en cela par le juge dissident en appel; et les deux juges qui ont formé la majorité dans cette dernière cour n'ont pas exprimé d'opinion contraire: leur conclusion quant au résultat du procès leur a été dictée par des raisons de droit. Ainsi posé, le problème se réduit donc à une simple question d'interprétation.

Nous ne croyons pas que la loi 7 Geo. V, c. 85, s. 6, ait voulu imposer à la cité de Lévis l'obligation d'installer le système d'aqueduc et d'égouts absolument partout dans le nouveau quartier de Villemay et qu'il ait donné au requérant un droit absolu de le demander. Sur ce point, nous partageons l'avis de la Cour Supérieure et de l'honorable juge Rivard, qui a exprimé son dissentiment en Cour du Banc du Roi. Nous ne pensons pas que cette clause exige que les tuyaux de l'aqueduc et des égouts soient construits dans tout le territoire du nouveau quartier.

La règle d'interprétation nous paraît être posée par Maxwell, On the Interpretation of Statutes (6th ed., pp. 148 and 149) d'une façon lumineuse:

> There are certain objects which the legislature is presumed not to intend. * * * One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning when used either in their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act, and as not altering the law beyond.

L'on est d'accord pour dire, qu'en vertu de la loi générale des cités et villes et de la loi spéciale de Lévis, cette cité avait une discrétion absolue pour décider où les canaux d'égouts et d'aqueduc seraient construits, et qu'il ne lui incombait en aucune façon de fournir le service d'eau et d'égouts à toutes les parties du territoire ou également à toutes les parties d'un même quartier.

La loi d'annexion oblige la cité de Lévis à introduire l'eau de l'aqueduc, à construire des canaux d'égouts pour le

drainage et à placer des bornes-fontaines dans les rues et avenues du quartier Villemay. Dans ce sens, elle a supprimé la discrétion que la ville possédait en vertu de la loi générale et de sa charte; et elle a imposé à la ville une obligation à laquelle cette dernière n'aurait pas autrement été soumise. La ville était donc forcée d'accomplir son devoir, selon l'expression de Dillon,

without discrimination between persons similarly situated and under circumstances substantially the same. (Dillon, loc. cit.).

Or, sous ce rapport, la cité de Lévis s'est conformée à l'injonction de la législature; elle a fait ce que la clause d'annexion lui ordonnait. Mais cette clause ne va pas au delà. Elle n'a pas enlevé la discrétion municipale quant aux cas particuliers et exceptionnels, comme celui de Bégin. Il s'agit ici d'une cause d'espèce, qui est différente de celle que les tribunaux ont eue à considérer dans l'affaire de *Mountain Sites, Ltd.*, v. *Cité de Montréal* (1). Dans cette cause, la loi déclarait que la corporation municipale devait ouvrir une rue, en indiquant le point de départ et le point d'arrivée de la rue. Le choix du parcours était laissé à la cité. La Cour de Revision a été d'avis que cela ne rendait pas la loi tellement vague qu'elle ne pût être exécutée, et qu'on ne pouvait admettre qu'une corporation municipale pût se libérer d'une obligation statutaire en prétextant qu'elle n'avait pas les moyens suffisants pour s'y conformer, lorsqu'il était prouvé qu'elle avait volontairement employé son argent à d'autres fins. Dans ce cas, les expressions étaient claires: la législature avait ordonné l'ouverture de la rue. On a décidé que la cité de Montréal n'avait plus de discrétion et ne pouvait pas se demander si cette rue était nécessaire dans l'intérêt public et s'il était opportun de dépenser à cette fin une somme considérable alors que, par là, beaucoup d'autres travaux impérieux seraient forcément retardés. La législature seule pouvait changer sa décision sous ce rapport.

Mais, dans le cas qui nous occupe, la législature n'a rien dit qui soit de nature à faire disparaître la discrétion particulière en ce qui regarde les circonstances exceptionnelles. Il n'entrait pas dans son intention de priver la cité de Lévis du droit qui l'autorisait, en vertu de sa charte et de la loi générale, à éliminer de son service les maisons qui se trou-

(1) [1917] Q.R. 52 S.C. 174.

1925

LA CITÉ DE LÉVIS v. BÉGIN.

Rinfret J.

vaient dans des cas distincts et différents des contribuables du quartier Villemay en général. Nous ne pouvons présumer que le législateur ait voulu enlever à la cité de Lévis ce pouvoir discrétionnaire; et, en l'absence d'une disposition claire et expresse, nous ne croyons pas, en l'espèce, devoir intervenir, surtout par le bref de mandamus, où

the duties sought to be coerced must be of so plain and unmistakable a nature as to leave no room for doubt.

High, Extraordinary Legal Remedies, 3e éd., par. 423; *State* v. *Supervisor of Washington County* (1); *Carrier* v. *Corporation de Saint-Henri* (2).

Pour ces raisons, nous croyons devoir maintenir l'appel avec dépens et rétablir le jugement de la Cour Supérieure.

Appeal allowed with costs.

Solicitors for the appellant: *Bernier, De Billy & Dorion.*
Solicitor for the respondent: *Arthur Bélanger.*

1925

*Nov. 23.
*Dec. 10.

PAUL BERGEON (PLAINTIFF) ..... APPELLANT;

AND

DE KERMOR ELECTRIC HEATING COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Practice—Action to impeach—Abandonment of grounds of—Interest—Status——Exchequer Court Act, R.S.C. (1906) c. 140, s. 23 and rule 16.

The appellant, to whom a Canadian patent upon an apparatus for electric heating had been granted in the interval between the commencement of his action and its coming on for trial, sought to impeach certain patents of the respondent company alleged to cover similar devices. At the trial, the appellant, in order to avoid an adjournment applied for by the respondent, offered to refrain from giving evidence in respect of certain foreign patents, and on these terms the trial proceeded. At the conclusion of the argument, the respondent for the first time raised the question of the appellant's status to maintain the action. The trial judge held that the appellant had adduced no evidence showing that he was a "person interested" within the meaning of rule 16 of the Exchequer Court Act and had no *locus standi;* and he accordingly dismissed the action.

Held that effect ought not to have been given to the respondent's objection without first giving the appellant an opportunity of producing the foreign patents as evidence to meet it.

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

(1) 2 Chand. R. 247. (2) Q.R. 30 S.C. 45.

1925

BERGEON v. DE KERMOR ELECTRIC HEATING CO.

Held, also, that, in the circumstances of this case, the appellant possessed a sufficient "interest," within the meaning of rule 16, to qualify him to maintain the action.

Judgment of the Exchequer Court of Canada ([1925] Ex. C.R. 160) reversed and new trial ordered.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the appellant's action.

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

Smart and *McDougall* for the appellant.
Sinclair K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—On the 5th of October, 1921, the appellant applied for a patent upon an apparatus for electric heating. A patent was granted on this application on September 23, 1924. By an action commenced on the 25th of February, 1924, the appellant sought to impeach certain patents of the respondent company alleged to cover devices similar to that which was the subject of the appellant's application. When the action came on for trial, in February, 1925, counsel for the respondent company applied for an adjournment, alleging the necessity of taking the evidence of certain witnesses in France touching the issue of priority raised by the appellant's allegation that the devices which were the subjects of the respondent company's patents were not new but had been previously invented by the appellant or by others. The appellant, with a view to facilitating the early trial of the action and in order to avoid an adjournment, offered to refrain from giving evidence in respect of certain patents set up in the particulars of objections, and on these terms the trial proceeded.

By s. 23 of the *Exchequer Court Act*, the Exchequer Court has jurisdiction in actions to impeach or to annul a patent or invention; and by rule 16 of the Exchequer Court Rules, such an action or proceeding may be by information, by a statement of claim filed by any person interested, or by *scire facias*.

At the conclusion of the argument at the trial, for the

(1) [1925] Ex. C.R. 160.

1925

BERGEON v. DE KERMOR ELECTRIC HEATING CO.

Duff J.

first time the respondent company raised the question of the appellant's status to maintain the action. The learned trial judge gave effect to the objection, without pronouncing on the merits of the action, holding that as he had adduced no evidence shewing that he was a "person interested" within the meaning of rule 16 at the date of the filing of the statement of claim, the appellant had no *locus standi;* and he accordingly dismissed the action with costs.

It is not seriously disputed that had the patents respecting which the appellant had undertaken, in the circumstances already mentioned, to offer no evidence, been put in evidence, no question could have arisen as to the appellant's status. The appellant's undertaking not to give such evidence was proposed solely with the purpose of meeting the respondent company's complaint that in fairness to him the trial ought not to proceed without giving him an opportunity to meet the evidence afforded by these patents as bearing upon the issue of priority of invention; it was, as all parties must have understood, proffered solely with a view to meeting this objection by excluding the patents as evidence upon that issue. Had it been suggested that the appellant's *locus standi* was attacked, the undertaking would unquestionably have been qualified or restricted by permitting the admission of these patents as evidence establishing such status or, more probably, by an admission of the appellant's status by the respondent company. In these circumstances, it seems to be quite clear that effect ought not to have been given to the respondent company's objection without, at all events, first giving the appellant an opportunity of producing these patents as evidence to meet it. The appellant's undertaking, which was given *alio intuitu,* could not have been regarded as standing in the way.

There is another ground, however, upon which the appeal should succeed. At the time of the trial, it is unquestioned that the appellant had a status to impeach the respondent company's patent, in virtue of the patent granted after the commencement of the action. It may be assumed, without deciding either point, that status at the date of the trial only is not sufficient, and that, for the purpose of conferring status, the patent in evidence ought not to be considered as relating back to the application for it,

which, as already mentioned, was presented before the commencement of the action. But, these assumptions made, the facts seem to be amply sufficient to establish the interest of the appellant at the critical date. The appellant, admittedly, is and was when the action was commenced, engaged in the design and manufacture of electric steam generators or water heaters,
and a trader in articles similar to the alleged invention which is the subject of the patents attacked. It is not suggested, and could not be suggested, in face of the correspondence in evidence, that the application (which, as already mentioned, had been granted before the trial) was a merely frivolous one or that it was presented *male fide* for the purpose of acquiring a colourable standing to impugn the respondent company's patent. Indisputably, the existence of the patents attacked was calculated directly to affect the appellant prejudicially in his business as a manufacturer and trader, and both in the prosecution of his application and in respect of the protection to be afforded him by his patent if his application for a patent should be successful. In these circumstances, there seems little room for doubt that the appellant possessed a sufficient "interest," within the meaning of rule 16, to quality him to maintain the action, and the appeal should therefore be allowed. A new trial is a regrettable necessity. The respondent company must pay the costs of the appeal forthwith. The appellant's costs of the abortive trial will abide the event of the new trial, while the respondent company's costs of the abortive trial will be borne by the respondent company in any event.

Appeal allowed with costs.

Solicitors for the appellant: *Fetherstonhaugh & Co.*
Solicitor for the respondent: *R. V. Sinclair.*

1925

*Nov. 10.
*Dec. 10.

J. F. R. LEDUC (PLAINTIFF) ..... APPELLANT;

AND

LA BANQUE D'HOCHELAGA (DEFENDANT) ..... } RESPONDENT.

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

Bank and banking—Cheque—Definition—Bill of exchange—Post-dated—Acceptance by a branch manager—Validity

The appellant sued upon an instrument bearing date the 2nd of July, 1919, which is in the form of a cheque for $4,000 drawn upon the respondent by P. payable to the order of the "Ministre de la Voirie." This instrument bore stamped upon it what purported to be an acceptance by the respondent bank, authenticated by what are admitted to be initials of a local manager, dated the 2nd of July, 1921, but placed on the instrument on the day on which it was dated.

Held, Rinfret J. dissenting, that such an instrument is not "payable on demand" and consequently is not a "cheque" within the terms of s. 165 of the Bills of Exchange Act.—To anybody into whose hands it may come before the arrival of the date of acceptance, the proper interpretation of it would be that the instrument had been treated by the bank and the drawer, not as a cheque, but as an ordinary bill of exchange and accepted as such.

Held also, Rinfret J. dissenting, that, although the acceptance of a cheque by a local bank manager is binding upon the bank, although at the time the drawer has insufficient funds to meet it, the appellant cannot recover, as no evidence has been adduced indicating that the acceptance of a bill of exchange is within the duties included in the ordinary conduct of a branch bank by its manager.

Per Rinfret J. (dissenting).—The Minister of Roads was a holder in due course and for value. By "accepting" the instrument, which was a cheque within the terms of the Bills of Exchange Act, the bank was binding itself unconditionally to pay the holder of the cheque on the date named in the acceptance.

Per Rinfret J. (dissenting).—The internal regulations concerning the authority of the manager of a branch of the bank are a matter between the latter and its local manager. A holder in due course and the public at large are entitled to act upon the apparent authority of this manager and cannot be affected by regulations unknown to them.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and dismissing the appellant's action.—Appeal dismissed with costs.

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.

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

Arthur Vallée K.C. for the appellant.
Aimé Geoffrion K.C. for the respondent.

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

DUFF J.—The appellant sues upon an instrument bearing date the 2nd of July, 1919, which is in the form of a cheque for $4,000, drawn upon the respondent bank by Achille Picard, payable to the order of "Ministre de la Voirie." This instrument bears stamped upon it a legend purporting to be an acceptance by the respondent bank, dated the 2nd of July, 1921 (two years later than the date of the cheque), and authenticated by what are admitted to be the initials of the manager of the respondent's branch at Beauharnois on the day on which the cheque is dated. This cheque (so called), for reasons about to be mentioned, cannot take effect as a cheque and must, in point of law, if it have any validity at all as against the respondent bank, be treated as an ordinary bill of exchange.

On or about the day of its date (2nd July, 1919), the cheque was deposited with the Minister of Roads as security for the performance by Picard of a contract with the municipality of Beauharnois for constructing a certain public road. The acceptance which it bears was stamped upon it by or by the authority of the local manager of the respondent bank, and initialed by him on the day of its date, for the purpose of enabling Picard, who was a customer of the branch, to comply with the terms of the contract, which required the deposit of a marked cheque for the purpose above mentioned. In point of fact, Picard at the time had no funds available for the payment of the cheque.

Picard's contract was transferred to his brothers, Picard & Frères, who failed to complete the work, and became insolvent. In May, 1922, an arrangement was made for the completion of the road by the appellant, and a contract was accordingly entered into between the appellant and the municipality, with the approval of the Minister of Roads, who was concerned as the head of the department having the administration and dispensation of moneys advanced by the province to municipalities for the construction of such works, under the authority of the "good

1925

LEDUC v. LA BANQUE D'HOCHELAGA

Duff J.

roads" legislation. It was, the appellant alleges, one of the terms of the arrangement that, on the completion of the work to the satisfaction of the "Ministre de la Voirie," the cheque deposited by Picard should be delivered to the appellant as consideration, in part, for the performance of his contract with the municipality. On the completion of the contract, the cheque was transferred, and payment having been demanded from the respondent bank, the bank disputed liability on the ground, among others, that the acceptance of the cheque by the local manager was fraudulent, and without authority. The question of the authority of the local manager to bind the bank by such an acceptance is the only question which need be considered.

A "cheque" is defined by the *Bills of Exchange Act* (s. 165) as "a bill of exchange drawn on a bank, payable on demand." The order in question, as accepted, is obviously not payable on demand, and consequently is not a cheque within this definition.

The authority of the local bank manager to mark a customer's cheque as accepted when the customer has funds sufficient to meet it, is, of course, not disputed; and as the acceptance of cheques in such circumstances is within the ordinary course of the manager's duty it may be assumed that such an acceptance would be binding upon the bank, even though in fact there were no such funds and no credit upon which the customer was entitled to draw, and although consequently, the manager, as between himself and his principal, the bank, by accepting the cheque in such circumstances, was acting in excess of his authority. But there is a wide difference between the acceptance of a cheque implying the existence of such funds or credit at the time of the acceptance, and the acceptance with which we are concerned on this appeal. A post-dated acceptance obviously does not imply the existence of any such funds or credit at the date of the acceptance. To anybody in whose hands it may come before the arrival of the date, it says nothing whatever upon that subject, and the proper interpretation of it would appear to be that the instrument, in form a cheque when drawn, has by the bank and the drawer been treated not as a cheque but as an ordinary bill of exchange, and accepted as such.

It may be assumed that the manager of a branch of a

chartered Canadian bank is placed in the position he holds to perform for the bank all acts appertaining in the ordinary course to the business of the branch. Acts performed within that sphere are, as between the bank and third persons, as a rule, the acts of the bank. Any special limitation of authority or special instructions do not affect third persons, unless they are aware of them. The ostensible authority of the manager extends to all such acts. Article 1730 of the Civil Code embodies the principle upon which the common law rule proceeds, and in this respect there can be no difference between the principles of law prevailing in Quebec and those of the common law.

It may be assumed that the Department of Roads received the cheque and accepted it as security without meticulous inspection of the terms of the acceptance. But the action is based upon the bank's acceptance, and the appellant can only succeed, if at all, in virtue of the rights of the Minister, since the instrument had been long overdue when it was transferred to the appellant. The Minister could only recover against the bank in this action upon the instrument as it is; and his rights can be no higher than they would have been if the exact form of the bank's acceptance had been noted. It may be added that the instrument on its face bore unmistakable evidence that it was drawn and accepted for the purpose for which it was in fact being used. If the department had observed the real nature of the instrument and had given thought to the matter at all, it must have been apparent that what was being offered as security for the performance of Picard's contract was a bill of exchange drawn for that purpose and accepted with the same purpose by the manager of the Beauharnois branch of the respondent bank; and the question for decision therefore is whether the acceptance of bills of exchange generally, for accommodation and otherwise, is within the ordinary course of the business of a branch bank, and as such, within the ostensible authority of the local manager.

It seems impossible, from the record before us, to give an answer to this question in the affirmative. An authority to accept cheques in the ordinary way is not, although a cheque is a bill of exchange of a particular kind, an authority to accept bills of exchange. *Forster* v. *MacKreth*

1925

LEDUC
v.
LA BANQUE D'HOCHELAGA

Duff J.

(1). No evidence was offered indicating that the acceptance of bills of exchange is one of the duties included in the ordinary conduct of a branch bank by the manager of such a branch. *In Re The Southport and West Lancashire Banking Company* (2), the Court of Appeal had to consider the question whether it was within the ordinary scope of a branch bank manager's authority to guarantee the payment of a draft. The question was answered in the negative; and according to the report in the Times Law Reports, Lord Justice Bowen said:—

> If the giving of the guarantee was not authorized by the memorandum of association the whole thing was at an end. His Lordship would not express any opinion as to the effect of the memorandum, but would assume that the transaction came within the general words. Still it did not follow that this was a kind of business which the directors had authorized the manager to engage in. In order to find out what the authority of a bank manager was (which was often a difficult matter) regard must be had to his position. Did the ordinary authority of a bank manager include such a transaction as this? This was a question of fact. There was no evidence that such a transaction was within the ordinary authority of a bank manager, and there was no evidence of any special authority.

This reasoning seems applicable to the question before us.

On this ground the appeal should be dismissed with costs.

RINFRET J. (dissenting).—Le chèque pour lequel l'appelant demande jugement contre la Banque d'Hochelaga a été souscrit à Beauharnois le 2 juillet 1919, à l'ordre du ministre de la voirie, et il a été certifié par la banque au moyen d'une griffe mécanique en encre grasse dont le libellé est ainsi conçu:

Banque d'Hochelaga
Accepté
Juil. 2, 1921
Beauharnois, P.Q.

Ce chèque avait ainsi été remis au ministère de la voirie par Achille Picard pour garantir l'exécution de son contrat avec la paroisse de Saint-Clément de Beauharnois

pour le pavage d'une route appelée chemin de la rivière Saint-Louis.

Le contrat n'a pas été versé au dossier; mais nous savons qu'il s'agit d'une convention en vertu de la Loi des bons chemins, 1912. D'après cette loi, les municipalités rurales, à la suite d'une entente au préalable avec le département de la voirie, reçoivent du gouvernement de la province le

(1) [1867] L.R. 2 Ex. 163. (2) [1885] 1 T.L.R., p. 204, at p. 205.

montant nécessaire à la confection de leurs chemins, après avoir adopté un règlement à cet effet. Les sommes requises pour l'exécution des travaux ordonnés sont payées de temps en temps par le trésorier de la province, sur un certificat du ministre de la voirie, ou de son sous-ministre, et les travaux sont exécutés par la municipalité sous la surveillance et la direction d'un officier du département de la voirie à ce autorisé par le ministre.

La municipalité doit faire au ministre un rapport mensuel, attesté sous serment, indiquant les travaux qui sont terminés, le montant détaillé des deniers dépensés et le montant des deniers qui ne sont pas encore dépensés. Toute balance de deniers non employés provenant des sommes fournies par le gouvernement doit être retournée

au trésorier de la province pour être versée au fonds consolidé du revenu de la province.

Le seul engagement financier de la part de la municipalité est de payer annuellement, à l'époque fixée par le trésorier de la province, trois pour cent d'intérêt sur la somme indiquée dans la résolution contenant la demande de fonds au gouvernement.

On constate donc que le département de la voirie est le principal intéressé dans le côté financier des contrats ainsi faits pour l'amélioration des chemins; et, bien que ni le contrat entre Picard et la corporation de Saint-Clément, ni le règlement et la résolution adoptés par cette dernière, n'aient été produits, et bien que chacun de ces documents eût sans doute été de nature à verser de la lumière sur la question, il est facile de comprendre pourquoi le chèque remis par Picard en même temps que sa soumission pour les travaux du chemin a été fait à l'ordre du ministre de la voirie et transmis à ce dernier par la municipalité. Ce chèque certifié prenait la place d'un cautionnement en argent.

Comme tel, il avait une considération suffisante pour lui donner validité (Loi des Lettres de Change, art. 53) entre les mains du ministre de la voirie qui, à l'époque où il l'a reçu, n'avait été notifié d'aucun vice affectant le titre du cédant (Loi des Lettres de Change, art. 56). Ayant reçu le chèque de bonne foi et contre valeur, le ministre en devenait un détenteur régulier; et la lettre écrite plus tard, le 13 avril 1923, par le secrétaire général de la banque ne pouvait affecter cette situation. Quelles qu'aient pu être

1925

LEDUC
v.
LA BANQUE D'HOCHELAGA

Rinfret J.

à cet égard les relations légales (que le dossier ne révèle pas) entre le ministre de la voirie et la municipalité, quelle qu'ait été la position du ministre vis-à-vis de Picard, ces relations ne concernaient pas la banque. En certifiant le chèque de Picard, et en l'acceptant (pour employer l'expression du libellé), elle avait pris un engagement sans condition de payer le détenteur du chèque à la date fixée dans son acceptation (Loi des Lettres de Change, articles 165 et 17).

Par conséquent, au moment où le détenteur du chèque l'a présenté à la banque, l'obligation de paiement par cette dernière n'était subordonnée à aucune restriction. Il semble, en tout cas, certain qu'il n'appartenait pas à la banque de soulever pour son propre compte la prétention que les conditions de la garantie ne s'étaient pas accomplies, et que le chèque n'était pas acquis au ministre, lorsque ni Picard, ni la municipalité n'intervenaient dans la cause pour soulever ce débat.

Il ne nous paraît pas, pour ces raisons, que les motifs donnés par le majorité de la Cour du Banc du Roi peuvent être accueillis. La banque ne pouvait refuser le paiement du chèque en invoquant des arguments qui ne regardaient que les parties au contrat pour travaux du chemin. Le département de la voirie alléguait que le montant du chèque avait dû être employé pour terminer les travaux. Ni le souscripteur, ni la municipalité ne contestaient cela. La banque, qui s'était engagée à payer sans condition, pouvait encore moins offrir cette défense. D'ailleurs les faits ne la justifiaient pas.

Pour en reprendre le récit:

Le 7 janvier 1921, Achille Picard transporta à Léandre Picard fils, Félix Picard et Clodomir Picard, tous ses droits dans le contrat avec la paroisse de Saint-Clément

et aussi le montant déposé par le dit Achille Picard au département de la voirie de la province de Québec pour garantir l'exécution des travaux ordonnés par les dits contrats.

Cet acte de transport déclare:

Que les dits Léandre Picard, fils, Clodomir et Félix Picard se sont portés cautions pour le dit Achille Picard à la Banque d'Hochelaga, de la ville de Beauharnois, pour permettre à ce dernier de donner les garanties exigés par le département de la voirie de la province de Québec, et aussi pour lui aider à obtenir les fonds nécessaires pour faire le chemin.

Il déclare également qu'Achille Picard a cédé à la Banque d'Hochelaga tout montant qui pourrait lui être dû par la paroisse de Saint-Clément, pour garantir la banque des

montants

qu'elle pourrait fournir au dit Achille Picard pour la confection du chemin.

Ce contrat fait partie des pièces produites à l'enquête; mais l'appelant n'a pas tenté d'en savoir davantage de la banque; et cette dernière n'a fourni, par la suite, aucun éclaircissement sur les déclarations qui précèdent. On chercherait en vain dans le reste du dossier une allusion aux garanties que la banque aurait obtenues pour permettre à Achille Picard de fournir son cautionnement au département de la voirie.

On constate cependant que Léandre Picard fils et ses deux associés étaient devenus les cessionnaires du montant déposé par Achille Picard entre les mains du ministre de la voirie et que, par contre, ils s'étaient chargés

de payer à la Banque d'Hochelaga les montants avancés au dit Achille Picard et à cette fin de respecter le transport qui a été fait à la banque par ce dernier.

La corporation de Saint-Clément avait consenti à la substitution de Léandre Picard fils et al. à Achille Picard, sans libérer Achille Picard de ses obligations, ni perdre aucun de ses droits en garantie.

Plus tard, Léandre Picard fils, Félix Picard et Clodomir Picard firent faillite et renoncèrent au contrat. Achille Picard refusa de le reprendre, ce dont d'ailleurs il paraissait incapable, et l'entreprise fut confiée à l'appelant par la municipalité le 26 mai 1922.

La résolution du conseil municipal de Saint-Clément, octroyant à l'appelant la complétion du contrat, devait être approuvée par le ministre de la voirie. Ce dernier a témoigné comme suit:

L'une des considérations de la terminaison des travaux par Leduc était que s'il terminait les travaux, aussitôt qu'ils seraient acceptés par le département, je lui remettrais ce chèque en considération de l'exécution des travaux, comme partie du prix.

Ailleurs, il dit:

C'était la condition essentielle pour la complétion du chemin.

Cette convention n'avait rien d'incompatible avec le contrat donné à l'appelant par la corporation municipale; et il a été prouvé, comme il avait été allégué, que le montant représenté par le chèque a été nécessaire pour compléter le chemin, qu'il a été employé dans ce but, et que le chèque a été, en conséquence, remis à Leduc par le département de la voirie.

L'appelant a tous les droits du ministre de la voirie, et la

1925

LEDUC
v.
LA BANQUE D'HOCHELAGA

Rinfret J.

question est de savoir si la banque eût pu refuser le paiement du chèque à ce dernier. La raison qu'elle invoque pour justifier son refus est qu'au moment où le timbre d'acceptation a été apposé sur le chèque, Picard n'avait pas en dépôt des fonds suffisants pour le rencontrer; que, en plus, le timbre d'acceptation

pouvait au plus signifier une acceptation dans deux ans à venir

et que cet engagement de la défenderesse

était *ultra vires*, illégal et en dehors des opérations ordinaires des banques.

Le chèque a été certifié en 1919, et c'est la *Loi des Banques* de 1913 qui s'applique (3-4 Geo. V, c. 9). Par l'art. 76,

> La banque peut,—
> (*a*) ouvrir des succursales, agences et bureaux;
> (*b*) faire le commerce des espèces et lingots d'or et d'argent;
> (*c*) faire le commerce de l'argent, en escompter et prêter, et faire des avances sur la garantie de lettres de change, billets à ordre ou au porteur, et autres effets négociables, ou sur la garantie des actions, obligations et débentures de corporations municipales et autres, qu'elles soient garanties par hypothèques ou autrement, ou sur celle des effets publics et autres du Canada, des provinces, du Royaume-Uni ou de l'étranger; et
> (*d*) faire telles autres opérations qui se rattachent en général au commerce de banque.

Une banque est, entre autres choses, un prêteur d'argent. Elle fait le commerce de l'argent. Ce commerce comprend l'acceptation ou l'émission, en échange d'argent, d'effets négociables en vertu desquels la banque reconnaît son obligation de payer le détenteur.

Il est d'usage courant, dans la province de Québec; mais, au besoin, la preuve démontre que les banques acceptent des chèques sans qu'il y ait de fonds pour les payer et mettent ainsi le compte de leur client à découvert.

C'est une forme d'escompte * * * Au lieu de lui faire une avance ou un escompte sur billet, on le fait sous cette forme-là, en le laissant soutirer son compte.

Cela se faisait à la Banque d'Hochelaga; et, en particulier, à sa succursale de Beauharnois.

Il est également de pratique universelle pour les banques sur le continent américain de certifier des chèques, en y apposant

une mention signifiant que le chèque est bon pour la somme à concurrence de laquelle il a été tiré.

Cette pratique n'est guère répandue en France et elle est différente du procédé connu en Angleterre sous le nom de "marking of cheques" et qui

consiste, lorsqu'un chèque est présenté à la banque chargée de l'encaisse-

ment trop tardivement pour parvenir utilement à la chambre de compensation à laquelle elle est affiliée, à faire revêtir le titre par le banquier tiré de la mention *Bon à payer* destinée à attester que le chèque sera payé le lendemain.

(J. Bouteron, Le Chèque, pp. 341-2; Grant, Law of Banking, 7e éd., pp. 42-43; Paget, The Law of Banking, 3e éd., p. 190 et suiv.).

La pratique de " post-dater " un effet négociable ou de lui donner une acceptation " restreinte quant au temps " est sanctionnée par la loi (*Loi des lettres de change*—Arts. 27d et 38c) et il n'y a donc, dans le chèque accepté sans fonds et pour une date ultérieure, rien d'anormal, d'irrégulier ou d'illégal.

En l'espèce, cette date reculée de deux ans était même assez logique et naturelle. On savait que le chèque était destiné à fournir un cautionnement pour des travaux d'une certaine durée. Il était possible que le chèque ne serait jamais encaissé. Il était, au moins, vraisemblable que les fonds qu'il représentait ne seraient pas requis avant longtemps. En fait, on n'en a demandé le paiement à la banque que le 26 novembre 1923. En le marquant payable le 2 juillet 1921, la banque s'assurait qu'elle ne serait pas appelée à débourser les fonds avant deux ans. Tout ce qu'elle avait à faire était de prendre ses mesures pour honorer ce chèque lorsqu'il serait présenté pour paiement à la date de son acceptation ou subséquemment à cette date. La transaction qui nous occupe était donc strictement dans les limites des pouvoirs d'une banque; et l'intimée ne saurait prétendre qu'un tel engagement de sa part, par l'intermédiaire d'un officier dûment autorisé, serait *ultra vires*.

Il ne reste plus qu'à considérer si elle peut se soustraire à cet engagement sous prétexte que l'acceptation du chèque aurait été faite par le gérant d'une succursale contrairement à l'autorité restreinte qui lui est conférée par les règlements internes de la banque.

Ces règlements n'ont pas été mis en preuve. La banque s'est contentée d'offrir le témoignage du gérant actuel de sa succursale à Beauharnois, qui a déclaré qu'une acceptation de ce genre ne s'était jamais présentée à sa connaissance et qu'un gérant de succursale—comme celui qui avait certifié le chèque—n'avait pas le droit de faire de son chef une avance de cette importance sans en référer au bureau principal.

1925

LEDUC v. LA BANQUE D'HOCHELAGA

Rinfret J.

Mais l'expérience du témoin offert par la banque est évidemment très limitée et ne saurait faire preuve de l'usage et de la coutume dans le commerce de banque au Canada ou même dans la province de Québec.

Son témoignage fait voir cependant que, conformément aux règlements internes de la banque, un client désireux de faire la transaction dont il s'agit devait s'adresser au gérant de la succursale de Beauharnois, qui en aurait référé au bureau principal de la banque, et que la réponse de ce bureau aurait été transmise au client par le gérant de la succursale. Dans ce cas, si la réponse du bureau principal était affirmative, il n'est pas douteux que la responsabilité de la banque eût été indiscutable.

Mais il semble évident que si les formalités indiquées par le témoin de l'intimée sont exigibles dans les rapports entre le bureau principal et le gérant local d'une succursale, il n'en est pas ainsi vis-à-vis des tiers. Le client, de son côté, et surtout le public, et en particulier le détenteur régulier d'un effet négociable qui engage la banque, ont le droit de traiter avec le gérant d'une succursale suivant son autorisation apparente. (*Cox v. Canadian Bank of Commerce* (1); *Bryant v. La Banque du Peuple* (2).

Une succursale de banque n'est pas une agence.

Le bureau principal d'une banque, avec ses succursales, ne forme qu'une seule et même personne juridique ayant dans chaque endroit la même situation légale et occupant la même position au point de vue juridique, soit dans ses rapports avec les tiers, soit dans les rapports des tiers avec elle. Lafontaine J. *in re Brunelle* v. *Ostiguy* (3).

La banque, à sa succursale, agit par l'intermédiaire de son gérant local. C'est à lui que le client et le public ont affaire. La banque le représente comme l'officier chargé d'exercer ses pouvoirs et investi à cet effet de toutes les autorisations requises. Art. 1730 C.C.; *Merchant National Bank of Boston* v. *State National Bank of Boston* (4). Son mandat apparent semble donc être d'accomplir à la succursale tous les actes qui sont du ressort d'une banque. Les règlements ne sauraient affecter les tiers qui ne les connaissent pas; et ces tiers ont, en plus, le droit d'assumer que le gérant de la succursale, dans l'exercice de ses fonctions, a suivi les règlements qui lui étaient imposés par

(1) [1912] 46 Can. S.C.R. 564.
(2) [1893] A.C. 170.
(3) [1911] Q.R. 21 K.B. 302.
(4) [1870] 10 Wall, 604.

le bureau principal. *Montreal & St. Lawrence Light, Heat & Power Co.* v. *Robert* (1).

En l'espèce, l'apposition du certificat d'acceptation sur le chèque de Picard, que la banque avait le droit de faire dans l'exercice de ses pouvoirs, devait, dans le cours ordinaire des choses, être effectuée par le gérant de la succursale de Beauharnois. Un tiers de bonne foi qui recevait cette acceptation était justifiable de supposer qu'avant de l'accorder ce gérant s'était conformé aux règlements de sa banque.

Si, pour définir les pouvoirs du gérant d'une succursale de banque, il fallait s'en rapporter à la preuve de l'usage, cela devrait s'entendre de l'usage local. Ainsi s'exprimait le baron Parke:

> It may differ in different parts of the country. The nature of this power and duty in any instance is a question of fact and is to be determined by the usage and course of dealing in the particular place. *Foster* v. *Pearson* (2).

Un usage qui, en Angleterre, avait besoin d'être prouvé peut fort bien être notoire aux Etats-Unis ou au Canada. Par exemple, on ne se croirait pas obligé, dans notre pays, de prouver la coutume d'accepter des chèques, ce qui s'effectue ici par un employé subalterne dans la plus infime des succursales.

Mais, comme le dit lord Campbell, *in re Bank of Australasia* v. *Breillat* (3).

> The nature of the business of bankers is a part of the law merchant and is to be judicially noticed by the court.

La transaction qui nous occupe est une affaire de banque et découle de la nature des fonctions d'un gérant de banque. *La Banque Nationale* v. *The City Bank* (4). Il était autorisé *virtute officii*. L'affaire rentrait suffisamment dans la catégorie de celles qu'il transigeait habituellement, même si la méthode spéciale adoptée en l'espèce était moins usitée.

Car il ne faut pas oublier que le chèque entre les mains du ministre de la voirie portait le timbre d'acceptation de la banque sans indication spéciale qu'il y avait été apposé par un agent, et que ce timbre était, dans l'usage courant, la signature de la banque adoptée pour tous les chèques qu'elle certifiait. Cette signature était imprimée sur le

(1) Cn. Rep. [1906] A.C. 227.
(2) [1835] 1 Cromp. M. & R.
(3) [1847] 6 Moo. P.C. 152, at p. 173.
(4) [1873] 17 L.C.J. 197, at p. 211.

1925

LEDUC v. LA BANQUE D'HOCHELAGA

Rinfret J.

chèque au moyen de la griffe mécanique qu'elle avait elle-même remise à la succursale à cette fin et dont cette dernière se servait dans le cours ordinaire des affaires. Entre les mains d'un détenteur régulier, cette acceptation voulait dire que la banque s'engageait elle-même à payer le montant représenté par le chèque, à la date indiquée dans l'acceptation. La banque représentait au détenteur qu'elle avait mis à part les fonds suffisants pour rencontrer le chèque à échéance et ajoutait son crédit à celui du souscripteur. *Gaden* v. *The Newfoundland Savings Bank* (1); *The Exchange Bank of Canada* v. *La Banque du Peuple* (2).

La Cour du Banc du Roi, dans les deux causes de *The Exchange Bank of Canada* v. *La Banque du Peuple* (3) et *Brunelle* v. *Ostiguy* (4), cite avec approbation les extraits suivants de Morse, On banks and banking, et Daniel, On negotiable instruments. Morse, 2ème éd., n° 309:

> The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting and passing from hand to hand large sums of money * * * If the bank only accepts or certifies generally, its obligation is to pay at any time when the holder may make demand. But if the acceptance is to pay at a future day certain, then the transaction, as between the bank and the drawer, is equivalent to a loan of the amount, made by the drawer, to the bank, for the period intervening between the acceptance and the date named for payment. *Bank of England* v. *Anderson* (5).

Daniel, On negotiable instruments, vol. 2:

> No. 1603.—A bank by certifying a cheque becomes the principal debtor * * * Nor can it say that there were in fact no funds of the drawer to meet the cheque, for its certificate is an assurance that there were such funds, and that it will apply them for that purpose. These doctrines are now universally settled, and the United States Supreme Court has declared that it could not inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon them * * *
>
> No. 1606b. Ordinarily the certification states no time of payments, and the check is then payable instantly on demand; but if the certificate specify a future day of payment, it is binding between the bank and the holder receiving it.

On y cite aussi Cyclopedia of Law and Procedure, vol. 5, p. 541:

> The certification of a cheque implies that the cheque is drawn on sufficient funds in the drawer's possession, that they have been set apart for its payment, and that they will be thus applied when the cheque is presented for that purpose.

(1) [1899] A.C. 281, at p. 285.
(2) [1886] M.L.R. 3 Q.B. 232.
(3) M.L.R. 3 Q.B. 232.
(4) Q.R. 21 K.B. 302.
(5) [1837] 4 Scott 50.

Dans chacune des causes de *The Exchange Bank* v. *La Banque du Peuple* (1) et de *Brunelle* v. *Ostiguy* (2), il fut décidé par la Cour du Banc du Roi que la réception d'un chèque accepté par une banque libérait le tireur et constituait un paiement par ce dernier au tiré.

En appliquant cette jurisprudence à la cause actuelle, le chèque de Picard devenait donc, entre les mains du ministre de la voirie, l'engagement direct de la Banque d'Hochelaga. C'est par le moyen de ce chèque que le cautionnement était fourni, et le ministre avait le droit de compter que la banque, qui avait remis le chèque en circulation, l'avait accepté suivant toutes les formalités requises par ses règlements internes et qu'elle avait pris les garanties nécessaires pour s'assurer les fonds requis pour le rencontrer. Il n'y avait rien dans tout cela de nature à faire naître raisonnablement dans l'esprit d'un détenteur régulier un soupçon contre la validité du chèque.

Comme le dit le juge Cross, dans *Exchange Bank* v. *Banque du Peuple* (3):

> It was said to be supported by authority that a post dated cheque was a suspicious cheque. But the cheques in question here are not post dated cheques; the bank says in effect, " the cheque is good, but we will only pay it next week, or as the case may be." This does not indicate that the drawer has no funds; it rather indicates, to my mind, that the bank was not prepared to pay so large a sum at once.

Pour ces raisons, je conclurais à l'infirmation du jugement rendu par la majorité de la Cour du Banc du Roi; et, d'accord avec l'honorable juge Dorion, je maintiendrais le jugement de la Cour Supérieure.

Appeal dismissed with costs.

Solicitors for the appellant: *Perron, Taschereau, Vallée, Genest & Perron.*

Solicitors for the respondent: *Geoffrion & Prud'homme.*

---

(1) M.L.R. 3 Q.B. 232. (2) Q.R. 21 K.B. 302.
(3) M.L.R. 3 Q.B. 232.

1926

*Jan. 5.
*Jan. 11.

BENJAMIN STEVENSON (RESPONDENT) . . APPELLANT;

AND

DAME FLORA FLORANT (PETITIONER) . . RESPONDENT.

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

Practice and procedure—Stay of proceedings—Leave to appeal to Privy Council—Proceedings in execution—Suspension—Application for stay after leave to appeal obtained—Supreme Court Act, R.S.C. [1906] c. 139, s. 37, rule 136.

An application for special leave to appeal to the Privy Council, and even the granting of such leave, do not, as a matter of law or by the rules of this court, *ipso facto* operate as a suspension of proceedings in execution of the judgment rendered by the Supreme Court of Canada.

Pursuant to rule 136, the practice of this court has been to make orders for stay of execution of its judgments pending the time necessary for applying to the Privy Council for leave to appeal. But, except for very special reasons, this court will be slow to exercise the wider discretion which the rule authorizes.

As a general rule, it is desirable, where leave to appeal to the Privy Council is granted, that the conditions attached to such leave and the terms upon which it is allowed should be left to the Judicial Committee.

MOTION for an order staying the execution of a judgment of this court pending the hearing of an appeal to the Privy Council.

A. S. Bruneau for motion.

H. G. Gérin-Lajoie contra.

RINFRET J.—This application is for an order staying the execution of the judgment of the Supreme Court of Canada pending the hearing of the appeal herein to His Majesty's Privy Council.

This judgment was rendered on the 18th day of June, 1925.

On the 25th day of the same month, it was ordered by a judge of this court in chambers that, upon the appellant giving, on or before the 6th day of July, 1925, security to the amount of $1,000 to indemnify the respondent from the costs incurred as well in this court as in the lower courts, to the satisfaction of the registrar of this court, all proceedings herein, except a settlement of the minutes of judgment, be stayed until the 31st day of July, 1925, to afford appellant an opportunity of applying to the Judicial

*PRESENT:—Mr. Justice Rinfret in chambers.

Committee of His Majesty's Privy Council for leave to appeal from the judgment rendered.

The above order is now spent, both for the reason that the period of time during which it was to remain in force has expired, and because the purpose of the order has been served, since the appellant has obtained leave to appeal as appears from His Majesty's order dated the 12th day of October, 1925, and duly filed in this court.

When the present application was made, the judgment of the Supreme Court of Canada rendered on the 18th of June, 1925, had not yet been certified by the registrar of this court to the proper officer of the court of original jurisdiction, so that this court, or a judge thereof was still competent to entertain the application and make the order (*In re Strathcona Fire Company, Lemire* v. *Nicol* (1)).

An application for special leave to appeal to the Privy Council, and even the granting of such leave, do not, as a matter of law or by the rules of this court, *ipso facto* operate as a suspension of proceedings in execution.

Under s. 58 of the *Supreme Court Act,* so soon as the judgment of this court in appeal has been certified by the registrar of this court to the officer of the court of original jurisdiction and all proper and necessary entries have thereupon been made, all such proceedings may be taken thereon as if the judgment had been entered or pronounced in the said last mentioned court.

Pursuant to rule 136, it has been the practice of this court to make orders for stay of execution of its judgments pending the time necessary for applying to the Judicial Committee of the Privy Council for leave to appeal from the judgment rendered. Except however for very special reasons, such as no doubt existed in *Schofield* v. *Emmerson Brantingham Implement Company* (2), this court will be slow to exercise the wider discretion which the rule undoubtedly authorizes. As a general rule, it is desirable, where special leave to appeal to His Majesty's Privy Council is granted, that the conditions attached to such special leave and the terms upon which it is allowed should be left to the Judicial Committee.

(1) [1924] S.C.R. 510.

(2) Cameron's Pract., 3rd Ed., 469.

1926

STEVENSON v. FLORANT.

Rinfret J.

In this case, the petition for special leave contained a prayer

that execution of the judgment of the Supreme Court of Canada be stayed pending the hearing of the appeal.

In the report of the Board, dated the 28th day of July, 1925, their Lordships, while recommending that leave ought to be granted to the petitioner and defining the terms as the circumstances of the case in their view required, made no order with regard to the stay of execution of the judgment of this court. It is not to be doubted therefore that their Lordships thought that a stay of execution ought not to be ordered in the premises. Any temporary relief against the judgment of this court until judgment shall be given in this case by the Judicial Committee of the Privy Council should properly be left to the Judicial Committee itself.

The application is dismissed with costs.

Motion dismissed.

OWEN B. BAKER .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT;

HARRY F. SOWASH.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Murder—Misdirection—Evidence—Similar acts—Admissibility—Corroboration—Accomplices

The appellants were convicted of the murder of the captain of the boat *Beryl G.* containing a cargo of liquor intended to be illegally delivered in the United States. The appellants, with two others, set forth in a boat called *Denman II* and left for Sidney Island with the intention of taking from the *Beryl G.* her cargo of liquor. According to the story of one of the appellants and an accomplice the *Beryl G.* was towed from Sidney Island by the *Denman II*, and the bow anchor, having been detached was sunk with the bodies of the captain and of his son, which had been fastened together by a pair of handcuffs. It had been proven that Baker had bought a yachtman's cap with a white top and ornamented profusely with gold braid in order to give himself the appearance of a revenue officer, and that this cap, together with two revolvers

1926

BAKER
v.
THE KING.

SOWASH.
v.
THE KING.

and handcuffs and a flashlight had been brought by Baker on board the *Denman II.* The case against Baker, as exhibited in the evidence on behalf of the Crown, was that in concert with the others he attacked the crew of the *Beryl G.*, under the pretence that he and his associates were officers of the law, one of them being disguised in such a way as to present the appearance of a revenue officer, and the party being equipped with and displaying such arms and implements as such officers might be expected to use in dealing with the possessors of a contraband cargo of liquor. Evidence was offered by the Crown in rebuttal, of the fact that Baker on one occasion recently, and on another at a considerably earlier date, had employed similar equipment and precisely this ruse for the purpose of deceiving and disarming the opposition of bootleggers while he took over their illegal possessions.

Held that, as bearing upon the issue thus raised (as to design) it was relevant to shew a similar use of such implements by Baker on a recent occasion—within a month; and, such evidence being given, evidence of the use of similar implements in a similar way on an earlier occasion, several years before, would be admissible as tending to establish a practice.

Quaere whether the admission of such evidence could be supported on the ground that it tended to corroborate the evidence of the accomplices.

Held, also, that the criticism against the trial judge's charge to the jury—that he insufficiently warned the jury as to the risk of finding a verdict against the accused on the uncorroborated testimony of an accomplice—possessed little or no importance when considered in light of the undisputed and indisputable facts proven or admitted by the accused.

APPEALS from the judgments of the Court of Appeal for British Columbia, affirming the convictions of the appellants of the crime of murder.

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

R. V. Sinclair K.C. for the appellant Baker.

Austin O'Connor for the appellant Sowash.

J. A. Ritchie K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—When the undisputed and indisputable facts are understood and the course of the trial is appreciated, it becomes evident that only two questions of any importance are raised by these appeals. The first concerns a criticism directed against the charge of the learned trial judge, and the second concerns the admissibility of certain evidence offered by the Crown in rebuttal. Both these questions must be considered in light of the evidence and the issues to which it was directed. Though the evidence is volum-

1926

BAKER v. THE KING.

SOWASH v. THE KING.

Duff J.

inous, the case is not a complicated one, and the essential facts and the critical points in controversy at the trial can be easily grasped.

In the summer and autumn of 1924, one Marinoff, who lived in Tacoma, was engaged in running liquor from British Columbia into the state of Washington. One Willis kept a stock of liquor in a boat-house near Barclay, on the west coast of Vancouver Island, and Marinoff was a purchaser from him. In the early days of September, Marinoff purchased from Willis 350 "cases," so called, of Scotch whisky and gin, and it was arranged that, according to a practice followed in the execution of previous sales, the liquor should be sent in the *Beryl G.*, manned by William Gillis and his son, to an anchorage in a cove at Sidney Island, which is an island situated a little west of the boundary line between Canada and the United States running through Haro Strait, there to be delivered to Marinoff's agents. The *Beryl G.*, with her cargo, duly arrived at the appointed place, and about five or six o'clock in the evening on the 15th of September, 110 cases out of this cargo were delivered to Marinoff's agents, and reached his hands in due course in the United States. Marinoff's agents left the *Beryl G.* anchored (with one bow anchor weighing from 100 to 150 pounds, and a much lighter one at the stern), with the intention of returning for the remainder of the cargo. Two days later the *Beryl G.* was discovered a few miles from Sidney Island, adrift. The bow anchor had disappeared, her cargo was gone, and the craft presented unmistakable indications of a sanguinary struggle. Neither of the Gillises has been seen or heard of since, and the appellants have been convicted of the murder of the father.

In the first week of September, the appellants, Baker and Sowash, together with Stromkins, who was the principal witness for the Crown at the trial, and one Charlie Morris, were in Victoria (whither they had come from Seattle); and it is admitted by Baker and Sowash that, as Stromkins testifies, they then had in view jointly an expedition to the west coast of Vancouver Island, with the object of taking possession of liquor they hoped to find cached in places said to have been disclosed to them as likely places by the customs officials and the provincial

police of British Columbia. The police had, Baker insists in his evidence, assured them through one Majowski, a detective from Seattle, that, such liquor having been illegally in the possession of persons who had hidden it, and having been hidden for illegal purposes, anybody who should find it might take it without violating the law of British Columbia, and get it into the United States if he could. This comparatively harmless design was one, at least, of the objects of the expedition. They set forth in a boat owned by Stromkins, called *Denman II*, and coasted as far north as Port Renfrew, but returned on the 12th or 13th to Esquimalt empty handed. They remained in Victoria until the night of the 15th, when they, that is to say, Baker, Sowash, Charlie Morris and Stromkins, started from Cadboro Bay in the *Denman II*. Baker says that from Cadboro Bay they went direct to Anacortes, in the state of Washington, and there parted company. Stromkins and Sowash say that, on Baker's proposal, or the proposal of Baker and Morris, they left for Sidney Island with the intention of taking from the *Beryl G.*, whose anchorage was well known, her cargo of liquor; that this purpose was carried out; that William Gillis and his son were killed in the course of its execution; that the liquor was cached in various places, some on the beach at Sidney Island, some on Gooch Island, some on South Pender Island and some on Moresby Island (though as to this there is some discrepancy between the evidence of Stromkins and that of Sowash).

As regards this whole chapter of events, to which Stromkins and Sowash testified—from the departure, at ten o'clock on the evening of the 15th, until the disposal of the liquor was completed—Baker advanced a blank denial. Not only did he say that he was not there himself, but that *Denman II.* and Stromkins and his passengers were all elsewhere—en voyage from Cadboro Bay to Anacortes; that this part of the story of Stromkins and Sowash is pure fabrication. Two or three days after the 16th of September, when, according to the story of Baker, as well as that of Sowash and Stromkins, all had arrived at Anacortes, and Baker, Sowash and Morris had separated from Stromkins, leaving him with his boat, Baker admits that he, with Sowash and Morris, made arrangements with one Clausen,

1926

BAKER v. THE KING.

SOWASH. v. THE KING.

Duff J.

of Seattle, to go to the British Columbia islands and bring whisky and gin cached there to the American side, on the terms that Clausen was to receive for his services one-third of the liquor recovered; and that with Clausen, he and Sowash set out on this expedition from Seattle, on the 18th or 19th. They first went to Moresby Island and, under the direction of Baker, discovered and took away with them some twenty cases of whisky and gin, containing 12 quart bottles each, which, however, they were obliged to throw overboard under pressure of pursuit by an American revenue cutter. After this misadventure, they entered Lake Union, where Clausen's boat, the *Dolphin,* was allowed to lie for about a week, when they, Clausen, Baker and Sowash, set forth again, and this time they went to Sidney Cove, on the northeast side of Sidney Island, and, under the direction of Baker, discovered on the beach above high water mark, a lot of eighteen cases of Scotch whisky and gin (the exact quantity of such liquor which Stromkins states was left above high water mark in this locality on the night of the 15th out of the looted cargo of the *Beryl G.*); two lots of the same kind of liquor on Gooch Island, and another on South Pender Island. All these various lots were together brought to a place on South Pender Island, and deposited there. The liquor so collected was later—in part with the assistance of Clausen, in part with the assistance of one Smith—introduced into Washington state and apparently was sold, under the direction of Baker, who controlled the distribution of the proceeds and still held, at the time of the trial, he declared, $3,200 for Stromkins as his share. It should be mentioned that the liquor which constituted the cargo of the *Beryl G.* was done up in sacks, described by the witnesses as " cases," of 12 quart bottles each, of Scotch whisky or gin; and it is undisputed that all the whisky and gin recovered from the various places of deposit visited under the direction of Baker by Clausen, Baker and Sowash was in such sacks, except where the sacks had been ruptured by the action of the water.

Before proceeding to notice the grounds of appeal, some additional facts, as well as some passages in the evidence which are not undisputed, should be mentioned. According to the story of Stromkins and Sowash, the *Beryl G.* was towed from Sidney Island to Halibut Island on the

night of the 15th by *Denman II*, and the bow anchor, having been detached, was sunk with the bodies of the Gillises, father and son, which had been fastened together by a pair of handcuffs. These handcuffs, as well as a flashlight, which he used in boarding the *Beryl G.*, had been in possession of Baker, who also had with him on board the *Denman II* at least two revolvers, with one of which he shot the elder Gillis. It was shewn that there was, on the 16th, a wind prevailing in the vicinity of Halibut Island of about 36 miles an hour, and expert evidence was given to the effect that the *Beryl G.*, when sighted on the 17th, was approximately in a position where, having regard to the weather and the tides, she might be expected to be found if left on the night of the 15th, as in the testimony was averred, in the vicinity of Halibut Island with only her stern anchor holding her. Before leaving Seattle for Victoria, Baker bought a yachtsman's cap with a white top and ornamented profusely with gold braid, on the advice, as he said, of Clausen, who suggested that he might use it in a critical juncture to disarm suspicion by giving himself the appearance of a revenue officer. Stromkins and Sowash say that this cap, together with the revolvers, the handcuffs and the flashlight mentioned above, were brought by Baker on board the *Denman II* on the night of the 15th. Baker denies that he ever had in his possession handcuffs or a flashlight, and he asserts that for many years before the trial he had not carried a revolver.

The criticism directed against the learned trial judge's charge to the jury—that he insufficiently warned the jury as to the risk of finding a verdict against the accused on the uncorroborated testimony of an accomplice,—is seen to possess little or no importance when considered in light of the facts. The learned trial judge did explain in a most unexceptionable way that the evidence of an accomplice must be weighed and examined with care and suspicion, and that although the jury might convict on such evidence, it would be dangerous to do so. He did explicitly warn the jury that Sowash must be treated as an accomplice, although he did fail to give in express terms the same warning as to Stromkins. A passage in his charge, in which he says in so many words that Sowash corroborates Stromkins, obviously relates exclusively to the Crown's case against

1926

BAKER v. THE KING.

SOWASH. v. THE KING.

Duff J.

Sowash himself, and directs attention to Sowash's own admissions. The learned trial judge did not, it is true, explain to the jury that corroboration in the relevant sense means corroboration not only in respect of some fact tending to shew that the crime was committed, but also in respect of some evidence implicating or tending to implicate the accused.

Indeed, there is perhaps reason to impute to the charge some tendency to mislead in a sense unfavourable to the accused in this respect, as well as in the explicit labelling of Sowash as an accomplice as contrasted with the absence of any such description of Stromkins in so many words; and had the corroboration which the jury actually had before them been either scanty or of questionable weight, it might have been necessary to consider the probable effect of these features of the learned judge's observations with some care.

But the learned trial judge would have done much less than justice to the force of the uncontroverted facts—facts established by the admissions of the appellants or by independent and unchallenged evidence—if he had led the jury to believe that they were at liberty to regard the evidence of Stromkins in its essential elements or of Sowash in so far as it implicated Baker as destitute of corroboration. Considering the gravity of the crime, corroboration of real substance and weight was no doubt demanded, but it was produced in superfluity. Sowash's case requires no comment; indeed, as to this point, is hardly susceptible of useful comment. As concerns Baker's case, there was one capital issue and one only, for the jury to pass upon. As already intimated, that issue was simply this: Was the narrative of Stromkins and Sowash dealing with the trip of the *Denman II* to Sidney Island on the night of the 15th and the attack on the *Beryl G.*, and the subsequent disposal of the cargo, a fabrication from beginning to end, or was it not? That is to say, was Baker's story of the uneventful crossing to Anacortes the true story? If this issue were found against Baker, that would be the end of the controversy.

First must be noticed the evidence of Clausen, who deposes to a conversation with Baker, in which Baker told him the liquor they were collecting was the cargo of the

Beryl G., which he and his associates had taken by force. The killing was not admitted, Baker's story being that the Gillises had been marooned on one of the islands. But this evidence of Clausen, if believed, was of course, as touching the real issue raised by Baker's defence—as to the attack on the *Beryl G.*, from the *Denman II*—conclusive against Baker. Clausen, of course, was deeply involved with Baker by his association with him in the collection and sale of the cargo after he became aware, according to his own account, that he was dealing with goods procured by acts of robbery and violence. But however justly suspicious one may be that we are not in possession of the whole story of Clausen's relations with Baker, there is no evidence in the juridical sense that Clausen was from the beginning a party to Baker's design (Clausen's loan to Baker proves nothing); and, whatever might have been the position if Baker had been charged with another offence, there is no ground for treating Clausen for our present purpose as an accomplice in the murder.

Clausen's statement is denied by Baker. But Baker, confronted with the necessity of producing an alternative explanation of his expeditions with Clausen and Sowash in the *Dolphin*, gives an explanation of which it is only necessary to say that in itself it is a highly improbable one and destitute of a shred of support from independent sources.

It is in the light of this improbable explanation of Baker's that the corroborative cogency of the admissions of Baker and Sowash must be weighed; and in light of it, the facts already mentioned, the venture as originally conceived, the departure of all the conspirators together on the night of the 15th, the concerted action of all but Stromkins in the recovery of the liquor, the situation of the caches, indicating that they had been selected under stress of emergency, Baker's knowledge of their situation, all tend strongly to confirm the conclusion that the collection of the liquor from these places was only one of the latest steps in execution of a design with which the party set out.

Had Baker not been called as a witness, and had the facts admitted in his own evidence been put in evidence through the testimony of an independent witness, could it have been suggested either that Stromkins or Sowash was an

1926

BAKER v. THE KING.

SOWASH. v. THE KING.

Duff J

uncorroborated witness as against Baker, or even that upon that subject any question could possibly arise? His own admissions were conclusive in a higher degree than the testimony of any other witness could be; and his explanation, given by himself, cannot be said to weaken the case against him. There seems little room for doubt that the accused suffered no substantial wrong because the trial judge did not more elaborately discuss the subject of corroboration with the jury. So also, in face of the admissions of Baker and Sowash, it seems idle to suggest prejudice resulting either from the refusal to postpone the trial or the admission of the memorandum of proposed evidence which got into the hands of the jury.

A question remains, however, which requires careful examination, and that is the question affecting the admissibility of the evidence, adduced in rebuttal, of the witnesses Johnston and Marinoff. It seems impossible to support the admission of this evidence as going to credit alone; the rule is rudimentary that, except in certain well-known classes of cases within which the present case does not fall, a cross-examiner is bound to accept the answers of the witness unless the testimony so given is in itself relevant to one of the issues between the parties. Subject, at all events, to a qualification which seems to be open to question (*Thompson* v. *The King* (1)), namely, that the admission of the testimony in question could be supported on the ground that it tended to corroborate the evidence of Stromkins and Sowash, the point to be considered is whether this evidence was in the legal sense relevant to any issue between the Crown and Baker. The view taken by some of the judges in the court below may, perhaps, be put in this way: The case against Baker, as exhibited in the evidence on behalf of the Crown, was that in concert with the others he attacked the crew of the *Beryl G.*, under the pretence that he and his associates were officers of the law, one of them being disguised in such a way as to present the appearance of a revenue officer, and the party being equipped with and displaying such arms and implements as such officers might be expected to use in dealing with the possessors of a contraband cargo of liquor. Evi-

(1) [1918] A.C. 221, at p. 233.

dence, therefore, of the fact that Baker on one occasion recently, and on another at a considerably earlier date, had employed similar equipment and precisely this ruse for the purpose of deceiving and disarming the opposition of bootleggers while he took over their illegal possessions, was admissible on the same principle as the possession of the ordinary implements of burglary would be admissible to prove a charge implicating the accused in a burglary in which such implements had been used.

This seems at first sight to be open to some criticism. It may be said that the issue was not whether Baker was personally implicated in an act of piracy involving murder, in which such implements and methods were employed, or, in other words, whether Baker was present and took part in an attack on the *Beryl G.* from the *Denman II;* the issue of substance was: Did any such attack take place at all? The evidence establishing that such methods were employed establishes, if accepted, that the crime was committed, as Stromkins and Sowash say it was—and that being established, there could be, as between the Crown and Baker, no substantial issue left. This criticism appears, however, when analyzed, to go to the form in which the view is expressed, rather than to the substance of it. It can be stated in another form, when, as will appear, the criticism seems to miss the mark.

The principle of law to be applied is hardly in doubt, but the most apt statement of it for the present purpose is, I think, to be found in the judgment of Lord Sumner (in which Lord Parker concurred), in *Thompson's Case* (1), in these passages:—

> No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime; but, sometimes for one reason sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences and sundry species of frauds, such evidence is constantly and properly admitted. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words,

(1) [1918] A.C. 221, at pp. 232, 233, 235 and 236.

1926

BAKER v. THE KING.

SOWASH. v. THE KING.

Duff J.

and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice. No doubt it is paradoxical that a man, whose act is so nakedly wicked as to admit of no doubt about its character, may be better off in regard to admissibility of evidence than a man whose acts are at any rate capable of having a decent face put upon them, and that the accused can exclude evidence that would be admissible and fatal if he ran two defences by prudently confining himself to one. Still, so it is * * *

I certainly do not think it could be held that, as a matter of course, even in the case of crimes of this class, the articles found in a man's possession, not as parts of the transaction which is being enquired into, but at a separate time and place, could, as such, be put in evidence against him merely because they were such as criminals possess or use, and in the absence of any circumstance in the crime tending to show specific connection between it and the articles in question. If a man could be convicted of a particular burglary, in which it was clear that no tools had been used at all, merely because at another place and time burglar's implements were found on his premises, it is difficult to see what limit could be put to the admissibility of general evidence of bad character, and the fact that evidence of articles found on the premises of accused persons is constantly given without much question, though I doubt not in the vast majority of cases quite rightly, is really only misleading, unless at the same time we ask the question what exactly does this purport to prove and by what probative nexus does it seek to prove it. * * * All lawyers recognize, as part of their professional premises, that there is all the difference in the world between evidence proving that the accused is a bad man and evidence proving that he is *the man*. Laymen are apt to think that the difference, if any, is in favour of admitting the former. There must be something to connect the circumstance tendered in evidence, not only with the accused, but with his participation in the crime.

Was there, then, an issue before the jury in respect of which the impeached testimony was relevant in the sense indicated in these passages in Lord Sumner's judgment? I think there was. At a very early stage the Crown pointedly raised the issue by eliciting from Stromkins evidence indicating that the design with which Baker and his companions became associated was not limited to the comparatively harmless one of picking up unguarded deposits of liquor without resorting to violent measures; but to take such liquor whenever a convenient opportunity arose, and if necessary to employ force and to facilitate success by the stratagem said to have been actually put into effect. Evidence was adduced of Baker's purchase of a cap and, as already mentioned, of his possession of revolvers and a flashlight and handcuffs, and of a significant remark by him on sighting the *Beryl G.* at the mouth of Sooke Har-

bour. It would have been competent to the Crown to call evidence of a practice among criminals of Baker's class to use such implements in the way suggested, as tending to shew that the possession of them was not accidental or innocent. The possession of the implements, especially if so supplemented, would be evidence that the design of the expeditions and of the whole venture on which they were engaged was as the Crown contended. It is within the principle of the observations quoted, and of the decision of this Court in *Brunet* v. *The King* (1), and of that of the Court of Criminal Appeal in *The King* v. *Armstrong* (2), to hold that, as bearing upon the issue thus raised (as to design) it was relevant to shew a similar use of such implements by Baker on a recent occasion—within a month; and such evidence being given, it would appear that evidence of the use of similar implements in a similar way on an earlier occasion, several years before, would be admissible as tending to establish a practice. The existence of such a design would in itself be relevant on the cardinal issue whether, when the party left Cadboro Bay, Baker having these implements with him, they left with the intention of attacking the *Beryl G.* or crossing to Anacortes direct.

An objection was raised concerning the admissibility of a passage in Stromkins' evidence professing to report a remark made by Morris to Stromkins on the *Denman II* immediately after the killing of the Gillises which, perhaps, deserves a word of notice. Morris' remark consisted in the exclamation, "The cold-blooded murderers!" The admissibility of this evidence does not, in view of the circumstances, appear to be open to serious doubt. The learned trial judge was entitled to find, for the purpose of determining the question of admissibility, that the criminal acts of Baker and Sowash, to which Stromkins had testified, were within the scope of the objects of a conspiracy with which Morris was identified, and identified so narrowly as to constitute him the *alter ego* of Baker and Sowash in relation to the incidents of the crime and contemporaneous comments upon them. In point of law, such a comment, uttered in such circumstances by Morris, was, as the learned trial judge was entitled, for that purpose,

(1) [1918] 57 Can. S.C.R. 83. (2) [1922] 2 K.B. 555.

1926

BAKER v. THE KING.

SOWASH. v. THE KING.

Duff J.

to find, the comment of the appellants. (*Rex* v. *Brandreth* (1), per Richards L.C.B.)

The appeals should be dismissed.

Appeal dismissed.

Solicitors for the appellant Baker: *Moresby, O'Reilly & Lowe.*

Solicitor for the appellant Sowash: *R. D. Harvey.*

Solicitor for the respondent: *W. D. Carter.*

(1) 32 How. St. T., at 857.

THE P. & M. COMPANY AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS;

AND

CANADA MACHINERY CORPORATION LIMITED AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1925
*June 12, 13.
*Oct. 6.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Infringement—Railroad rails—Anti-creeping devices—Claim and specifications—Construction—Defence—Want of definitiveness—Anticipation.

The appellants (plaintiffs) had a patent for an anti-creeping rail device, which, as they alleged, had been infringed by the respondents (defendants), who had, subsequently to the appellants' patent, manufactured and used, in Canada, a rail anchor which, it was urged, embodied the principle of the appellants' patent. Before the appellants' patent, various contrivances had been devised and used for the prevention of creeping, usually in the form of a stay or brace between the rail and the sleeper. A favourite method of applying this mode of resistance, and which had been tried in different forms and under various patents, was by means of a cross bolt or yoke, underlying the rail, bent at either end to engage on each side with the base of the rail and kept in position by a wedge inserted on one side between the yoke and the rail, a part of the contrivance extending downwards perpendicularly to form an abutment designed to press against the contiguous sleeper and thus to overcome the creeping. The invention which was the subject of the appellants' patent consisted of a steel yoke or cross-bar in principle and not unlike those which were known and had been tried before, but, instead of a wedge for securing the apparatus to the rail, it made use of a locking device which was worked by means of torsion of the steel yoke. The device manufactured and used by the respondents, which was alleged to infringe, was of the wedge variety, the wedge being so formed that when driven into place the yoke was sprung into holding position. It was contended by the appellants that the respondents' device depended for its efficiency upon the torsion, spring or recoil of the steel yoke and that it therefore constituted an infringement.

Held, that the appellants' invention was one of mechanical detail, that the characteristic of the steel bar when sprung or twisted to resume its normal position was not the discovery of the appellants' patentees, who merely made use of a well known quality of the metal for bringing about the particular result in the specified manner; that while, if a new principle be discovered, the court will regard jealously any other method embodying that principle, yet where, as in this case, the invention consists in a particular new method of applying a well known principle, the use of other methods is not contemplated by the patentee, and that these do not fall within the ambit of the claim.

Judgment of the Exchequer Court of Canada ([1925] Ex. C.R. 47) affirmed.

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

1925

THE P. & M. COMPANY v. CANADA MACHINERY CORP., LTD.

APPEAL from a decision of the Exchequer Court of Canada (1), dismissing the appellants' action involving a charge of infringement of their patent by the respondents. The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

Anglin K.C. and *Cassels* for the appellants.
Wilkie K.C. and *Gibson* for the respondents.

The judgment of the court was delivered by

NEWCOMBE J.—By letters patent of Canada, numbered 122, 715, of 21st December, 1909, there was granted to David Fisher Vaughan and David Lawrence Vaughan, of Riverton, New Jersey, the exclusive right, privilege and liberty of making, constructing, using, and vending to others, to be used in the Dominion of Canada, an alleged new and useful improvement in anti-creeping devices for railroad rails, a description of which is contained in the specification and drawings attached to the letters patent. Subsequently, on 12th October, 1922, the patentees assigned to one of the appellants, the P. & M. Company, all rights under this patent, and thereafter the appellant, the P. & M. Company, gave an exclusive license to the other appellant company to manufacture the invention and to use and to sell it to others. No question arises as to the constitution of the action or the title of the appellant (plaintiff) companies. They claim that the respondents (defendants) infringed their patent rights by manufacturing and using the invention, and by selling it to others to be used in Canada, and they seek a declaration of the validity of the patent; a declaration of the alleged infringement; an injunction; accounting, and damages. The substantial answer is that there was no infringement, and this defence has been upheld and found for the defendants by the learned judge of the Exchequer Court of Canada who tried the cause. It is from this finding that the appellants appeal to this court. There is a large body of evidence, mostly of a descriptive and technical character.

It appears that the movement of railroad rails under operation, which is described as creeping, has long been

(1) [1925] Ex. C.R. 47.

known as a common fault, and many attempts have been made through numerous devices to afford a satisfactory remedy. The creeping takes place in the lengthwise movement of the rails in the direction of the traffic, and is caused chiefly by the severe stresses, jars and pounding to which the rails are subjected by the heavy locomotives, cars and loads which pass over them. The tendency to creep varies according to conditions of roadbed, grades, speed, frequency and weight of traffic. It is of course less on a single track, because there the loads, moving in opposite directions, tend in their effect to compensate for each other; but, upon double tracks, and these systems have become greatly extended, where the traffic upon each line of rails is practically all in one direction, the creeping, if not checked, develops into a cause of difficulty and of some danger in the working of the railways, especially at crossings and switches, or in localities where the nature of the soil or roadbed tends to facilitate it. Its consequences are also aggravated by the temperature and consequent expansion of the rails. Mr. Gutelius, an engineer engaged in the operation, maintenance and traffic of the Delaware and Hudson Railway lines in Canada, who has had long and important connection with railways in the Dominion, and especially in the supervision of their construction, maintenance and traffic, and who is the appellants' leading witness, gives the following testimony:

> The string of rails that are butted against each other at a temperature of 60 degrees, will, when the temperature of the sun rises in the day time, rises to 100, push itself forward somewhere, and in cases of that kind we used to have what is known as a sun kink. A sun kink is across on a straight track along tangents where the expansion space has been used up, and the rails expand and must go somewhere, and they jump out in a sort of an S shape. Some very serious wrecks have occurred on account of sun kinks.
>
> His Lordship: That is buckling?—A. The buckle is a side buckle—they do not buckle vertically. The character, the shape of the rail, makes it so much stronger vertically than laterally that the buckling is laterally.

During the years before the appellants' patent various contrivances were devised and used for the prevention of creeping, and these usually took the form of some sort of stay or brace between the rails and the sleepers or ties, which were embedded underneath, and to which the rails were fastened. A favourite method of applying this ob-

1925

THE P. & M. COMPANY v. CANADA MACHINERY CORP., LTD.

NewcombeJ.

struction or mode of resistance, and which was tried in different forms and under various patents, was by means of a cross bolt or yoke underlying the rail, bent at either end so as to engage on each side with the base of the rail, and intended to be kept in position by a wedge inserted on one side between the hook and the rail, a part of the contrivance extending downward perpendicularly to form an abutment or obstacle designed to press upon the contiguous sleeper, and thus to stay or overcome the creeping. Indeed the appellants in their factum frankly confess that:

> It had been more or less well known before the Vaughans' invention that, assuming an anti-creeping device to be in its proper initial relation to the rail just before the creeping was attempted, the actual creeping when attempted could be best resisted and prevented by a yoke, engaging the rail base transversely, and substantially inextensible crosswise of the rail, so arranged in combination with a downward abutment at one of its sides that when creeping was attempted this abutment would be forced against a sleeper and would prevent the forward movement of one end of the yoke while the other end was permitted to move forward so that the yoke would tend to assume a slightly diagonal position across the base of the rail with a resulting substantially unyielding grip upon the rail, increasing as the effort of the yoke to assume a diagonal position increased, and operating by a cramping or shackle action in a generally horizontal direction.

Some of these designs were found to operate with a measure of success, but the trouble appears to have been that the creeping action was not constant, and at times when the anti-creeping function of the rail anchor was not taking place, there being then no pressure of the shoe abutment upon the tie, the loads or blows and pressure to which the apparatus was subjected operated to loosen the grip or tension of the wedge, and in that manner to impair or destroy its usefulness. One after another of these designs was tried and rejected. Then the Vaughans, the patentees of the design which is said to have been infringed, contrived a special combination of means, as explained by their specification, for holding the rail in place. The apparatus consists of a yoke or crossbar, in principle and use not unlike those which were known and had been tried before; it abandons the wedge and uses a locking device the primary form of which I shall attempt to describe, although it is difficult, if not impossible, to give a lucid explanation in the absence of the drawings, which cannot here conveniently be reproduced, and the specimens used at the hearing.

The invention as introduced to the specification consists in the novel construction and combination of parts which will be hereinafter fully described and claimed; there follows a careful description by reference to the drawing of the applicants' device, explaining particularly its construction, parts and methods of engagement and operation. The claims upon which the appellants rely, as stated in paragraphs 1 and 4 of the specification attached to the patent, are as follows:

(1) In an anti-creeping device for railroad rails, the combination, with the rail, of a part engaging one side of the rail foot flange, a cross bar extending beneath said flange, and provided with means on one end thereof for engaging one side of said flange, means on the other end of said bar for engaging said part, the part-engaging means on the bar being held in engaging position by the spring action of said bar in tending to assume a position from which it was sprung, and tie-engaging means acting upon said bar, substantially as described.

(4) In an anti-creeping device for railroad rails, the combination, with the rail, of a shoe engaging one side of the rail foot flange, a cross bar extending beneath said flange and provided with means on one end thereof for engaging one side of the flange, a head on the other end of said bar holding said shoe in engagement with said flange, means on said bar for engaging said shoe, the shoe-engaging means on the bar being held in engaging position by the spring action of said bar in tending to assume a position from which it was sprung, and tie-engaging means acting upon said bar, substantially as described.

The device consists of two pieces of metal; one, the yoke or cross bar, which is made of steel, having a hook at one end to engage with one side of the foot flange of the rail, and which, passing under the rail, terminates at the other end in a square bolt head by which the bar may be torted or twisted by a wrench or other suitable tool in the hands of a workman, thus applying the torsion necessary for the engagement of the parts. The other member consists of the shoe, which is a casting of malleable iron, having two jaws projecting on its inner side to engage with the side of the rail opposite to that which is hooked by the yoke. The upper jaw is continuous for the entire length of the shoe, about three inches, but the continuity of the lower jaw is interrupted by an open space to form a socket into which the yoke passes, and, on the inner side of the socket, at its opening, there is a notch or slot to admit, when in proper position, a projection upon the side of the yoke with which it engages, and which is known in the evidence as a lug or spud. The opening in the side of the jaw admitting to

1925

THE P. & M. COMPANY v. CANADA MACHINERY CORP., LTD.

Newcombe J

the socket is not of sufficient width to allow the yoke to enter in its natural position, but, when the shoe is affixed to the rail flange, the yoke, hooked to the opposite flange and brought into contact with the shoe at the opening of the socket, is twisted by use of the wrench upon the bolt head, and then, by reason of a diminution in the thickness of the bar, which is somewhat flattened on the side to which it is twisted or sprung, the bar finds room to enter and is pressed into its socket. It is then allowed to spring back, and, upon the recoil, the lug on the shoulder of the yoke or bar articulates with and engages in the slot on the inner side of the socket, thus locking the parts, and causing both yoke and shoe to remain in place. By this means the anchor is secured to the rail. In this connection the patentees state in their specification that they *preferably* so locate the spud on the bar, that, after the bar has been sprung into the socket, there will remain in it sufficient resilience or spring action to press the spud into engagement with the shoulder of the slot, and thus firmly to hold or lock the parts together and to the rail flange. Continuance of the torsional spring action after the shoulder or lug of the yoke is in place in its socket is therefore not claimed as an essential feature of the plaintiff's device. The function of the torsion is to enable the yoke to enter the socket under conditions in which it can be released only by reverse application of the force requisite to admit it.

The shoe terminates in a face, known as the abutment of the shoe, which, of a width of about two inches, projects perpendicularly downward from the rail flange with which the shoe is engaged, and is intended, when in position and in action, to press against the sleeper which underlies the rail immediately in front of this projection, and, in order better to serve its object, the surface of the abutment is preferably made slightly convex. Then, to strengthen and render more secure the hold of the anchor upon the rail, the yoke, which in the process above described lies transversely of the rail at right angles to it, is forced by hammer blows at the hook into a slanting position in the direction of the tie; and here it may be said that, in order further to increase the grip, and so to prevent the turning of the bar, the hook, or portion of the bar turned over which embraces the flange of the rail on the side opposite to the

shoe, is preferably made still further to extend laterally in the same direction. Mr. Gutelius says, referring to the cross bar, that:

In practice it should be driven forward toward the tie so as to get a triangle toggle action.

* * * *

Q. Is it necessary to drive that one side of that crossbar up towards the tie after you put the apparatus in working position?

A. It becomes in working position when the shoe touches the tie, it pushes the shoe back, and you get the same result as when you drive that side forward.

Q. In order to get this into working position you must have the crossbar more or less diagonal to the long line of the rail?

A. That is the way it should be when it is working. It is that diagonal position that gives the bite on the rail to resist the greatest tendency to creep.

* * * *

Q. Is that transverse toggle action due to the diagonal position of the crossbar that gives the apparatus its bite upon the rail?

A. It gives it the bite. It gives it the bite on the edges of the rail base both at the shoe and on the other side. There is a bite caused by the torsion in the crossbar which affects the top of the rail on the far side and inversely the lower portion of the rail on the shoe side. * * *

Q. You told me a moment ago the detorsion action of the spring rested against that stud on the shoe?

A. Yes.

Q. That is correct, is it not?

A. What there is left of it when the apparatus is static, that is true.

Q. What is true?

A. What torsion is left in the bar when the apparatus is static is overcome, held in position by the lug. When the apparatus is working as against track creeping there is another problem in connection with the forces.

Q. Then that torsional action against that spud or stud is parallel with the long axis of the rail, is it not?

A. It is at right angles to the yoke or crossbar, and that yoke or crossbar should not be at right angles to the centre of the rail in working position; it should be on a diagonal.

Q. But it is approximately parallel to the rail?

A. Well, approximately, yes.

Q. Now, you saw a moment ago that when one of the men relieved that stud and spring torque member back that the whole apparatus fell off from the rail—you saw that?

A. That is what it would do.

Q. And that is what it does do?

A. No, I do not agree with that. It did not do it except when it is unloosened.

Q. If the torque spring action against the spring is removed the apparatus falls off?

A. Yes.

Q. So that the torque spring action is to keep the anchor on the rail?

1925

THE P. & M. COMPANY v. CANADA MACHINERY CORP., LTD.

NewcombeJ.

A. Hold the contrivance together.

Q. So that it may stay upon the rail?

A. Yes; perform its function.

Q. Then that function and office is to keep the parts upon the rail?

A. That is one of the functions.

Q. Then tell me, if you will, if it were not for that torque action would the apparatus stay upon the rail?

A. No.

Q. Then, taking Exhibit No. 10, that crossbar must be twisted or torqued by a man—is not that so, with a tool or wrench or some such tool in order to get it on?

A. Yes, it must be sprung into this position.

Q. And so it must be of such size and shape that the ordinary man can with an ordinary tool twist it, or with some tool twist it?

A. Yes.

Q. And that fixes the limit of its size. It cannot be bigger than a man can twist?

A. It depends on your tool entirely as to what you can spring.

Q. But that is the situation whatever else there may be said about it, it has got to be of a size and shape that it is practical twist. Perhaps you can twist anything but this must be practical—is that the situation?

A. Yes. It takes a tool about thirty inches long in the hands of a labourer—and of course if the lever were lengthened the crossbar could be strengthened.

This explanation from Mr. Gutelius follows upon testimony in which he says that the twisting motion of the cross bar, to put it on, is necessary in all forms of the appellant's device; that it is, in the words of the witness, "the meat of the Vaughan patent," and he testifies moreover that

the full force of the torsional effect of the spring is taken against the spud —is exerted against the spud;

but, as will have been observed in the passage quoted, he says that

what torsion is left in the bar when the apparatus is static is overcome, held in position by the lug.

There are other forms of the appellants' device which rest upon the same principle and the same combination of parts, although showing some variety in structure, but it is not I think necessary for the purposes of the case to endeavour to explain these.

The object to which the appellants' patentees applied themselves was not new. The novelty of the means which they devised for realizing their object is to be found in the application of the resilient force of the steel yoke by the torque produced in the manner described, and in the adaptation and combination of the selected appliances. The claim can be understood and defined only by reference

to the drawings which accompany it. The device is in reality a combination of well known and tried parts for an object the achievement of which had been the subject of many trials. It had been found that a shoe abutment anchored to the rail and pressing with the traffic against the tie was effective, while firmly held in place, to overcome or materially to reduce the creeping movement of the rail, but that the efficiency of the anchors which had been tried was of duration too brief for practical purposes, and, for the reason which I have mentioned, that these devices speedily lost capacity to resist the action of the load upon the rail, and were therefore unreliable. It had been discovered that owing to failure of the holding device the forces to which the anchor was subjected had the effect of causing it to relinquish its hold upon the rail, and so to become loose or disengaged. Up to this point there was no novelty in the appellants' device; this was the state of the art as they found it; but what their patentees secured by their monopoly, and what is involved in their claim, if it be not too broadly stated to be valid for any purpose, is the holding to the rail of the parts in engaging position by the spring action of the cross bar

in tending to assume a position from which it was sprung * * * substantially as described.

The substantial description is to be found only in the specification and drawings, and by reference to these it is evident that the essence or substance, the "pith and marrow" in the terminology of the cases, or the "meat," to adopt the word of the expert witness, Gutelius, of the appellants' invention, which is in reality no more than an improvement, consists in the lug or spud of the cross bar, the slot or shoulder of the shoe, into or behind which the lug or spud is designed to find place, and the torsion and recoil of the cross bar by which these parts are articulated and locked together. These means are said to provide an efficient lock; but, preferably, as said in the specification, it is desirable so to locate the spud, that, after the bar has been twisted and sprung into the socket, there will remain sufficient resilience or spring action in the body of the bar to exert continuous pressure upon the spud, and thus to strengthen its engagement with the shoulder or slot in the socket; meaning thereby, as the specification may be in-

1925

THE P. & M. COMPANY v. CANADA MACHINERY CORP., LTD.

Newcombe J.

terpreted, and as was in effect stated at the argument, that the lock would be strengthened if the natural recoil from the torsion communicated to the cross bar by use of the wrench be not permitted entirely to exhaust itself when the cross bar is released in its socket; the purpose of this reserve of spring or recoil, which is recommended, being to aid in securing the engagement of the parts of the lock by the continued and permanent pressure of the spring.

It is true, as has been shewn, that the Vaughans in their claims for invention speak of the shoe-engaging means on the bar being held in engaging position by the spring action of the bar, in tending to assume a position from which it was sprung; but, when the claims and specifications are read and construed together, as they should be (*Arnold* v. *Bradbury* (1)), it would seem that for its essential purpose the torsion is employed as a means to the fitting together of the parts.

The spring or resilient quality of steel was of course known, and it had been manifested in previous inventions; the appellants acquired no monopoly of that; it has not been denied upon this appeal that its use and application for the purpose, and by the particular method, which has been described, became by the grant, the exclusive right of the patentees; nevertheless of course the claim for infringement fails unless it be established that the right so acquired has been infringed.

Turning now to the evidence of the alleged infringement; on 16th May, 1922, the respondent Charles D. Ericson obtained Canadian letters patent, no. 218,561, for rail anchors; previously, on 21st March, he had become party to a deed whereby he had granted to the respondent corporation an exclusive license for the manufacture and sale of the device which was the subject of his application; net profits to be equally divided. The other respondent, Thomas H. Watson, is the president of the respondent corporation. It is the manufacture and sale of the rail anchors by the last named respondents, in which the respondent Ericson shares the profits, which are said to infringe the appellants' device. Ericson in his specification describes his object, and I quote his language as explanatory; it

(1) L.R. 6 Ch. App. 712.

should be borne in mind however that the infringement, if any, consists in what has been done, not in statement or description. He says:

> This invention relates to devices for preventing the longitudinal creeping of railway rails and more particularly to that type in which a longitudinal wedge-shaped jaw is driven between one edge of a rail base and one end of a yoke member spanning the rail base, and my object is to devise an anchor of this type which will be cheap to construct and which will hold securely on the rail. In anchors of this type there always exists a tendency for the wedge to loosen under the stresses to which the anchor is subjected and unless there is sufficient resiliency in the parts to take up any slight initial slack, the whole anchor comes loose as soon as such initial slack takes place. I aim therefore to obtain as much resiliency as possible where resiliency does not affect the immobility of the device longitudinally of the rail base when in service. It is also desirable to provide resilient frictional locking pressure tending to resist the slipping of the wedge which does not resolve itself into component forces of which one acts in a direction parallel to the length of the wedge. I aim therefore to so design the anchor that a resilient locking friction is produced by wedge action transversely of the rail.

In the fitting of this device to the rail the shoe is driven firmly onto the rail base, and then the yoke is driven over the shoe. In the latter operation the shoe is not moved. The upper face of the shoe is somewhat chambered off at the end which enters the yoke for a distance of one-quarter to one-third of its length to form a slight vertical wedge which assists the driving, and, by the wedge action which it develops, has the effect of springing the large arm of the yoke into holding position. But, when the yoke has passed over the chamfered end, the upper surface of the shoe, over which it continues to move in the driving process, is horizontal or parallel to the rail, so that, when the yoke comes to rest, the plane of contact between it and the upper jaw of the shoe is horizontal and parallel with the underlying plane of contact between the lower jaw and the rail base, thus avoiding in the use of the anchor any resulting force, the action of which would tend to displace or to expel the wedge. This is a very simple expedient, and none the less meritorious because of its simplicity. The respondents have a patent for it; the question is, not the validity of the respondents patent, but whether the rail anchors which the respondents manufactured and sold infringe the appellants' patent.

Elaborate experiments were conducted by one of the appellants' expert witnesses to demonstrate, by means of

1925

THE P. & M. COMPANY v. CANADA MACHINERY CORP., LTD.

Newcombe J.

scientific apparatus, that in the driving process by which the respondents' yoke was fitted to the shoe and to the rail, torsion of the yoke was necessarily, and it was suggested designedly produced, and therefore it was said that the respondents had appropriated the principle, and indeed the essential element, of the appellants' patent; but I would reject that contention, because, even were I satisfied that the respondents' contrivance is placed in position not without some twisting of the yoke when it is driven over the wedge, I would not consider that the respondents had thereby infringed the appellants' patent, because they have not adopted the appellants' method of engaging the parts, and I hold that the appellants have no monopoly of the torsion, unless, it may be, in the application of it to the particular contrivance which they describe in detail. The words of the Lord Chancellor in *Tweedale* v. *Ashworth* (1), are very pertinent. His Lordship said:

> There are some things wherein a principle properly so called is invented, and the infringer may take the principle and may alter the details, and yet it is very obvious that he has, in truth, taken the idea which has been the subject-matter of the invention, and has simply altered the details so as to avoid the possibility of its being suggested that he has taken the same thing. The court can in such cases very often look through the mere variation of details and see that the substance and pith of the invention has been pirated, and consequently can protect the inventor. But there are some cases in which, although the principle is common to a great variety of manufacturers, there may be a good subject-matter of a patent in the particular mechanical mode by which that principle is carried into operation.

The appellants' invention is of the latter description, and if, using the language of the Lord Chancellor on the following page of the report, one were to endeavour to adapt it, *mutatis mutandis,* to the facts of the present case, I think the passage might fairly be reproduced thus:

> If it is suggested that each of them uses a steel yoke, and that each of them fastens the shoe to the rail by the use of that yoke and the elasticity of the material of which it is composed, it occurs to me immediately that where there are two such things as we are dealing with here, where there must be a steel yoke underlying the rail to hold in position upon the rail a shoe of substantially common form and purpose, and where there must be some means or other of fastening the shoe to the rail by means of the bar or yoke, there is necessarily a considerable likeness between all the forms; and indeed in the oldest forms there must be in some sense a likeness; but that which alone seems to me to constitute the patentable article in the case of the appellants is that which the

(1) 9 R.P.C. 126.

respondents have not taken at all; they have not, either in the form of the bar or by what is called the grip, taken the appellants' mode of doing it.

In the same case at p. 128, Lord Watson said:

> The plain object of the invention as described in the specification is to substitute better mechanical equivalents for those already known and used as a means to the same end. It follows that, in construing the appellants' specification, the doctrine of mechanical equivalents must be left out of view. He cannot bring within the scope of his invention any mechanical equivalent which he has not specifically described and claimed.

To the like effect is the judgment of the same great authority in *Miller* v. *Clyde Bridge Steel Co.* (1).

The novel element either in the appellants' patent or in the respondents' device is somewhat fine and narrow. Both depend upon the use of the steel yoke and the rail-engaging shoe. The yoke is applied in the one case by the torque, in the other by the wedge. In either case there is of course the recoil or resiliency of the steel bar, but that was in fact a feature of prior devices; it had been specifically mentioned in two of them at least, Clawson's specification of May, 1907, and Gutheridge's of October, 1907; it was obvious or capable of being realized upon investigation, whether declared or not. It makes possible the appellants' method of locking the parts, and it is apparent that the Ericson wedge could not be worked to form a binding connection if the yoke were rigid. The appellants' patentees have made use of an ingenious means of interlocking for the purpose of making their device effective. They have produced a useful lock. The respondent, Eriscon, has succeeded in the same purpose by a simple adaptation of the form and use of the wedge.

The case is I think covered by the authorities. Vice-Chancellor Wood in *Curtis* v. *Platt,* as reported to the footnote to *Adie* v. *Clark* (2), among other pertinent observations, says:

> Where the thing is wholly novel and one which has never been achieved before, the machine itself which is invented necessarily contains a great amount of novelty in all its parts, and one looks very narrowly and very jealously upon any other machines for effecting the same object, to see whether or not they are merely colourable contrivances for evading that which has been before done. When the object itself is one which is not new, but the means only are new, one is not inclined to say that a person who invents a particular means of doing something that has been known to all the world long before has a right to extend very largely

(1) 9 R.P.C. 478-9. (2) 3 Ch. D. 135.

1925

THE P. & M. COMPANY v. CANADA MACHINERY CORP., LTD.

Newcombe J.

the interpretation of those means which he has adopted for carrying it into effect.

* * * *

And although one is not to be too narrow in scrutinizing or interpreting a patent against a person who is a *bona fide* inventor, yet, on the other hand, as to all those who may be proceeding to effect similar objects by other discoveries, the court is bound to say that they are at liberty to do so provided they do not infringe the precise mechanism claimed for by the patentee.

Upon review of the Vice-Chancellor's judgment Lord Westbury expressed his entire agreement (1). See also the observations of Patteson J. in *Jones* v. *Pearce* (2), and Lord Davey's judgment in *Consolidated Car Heating Co.* v. *Came* (3).

It is true as held by Lord Justice Clerk Hope in *Household Company* v. *Neilson* (4), and by Viscount Haldane in *British Thomson-Houston* v. *Corona Lamp Works* (5), that a claim may be well founded to the use of a principle of manufacture so distinctive and individual in form that it may be carried out under the general direction of a skilled manufacturer without further invention. Or if you suggest and discover not only the principle but a means of applying it to practical result by mechanical contrivance and apparatus, and show also that you are aware

that no particular sort of modification or form of the apparatus is essential in order to obtain a benefit from the principle, then you may take your patent for the mode of carrying it into effect and are not under the necessity of describing and confining yourself to one form of apparatus.

It is said that in such cases the essence of the invention is independent of the form or construction of the instruments by which it is to be applied. The appellants claim that their invention is of this quality, but I think they fail to establish either the invention of a principle or a claim for the application of the principle, such as it is, which is embodied in their patent, in any manner other than that which is particularly described by their drawings. The invention is one of mechanical detail. The specification and claims of the appellants' patentees taught or suggested nothing as to the agency or usefulness of the wedge in fastening the rail anchor. They departed deliberately from the wedge and contrived a locking action of a minute and particular description, and essentially they invoked the

(1) 11 L.T. N.S. 247.
(2) 1 Webster's P.C. 124.
(3) [1903] A.C. 576-578.
(4) 1 Webster's P.C. 685.
(5) 39 R.P.C. 70.

resilient action of the steel yoke only for the purpose of bringing into place and engagement or function the specially designed parts of the anchor and the shoe. The characteristic of the steel bar when sprung or twisted to resume its normal position was not the discovery of the appellants' patentees. They merely made use of a well known quality of the metal for bringing about the particular result in the specified manner, and there is in my judgment no suggestion of or foundation for any broader application of their idea. The question raised in the case is essentially a question of fact and as I view the evidence there is nothing to suggest that practical men, working with the object of producing a contrivance answering to the appellants' specification in its broadest interpretation, would be apt by any chance to produce the device which is claimed to infringe. I have come to the conclusion, after reviewing the authorities, that the observations of the learned authors of Terrell on Patents, 6th ed. at p. 121, may be safely adopted. They say:

> But the consideration of the question of infringement is much simplified if one remembers that inventions may be divided roughly into two classes in respect to subject-matter. Firstly there is that kind of invention which consists in the discovery of a method of application of a new principle—here what has been invented is in effect the new principle, and, generally speaking, the court will regard jealously any other method embodying that principle, for the patentee was not bound to describe every method by which his invention could be carried into effect. Secondly there is that kind of invention which consists in some particular new method of applying a well-known principle, and in this case the use of other methods is not contemplated by the patentee, and such will not fall within the ambit of his claim.

It is the second category to which the kind of invention which is involved in the appellants' patent belongs.

We ought not to overrule the judgment of the learned trial judge unless satisfied that he was wrong, and after having considered the findings below, and the carefully prepared and able arguments on both sides, which we had the advantage of hearing, I am by no means convinced that the judgment is erroneous.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Blake, Lash, Anglin & Cassels.*

Solicitors for the respondents: *Gibson & Gibson.*

1925
*Nov. 19, 20.
*Dec. 10.

THE NORTHERN GRAIN COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

THE GODERICH ELEVATOR AND TRANSIT CO. (DEFENDANT)..... } RESPONDENT.

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

Contract—Sale of goods—Bailement—Warehouseman—Storage of grain shipped to warehouse by lake vessel—Instructions from shippers to ship grain by rail to purchaseers—Delivery to one purchaser without production of lake bills of lading—Failure of purchaser to pay for grain —Action against warehouseman to recover damage for loss.

The appellant, a grain merchant in Manitoba, shipped by a lake vessel 70,000 bushels of grain to the respondent, an elevator company in Ontario, for storage, and advised the respondent that the grain would be shipped out by rail from the elevator to various purchasers from the appellant. According to the documents produced in the case, it was agreed for the protection of all parties that the rail shipping bills were to be held as against the lake shipping bills and delivered to the purchaser only on delivery of or endorsement upon the lake bills and payment of the drafts attached. By letter of the 29th of May, 1923, the respondent company advised the appellant company that some 40,000 bushels of seed oats had been unloaded by the ss. *Martian* on the 24th and asked for advise as to where the rail bills were to be sent "for endorsation from the lake documents." The respondent company received no reply other than a letter of June 1 appraising it that the appellant company had carefully noted its request. In the meantime, on the day before May 31, the appellant company wrote to the respondent confirming "wire instructions * * * to accept orders from the P. Co., covering 10,000 feeds ex ss. *Martian* * * *," adding: "We are forwarding to them (The P. Co.) the lake shipping bills covering this quantity and trust that our instructions will be found entirely in order with you." Another lot of 10,000 bushels were sold in a similar way. These 20,000 bushels were shipped to the order of the P. Co., the railway shipping bills being forwarded by the respondent company to the local freight agent of the C.N.R. at Woodstock. The appellant company had forwarded the lake bills, with drafts attached, to its bank at Woodstock with instructions to hand over the bills on payment of the drafts, according to the usual course of business. The P. Co. obtained delivery of the 20,000 bushels without the production of the lake bills, but took up only one of the drafts, leaving the drafts for the residue of the two shipments, 15,000 bushels, unpaid. The appellant company, on learning the facts, immediately advised the respondent company that it would be held responsible. The P. Co. having become insolvent, this action was brought by the appellant company to recover from the respondent company the value of the grain. The appellant company contends that it was the owner of this grain, which the respondent company

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

held as its bailee and which, without authority from it, had been delivered to a person who had no title to receive it. The respondent company's defence is that the letter of May 31 was in effect a direction to ship to the P. Co. direct and to deliver the rail bills to the latter regardless of payment or of the whereabouts of the lake bills.

Held, that the respondent company was liable. The statement contained in the letter of 31st May that the appellant company was forwarding the shipping bill to its customer, should only be read as meaning that it was forwarding them in the ordinary course, through its bank or other agent, with the drafts for the price of the grain attached, and there is nothing in the letter justifying a departure from the understanding expressed in the respondent company's letter to the effect that the rail bills were to be held against the delivery or the endorsation of the lake bills.

Judgment of the Appellate Division (57 Ont. L.R. 1) reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment of the trial judge and dismissing the appellant's action.

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

Pitblado K.C. and *Glyn Osler K.C.* for the appellant.
H. J. Scott K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—The appellant company, which carries on business as a grain dealer with its principal place of business at Winnipeg, in the spring of 1923 had a considerable quantity of grain in elevators at Port Arthur and Fort William.

In May of that year, arrangements were made with the respondent company, which had an elevator at Goderich, for the storing of this grain by them when arriving by vessel from the head of the lakes and for shipment of it from time to time to the appellant company's customers, in fulfilment of contracts already made or to be made. Among other contracts, the appellant had an arrangement with the Peerless Cereal Mills Limited, of Woodstock, for the sale to that concern of 60,000 bushels; and in May and June shipments were made from time to time, pursuant to this contract, which were duly paid for on delivery. On the 20th and 23rd of June, the appellant company gave authority to the respondent company to accept two several

(1) 57 Ont. L.R. 1.

1925

NORTHERN GRAIN CO. v. GODERICH ELEVATOR & TRANSIT CO.

Duff J.

orders from the Peerless Company of 10,000 bushels each. These lots were shipped to the order of the Peerless Company, the railway shipping bills being forwarded by the respondent company to the local freight agent of the Canadian National Railways at Woodstock. The appellant company had forwarded the lake bills, with drafts attached (10 bills, representing 2,000 bushels each) to their bank at Woodstock, with instructions to hand over the bills on payment of the drafts, according to the usual course of business. The Peerless Company obtained delivery of both lots of grain, 20,000 bushels in all, without the production of the lake bills, but took up only one of the drafts, leaving the drafts for the residue of the two shipments, 15,000 bushels, unpaid. The appellant company, on learning the facts, immediately advised the respondent company that they would be held responsible. The Peerless Company having become insolvent, the action out of which this appeal arises was brought by the appellant company to recover from the respondent company the value of the grain.

The appellant company's case, in a word, is that they were the owners of this grain, which the respondent company held as their bailee and which without authority from them they delivered to a person who had no title to receive it. The respondent company's answer is, in effect, although the legal contention was advanced in a slightly different form, that they had the authority of the appellant company for making delivery to the Peerless Company.

The issue is an issue of fact, depending, however, upon documents supplemented by uncontradicted oral evidence.

The arrangements between the appellant company and the respondent company were all made by correspondence, and the letters outlining the procedure to be followed in shipping the grain from the Goderich elevator to the appellant company's customers are these:—

Winnipeg, Manitoba, May 4, 1923.

Goderich Elevator & Transit Company,
Goderich, Ont.

Gentlemen,—We are pleased to advise you that some time during this month, probably the latter half, we will have shipped in your care 70,000 bushels no. 2 feed oats which will be for domestic distribution. We will be wanting to order this loaded out on track from time to time as our orders call for and will appreciate hearing from you just what the procedure is in this connection, so that we can handle ourselves satisfactorily with you and to give you the least trouble in the matter.

The above is our first shipment in your care, and when we get ourselves in line with what has to be done to facilitate the handling at your end, we will be guided accordingly and enabled to expedite the movement through your hands.

Appreciating your early advices and favours, we are,

Yours very truly,

The Northern Grain Co., Ltd.

P.S.—We will give you advices of forwarding as soon as the same is loaded at Fort William.

To this letter the defendant sent the following answer:

Goderich, Ont., May 7, 1923.

Northern Grain Co.,
Winnipeg.

Dear Sirs,—We have your favour of the 4th and note that you contemplate shipping some no. 2 feed oats in our care this month, for domestic distribution.

This will have our extreme care on arrival and in storing and shipping.

The usual method is to write or wire in your orders with complete information, backed up by shipping bills in triplicate over the road in which shipment is desired. The lake bills may be held by your bank or any eastern shipper to whom the rail bills can be sent for endorsation from, and attachment to draft on the purchaser. The usual method, however, is for us to send these rail bills to the nearest Division Freight Agent of the railway, in your territory; but we may say it is immaterial whether they go to the bank or the D.F.A. so long as all concerned are adequately protected. When the bills have been completed by shipment of the aggregate amount covered thereby, they are sent in (sic) to us for filing.

Insurance on grain stored is taken care of by the shipper and also the cancellations as shipments are made.

We are enclosing herewith one of our tariffs, which will give handling, storage and insurance rate, with general conditions covering the operation of our plant. We also enclose a mileage tariff which will prove convenient for your billing.

We shall be glad to serve you at any time, and we quite believe that a test shipment will serve to show you that we have exceptional facilities for handling domestic shipments via the Canadian National or Canadian Pacific Railways.

Yours faithfully,

Goderich Elevator & Transit Co., Ltd.

With this letter was sent a document professing to give the rules and regulations governing the Goderich Company's elevators. *Inter alia,* it contains the following rules:

9. Upon payment of all freight charges being made and in exchange for lake bills of lading properly endorsed, the company will issue warehouse receipts for grain received and weighed in to the company's elevators. No transfer of such receipts will be recognized by the company, nor will the grain so designated be delivered until the original warehouse receipt has been duly endorsed by the owners of the grain and surrendered to the company or its authorized agent.

1925

NORTHERN GRAIN CO. v. GODERICH ELEVATOR & TRANSIT CO.

Duff J.

10. Elevation, storage, or other handling charges accruing to the company must be paid before securing delivery of the grain to the consignee.

* * * *

12. Owners or their agents when sending instructions for shipment of grain from the elevators must state name of vessel, with date of lake bill of lading, from which shipment is desired.

To these should be added a letter of the 11th of May, in these terms:

The Northern Grain Company, Ltd.,
Winnipeg, Man., May 11, 1923.

Goderich Elevator and Transit Co.,
Goderich, Ont.

Gentlemen,—We beg to acknowledge receipt of your favour of the 7th and appreciate the information you have so carefully conveyed to us in the same. This we have made careful note of and will govern ourselves accordingly.

We wish to thank you for the tariffs enclosed. The same will be made good use of by us.

As soon as our loadings go forward which we expect will be sometime the latter half of this month, we will give you additional advices.

Yours very truly,
The Northern Grain Co., Ltd.,
JNS:W Per (Sgd.) J. N. Sternberg.

Comment upon these documents is, perhaps, superfluous. They manifest in the clearest way the intention that whichever of the two alternative methods of procedure described in the respondent company's letter was to be pursued, the essential thing for the protection of all parties was that the rail shipping bills (in other words, the grain itself) were to be held as against the lake shipping bills, and delivered to the purchaser only on delivery of or endorsement upon the lake bills and payment of the drafts attached. In part, no doubt, the procedure is framed with a view to the protection of the warehouseman by affording formal evidence of delivery by him to the order of the holder of the lake bills, the owner of the grain, but also for the protection of the holder of the lake bills, who is to receive payment before the rail bills become available for the purchaser.

As already mentioned, the respondent company justifies delivery to the Peerless Company by alleging that this delivery was made pursuant to the express authority of the appellant company. The contention is based upon these facts: By letter of the 29th of May, the respondent company advised the appellant company that some 40,000 bushels of no. 2 seed oats had been unloaded by the *Martian* on the 24th, and concluded with this request:

If, perchance, you are making our shipments to individual purchases, you will please advise to whose order you wish the grain shipped, naming the party to advise, and advising where we shall send rail bills for endorsation from the lake documents.

On the 1st of June, the appellant company wrote in reply a letter which contains this observation:

We note your additional advices in connection with the procedure to facilitate the loading and shipping ex the elevator, and this we will keep in front of us for our further guidance and attention.

In the meantime, on the day before, May 31, the appellant company had sent this letter to the respondent company:

The Northern Grain Company, Ltd.
Winnipeg, Man., May 31, 1923.

Goderich Elevator and Transit Co.,
Goderich, Ont.

Gentlemen,—We are pleased to confirm our wire instructions to you this morning to accept orders from the Peerless Cereal Mills of Woodstock, Ont., covering 10,000 no. 2 Feeds ex ss. *Martian,* unloaded into store for our account May 24. We are forwarding to them the lake shipping bills covering this quantity and trust that our instructions will be found entirely in order with you.

Please note that on ss. *Martian,* ex Fort William May 28, in care of your good selves at Goderich, contained in Hold no. 3, shipment for our account of 24, 427.12 of no. 2 feed oats had gone forward. These oats also are intended for domestic consumption and you will receive loading out instructions by wire in due course of time.

Thanking you for your careful and prompt attention to this shipment, we are,

Yours very truly,
The Northern Grain Co., Ltd.,
JNS:W Per (Sgd.) J. N. Sternberg.

By the respondent company it is now said that this letter of May 31 was in effect a direction to ship to the Peerless Company direct, and to deliver the rail bills to them, regardless of payment or of the whereabouts of the lake bills. This authority, it is now stated, was acted upon, and the same course followed in relation to subsequent shipments, without objection, until the present dispute arose. It is undeniable that the letter of May 31 seems carelessly framed, and it is quite capable in itself of an interpretation involving the suggestion at least that the shipping bills will be in the hands of the Peerless Company as the appellant company's agents, an interpretation which may receive some additional support from the consideration that the letter of May 29, asking for advice as to where the rail bills were to be sent for endorsation on the lake docu-

1925

NORTHERN GRAIN CO. v. GODERICH ELEVATOR & TRANSIT CO.

Duff J.

ments, received no reply other than the letter of June 1, apprising the respondent company that the appellant company had carefully noted its request.

There is, however, some danger of misinterpreting commercial correspondence of this kind when a lawyer's critical apparatus is applied to it. In order to understand such letters, it is essential that one should put oneself in the position of the parties, and it is at least very difficult to suppose—one is tempted to say it is incredible—that any person experienced in commerce could have conceived the idea, in the absence of something much more explicit than anything in this letter, especially in view of the earlier letters, that the appellant company were forwarding the documents of title to their customers direct, without protecting themselves in the usual way. The statement that the appellant company were forwarding the shipping bills to their customers would only be read as meaning that they were forwarding them in the ordinary course, through their bank or other agent, with the drafts for the price of the grain attached. In any case there is nothing in the letter, on the most critical analysis of it, justifying a departure from the understanding so clearly expressed in the respondent company's letter already quoted, to the effect that the rail bills were to be held against the delivery or the endorsation of the lake bills. The same observations apply to the subsequent letter of the 11th of June.

Moreover, it is undisputed that these letters were not construed by the respondent company as authorizing any delivery except upon production of the lake bills. Three communications are in evidence, written immediately upon notification to the respondent company of the default of the Peerless Co. The first is a telegram of the 14th of July, in these words:

Telegram Rush

Woodstock, Ont., July 14, 1923.

Goderich Elevator & Transit Co.,
Goderich, Ont.

Peerless received delivery grapnel prepuce with stenting cover lake shipping bills in bank here whipsaw seedsman here care J. N. Sternberg.

The Northern Grain Co., Ltd.

Translation:

Peerless received delivery 15,000 bushels no. 2 feed oats with drafts unpaid. Amount to cover lake shipping bills in bank here. We hold you responsible. Advise by wire here care J. N. Sternberg.

The other two are letters of the 18th and 20th of July respectively, and are as follows:

Goderich Elevator & Transit Company Limited
Goderich, Ont., July 18, 1923.

Agent Grand Trunk Railway,
Woodstock, Ont.

Dear Sir,—We are advised by Mr. Sternberg, of the Northern Grain Co., Winnipeg, that notwithstanding we had billed certain shipments to Woodstock to "Order" of Peerless Cereal Co., for no. 2 feed oats ex *Martian*, and sent the rail bills to you for delivery to Peerless Cereal Co., in exchange for lake bills, or reduction therefrom, in the usual way, that you have delivered the oats to the Peerless people without cancellation of the lake documents.

Will you be good enough to advise us immediately the numbers of the cars which were delivered in this manner, obliging,

Yours faithfully,
The Goderich Elevator and Transit Co., Ltd.,
GLP/P (Sgd.) G. L. Parsons, Manager.

Goderich Elevator & Transit Company Limited
Goderich, Ont., July 20, 1923.

Agent Canadian National Rys.,
Woodstock, Ont.

Dear Sir,—Your favour of the 19th. What we requested from you was the numbers of the cars which had been surrendered without presentation of lake documents to Peerless Cereal Mills. We understand from The Northern Grain Co. that of 20,000 bushels shipped from here, all on the same billing instructions, you took up lake bills for only 5,000 bushels, is this correct? and why did you not take up lake bills for the other 15,000 bushels?

For your information, we have been billing grain in many cases in this way for many years, and this is the first negligence reported to us. It should be known by any agent that anything billed to "Order" of anybody, requires the production of proper authority from the shipper, or his agent, before delivery is made; thus on ex-lake grain the corresponding lake bills of lading must be surrendered for cancellation, or reduction therefrom, as the quantity shipped may necessitate.

The shipper, Northern Grain Co., will insist upon payment of the goods, and we in handling the goods between vessel and cars here wish to have a proper record of the cars affected. Please inform us by return mail, obliging,

Yours faithfully,
Goderich Elevator and Transit Co., Ltd.,
GLP/P G. L. Parsons, Manager.

In addition to these written communications, it was stated in evidence by Mr. Sternberg, who was called for the appellant company, that Mr. Parsons, the manager of the respondent company, some time later told him that the railway company were responsible; that with all the rail shipping bills, a document went forward to the rail-

1925

NORTHERN GRAIN CO. v. GODERICH ELEVATOR & TRANSIT CO.

Duff J.

way company's agent, directing the surrender of the rail bills on exchange for lake bills or warehouse receipts. It is undeniable, in view of this evidence, that the officials of the respondent company were fully alive to their duty to retain the control of the Peerless Company's shipments until the proper lake bills had been surrendered or duly endorsed; and it seems equally undeniable that nothing in their correspondence with the appellant company led them to believe that the appellant company was relieving them from the performance of that duty.

The view taken in the Appellate Division appears to have been that the practice of requiring the production and delivery or the endorsation of the lake shipping documents in exchange for the rail bills is a practice devised solely for the protection and in the interests of the warehouseman. With great respect, that seems hardly consistent with the letter of the respondent company, in which it is clearly implied that the procedure outlined is for the protection of all parties. The appellant company was invited by the respondent company to rely upon the observance of this procedure for the protection of its own interest as well as those of the respondent company. It is indisputable that the appellant company did act upon this invitation.

The appeal should be allowed, with costs here and in the Appellate Division, and the judgment of Riddell J. restored.

Appeal allowed with costs.

Solicitors for the appellant: *Blake, Lash, Anglin & Cassels.*
Solicitors for the respondent: *Millar, Ferguson & Hunter.*

L. O. GROSSMAN (PLAINTIFF).....APPELLANT; 1925

AND

*Nov. 16.
*Dec. 10.

L. E. BARRETT AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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

Sale of goods—Thing lost or stolen—Second-hand automobile—Purchaser—Good faith—Arts. 1487, 1488, 1489, 1490, 2268 C.C.

The purchaser of a thing lost or stolen is in "good faith" within the meaning of art. 1489 C.C., if he honestly believes that the vendor is the owner of the thing lost or stolen. It is not necessary that his good faith be "*une bonne foi éclatante*," or that his error be an invincible one.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and dismissing the appellant's action.

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

J. de G. Audette for the appellant.

A. Geoffrion K.C. and *F. Fauteux* for the respondents.

The judgment of the court was delivered by

MIGNAULT J.—The respondents are the Prudential Coal Company, Ltd., a company carrying on a coal business in Montreal, and L. E. Barrett, its president and manager. The appellant, owner of a Packard single-six sedan automobile, stolen from him in Syracuse, N.Y., in November, 1923, brought this action accompanied by a seizure in revendication of this car on the 12th of January, 1924, against the respondents in whose possession the car was found in Montreal. The plea of the respondents is that on the 20th December, 1923, they purchased the car in good faith from the Robinson Motor Car Company, Limited, and Hector Meunier, carrying on business in Montreal as dealers in automobiles, who were traders dealing in similar articles, and who bought the car at a public sale. They also set up that the car in question cannot be revendicated without reimbursing to them the price they paid, which price is not stated in the plea. They further alleged that the car was insured and that the insurance

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

1925

GROSSMAN v. BARRETT.

Mignault J.

money had been paid to the appellant, who ceased to have any right of action, but this allegation was struck out on an inscription in law. They asked for the dismissal of the action.

No question was raised whether such a plea is the appropriate answer to an action by the owner of a thing stolen to recover its possession. As between the owner and the possessor, in the absence of prescription which of course would transform possession into ownership, the right of the former necessarily prevails over the possession of the latter, and there is, as a rule, no defence to his action. While sale, as to a determinate object, is translatory of ownership, a sale by a non-owner is without effect, saving the right of the buyer to claim damages if he was ignorant of the lack of title of the seller. This is the general rule stated by art. 1487 C.C., which says that the sale of a thing which does not belong to the seller is null. To this rule there are three exceptions mentioned in arts. 1488, 1489 and 1490 C.C. We are here concerned only with art. 1489 C.C. which is as follows:

1489.—If a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it.

This article must be read with the third and fourth paragraphs of Art. 2268 C.C. which deals with prescription of corporeal movables:

This prescription is not, however, necessary to prevent revendication, if the thing have been bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, nor in commercial matters generally; saving the exception contained in the following paragraph.

Nevertheless, so long as prescription has not been acquired, the thing lost or stolen may be revendicated, although it have been bought in good faith in the cases of the preceding paragraph; but the revendication in such cases can only take place upon reimbursing the purchaser for the price which he has paid.

The advantage of possession is that it throws on the claimant the onus of proving ownership and the defects in the possession or title of the possessor. When ownership is proved, any title short of prescription acquired by the possessor of a thing lost or stolen will not avail to prevent revendication, but if the possessor bought the thing in good faith in a fair or market, or at a public sale, or from a

trader dealing in similar articles, the owner cannot reclaim it without reimbursing to the purchaser the price he paid for it. As a further observation to complete this statement of the law, I may add, although nothing turns on it in this case, that a title acquired under a sale by authority of law is a complete bar to an action in revendication, even when the thing sold was lost or stolen (art. 1490 C.C.)

There is no possible doubt here that the automobile belonged to the appellant and was stolen from him. The respondents therefore must shew that they come within the exception of art. 1489 C.C. or, to the same effect, of the third and fourth paragraphs of art. 2268 C.C. If they do, the appellant's right of revendication is not defeated, but is subject to the condition that he must, before obtaining possession of the car, reimburse to the respondents the price they paid for it.

I will treat the respondents as having the same interest, for Barrett purchased the car for the Prudential Coal Company, Ltd. He bought it from the Robinson Motor Car Company, Ltd.

Two questions of fact remain to be discussed.

1. Was the Robinson Motor Car Company a dealer in similar articles, namely second hand, or as they are generally called, used cars?

2. Did the respondents purchase this car in good faith?

Before dealing with these two questions, it is proper to say that the learned trial judge found against the allegation of the respondents' plea that the Robinson Motor Car Company bought this car at a public sale, expressly holding that the plea in that respect was unfounded. He further stated that the pretended auction sale by U. H. Dandurand, Limited, which the respondents' witnesses Falcon and Reid swore took place on the 18th of December, 1923, appeared to have been a fictitious sale. In so holding, the learned judge necessarily discredited the testimony of both Falcon and Reid, the former the president, and the latter the salesman of the Robinson Motor Car Company. I would not interfere with this finding of fact. There is ample ground for disbelieving what Falcon and Reid said as to the alleged auction sale. An independent witness, Gilbride, employed with the Packard Motor Company, Ltd., in Montreal, testified that Falcon brought the car to

1925

GROSSMAN v. BARRETT.

Mignault J.

that company's office with a Montreal lawyer, Mr. Paul Mercier, and a friend of the latter from St. Henry, who desired to be advised whether he could safely purchase the car. The company's employee Jones discovered that the numbers of the car had been changed, and, as a result of their investigation, they came to the conclusion that the car had been stolen from Syracuse, New York. They have in their office a record of stolen cars, and they wired to Syracuse giving information of the fact. He added that Mr. Mercier advised his friend not to buy the car. He was not asked the date of this visit, but he says that a couple of weeks afterwards, Corporal Anderson of the Royal Mounted Police brought the car which had been seized to their store. It is rather unfortunate that neither Mr. Mercier, nor his friend, nor Corporal Anderson were called at the trial.

As further discrediting the testimony of Falcon and Reid as to the pretended auction sale, there is the fact that they swear that they showed the car to Barrett only after the auction sale, the date of which is given as the 18th of December, 1923, while Barrett testifies that he bought the car (the date of the sale to Barrett is December 20, but apparently the contract was prepared on December 18), ten days after he saw it for the first time. He says that the employees of the Robinson Motor Car Company, he mentions Reid, made practically daily visits to him with the car, and one evening they took his wife, his sister and himself for a little drive of about five miles. It is impossible to reconcile what Barrett says with the testimony of Falcon and Reid, and it is quite evident that the learned trial judge did not believe the latter as to the alleged auction sale.

I will now take up the two questions of fact on which the decision of this case depends.

1. Was the Robinson Motor Car Company, Ltd., a dealer in similar articles, namely used cars?

This company was incorporated in March, 1921, under a Dominion charter, with authority, *inter alia,* to deal in automobiles. Its capital was $50,000. The original incorporators are not now interested in the company. Falcon says that he bought the company, meaning probably that he acquired control, in January, 1923. He invested

$22,000 in the company, $10,000 in cash and the balance in automobiles. He, one Geo. McGown and one Lucien Mignault, the secretary-treasurer, are the shareholders and also the directors, Falcon being the president and no doubt the ruling spirit in the company. Falcon says that besides his investment, $2,000 was put into the company by others. In July, 1923, the company hired from Morgan Realties, Ltd., a building and a garage in the rear on St. Alexander street, near Ste. Catherine street. In the same month, it obtained a license from the province of Quebec to keep a garage not in the premises on St. Alexander street, but at no. 221 Ontario street west. It filed certain statements of its business up to December, 1923, showing an operating deficit. A page of its cash book was copied into the record but is of no use, for it has no dates opposite the entries which are of mere sums of money.

As to the business carried on by the company in December, 1923, we have only the statements of Falcon, Reid and Lucien Mignault. It does not however appear to be seriously contended that the company did not carry on the business of selling used cars, but the appellant endeavoured to prove that the cars it dealt in were stolen cars. In that regard, the proof is not conclusive, although it shews that suspicions were entertained as to the honesty of the business.

In the absence of a finding of the learned trial judge, based on his appreciation of the trustworthiness of these witnesses, that the Robinson Motor Company was not a dealer in used cars within the meaning of art. 1489 C.C. I think we must assume, as was held by the Court of King's Bench, that the purchase of the car in question was made from a trader dealing in similar articles.

2. But was this purchase made in good faith?

I accept the definition of good faith adopted by the learned trial judge: *bonae fidei emptor esse videtur qui ignorat rem alienam esse.* Barrett, in answer to questions put to him by counsel for the appellant, swore that he was perfectly satisfied and that he had no doubt that the Robinson Motor Car Company were *bona fide* dealers. It was open to the learned trial judge to refuse to believe Barrett, and had he based his decision that Barrett was in bad faith

1925

GROSSMAN v. BARRETT.

Mignault J.

on his disbelief of this testimony, it might have been difficult to set it aside.

The learned judge however gave reasons derived from the circumstances of the sale for inferring that Barrett was not a purchaser in good faith. These reasons must be carefully scrutinized, the more so as the Court of King's Bench came to the opposite conclusion upon consideration of the same circumstances.

Barrett explains that he had a new Hudson touring car, 1923 model, which had cost him $2,300. He desired to exchange this car for a closed automobile. His nephew, one Smetzer, was employed by the Robinson Motor Car Company, and through him he was brought into connection with that company. The latter offered him successively a Paige car and a Cadillac car which did not suit. They then showed him this Packard Sedan car, and, after having tried it for some ten days, he decided to make the exchange. He says that Reid told him that the Robinson Motor Car Company had obtained this car from responsible dealers in New York, which Reid denies, but I prefer to accept Barrett's statement because Reid does not seem very reliable. There was some bargaining as to the sum which the Robinson Motor Car Company would allow him for the Hudson car and the amount he would have to pay in order to complete the exchange. Finally it was agreed that the Hudson car would be taken at $1,500 and that Barrett would pay in addition $1,600, in all $3,100, which with the sales tax and some accessories formed a total purchase price of $3,185. The amount payable in cash was settled by giving twelve notes for $148.75 each.

Barrett had the shrewdness to make an inquiry of Bradstreets as to the financial standing of the Robinson Company and also to require a guarantee that the car was free from all incumbrances, duty, etc., and that, in the event of any claims from Government or insurance companies, the Robinson Motor Car Company would refund the full purchase price of $3,100. That he was wise in requiring this guarantee was shewn by the event, for some days after the sale the car was seized by Corporal Anderson of the Mounted Police, on behalf of the Canadian Government, for customs duty due on the entry of the car from the

United States. Barrett went to see Falcon in connection with this seizure, and Falcon testifies that he paid the duty, a sum exceeding one thousand dollars. At all events, the car was returned to Barrett. It was on this occasion that Corporal Anderson brought the car to the Packard Motor Car Company's office in Montreal, as already mentioned.

Coming now to the reasons of the learned trial judge for inferring that Barrett purchased the car in bad faith, they are, as briefly as can be stated, the following, which I give under the letters used by the trial judge:—

(*a*) Smetzer, Barrett's nephew, was the latter's agent, and his knowledge of the fraud should be imputed to Barrett. Smetzer was not called on behalf of the respondents.

(*b*) Barrett inquired from Bradstreets as to the solvency of the Robinson Motor Car Company and did not take the trouble to ascertain from the Montreal agents of the Packard Motor Car Company whether they knew where the Robinson Motor Car Company had obtained the car.

(*c*) Barrett did not notice the initials on the car doors or the filing of the numbers of the car, although they were fairly evident.

(*d*) No explanation is given why the amount of the sale was raised from $3,000 to $3,100 and of the change of the date of the contract from December 18 to December 20, the former being the date of the guarantee.

(*e*) The sale was not made at the vendor's place of business, but at the purchaser's office, and Barrett knew that one Hector Meunier had an interest in the car.

(*f* and *g*) Barrett insisted on the vendor giving him the guarantee mentioned above and, as such guarantee cannot be treated as

> the legal warranty against eviction which is of the nature of the contract of sale,

it is an indication that Barrett was doubtful as to the origin of the car and wanted this additional assurance.

(*h*) Barrett bought for $3,100, part of which was represented by an old car, a motor car worth from $3,800 to $4,200.

With all possible deference, I think that the only reasons that need be discussed are those indicated under letters (*c*), (*e*) and (*f* and *g*). As to the others, they appear devoid of any significance. Smetzer was not Barrett's agent. Unless it be assumed that Barrett's suspicions had

1925

GROSSMAN v. BARRETT.

Mignault J.

been aroused, it was not an indication of bad faith not to inquire as to the origin of the car at the Packard Motor Car Company's office, although Barrett would have been saved much annoyance had he done so. There was some bargaining about the price to be paid and the raising of the price from $3,000 to $3,100 is without importance. The car exchanged was not an old car and there is not, under the evidence, such a disproportion between the price paid and the value of the car as to warrant a conclusion that the buyer must have suspected that the car had been obtained by criminal means.

Now as to reason (*c*), Barrett says that he did not see the initials on the doors of the car, and he may be readily believed when he states that he did not observe that the car numbers had been filed or effaced. He was getting a second hand car, and, had he seen the initials, he might well have supposed that the owner did not wish to scratch them out and spoil the appearance of the car. Nothing here is inconsistent with good faith or an indication that the car had been stolen.

Reason (*e*) might have some significance, were it not well known how eager agents are to run after purchasers who, left to themselves, would never go to the dealer's place of business. Moreover, in this case, Barrett, having expressed to his nephew, an employee of the Robinson Motor Car Company, his desire to exchange his open car for a closed one, the visit of Reid to Barrett is explained. The important point was whether or not Barrett purchased the car from a trader dealing in similar articles. If so, the place where the bargain was made is immaterial.

Reasons (*f* and *g*) refer to the special guarantee which Barrett demanded before committing himself to the purchase of the car. Reid told him the car had come from New York and that the customs duties had been paid. It was purely a business precaution to require a guarantee against a claim by the custom authorities. There is perhaps more significance in the guarantee demanded against a claim by an insurance company, but standing alone, if Barrett's story be believed—and that is really the test—it does not import bad faith on Barrett's part, for it does not necessarily mean that Barrett suspected that the car had been stolen.

With great respect, I cannot help thinking that the learned trial judge placed the duty of a purchaser of a second hand car on much too high a plane. Good faith does not need to be *une bonne foi éclatante,* it suffices that it be an honest belief that the vendor is the owner of the thing sold. Nor if there be an error on the part of the purchaser is it necessary that the error be an invincible one. I do not think the authorities cited by the learned judge should be given that effect, for it would not be justified by the language of the code.

Barrett's story, which I have given in full, is a perfectly consistent one. The learned trial judge has not said that he did not believe it, but has indicated reasons why he inferred that Barrett was in bad faith. Under these circumstances, I do not think that this court should reject Barrett's testimony.

I have not adverted to the fact that the name of Hector Meunier was inserted in the contract as seller of the car. The circumstances under which this was done are fully explained. Meunier obtained the discounting of the notes given in payment by Barrett. It was at the latter's request that Meunier signed the contract. The intervention of Meunier, whether or not he was a dealer in used cars, has no other significance.

I think therefore that the respondents are entitled to the protection of art. 1489 C.C., having bought the car in good faith from a trader dealing in similar articles. This means that the appellant cannot reclaim it without reimbursing to the respondents the price they paid for it. He has not offered to do so, but the whole question submitted by his counsel at the hearing was whether the respondents were entitled to reimbursement. He fails in this and therefore his appeal must be dismissed. As an act of indulgence, however, and to avoid any difficulty in the future, we think that the dismissal of the appellant's action should be without prejudice to his right to revendicate the car on reimbursing the price paid by the respondents.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Audette & Garneau.*
Solicitors for the respondent: *Fauteux & Fauteux.*

1925

*Nov. 12, 13.
*Dec. 10.

GEORGES DANSEREAU (DEFENDANT) ....APPELLANT;

AND

RICHELIEU TRANSPORTATION CO...(DEFENDANT),

AND

J.-BTE. LAFRENIERE AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Contract—Repairs—Barge—Sale—Notice to contractors—Novation—Arts. 1171-1173, 1174 C.C.

D., being the owner of a barge, gave instructions to the respondents to have some repairs done upon it. After some repairs had been made, D. entered into a conditional promise of sale of the barge to the R. Co., which, apparently, undertook to pay for the repairs. D. wrote to the respondents that he had "sold" his barge to the R. Co. "who will take immediate possession. The R. Co. will arrange with you about payment of repairs which have been done thereon." The R. Co. became insolvent and D. retook possession of the barge, the purchase money being unpaid. The respondents sue both D. and the R. Co. to recover the whole costs of repairing the barge.

Held, Duff J. dissenting, that D. was liable for all the repairs done to the barge. While, as directed by D., the respondents appear to have rendered their account for repairs to the R. Co. and to have made some arrangement with it for payment, the evidence does not establish intent on their part to discharge D. as their debtor—an intent essential to novation (Art. 1173 C.C.) and never to be presumed (Art. 1171 C.C.). In the absence of this "evident intention" the notification given by D. is to be deemed to be a simple indication by him of a person who was to pay in his place, which does not suffice to effect novation. (Art. 1174 C.C.).

Per Duff J. dissenting.—The letter of notification by D. to the respondents was an unmistakable intimation of his intention not to be responsible for any repairs done after its date and, as the possession of the barge then passed to the R. Co., the respondents had no authority to proceed with the repairs except with the latter's consent. Upon the evidence, the inference is justified that both the respondents and the R. Co. understood that the repairs were to be charged to the latter only.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and maintaining the respondents' action.

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

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

1925

DANSEREAU v. LAFRENIÈRE.

T. Brosseau K.C. for the appellant.

P. St-Germain K.C. and *P. N. Pontbriand* for the respondents.

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.—The respondents sue to recover the cost of repairing a barge. The instructions for these repairs were given by the owner, the defendant Dansereau. After some repairs had been made, Dansereau entered into a conditional promise of sale of the barge to his co-defendant the Richelieu Transportation Co., which, apparently, undertook to pay for the repairs. Dansereau notified the respondents of this arrangement, without, however, disclaiming responsibility for work yet to be done, and he instructed them to deliver the barge when ready to the company. Delivery was made accordingly. The barge was used by the company until it became insolvent. When this occurred, the purchase price being unpaid, Dansereau retook possession under the terms of his agreement with the Richelieu Transportation Company.

While, as directed by Dansereau, the respondents appear to have rendered their account for repairs to the Richelieu Transportation Company, and to have made some arrangement with it for payment, the evidence does not establish intent on their part to discharge Dansereau as their debtor —an intent essential to novation (Art. 1173, C.C.) and never to be presumed (Art. 1171, C.C.). In the absence of this "evident intention" we have a case of simple indication by the debtor of a person who is to pay in his place which does not suffice to effect novation. (Art. 1174, C.C.). The text of these articles of the code is so clear and explicit that recourse to authorities to elucidate their scope or application is quite unnecessary.

The evidence negatives the giving of orders for any part of the repairs by the Richelieu Transportation Co. They were all made upon Dansereau's orders. It is sufficiently shewn that all the repairing done was necessary and that the charge therefor is reasonable. The findings of fact in the following *considérant* in the judgment of the Court of King's Bench are warranted by the evidence:

1925

DANSEREAU v. LAFRENIÈRE.

Anglin C.J.C.

Considérant que les demandeurs ont prouvé qu'ils ont fait les réparations à cette barge, au montant de $2,785.89, suivant les instructions données par l'intimé Dansereau, que ces réparations ont été utiles, nécessaires même, ont ajouté à la valeur de la barge et qu'elles l'ont été pour le bénéfice et avantage du dit défendeur qui en était le propriétaire et que, quant à la question de novation, il n'y a aucune preuve de novation expresse, et que bien qu'il y ait quelques éléments de preuve de l'existence de novation tacite, ou par les faits, notamment, dans le fait de l'acceptation, par les demandeurs, des billets de la compagnie "Richelieu Transportation Co., Ltd.", de l'envoi de compte des demandeurs uniquement à cette compagnie, pour des réparations, de la production, par les demandeurs, dans la faillite de cette compagnie, de leur réclamation, néanmoins, ces quelques éléments de preuve sont insuffisants pour démontrer l'existence de telle novation, la novation, d'ailleurs, ne pouvant pas se présumer, l'intention de l'opérer devant être évidente, (article 1171, C.C.) et cette intention n'étant pas évidente dans l'espèce et que dans le cas de doute sur l'existence de la novation, la cour doit juger qu'il n'y a pas de novation.

The appellant has had the full benefit of the work for which payment from him is claimed. The barge on which the repairs were made admittedly always remained his property. He alone gave instructions for the making of these repairs. His only substantial defence to this action was novation. His attempt to establish that has failed. There was a simple delegation which may have given to the respondents a new debtor, but did not amount to a complete novation because proof of evident intent to effect novation by discharging the debtor who made the delegation is lacking.

Taking this view of the case it is unnecessary for us to pass upon the alleged misrepresentation by the appellant of the nature of his sale to the Richelieu Transportation Co., or upon its effect on the novation claimed. This we might have been called upon to do had the essential elements of a novation been established.

We accept the view taken in the Superior Court and maintained in the Court of King's Bench that the respondents had lost the privilege on which they based their conservatory attachment.

The appeal fails and must be dismissed with costs.

DUFF J. (dissenting).—Certain undisputed facts seem to me to be conclusive in their effect against the respondents. The letter of the 31st of July, informing the respondents that the barge had been sold to the Richelieu Transportation Company, who would take possession of it immedi-

ately, and advising the respondents that this company would arrange about the payment of repairs already done, was an unmistakable intimation of the intention of the appellant Dansereau not to be responsible for any repairs done after that date. As the learned trial judge finds, it sufficiently expresses the intention, as regards work to be done in the future at all events, to put an end to the contractual relations between the parties. It is undeniable, also, as the learned trial judge also finds, that the respondents acquiesced in this declaration of Dansereau. Not only did the respondents treat the Richelieu Transportation Company as their debtors; they accepted their promissory notes, extending the time for the payment of the debt, without consulting Dansereau. It is impossible to maintain that, consistently with good faith on the part of the respondents, this conduct can, after the notification of the 31st of July, be reconciled with the continued existence of an intention on their part to hold Dansereau responsible for repairs executed subsequent to that date. If Dansereau's own evidence be accepted as to the nature of the original arrangement between himself and the respondents, there could be no question that he was at liberty at any time to direct the continuance of the work. The learned trial judge appears to have been satisfied with his evidence.

It should be observed, also, that the possession of the barge passed to the Richelieu Transportation Company. It is difficult to see how, without the consent of the Richelieu Transportation Company, and in face of the notification of the 31st of July, the respondents possessed any authority to proceed with the repairs. The respondents deny that any authority was in fact given by the Richelieu Transportation Company, but this denial does not appear to have impressed the learned trial judge, and that contention is open to the destructive criticism that the respondents, although required to produce their books by subpoena, failed to do so. In view of all the facts, the inference is justified that both the respondents and the Richelieu Transportation Company understood that the repairs were to be charged to the Richelieu Transportation Company, and that the repairs proceeded on that footing; and the question, consequently, whether there was or was not an explicit arrangement between the Richelieu Transporta-

1925

DANSEREAU v. LAFRENIÈRE.

Duff J.

tion Company and the respondents, appears to have little importance.

As to the repairs done before the 31st of July, a different question arises. In respect of them, the obligation to pay was in existence, and the appellant Dansereau is responsible, in the absence of sufficient evidence of release. The question is a doubtful one, and on the whole I am disposed to think that as regards that question, the conclusion of the Court of King's Bench ought not to be set aside. The respondents have failed to establish in this action the amount to which they are entitled under this head, and the learned trial judge appears to treat that amount as negligible. It will be sufficient, I think, to protect them by reserving any right they may have to recover for such repairs.

The appeal should be allowed, with costs, and the judgment of the learned trial judge restored.

Appeal dismissed with costs.

Solicitor for the appellant: *J. G. Magnan.*
Solicitor for the respondent: *P. N. Pontbriand.*

1925

*Oct. 12, 13.
*Nov. 2.

THE ATTORNEY GENERAL OF ALBERTA (DEFENDANT) ..... } APPELLANT;

AND

THOMAS GEORGE COWAN AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Declaration of trust—Possession and enjoyment—Succession duties—R.S.A. [1922] c. 28, s. 6

While in point of law the possession of the donor of a trust fund is the possession of the *cestuis que trustent*, such possession is not of the character contemplated by s. 6 of the Succession Duties Act, R.S.A. [1922], c. 28.

Section 6 contemplates possession by the beneficiaries as contradistinguished from possession by the donor and not a possession which in fact is that of the donor and is attributable to the beneficiaries in point of law solely by force of the instrument under which the title of the beneficiaries is created.

Judgment of the Appellate Division reversed.

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

1925

ATTORNEY GENERAL OF ALBERTA v. COWAN.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, in a stated case.

Alexander Thompson of Carlisle, England, purchased, in the year 1913, debentures of the town of Camrose, Alberta, amounting to $20,000, issued on the amortization plan, the annual payment to be $1,743.70. These debentures were payable at the Merchants Bank of Canada at Camrose in Canadian currency. On or about the 21st November, 1913, Thompson executed a declaration of trust, whereby he declared that he held the debentures in trust for four of his children named therein, and deposited the declaration of trust with the said bank in whose hands it has ever since remained. Thompson died in 1923. During his lifetime he never received or attempted to take any benefit from the debentures. He, through agents, invested and re-invested the proceeds therefrom and the income and proceeds of the debentures and of the subsequently acquired securities were all passed through an account in the said bank entitled "Alexander Thompson trust."

The Crown claims to be entitled to succession duty upon the amount of the accumulated trust funds as they stood at the date of Thompson's death under clauses (*a*) and (*b*) of section 6 of the Succession Duties Act, R.S.A. [1922], c. 28. Duty was paid subject to its being refunded in the event of its being found that duty was not payable and the question was referred by special case to the Supreme Court of Alberta, which by a majority decided in favour of the plaintiffs (respondents).

W. S. Gray for the appellant. The doner must make his gift in such manner that possession and enjoyment may be assumed immediately. The retention of possession by the donor is fatal to the respondent's case, otherwise sections 6 and 7 of the Act are rendered useless.

N. D. MacLean, K.C. for the respondent. The *cestuis que trustent* had full possession and the said Alexander Thompson only had such control as it was necessary for him to have to function as a trustee.

The judgment of the court was delivered by

DUFF J.—The debentures, which were the subject of the declaration of trust, were payable to bearer, negotiable, and part of the currency of the country. The declaration of trust operated just as it would have operated

1925

ATTORNEY GENERAL OF ALBERTA v. COWAN.

Duff J.

had the debentures been bank-notes. The late Alexander Thompson, in consequence of the declaration, became trustee for the persons named, but he retained possession and entire control. In point of law, Thompson's possession was the possession of the *cestuis que trustent;* but the real question is whether this possession of theirs, which was only theirs by virtue of the declaration of trust, was "possession" of the character contemplated by section 6. The question does not lend itself to extended discussion; I confess it does appear to me to be very clear that, within the meaning of the statute, "possession" was not "assumed" by the beneficiaries. I think the section contemplates possession by the beneficiaries as contradistinguished from possession by the donor; and not a possession which, in fact, is that of the donor, and is attributable to the beneficiaries in point of law solely by force of the instrument under which the title of the beneficiaries is created.

The appeal should be allowed. The question of costs may be spoken to.

Appeal allowed.

Solicitor for the appellant: *Trenholme Dickson.*
Solicitors for the respondents: *Burgess & McKay.*

1925

*Oct. 9, 12.
*Nov. 2.

WILLIAM F. MURRAY AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE DELTA COPPER COMPANY LTD. AND OTHERS (DEFENDANTS)... } RESPONDENTS.

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

Findings of trial judge—Duty of appellate court—Agency

It is for an appellate court to ascertain whether there is evidence upon which the trial judge could find, as he did find, and if there be evidence of the facts found to which he could reasonably give effect, having due regard to the weight of the evidence, it is for the court to consider further whether his finding is based upon any misdirection occasioning a substantial miscarriage of justice, or the judgment, in the light of the evidence, and having regard to the course of the trial, discloses any error of law; and, if there be no error in these particulars, the judgment should be permitted to stand.

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

The appellants sought to recover $6,000 as money lent. Their transactions were with the respondent, C. R. Tufford, and the liability of the other respondents depended upon the agency of Tufford. The judgment at the trial proceeded upon the view that all three respondents were jointly and severally liable.

Held that while, if the agency were established, there might be an alternative liability, that liability continued only until the election of the appellants to accept one, either the principal or the agent, as their debtor and then only he could be sued to judgment.

Held, in view of the facts, that the appellants might elect to have judgment against the respondents, the C. R. Tufford Company, Limited, or C. R. Tufford, but that, as against the other respondent, the Delta Company, Limited, the appeal should be dismissed, because there was no proof that either of the respondents was authorized to borrow on its credit.

AN APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, reversing the judgment of the trial judge, the Honourable Mr. Justice Ives.

The judgment appealed from was reversed in part.

The facts are fully stated in the judgment now reported.

Maclean K.C. for the appellant.

Woods K.C. for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The Delta Copper Company, one of the defendants (respondents), was in possession of a copper mine in British Columbia which it was endeavouring to develop under an option to purchase, and it was trying to raise the necessary capital for the purchase and development of the property by the sale of shares of its capital stock. The defendant, C. R. Tufford, Ltd., was the exclusive agent for the sale of these shares upon the terms of a written agreement of 12th February, 1917, and the defendant, C. R. Tufford, was the president of the latter company and the agent and director of its activities in the sale of the stock. The head offices of the two defendant companies were established at Edmonton, where the defendant, C. R. Tufford, who was a broker, also had his office. The plaintiffs (appellants) resided at Caledonia in Ontario; they had acquired some of the stock of the Delta Company in December, 1916. In the following spring the defendant, Tufford, went to Ontario for the purpose of disposing of the stock or a portion of the stock which the Tufford Company was authorized to sell, and in April and

1925

MURRAY v. DELTA COPPER CO., LTD.

NewcombeJ.

the early part of May he had some interviews with the plaintiffs at Caledonia. Payments upon the Delta Company's option to purchase were accruing, and the defendant Tufford Company's agency for sale of the shares was conditional upon the making of sales and payment of the proceeds to the Delta Company in fixed amounts within the times limited therefor by the agency agreement; one of the provisions being that if the agent paid or procured to be paid to the Delta Company, in respect of shares sold under the terms of the agreement, the sum of $10,000, on or before 15th May, 1917, the agreement should continue until 15th June, 1917. Upon the former date, 15th May, 1917, it was also necessary for the Delta Company to make a considerable payment in order to save its rights under its option of purchase. The defendant, Tufford, in addition to his interest in the business of stock selling under the agency agreement, was a shareholder of the Delta Company, either individually or through the Tufford Company, of which he was president and had the control. In these circumstances it was necessary to provide $10,000 on or before 15th May. Negotiations took place between Tufford and the plaintiffs which resulted in the latter paying to the former, on that day, an amount of $6,000, which was immediately transmitted to Tufford, Ltd., at Edmonton, and by that company paid to the Delta Company, and 6,000 shares of the Delta Company's stock were then allotted to and placed in the name of the plaintiff, Moore, in trust. The main question at issue is as to whether this payment was made by the plaintiffs as a loan upon the security of the stock, or as consideration for the purchase of the stock. There was an agreement in writing executed at the time between Tufford, party of the first part, and the plaintiffs, parties of the second part, whereby it was mutually agreed:

That the party of the first part hereby agrees to sell six thousand shares of capital stock of the Delta Copper Company, Limited (N.P.L.) standing in the name of Thos. G. Moore in trust for the parties of the second part at or for the price of six thousand dollars on or before three months from date in the following manner, namely, one thousand shares within thirty days from date, two thousand shares within sixty days from date, and the balance within three months from date, and to prove his good faith he hereby agrees to deposit five thousand shares of his own stock in above described company with said Thos. G. Moore as trustee. said stock to be forfeited if party of first part does not carry out his agreement. Provided party of the first part does carry out his agreement

his five thousand shares are released by above mentioned trustee to said party of first part, and said party of first part immediately transfers one thousand of said shares to each of the parties of the second part, thereby liquidating any and all claims which the parties or any of them of the second part have or may have whatsoever against party hereto of first part.

1925

MURRAY v. DELTA COPPER CO., LTD.

Newcombe J.

The plaintiffs, Murray and Moore, testified in effect that they and their associates had, previously to 15th May, purchased all the stock of the Delta Company which, at the time, they were willing or could afford to purchase; that therefore they declined to entertain Tufford's solicitation for the purchase of further stock, but that they finally yielded to his entreaties for assistance in the urgent circumstances of the case, so far as to agree to lend the sum of $6,000, upon the security of the 6,000 shares, and subject to the terms mentioned in the agreement, which amount they borrowed from Thomas Patterson, a neighbour. Tufford on the other hand testified that he sold the 6,000 shares to the plaintiffs at $1 per share and that the money was raised and paid as the purchase price. During the following year there was considerable correspondence between the plaintiffs and Tufford, and the plaintiffs acquired some additional stock.

The mine did not realize the hopes or expectations of its promoters and shareholders; it was unproductive, and this action was instituted and brought to trial against the three defendants upon various counts, including one for the recovery of the sum of $6,000 as money lent.

At the close of the trial, the learned judge expressed the view that the $6,000 was a loan, and that the plaintiffs should succeed upon that issue, but he suggested a question as to whether the Delta Company, as distinguished from the other defendants, was liable to repay it, because it had received the money under the agency for sale agreement with Tufford Limited. Some discussion upon this topic followed, and the case stood over for judgment. Then, after consideration and further examination of the correspondence, the learned judge, having disposed of the other issues, which do not now arise, announced that he was of the same opinion as expressed when the evidence was completed at the trial; he said that the $6,000 was undoubtedly a loan, and he added:—

Tufford was bound to find $10,000, and pay it to The Delta Company that day (15th May, 1917), under the terms of the agreement between

1925

MURRAY v. DELTA COPPER CO., LTD.

NewcombeJ.

Tufford, Limited, and the Delta Company. He induces the plaintiffs—stampeded them—with a story of material loss to the company in which they were shareholders, if the money was not found. They get it on their credit and handed it over to him. He sends it to Tufford, Limited, and that company in turn hands it to the Delta Company. And as a further inducement, Tufford delivers to Moore to be held by him in trust, 6,000 shares of the Delta Company stock as security, and further he undertook to sell this security stock within three months to the public, and at the same time the plaintiffs also were authorized to sell it. These shares were to be sold at not less than one dollar, but eventually, as a consideration in other transactions, these shares and all others that had been sold at one dollar were reduced to fifty cents by doubling the number of shares. Neither Tufford nor the plaintiffs have sold these shares. They are still held by Moore as security for the loan. And certainly this sum remains a loan until paid or until plaintiffs expressly agree that its character be changed. I have examined all the correspondence, and I find no clear voluntary consent on plaintiff's part to accept this stock, now held as a security, in payment of the loan. There is much confusion in the letters of all parties but not sufficient for me to believe that any of these men intended at any time to release their claim for a return of this money, or that Tufford ever thought they had.

On appeal to the Appellate Division of the Supreme Court of Alberta that court allowed the appeal and dismissed the action, but the learned judges gave no reasons which are reported in the case, although we are informed that Beck J. dissented from the judgment of the majority.

At the argument I was impressed with the view that no sufficient or satisfactory reason had been shown for disturbing the finding of the trial judge upon the issue of loan or purchase, and now, after carefully reading the evidence and exhibits in proof, I am confirmed in that opinion. It is not the view of the learned judges of the Appellate Division upon the merits involved in the issue of fact which should govern the disposition of the case. It was for the Appellate Division to ascertain whether there is evidence upon which the trial judge could find as he did find; and, if there be evidence of the facts found to which he could reasonably give effect, having due regard to the weight of evidence, it was for the court to consider further whether his finding is based upon any misdirection, occasioning a substantial miscarriage of justice, or the judgment, in the light of the evidence, and having regard to the course of the trial, discloses any error of law. If there be no error in these particulars the judgment should be permitted to stand. It is by s. 51 of the Supreme Court Act the duty of this court to give the judgment which the court below should have given; and, in the endeavour to discharge this duty, I am

satisfied that there is evidence reasonably to justify the finding that the money was advanced by way of loan upon the security of the stock, and not as payment for stock purchased. This was clearly the intention of the transaction according to the testimony of the defendants, Murray and Moore, and there are moreover passages in the subsequent correspondence which are inconsistent with the view that the parties intended to become purchasers of the stock. It is urged that there are to be found in the circumstances of the case, and in other places in the correspondence, considerations or statements which are compatible only with an intention to purchase the shares; but I think the appellants failed to establish this, and I do not find in the circumstances, or in the evidence upon which the appellants rely, anything which demonstrates error in the trial judge's finding of fact.

There is a minor point, involving the liability of the borrower for $1,000, part of the loan, which it is said the learned trial judge overlooked. It appears that his attention was not directed to this point; but, upon examination of the facts, I do not think they justify any reduction of the amount found. By the agreement of 15th May, Tufford agreed to sell 1,000 shares within thirty days. On 2nd June following, he wrote Moore and his associates explaining that, by reason of a deal which he had completed in Toronto, he could not raise the $1,000 before 15th June, and he added

> that means default on my part unless you get busy and either sell or buy the thousand shares.

Moore, in his reply of 10th June, said:—

> We have decided to take care of the thousand shares mentioned in your letter.

It is urged that this correspondence should be interpreted to mean that, as to the thousand shares, part of the 6,000, the plaintiffs had become the purchasers, and that therefore, to that extent, the loan was satisfied. I think it very doubtful however that the plaintiffs in stating that they had decided to take care of the thousand shares intended to purchase them, or to take them in part payment of the money lent. I think it probable that they intended no more than to intimate that in the circumstances they would not insist upon Tufford making the sale of these shares within the thirty days stipulated by the agreement, and it

1925

MURRAY v. DELTA COPPER CO., LTD.

Newcombe J.

is to be observed that by a later agreement of 3rd September, 1917, between Tufford and the plaintiffs, which is signed by all of them, it was agreed that Tufford

> with the assistance of one, or more, if required (of the plaintiffs), shall forthwith, upon demand of the latter in writing, sell all or any part of the 6,000 shares at $1 per share.

It was anticipated of course, according to the plaintiffs' case, that the loan would be repaid by the proceeds of the sale of the shares, and, if in the interval 1,000 of these had been purchased by the plaintiffs, it is remarkable that in the later agreement they should have adhered to the project of selling the whole of the 6,000 shares which still stood in the name of the defendant, Moore, in trust.

Then it is said that inasmuch as the agreement of 15th May, 1917, provided that the defendant, Tufford, should deposit 6,000 shares of his own stock with the plaintiff Moore as trustee, to be forfeited if Tufford failed to carry out his agreement, and inasmuch as those 5,000 shares were deposited and forfeited, the plaintiffs, receiving the benefit of the forfeiture, could not thereafter insist upon payment of the loan, because of the rule that, where a penalty is provided for non-performance of a contract, the penalty if recovered shall be taken as a satisfaction of the contractual liability to secure which the penalty is stipulated. *Harrison* v. *Wright* (1). It must be observed, however, that the agreement which stipulated for the deposit and forfeiture of Tufford's 5,000 shares did not expressly provide for the loan or for the repayment of it. The agreement to lend the $6,000 upon the security of an equivalent amount of the Delta Company's shares was an oral agreement, concluded between the plaintiffs and Tufford, and the purpose of the written agreement was merely to bind the defendant, Tufford, to realize by sale of these shares within the times limited, so as to provide for payment of the loan; and, to ensure that he would do this, or, as the agreement states, "to prove his good faith," he deposited his own 5,000 shares. The agreement of 15th May, and the forfeiture of the 5,000 shares of Tufford's stock, are concerned with the security for the loan, not with the loan itself. The validity of the forfeiture is not in question. It would seem that Tufford acknowledged the forfeiture and surrendered his interest; but there is no proof, except the agreement itself,

(1) [1811] 13 East. 343.

that the forfeiture was intended to satisfy the loan; and, for the reasons which I have mentioned, I do not consider that the agreement bears that interpretation.

Finally, it is urged on behalf of the respondents that, if the $6,000 paid by the appellants to Tufford was money lent, the loan was to C. R. Tufford personally and that neither of the defendant companies is liable for it. This defence was not raised by the pleadings, nor does it appear to have been suggested at the trial as affecting the liability of C. R. Tufford, Limited, although the learned trial judge did, in the discussion at the close of the trial to which I have alluded, suggest doubt as to the liability of the Delta Company; but he does not refer to the question in the reasons for judgment which he subsequently delivered. C. R. Tufford, Limited, is said to have consisted of C. R. Tufford, his wife, mother and stenographer; he was the president of the company, and no doubt was acting as its agent in his efforts to dispose of the stock of the Delta Company, and to maintain the agreement under which the Tufford Company had authority to sell the stock. It was the latter company to which he reported and to which, under his instructions, the $6,000 paid by the plaintiff were remitted, and I am not disposed to disturb the finding involved in the judgment of the learned trial judge that Tufford, in his transaction with the plaintiffs, was acting with the authority and on behalf of C. R. Tufford, Limited. Tufford borrowed the money, but as between him, or the Tufford Company, and the Delta Company the transaction was treated as a purchase of the 6,000 shares by the plaintiffs; Tufford agreed to sell them, and it was anticipated that they would realize enough to pay the loan, but the transaction is not capable of an interpretation which would exclude personal liability of Tufford to repay the money borrowed. If, as I assume, he acted as agent of the Tufford Company, he nevertheless pledged his individual credit for the repayment of the loan.

Now the judgment at the trial proceeds upon the view that all three defendants are jointly and severally liable. The judgment is that the

> plaintiffs do recover judgment against the defendants and each of them for the sum of $6,000, etc.

But the liability of the defendants, the Delta Copper Company, Limited, and C. R. Tufford, Limited, depends upon

1925

MURRAY v. DELTA COPPER CO., LTD.

Newcombe J.

the agency of Tufford and upon the assumption that the loan was contracted on their behalf, Tufford undertaking at the same time personal responsibility for repayment. I find it difficult to justify a judgment holding the parties jointly and severally liable. The ordinary rule is that the principal and agent may be liable to the other contracting party in the alternative, which alternative liability continues until the election of the latter to accept one, either the principal or the agent, as his debtor. In *Priestly* v. *Fernie* (1), where the master of a ship had signed a bill of lading in his own name and was sued upon it to judgment, it was held that an action did not lie against the owner of the ship for the same cause, although satisfaction had not been obtained against the master, and Bramwell B., pronouncing the judgment of the Court of Exchequer, said:

> If this were an ordinary case of principal and agent, where the agent having made the contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made the contractee has an election to sue agent or principal, supposes he can only sue one of them, that is to say, sue to judgment.

This case was cited with approval by Lord Cairns in *Kendall* v. *Hamilton* (2), and followed by the Court of Appeal in Ireland in *Sullivan* v. *Sullivan* (3).

As to the Delta Company however there are additional and different considerations. That company was in possession of the mine under option to purchase. There was first an agreement of 24th June, 1916, between Bernard Halloran and Robt. W. Thomson, of the first part, and Byron R. Jones, of the second part, whereby the parties of the first part gave to the party of the second part the sole and exclusive right and option to purchase, for $50,000, certain mineral claims which comprise the mine in question, payable in instalments of varying amounts half yearly, the last payment to be made on or before 15th November, 1918, the party of the first part having immediate possession of the areas and the right to develop and to mine them. Then there is an agreement of 12th May, 1917, between Bernard Halloran and Robt. W. Thomson of the first part and the Delta Copper Company of the second part, which recites that the parties of the first part are the owners of

(1) [1865] 3 H. & C. 977.
(2) [1879] A.C. 504.
(3) [1912] 2 Ir. R. 116.

the Delta group of mineral claims; that by the agreement of 24th June, 1916, they granted to Byron R. Jones an option to purchase them, and that Jones had granted a further option to Robt. Spencer, who had assigned his option to the Delta Copper Company; this agreement provided for the reduction of the payments under the Jones option which were to mature. The agreement between Jones and Spencer and the assignment by Spencer to the Delta Company are not in evidence, but I infer that the Delta Company acquired a mere option and undertook no obligation for payment of the stipulated price. Now there is no evidence that the Delta Company gave to either of the other defendants any authority to borrow money on its account. The agreement between the Delta Company and C. R. Tufford, Limited, is in proof, and it confers no authority except for the sale of shares. There is no evidence that the Delta Company was informed of the facts with regard to the $6,000 transaction between the plaintiffs and Tufford, or had any knowledge or reason to suspect that the amount which the latter remitted was a loan. On 14th May, 1917, C. R. Tufford had telegraphed his firm at Edmonton from Caledonia as follows:—

> Standard Bank here wired two thousand our credit Standard Bank, Edmonton, to-day. Turn to (Delta) company immediately.

This refers to a payment of $2,000 which Tufford had obtained from the plaintiffs on the date last mentioned. In the meantime he was endeavouring to arrange for $6,000 additional, and, on the same day, he telegraphed his firm at Edmonton, saying:—

> Watch Standard Bank, Edmonton, to-morrow for more money wired through to-morrow, but do not be disappointed if none comes, and do not depend on it.

Then on 15th May, he telegraphed again to his firm, in these words:—

> Have company allot and issue to Thomas G. Moore, box forty-four Caledonia, Ontario, out of this issue, eight thousand shares; money wired Standard Bank, Edmonton, covering same yesterday and to-day. Draw full commission under contract thirty per cent before delivering money, then buy two thousand shares our name, and again draw full commission. Complete to-day, sure.

These 8,000 shares include the 6,000 shares, which, upon the finding in the case, were to be deposited as security for the plaintiffs' loan, and, in addition, 2,000 shares, which were to be issued in the transaction referred to in Tufford's first telegram of 14th May. The telegrams, it will be per-

1925

MURRAY v. DELTA COPPER CO., LTD.

Newcombe J.

ceived, convey no information or reason for conjecture, that the $8,000 represented anything but proceeds of the sale of shares, or that the 8,000 shares, or any part of them, were to be issued as security for a loan. On the contrary, Tufford, by his telegram of 15th May, directed that the Tufford Company's commission as selling agent should be withheld, and the taking of commission involved a direct representation of sale. No doubt the money was received by the company, and it may have been used to make up the payment to Halloran and Thomson, which, by the terms of the Delta Company's option, was to be paid on 15th May; but, if so, while in one sense the Delta Company had the benefit of the payment, the money did not go to discharge any obligation of the latter company. It was evidently the policy of the Delta Company that the mine, which was of course speculative property, should pay for itself; the optional payments and cost of development being provided for by money received from the sale of the shares. The plaintiffs now contend that, even if there be no evidence upon which it can be found that the Delta Company authorized the borrowing, nevertheless it is liable to repay them as recipient of the benefit, but I do not think this contention can be maintained.

The Delta Company received the money in circumstances which justified it to conclude, and no doubt it dealt with the money upon the assumption, that it was received as proceeds of the sale of its shares. The plaintiffs knew the defendant, Tufford, not otherwise than as agent for sale of the Delta Company's stock, and that agency was certainly not suggestive of any authority in Tufford to borrow money upon the company's credit. If therefore they paid the money to Tufford as a loan to the company, he must be regarded as their agent for the purpose of making the loan, and not as the company's agent to receive it; and, seeing that Tufford caused the money to be paid to the company as proceeds of the sale of the 6,000 shares of stock, which the company, under his instruction, allotted to the plaintiff, Moore, in trust, the plaintiffs have no recourse against the company for the recovery of the money, or by reason of the application of it to the company's purposes. I hold therefore that the plaintiffs cannot recover the $6,000 from the Delta Company upon the allegation of the statement of claim as money lent, or by reason of

any benefit which it enjoys through the use or application of the money which it received.

Therefore, as against the Delta Company, the appeal should be dismissed with costs, but as to the other defendants the appellants may elect to have judgment against one of them with costs throughout.

Appeal allowed in part.

Solicitors for the appellants: *Short, Cross, Maclean & McBride.*

Solicitors for the respondents: *Woods, Field & Co.*

THE NORTH WEST LUMBER CO. LTD. (DEFENDENT) ..... APPELLANT;

AND

MUNICIPAL DISTRICT OF LOCKERBIE NO. 580 (PLAINTIFF) ..... RESPONDENT.

1925
*Oct. 12.
*Nov. 2.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Licencee of Crown Lands—Assessment—Over-valuation—Municipal District Act, R.S.A. [1922], c. 110

The appellants, licencees of timber berth No. 2335, of which 3,884 acres are situated within the territory of the respondent municipality, were assessed in 1920 by the respondents at a total sum of $35,000, subsequently reduced by the Assessment Equalization Board to $32,882.40. The land subject to the licence is the property of the Crown in right of the Dominion and under s. 125 of the B.N.A. Act is not liable to taxation. The assessment was made for a five-year period beginning in 1921. Notice of assessment was sent to the appellants and later tax notices based on it were also sent in that year and in following years. The appellant did not appeal to the Court of Revision against the assessment, but upon being sued for taxes based thereon together with statutory penalties, contended that the assessment was null and void, alleging fraud on the part of the respondent in making the assessment. The assessment was based upon the value of the land, upon which the timber stood, as farm lands, whereas the appellant's interest is in the timber only.

Held, that the legislature of a province may authorize the assessment of the interest of an individual in property belonging to the Crown in right of the Dominion and that such assessment is not obnoxious to sec. 125 of the B.N.A. Act. *Smith* v. *Council of Rural Municipality of Vermilion Hills* (1); *City of Montreal* v. *Attorney General for Canada* (2) followed.

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

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

1925

NORTH WEST LUMBER CO., LTD. v. MUNICIPAL DISTRICT OF LOCKERBIE, No. 580.

Held, a case of over-valuation of the timber berth. The appellant should have availed itself of its right of appeal under the Municipal Districts Act, R.S.A., c. 110.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, affirming a judgment of the trial judge in favour of the respondent.

The facts are sufficiently stated in the above headnote and in the judgment now reported.

MacLean K.C. for the appellant.

Woods K.C. for the respondent.

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

MIGNAULT J.—The appellant, for some years, has held under a license to cut timber from the Dominion Government timber berth no. 2335 of which 3,884 acres are within the territory of the respondent. The license is a yearly one, with right of renewal subject to the conditions therein specified, and vests in the licenses all right of property whatsoever in all trees, timber, lumber and other products of timber which it is entitled by the license to cut, and which have been cut during the continuance of the license. The land subject to this license is of course the property of the Crown in right of the Dominion, and under section 125 of the British North America Act is not liable to taxation.

In the year 1920, the respondent assessed against the appellant what was described as timber berth no. 2335, containing 3,884 acres, at a total sum of $35,000, subsequently reduced by the Assessment Equalization Board to $32,882.40. This assessment, under the law governing the respondent, was made for a five-year period beginning in 1921. Notice of the assessment was duly sent to the appellant, and subsequently tax notices based on it were also sent in that year and in the following years. The appellant did not appeal to the Court of Revision against the assessment, but being now sued for the recovery of $2,338.15 for taxes imposed in 1921, 1922 and 1923, and based on this assessment, together with statutory penalties, it contends by way of defence that the assessment is null and void. It also alleges fraud on the part of the respondent in making this assessment. I will at once dispose of this allegation of fraud by saying that it is totally unsupported by the proof.

The most that the appellant can contend under the testimony is that the assessor committed a mistake in making this assessment.

Eliminating the question of fraud, the appellant's grounds of attack on the assessment are sufficiently set out in paragraphs 8, 9 and 10 of the statement of defence:

8. The plaintiff in the year 1920 purported to assess the defendant and its interest in the said timber berth no. 2335 at the sum of $32,882.40, but in arriving at the said value assessed the value of lands on which the said timber stood, and which lands stand in the name of and are owned by the Government of the Dominion of Canada and are exempt from taxation * * *

9. The said plaintiff in the year 1920 did not assess the defendant's interest in the said timber berth at its actual cash value as it would be appraised as a just debt from a solvent debtor as required by the Municipal Districts' Act, but on the contrary assessed the defendant's interest at a far higher rate than its actual cash value, and in the said assessment included the value of the land on which the said timber stood, and the said purported assessment in 1920, assessed the defendant's interest at a far higher value than it assessed the land of residents within the plaintiff district.

10. Wherefore the said purported assessment in 1920 was and is illegal, null and void and made on a wrong principle.

The evidence relied on by the appellant is contained in the cross-examination of Mr. Hooper, secretary-treasurer of the respondent, and its assessor during the years in question in this case. Mr. Hooper, who made this assessment, is perfectly frank in speaking of his method of valuation. Formerly lands were assessed on an acreage basis, but afterwards at a valuation. He knew that the only interest of the appellant was under its license and that it owned no land in the district. He made very little personal inspection of this berth on account of the depth of the snow on the ground. He had struck a rate on the land that he knew well and he worked it out in accordance with whether the land was better or poorer, and in assessing had reference to the soil, the situation and so forth. He assessed the appellant on a farm land basis, taking into consideration the soil and the location. In making the valuation, he did not consider the timber on the land, of which he appears to have had little knowledge. His valuation has not included in it any reference to the timber. If he had proceeded to assess the value of the timber in the municipality, he supposes that his assessment probably would have been in the neighbourhood of $2,600 which is suggested to him as its

1925

NORTH WEST LUMBER CO., LTD. v. MUNICIPAL DISTRICT OF LOCKERBIE, No. 580.

Mignault J.

value. He adds that the berth had always been previously assessed exactly the same as farm land, on the acreage basis, and at the time he made the assessment he was not certain how to proceed, but there did not seem (to be) any definite instructions, so he went along; and he thought, at any rate, they had the right to appeal and it would probably be brought up and heard of.

It is quite possible in this case that there may have been an over-valuation, a point on which it is not necessary to express any opinion, for there seems to be a marked difference between the value of this tract of land, considered as farm land, and what is stated to be, after a cruise was made in 1924, the value of the timber which the appellant is entitled to cut. But this brings up the question on which the case turned in the appellate divisional court: Should not the appellant have appealed against this assessment to the Court of Revision and, if its appeal failed, to the district court judge, and not having done so, is it entitled to resist payment of the taxes claimed by the respondent? The appellate court decided this question adversely to the appellant, following a previous decision of its own in another case affecting this same appellant: *Municipal District of Pershing* v. *North West Lumber Co.* (1). The answer of the appellant is that the assessment is null and void as made without jurisdiction over the subject matter, thus raising the only question which need now be considered, for, as stated, there is no proof of fraud.

A short statement of the legislation governing the assessment of lands in the municipal districts of Alberta, at the time of the assessment complained of, will assist us in deciding this question.

This legislation is contained in the Municipal District Act, statutes of 1918, c. 49, frequently amended, and forming now chapter 110 of the revised statutes of Alberta. The Act (s. 2) defines "land" or "property" as including lands, tenements and hereditaments and any estate or interest therein, including, *inter alia*, the interest of a holder of any lease of grazing, hay or marsh lands, or of any timber limit, or of any mineral rights from the Dominion of Canada. "Occupant" means the inhabitant occupier of any land exempt from taxation in a municipal district, or, if

(1) [1923] 19 Alta. L.R. 302.

there be no inhabitant occupier of such land, the person entitled to the possession thereof. "Owner" means any person who appears by the records of the Land Titles Office to have any interest in any land in the district, other than as mortgagee, lessee or incumbrancee.

Assessments in the municipal districts are made for five-year periods beginning in 1920, and a statement showing the total assessed value of the land in the district is forwarded by the assessor to the department of municipal affairs and is then considered by a board called the Assessment Equalization Board which may confirm the total assessed value as the equalized assessment of the municipal district, or may fix some other amount as such equalized assessment, and the amount so confirmed or fixed is the local assessed value for the year 1921 and each year thereafter until the next equalized assessment is made, 1920, c. 30, s. 28.

All land in every municipal district is liable to assessment and taxation subject to certain exemptions, comprising *inter alia* all lands belonging to Canada or to the province. R.S.A. 1922, s. 224. Land is assessed at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, exclusive of the value of any buildings erected thereon or of any other increase in value caused by the expenditure of labour or capital thereon. R.S.A. 1922, s. 226.

If any person thinks that he or any other person has been wrongly assessed or assessed too high or too low, he may, within the time limited by the Act, appeal from the assessment to the council which is constituted a Court of Revision for revising the assessment roll, and from the decision on this appeal he has a further right of appeal to a judge of the district court. The decision and judgment of the judge is final and conclusive in every case adjudicated upon. R.S.A. 1922, s. 241 and following, 258 and following, 271. I refer merely to the sections of the revised statutes which consolidate provisions in force at the time of this assessment.

Upon the termination of the sittings of the Court of Revision, or, where there are no appeals, upon the expiry of the time for appealing thereto, the secretary enters over his signature at the foot of the last page of the roll the fol-

1925

NORTH WEST LUMBER CO., LTD. v. MUNICIPAL DISTRICT OF LOCKERBIE, No. 580.

Mignault J.

lowing certificate, filling in the date of such entry: "roll finally completed this.....day of.....19..." And the roll thus finally completed and certified is the revised assessment roll for the year, subject to amendment on appeal to a district court judge and to amendment necessary to bring the roll into conformity with the assessment made by the Assessment Equalization Board and any directions of the board with respect thereto, and is valid and binds all parties concerned, notwithstanding any defect or error committed in or with regard to such roll. R.S.A. 1922, s. 254.

There is no doubt that where the assessor in making an assessment acts without jurisdiction, e.g., by assessing against a ratepayer property not subject to assessment, the failure to appeal to the Court of Revision or to the district court judge does not preclude the ratepayer from setting up the nullity of the assessment in answer to a demand for taxes levied on the basis of such an assessment, unless, perhaps, where jurisdiction is conferred on the court or judge to deal with such matters, as would appear to be the case under s. 83 of the Ontario Assessment Act. I may merely refer here to the latest decisions bearing on this question: *Toronto Railway Co.* v. *City of Toronto* (1); *Donahue Brothers* v. *Corporation of the Parish of St. Etienne de la Malbaie* (2).

On the other hand, it is settled that the legislature of a province may authorize the assessment of the interest of an individual in property belonging to the Dominion of Canada, and that such assessment is not obnoxious to s. 125 of the British North America Act. *Smith* v. *Council of the Rural Municipality of Vermillion Hills* (3); *City of Montreal* v. *Attorney General for Canada* (4).

Finally, if the complaint of the ratepayer, who has an interest in the assessed property, is that he has been assessed too high, in other words, if he objects to the excessive valuation of a subject matter of assessment which is within the jurisdiction of the assessing authority, and an appeal is afforded him by the assessing statute, he cannot be heard to attack the assessment in answer to an action claiming the tax, if he has not availed himself of this right of ap-

(1) [1904] A.C. 809.
(2) [1924] S.C.R. 511.
(3) [1916] 2 A.C. 569.
(4) [1923] A.C. 136.

peal, or if, having asserted an appeal, the decision has sustained the assessment. *Town of MacLeod* v. *Campbell* (1); *Shannon Realties Limited* v. *Ville de St. Michel* (2).

The able argument of Mr. Maclean has not convinced me that this is not really a case of alleged over-valuation of the timber berth of the appellant, and therefore my opinion is that the latter should have availed itself of its right of appeal under the statute. The cross-examination of the assessor, as well as the assessment roll, clearly shew that what was assessed in this case was the timber berth or the interest of the appellant under its license from the Crown, and not the lands themselves, although they were considered for purposes of valuation. The assessor thought that he was entitled to assess the appellant's interest in this land, and he knew it had no other interest than its license, at the value of the land on a farm land basis. It would probably be vain to expect that the persons whom the district municipal councils employ to assess property and prepare an assessment roll, should have expert knowledge of the principles of valuation. To guard against and correct their mistakes, the statute provides what may be called a domestic tribunal, with a further appeal to a judge. Here the searching enquiry into the motives or state of mind of the assessor does not show that an attempt was made to assess anything else than the appellant's interest in the land, however much the assessor's mode of valuation may be criticized. If a mistake was made, it could have been corrected by an appeal under the Act.

I have not failed to notice Mr. Maclean's contention at the argument that the interest of the appellant under its timber license would not come within the definition of "*owner*" under the Municipal District Act. I am inclined to think that it would, for the appellant does not appear to be a lessee within the meaning of the exception in the definition, but could be better described as a licensee, and it certainly had an interest in the land subject to its license. I think the whole gist of the appellant's case is that it had an assessable interest in the lands, but that it was illegally assessed for the lands themselves. To my mind, in the last analysis, we have nothing more here than an attempt to

(1) [1898] 57 Can. S.C.R. 517. (2) [1924] A.C. 185.

1925

NORTH WEST LUMBER CO., LTD. v. MUNICIPAL DISTRICT OF LOCKERBIE, No. 580.

Mignault J.

resist payment of taxes by complaining of an over-valuation of the subject matter of the assessment.

I would dismiss the appeal with costs, but I think it unnecessary to express any opinion on the ground relied on by the learned trial judge in giving judgment for the taxes claimed, that the matter was concluded by the 1923 amendment to the Municipal District Act.

NEWCOMBE J.—I acquiesce in the conclusion because I think it is impossible to decide otherwise, having regard to the judgment of the Judicial Committee in *City of Montreal* v. *Attorney General for Canada* (1). There, although it is provided by s. 125 of the British North America Act 1867, that no lands or property belonging to Canada or any province shall be liable to taxation, it was nevertheless held that a provincial legislature might authorize the taxation of a tenant in respect to lands belonging to the Dominion, as if he were the actual owner; and therefore an assessment was upheld which differed in no respect from an assessment of the property against the Dominion Crown, except that by the statute, it was the tenant who was held to pay the tax, and the land was nominally assessed against the tenant. If this legislation did not offend against the Constitutional Act, I do not perceive how it can be successfully maintained that anything is involved except the amount of the assessment, when, in the present case, the assessor, in the absence of a statutory direction, valued the land as if the tenant were the owner, and charged the assessment against the tenant in the assessment roll.

Appeal dismissed with costs.

Solicitors for the appellant: *Short, Cross, Maclean & McBride.*

Solicitors for the respondent: *Milner, Matheson, Carr & Dafoe.*

(1) [1923] A.C. 136.

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY AND EFFECT OF SECTION 189 OF THE RAILWAY ACT IN ITS APPLICATION TO PROVINCIAL CROWN LANDS.

1925

*Nov. 25, 26.
*Dec. 10.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL

Railway—Crown Lands—Expropriation—B.N.A. Act, ss. 91, 92

Section 189 of the Railway Act, 1919, c. 68, which enables railway companies with the consent of the Governor in Council to take possession of Crown Lands applies to Provincial Crown Lands and is within the competence of the Parliament of Canada to enact.

It is within the discretion of the Governor in Council to grant or refuse the consent required by said section. The condition which requires consent imports no more than an incidental power of regulation.

The Nipissing Central Railway Company was incorporated by a statute of Canada 6-7 Ed. VII, c. 112, and was authorized amongst other things to construct its railway from the town of Latchford in the province of Ontario northerly into and through part of the province of Quebec. The company obtained from the Board of Railway Commissioners of Canada as required by the Railway Act, an order approving of its general location plan, and a further order sanctioning the plan and profile, etc., of a portion of the line between Larder Lake in Ontario to Osisko Lake in the township of Rouyn, in the province of Quebec, a distance of 37 miles, and which passed through lands vested in the Crown in the right of the province of Quebec. The company thereupon applied to the Governor in Council for leave to take possession of the said Crown Lands pursuant to section 189 of the said Railway Act, which provides as follows:

(1) No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.

(2) Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway which have not been granted or sold, as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.

(3) The company may not alienate any such lands so taken, used or occupied.

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

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

(4) Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.

The Attorney General of the province of Quebec objected to the Governor in Council giving the leave asked for, and claimed that the expression "lands vested in the Crown" in said section 189 was limited to lands vested in the Crown in the right of the Dominion and not of any province. He further contended that if the said lands did include lands vested in the Crown in right of the province, the section in question was *ultra vires* of the Parliament of Canada. Thereupon pursuant to the provisions of section 60 of the Supreme Court Act, R.S.C. [1906], c. 139, the following questions were referred to the Supreme Court:

1. Is it within the competence of Parliament to enact the provisions of section 189 of the Railway Act, 1919, with regard to provincial Crown lands?

2. If the answer to question 1 be in the affirmative, is said section 189 as it now stands applicable to provincial Crown lands?

3. Is it obligatory upon the Governor in Council to give his consent under the provisions of subsection 2 of said section upon any proper application therefor, or has he discretion to grant or refuse such consent as he may see fit?

Lafleur K.C. for the Attorney General of Canada contended that by virtue of subsection 29 of section 91, and subsection 10 of section 92, B.N.A. Act, the railway in question was under the sole jurisdiction of the Parliament of Canada, and as a necessary consequence Parliament was vested with the necessary powers to enable the railway to be constructed and operated without assistance or hindrance from the provincial legislatures, and that the question was settled by the judgments of the Judicial Committee of the Privy Council. *Corporation of the City of Toronto* v. *Bell Telephone Co.* (1); *Attorney General for British Columbia* v. *Canadian Pacific Railway Company* (2).

W. N. Tilley K.C. and *Parmenter* for the Nipissing Central Railway Company relied on the same cases, and also emphasized the fact that section 189 had its origin before the passing of the B.N.A. Act. Substantially the same language is to be found in the Railway Act of 1868, 31 Vict. 68, s. 7.

(1) [1905] A.C. 52. (2) [1906] A.C. 204.

Lanctot K.C. and *Geoffrion K.C.* for the Attorney General of Quebec contended that the land in question was public property of the province of Quebec under the B.N.A. Act. *St. Catherine's Milling and Lumber Co.* v. *Queen* (1); *Attorney General for Canada* v. *Attorneys General for Ontario, Quebec and Nova Scotia (The Fisheries Case)* (2); *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours* (3); *Ontario Mining Co.* v. *Seybold* (4); *Corporation of the City of Toronto* v. *The Bell Telephone Co. of Canada* (5); *British Columbia* v. *Canadian Pacific Ry.* (6); *Burrard Power Co.* v. *The King* (7); *Attorney General for Ontario* v. *Attorney General for Canada* (8); *Attorney General for Canada* v. *Ritchie Contracting and Supply Co.* (9); *Attorney General for Quebec and others* v. *Attorney General for Canada and another (The Star Chrome Case)* (10); *Attorney General for Canada* v. *Attorney General for Quebec* (11); *Canadian Pacific Ry. Co.* and *Corporation of Toronto* (12); *Cushing* v. *Dupuy* (13); *City of Montreal* v. *Montreal Street Railway Co.* (14). They also distinguished the decision of *Attorney General of British Columbia* v. *Canadian Pacific Railway* (6), as in that case the harbour in question was the property of the Dominion under section 108 of the B.N.A. Act, and was subject also to the over-riding provisions of the Canadian Pacific Railway charter, 44 V.C. 1.

The judgment of the court was delivered by

NEWCOMBE J.—By order of the Governor General in Council of 11th June, 1925, the following questions were referred to this Court for hearing and consideration, under the authority of section 60 of the Supreme Court Act:

1. Is it within the competence of Parliament to enact the provisions of section 189 of the Railway Act, 1919, with regard to provincial Crown lands?

2. If the answer to question 1 be in the affirmative, is said section 189, as it now stands, applicable to provincial Crown lands?

3. Is it obligatory upon the Governor in Council to give his consent under the provisions of subsection 2 of said section upon any proper

(1) [1888] 14 A.C. 46.
(2) [1898] A.C. 700.
(3) [1899] A.C. 367.
(4) [1903] A.C. 73.
(5) [1905] A.C. 52.
(6) [1906] A.C. 204.
(7) [1911] A.C. 87.
(8) [1912] A.C. 571.
(9) [1919] A.C. 999.
(10) [1921] 1 A.C. 401.
(11) [1921] 1 A.C. 413.
(12) [1911] A.C. 461.
(13) [1880] 5 A.C. 409.
(14) [1912] A.C. 333.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

NewcombeJ.

application therefor, or has he discretion to grant or refuse such consent as he may see fit?

The order proceeds upon a recital that there is pending an application of the Nipissing Central Railway for the consent of the Governor in Council, under the section mentioned, to take possession of, use and occupy Crown Lands of the province of Quebec for the purposes of a proposed extension of its Larder Lake branch into the Rouyn mining district, and that the Government of Quebec opposes such consent upon the grounds that the section applies only to Crown Lands of the Dominion, and that, if interpreted as applying to Provincial Crown Lands, it is *ultra vires* of Parliament, in so far as it is intended to affect them.

The Nipissing Central Railway Company was incorporated by Act of the Dominion, c. 112 of 1907. The lines of railway which it is authorized to construct and operate are particularly described, and include a line extending from Latchford in the province of Ontario, through certain named townships, and thence, in a northerly direction, to a point on the line of the Grand Trunk Pacific Railway in the province of Quebec, at or near the Matagami River. Thus the work authorized to be constructed is of the class described in the 10th enumeration of s. 92 of the British North America Act, 1867, as a line of railway connecting one province with another, or extending beyond the limits of a province, and therefore within the exclusive legislative authority of the Parliament of Canada under the 29th enumeration of s. 91 of the last mentioned Act.

Section 189, the enactment with regard to which the questions are propounded, is the first of a group of sections comprised in the Railway Act, 1919, under the general title or description, "The taking and using of lands"; it is introduced under the special caption, "Restrictions—Crown Lands," and is expressed in the following words:

189. (1) No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.

(2) Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway which have not been granted or sold, as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.

(3) The company may not alienate any such lands so taken, used or occupied.

(4) Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.

A few brief observations are necessary in order to bring out the setting or context. The Railway Act, 1919, is the general Railway Act of the Dominion, providing for the construction and working of railways, other than Government railways, and authorizing, subject to its provisions, the compulsory taking and using of lands for railway purposes; it provides for the powers and regulation of railway companies, subject to the special or particular legislation affecting them individually; it applies to Government railways only so far as specially provided; it provides also for a Board of Railway Commissioners for Canada, and this board exercises large powers and jurisdiction with relation to railways under the provisions of the Act.

Under the general powers conferred, a railway company may, by s. 162, for the purposes of its undertaking and subject to the provisions of its special Act:

(*a*) enter into and upon any Crown lands without previous license therefor, or into or upon the lands of any person whomsoever, lying in the intended route or line of the railway, and make surveys, examinations or other necessary arrangements on such lands for fixing the site of the railway, and set out and ascertain such parts of the lands as are necessary and proper for the railway;

* * * * *

(*d*) make, carry or place the railway across or upon the lands of any person on the located line of the railway;

* * * * *

(*q*) do all other acts necessary for the construction, maintenance and operation of the railway.

It is provided by s. 166 that the company shall not commence the construction of its railway, or any section or portion thereof, until the general location shall have been approved by the Board of Railway Commissioners for Canada, nor until the plan, profile or book of reference of the railway shall have been sanctioned by the Board. Then by s. 167, it is enacted that the company shall prepare, and submit to the Board, a map showing the general location of the proposed line of the railway, the termini, and principal towns and places through which it is to pass, with some additional particulars which are specified, and such further or other information as the Board may require.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

This map may be approved by the Board, subject to such changes and alterations as may be deemed expedient, and, when so approved, the company is, by s. 168, required to prepare a plan, profile and book of reference of the railway with precise particulars, showing, among other requirements, the areas, length and width of the lands proposed to be taken, giving the numbers of lots, and defining the portion of each lot proposed to be taken, and stating the names of the owners and occupiers, so far as they can be ascertained. By s. 170, the plan, profile and book of reference are to be submitted to the Board, which, if satisfied therewith, may sanction them, and by such sanctioning, the Board shall be deemed to have approved the location, grades and curves as shown; and, by s. 172, the plan profile and book of reference, when sanctioned, are to be deposited with the Board, and copies thereof are also to be deposited in the office of the registrars of deeds for the districts or counties within which the lands lie. The company may then proceed, subject to the provisions of the Act, to take, for the purposes of its railway, the lands so defined or ascertained; but, so far as concerns lands vested in the Crown, the requirements of s. 189 are interposed. We are informed that the Board of Railway Commissioners has approved the location map of the Nipissing Central Railway, and sanctioned the plan, profile and book of reference of that portion of it which lies between Larder Lake, in the province of Ontario, and Osisko Lake, in the province of Quebec, a distance of about thirty-seven miles; but, as the railway so located necessarily traverses Crown Lands of Quebec, the work is stayed in the absence of the Governor General's consent to the taking of the lands required.

The course of the legislation is important, because, as I shall show, the section now in question was, in an earlier form, both as to its interpretation and enacting authority, the subject of conclusive determination by decision of the Judicial Committee of the Privy Council which is directly binding upon this court.

And, first, it is pertinent to observe that the Railway Act of 1919 is a consolidation, with some amendments, of preceding legislation; s. 189 finds its prototype in the preunion consolidation of the statutes of the province of Can-

ada in 1859, c. 66, s. 133, an Act which apparently has not been expressly repealed, either by the Parliament of Canada or by the legislature of Quebec, and which survived the union of the province, subject to the provisions of s. 129 of the British North America Act, 1867. A corresponding provision was enacted at the first session of Parliament after the Union by s. 7, ss. 3, of c. 68 of the Railway Act, 1868; it reads as follows:

3. No railway company shall take possession of, use or occupy any lands vested in Her Majesty, without the consent of the Governor in Council; but with such consent any such company may take and appropriate for the use of their railway and works, but not alienate, so much of the wild lands of the Crown lying on the route of the railway, as have not been granted or sold, and as may be necessary for such railway, as also so much of the public beach or of the land covered with the waters of any lake, river, stream or canal, or of their respective beds, as is necessary for making and completing and using their said railway and works, subject, however, to the exceptions contained in the next following subsection.

The exceptions are of no present consequence; they make special provision for lands reserved for naval or military purposes. This provision agrees precisely in effect with s. 133 of the Railway Act as found in the Consolidated Statutes of Canada, 1859, except that the public beach is not mentioned in the Act of 1859, and the exceptions include Indian as well as Military or Naval Reserves.

Eleven years later, Parliament enacted the Consolidated Railway Act, 1879, c. 9, and s. 7, ss. 3, of this Act reproduces in place and in terms the provision of 1868 last quoted.

Since the Act of 1879 there have been no less than five consolidations. When the Act of 1879 was consolidated in the general revision of the Public Statutes of 1886, c. 109, s. 7, ss. 3, was reproduced, without any material change, by paragraph 17 of s. 6; but when that section reappeared in the consolidation of 1888, c. 29, s. 99, some changes and an addition were introduced, making the section read as follows:—

99. No company shall take possession of, use or occupy any lands vested in Her Majesty, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway, as also so much of the public beach, or of the land covered with the waters of any lake, river, stream or canal,

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

or of their respective beds, as is necessary for making and completing and using its said railway and works; and whenever any such lands are vested in Her Majesty for any special purpose or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.

NewcombeJ.

C. 29 of 1888 stood until the consolidation of 1903, c. 58, wherein it was reproduced as ss. 1 of s. 134, under the heading "Taking or Using Lands"; but, in the latter section, the words "the Crown" were substituted for "Her Majesty," where they occurred in the provision of 1886, and the word "canal" was omitted in the mention of the lands covered with water, which, by the Act of 1888, the company was empowered to take. In the general consolidation and revision of 1906, c. 37, the provision respecting the taking possession of, use or occupation of lands vested in the Crown appears as s. 172, and it differs in no respect from ss. 1 of s. 134 of 1903, except that it is divided into four subsections with a view, I suppose, to simplify and improve its structure.

Section 172 of c. 37 of the Revised Statutes, 1906, is reproduced without material change in s. 189 of the Consolidation of 1919, the enactment which is now submitted for hearing and consideration.

Argument seems unnecessary to show that s. 189 is intended to apply to Provincial Crown Lands, or that it is, in relation to those lands, within the enacting authority of Parliament, if the previous corresponding enactments to which I have referred, and from which it is mediately or immediately derived, had that application, and were competently sanctioned. Now s. 189 does not differ, as to its intention and legislative effect, from the original Dominion provision of 1868 in any particular material to the questions submitted. There can be no doubt of course that, in the Consolidated Act of 1859, the parent provision applied to all Crown Lands; the separate rights of the Crown in relation to the Dominion and the provinces had not then been created; neither can there be any doubt that in 1868, when the Parliament of Canada re-enacted the clause of 1859, that re-enactment was expressed in terms which, in one particular at least, did not fail to describe lands belonging to the provinces. It must be remembered that at that time the only provinces comprised in the union were the four original ones, Ontario and Quebec, previously

united as the provinces of Canada, Nova Scotia and New Brunswick; and, in these provinces, by s. 109 of the British North America Act, 1867, the public lands, including all which would be understood as comprised in the description "wild lands of the Crown," were to belong to the several provinces in which they were situated. It was not until 1888, after the North West Territories had been incorporated in the Union, and after the constitution of the province of Manitoba, and after the provinces of British Columbia and Prince Edward Island had joined the Union, that the expression, "wild lands of the Crown," gave way to the general and more comprehensive description, "lands of the Crown," as a more apt and enlarged definition of the lands to which the provision was to apply.

The legislative authority of Parliament to give effect to s. 189, in its application to Provincial Crown Lands, might, however, present some difficulties were it not already affirmed by ultimate authority; but, in view of the judgment of the Judicial Committee of the Privy Council in the *Vancouver Case, Attorney General for British Columbia* v. *Canadian Pacific Railway Co.* (1), neither the meaning of the section nor the power to enact it is questionable in this court. That case was tried in 1904; the action was by the Attorney General of the province for a declaration that the public had a right of access to the waters of Vancouver harbour through certain streets of the city of Vancouver. The main line of the defendant company's railway extends from Calendar Station, near lake Nipissing, to Port Moodie, in British Columbia, and the company had constructed, under its statutory powers, a branch or extension of its railway from Port Moodie to Vancouver, the line of which ran along the foreshore on the south side of the harbour, crossing the ends of these streets, where the company had constructed yards and wharves which obstructed them. It was found that these streets were at the time public highways, extending to low water mark, and that the public right of passage over them to the waters of the harbour existed at the date of the admission of British Columbia into the Union. At the trial the action was dismissed; and, upon appeal to the Supreme Court of the province, sitting *en banc*, the question as to the authority of the company

(1) [1906] A.C. 204.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

under its statutory powers to take these lands for its railway purposes, seeing that they belonged to the Provincial Crown, was very fully discussed, both at the hearing and in the judgments of the learned judges who gave their reasons for dismissing the appeal. The authority of the company depended upon s. 7, ss. 3, of the Consolidated Railway Act, 1879, as modified or affected by the special legislation relating to the company, c. 1 of 1881. By ss. 17 and 18 (*a*) of the Company's Act of incorporation, which is embodied in a schedule to the Act last mentioned, it is provided that:—

> 17. "The Consolidated Railway Act, 1879," in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith.
>
> 18. As respects the said railway, the seventh section of "The Consolidated Railway Act, 1879," relating to powers, and the eighth section thereof relating to plans and surveys, shall be subject to the following provisions:—
>
> (*a*) The company shall have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways. But the provisions of this subsection shall not apply to any beach or land lying east of Lake Nipissing except with the approval of the Governor in Council.

The last four lines should not be overlooked; it is only with the approval of the Governor in Council that the provisions of the subsection apply to any beach or land lying east of Lake Nipissing, territory which could not be reached by the company save in the exercise of its very comprehensive powers to construct branches or extensions of its main line, as expressed in clause 14 of the contract, and in s. 15 of the Act of Incorporation, scheduled to c. 1 of 1881. Ordinarily, therefore, ss. 3 of s. 7 of the Railway Act, 1879, is left to its unqualified operation east of Lake Nipissing; beyond Lake Nipissing it applies subject to the special modification enacted by s. 18 (*a*), c. 1 of 1881. It must follow that when the Crown is spoken of, both in the main provision of 1879 and in s. 18 (*a*) of 1881, to which the main provision is made subject, it is the same Crown in both cases that Parliament had in mind; the rule and its exception must operate with relation to a com-

mon subject matter; east or west of Lake Nipissing, the Crown Lands which are provided for in subs. 3 of s. 7 of 1879, and in s. 18 (*a*) of 1881, include Crown Lands of the province.

It is noticeable in perusing the judgments of the learned judges of the provincial court upon the appeal that the arguments and the authorities which had been submitted to them, and to which they gave careful consideration, embrace all those, except the cases subsequently decided, which were so forcibly presented at the hearing of this reference in opposition to an affirmative answer to the first question submitted. From the judgment of the provincial court, sitting *en banc,* there was an appeal direct to His Majesty in Council, which was heard by Lord Macnaghten, Lord Davey, Sir Ford North and Sir Arthur Wilson, the latter pronouncing the judgment on 27th February, 1906. Their Lordships observe that the learned trial judge had found that the rights of way contended for existed when British Columbia entered the Union, and when the railway company, by the construction of its works, interrupted the free access to the sea, and that the learned judges of the full court did not dissent from this finding, "rightly addressing their minds to the more important general questions arising in the case". Their Lordships state that they propose to follow a similar course, and they proceed to consider the two distinct grounds upon which it was urged at the argument that the Dominion Parliament had the right to legislate; and, first, it was held that under s. 108 and the third schedule of the British North America Act, 1867, the harbour of Vancouver was a public harbour at the time of the Union, and therefore became the property of Canada. Then they consider the second ground which is thus described in the judgment:

> The second contention in support of the right of the Dominion Parliament to legislate for the foreshore in question is rested upon s. 91, read with s. 92 of the British North America Act, which secured to the Dominion Parliament exclusive legislative authority in respect of lines of steam or other ships, railways, canals, telegraphs, and other works, and undertakings connecting any province with any other or others of the provinces, or extending beyond the limits of the province, a description which clearly applies to the Canadian Pacific Railway.

Upon this question they conclude that:

> To construe the sections now in such a manner as to exclude the power of Parliament over provincial Crown lands would, in their Lordships' opinion, be inconsistent with the terms of the sections which they

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

have to construe, with the whole scope and purpose of the legislation, and with the principle acted upon in the previous decisions of this board. Their Lordships think, therefore, that the Dominion Parliament had full power, if it thought fit, to authorize the use of provincial Crown lands by the company for the purposes of this railway.

NewcombeJ.

With regard to the suggestion that s. 18 (*a*) of the Canadian Pacific Railway's Act of incorporation did not authorize the closing of public highways, their Lordships observe that the latter Act incorporated the Consolidated Railway Act, 1879, in so far as its provisions were not inconsistent with or contrary to the provisions of the Incorporating Act; that there was a variety of inconsistent provisions in the general Act, but that it was unnecessary to enquire whether these would or would not apply to the rights of way in question, and they concluded that:

> It is enough to say that the language of the Canadian Pacific Railway Act must prevail over that of the Consolidated Railway Act which applies only so far as it is not inconsistent with the special Act. And it is clear, in their Lordships' opinion, that the power given to the company to appropriate the foreshore for the purposes of their railway of necessity includes the right to obstruct any rights of passage previously existing across that foreshore.

It follows, I think, from the judgment of their Lordships that, in relation to railways, the authority given to Parliament by s. 91 of the British North America Act, 1867, necessarily involves the power to take provincial lands for railway purposes. That, I think, is the effect of the Vancouver decision. Their Lordships had before them the judgment of the provincial court in which the whole question of legislative power was elaborately considered; and, although the decision of either of the two more important general points before them might have been sufficient for the disposition of the case, these two questions were treated as of co-ordinate importance, and their Lordships emphasized the propriety of addressing their minds to the question of the legislative power, which they affirmed. It is impossible therefore to deny that the observations upon this branch of the case were strictly intended to form part of their judgment; *New South Wales Taxation Commissioners* v. *Palmer* (1); *Membery* v. *Great Western Railway Coy.* (2). I think that this court ought to follow the decision of their Lordships. It was given nearly twenty years ago,

(1) [1907] A.C. 179, at p. 184. (2) [1889] 14 A.C. 179, at p. 187.

and it has ever since been acted upon in practice. The provision which it upholds has, in the interval, been enacted and re-enacted by Parliament without any material change affecting the questions with which we are now concerned, and has thus become as firmly established in the legislation of the country as any statutory enactment, emanating from a legislature of limited powers, can possibly be.

It was said that s. 189 does not provide for adequate compensation, and is therefore *ultra vires* under the authority of the very recent decision of the Judicial Committee in the *Montreal Harbour Commissioners Case* (1). There are several answers. In the first place, it may be said that s. 189, at least, does not fail in the provision for indemnity more than did the legislation which was under review in the *Vancouver Case* (2); and, to the extent to which ss. 4 is intended to provide for compensation, that provision is additional to anything contained in the statutes which were considered in the latter case. We are not asked expressly to determine the effect of this subsection; but, whatever its interpretation may be, it must certainly be upheld along with the preceding subsections which accompany it. Then, if, as is suggested, the section do not provide for indemnity to the provinces for their Crown lands, the use of which may be taken under its provisions, it could therefore be considered *ultra vires* only if the powers conferred upon Parliament by ss. 91 and 92 (10) of the British North America Act with relation to railways are to be interpreted as subject to an implied condition or proviso to the effect that such lands are not to be taken or used thereunder without compensation; but there is not a word in the decision in the *Harbour Commissioners Case* to suggest that their Lordships were disposed to interpret the Dominion railway powers, which are expressed in the most general terms, as subject to any implied restriction, and such an implication would be inconsistent with the conclusion in the *Vancouver Case* (2), of which their Lordships have not intimated any disapproval. It is true that in considering the general power conferred by s. 91 (10), as to navigation and

(1) Reporter's Note:—This case is not yet reported.

(2) [1906] A.C. 204.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

shipping, in regard to legislation which, in the execution of that power, authorized the construction of an embankment and railway on the bank of the river, quays, a dry-dock and ship repairing plant, works the construction and use of which, could not, as their Lordships observe, be effected without an exclusive occupation of the soil equivalent to possession, it did not appear to their Lordships that the right of the Dominion extends so as to authorize them to vest in a body like the Commissioners an exclusive right to occupy property of the province without compensation, and to erect upon it permanent works, such as quays, docks and railways.

One must take it from this decision that, in the execution of the ancillary or incidental powers which are attendant upon the power of navigation and shipping, the Dominion may not authorize the taking of provincial property for the construction of railways without compensation; but different considerations arise when one is concerned with the powers derived from ss. 91 (29) and 92 (10). Their Lordships particularly point out that the railway in question, which was a mere harbour adjunct or facility, was not governed by s. 92 (10), because it had not been declared by the Parliament to be a work for the general advantage of Canada. The powers which the Dominion may exercise with relation to works so declared, or with regard to railways, such as the Nipissing Central Railway, which connect one province with another or extend beyond the limits of a province, are not considered or expounded in the *Harbour Commissioners Case*. It is, of course, requisite to the effective working of the latter section that the Parliament of Canada, to which the exclusive power is committed in regard to that which is essentially the construction and working of a railway, and nothing else, shall have the power to bring about that construction. It was in that view I apprehend that the Judicial Committee considered in the *Vancouver Case* (1) that the power would be inadequate and incapable of execution in cases calling for its exercise, if it were held not to embrace authority for the taking of the land required for the use of the railway; and, whatever may be the view upon which their Lordships suggest a power in the Dominion to take lands for purposes incidental to a harbour which cannot

(1) [1906] A.C. 204.

be exercised without compensation for the taking, I do not find anything in the decision which conflicts with the judgment in the *Vancouver Case* (1). That case I am sure did not excepe consideration, and it is an authority which, I should think, would stand perfectly well along side of what is held in the *Harbour Commissioners Case.*

There remains the third question of the reference with regard to the obligation of the Governor in Council to give his consent. It is too well established to require argument or the citation of authority that there is nothing obligatory upon the Governor General in Council, giving rise co-relatively to a right on the part of the railway to require his consent upon any application which may be submitted. It was contended for the Nipissing Central Railway Company that it was nevertheless the duty of the Governor in Council to give his consent in what, for lack of more exact definition, was described as a proper case; but I think it became apparent in the course of the discussion that the question submitted was strictly a question of law, as distinguished from any question which sought to ascertain the limits within which, as a matter of just or fair and reasonable decision, the Governor in Council might be justified to withhold his consent, and that he had a discretion to refuse. The company is constituted and its powers are conferred by Parliament which, as a condition to the taking of Crown Lands, has required the consent of the Governor in Council, who thus, as the donee of Parliament, is entrusted with the power of consent, to be exercised as an incident of the good government of the country; there is a duty to consider and to exercise sound discretion, but it is a duty involving political rather than legal responsibility, and in respect to the execution of which the Governor in Council is not answerable to the judicial tribunals. It was said that the construction of the railway upon the statutory route makes necessary the occupation of provincial Crown Lands, and that therefore refusal of consent to the taking of any such lands would in effect defeat the intention of Parliament in authorizing the construction of the railway. No statement of the facts in this particular is submitted with the case; but the condition which requires consent imports

(1) [1906] A.C. 204.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

NewcombeJ.

no more than an incidental power of regulation, and it cannot be assumed that the Government would exercise this power in a manner to frustrate the execution of the statutory project. The question appears to be governed in this court by the case of *Lake Champlain and St. Lawrence Ship and Canal Co.* v. *The King* (1).

For these reasons I would answer the first and second questions in the affirmative, and to the third question, subject to what I have said, I would answer that it is not obligatory upon the Governor in Council to give his consent, and that he has, in point of law, discretion to grant or refuse such consent, as he may see fit.

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney General of Quebec: *Charles Lanctot.*

Solicitors for the Nipissing Central Ry. Co.: *Tilley, Johnston, Thomson & Parmenter.*

1925

*Oct. 13.
*Nov. 2.

JOHN WILLIAM MacKENZIE (PLAINTIFF) ..... APPELLANT;

AND

THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Workmen's Compensation Act, Saskatchewan—Injury to employee—Interpretation of words "arising out of and in the course of the employment."

The Workmen's Compensation Act of Saskatchewan (1910-11, c. 9, s. 4) confers the right of compensation in cases of a "personal injury by accident arising out of and in the course of the employment caused to a workman." The same language is used in the English Workman's Compensation Act, 1906, (6 Edw. VII, c. 58). The plaintiff in returning home from his labours followed a short cut across the defendant's railway tracks, which the employees were accustomed to take to save time. In so doing, he attempted to climb and pass between two adjoining cars of a train and was injured. Under the English authorities, the plaintiff could not recover, as although the accident arose "in the course of his employment" it did not arise "out of the employment." The Saskatchewan Act, however, by s.

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

(1) [1916] 54 Can. S.C.R. 461.

1925

MACKENZIE v. THE G. T.P. RY. CO.

6 ss. (c) provides that the employer shall be liable to pay compensation whether or not "the workman contributed to or was the sole cause of the injury or death by reason of his own negligence or misconduct."

Held, that s. 6 did not enlarge the right given the plaintiff by section 4, as s. 6 deals solely with the exclusion, in cases within the statute, of what would be matters of defence to a claim for damages in an action at common law. Duff and Newcombe JJ. dissenting.

Per Duff and Newcombe JJ. dissenting.—The accident arose in the course of the plaintiff's employment and he was entitled to recover upon the true interpretation of the Saskatchewan Act.

APPEAL from the judgment of the Court of Appeal dismissing an appeal from the judgment of the Court of King's Bench which dismissed the plaintiff's action.

The facts are sufficiently set out in the head note and the reasons for judgment now reported.

Anderson K.C. for appellant.

Gregory K.C. for respondent.

ANGLIN C.J.C.—I have had the advantage of reading the opinion prepared by my brother Mignault. He states the facts and quotes the governing statutory provisions. If I add a few words to what he has written, it is merely in an effort to bring more into relief, if possible, what I consider to be the precise grounds of our decision.

Section 4 of the Workmen's Compensation Act of Saskatchewan, first enacted by c. 9 of the statutes of 1910-11, confers the right to compensation and defines the case in which it arises as that of

personal injury by accident arising out of and in the course of the employment caused to a workman.

The first paragraph of this section is a substantial reproduction of the first paragraph of the English Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58). The words quoted are taken verbatim from it.

Apart from a question presently to be considered, no reason has been advanced why these words should not here be given the construction put upon them in the English courts. So construed, while the injury by accident caused to the plaintiff arose "in the course of his employment," it did not arise "out of the employment." What he was doing when it occurred was not reasonably incidental to his employment; in doing it he was not acting in the sphere of that employment. He was unnecessarily and unreasonably and without lawful excuse adding to it a peril which it

1925

MACKENZIE v. THE G.T.P. RY. CO.

Anglin C.J.C.

did not normally entail. *Lancashire and Yorkshire Ry. Co.* Co. v. *Highley* (1); *St. Helens Colliery Co.* v. *Hewitson* (2). We are, I think, bound by these and other decisions of the highest courts in England (See *Willis's Workmen's Compensation,* 22nd ed., p. 42), as to the scope and effect of the words "arising out of the employment." *Catterall* v. *Sweetman* (3); *Trimble* v. *Hill* (4); *City Bank* v. *Barrow* (5); *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (6); *Harding* v. *Commissioners of Stamps* (7). *Highley's Case* (1) is really indistinguishable. On this aspect of the case I cannot usefully add to the judgments in the Court of Appeal.

But the crucial question on the present appeal is whether the construction placed by the English courts on the words quoted from s. 1 of the English Workmen's Compensation Act is rendered inapplicable to the same words in s. 4 of the Saskatchewan statute by the presence in the latter of clause (*c*) of s. 6, which has not a counterpart in the English Act. I am, with great respect, unable to appreciate the ground on which the appellant urges an affirmative answer.

I fully agree that the whole statute must be read together —s. 4 in the light of s. 6. But that does not imply that the application of the former section, which confers the right of claim and defines its basis, is to be enlarged by the latter, which deals solely with the exclusion, in cases within the statute, of what would be matters of defence to a claim for damages in an action at common law. That such is the nature and scope of s. 6 is manifest *ex facie.* Its introductory words are "such employer shall be liable to pay such compensation whether or not" i.e. notwithstanding that. "*Such* employer" and "*such* compensation" make it obvious that s. 6 is dealing with a liability imposed and a right conferred by an earlier provision of the statute. The only such provision is s. 4. Therefore s. 6 postulates a right of claim conferred by s. 4. Its purpose is to ensure, possibly *ex majore cautela,* that certain matters which would have

(1) [1917] A.C. 352, at pp. 359, 360-1, 365, 372, 374.
(2) [1924] A.C. 59.
(3) 1 Rob. Ecc. Rep. 304, at p. 318.
(4) [1879] 5 A.C. 342, at p. 344.
(5) [1880] 5 A.C. 664, at p. 663.
(6) [1908] A.C. 46, at p. 51.
(7) [1898] A.C. 769, at p. 774.

afforded the employer a defence had he been sued in tort at common law shall not avail against a claim for compensation within s. 4. In a case where the workman's negligence is the cause, sole or contributory, of the accident, if he fails to recover it will not be because of fault on his part —clause (*c*) of s. 6 provides against that—but because what he was doing, irrespective of any such fault, was a thing outside the scope of his employment,—something not necessarily incidental thereto. *Plumb* v. *Cobden Flour Mills Co.*, (1). Adapting Lord Atkinson's language in *Bourton* v. *Beauchamp* (2), negligence

> does not bring within the sphere of a workman's employment a work or an act which, apart from that (negligence) would have been outside it. The provision with regard to (negligence) has really no application until you first get the act, in the doing of which (negligence) has been committed, inside the scope of his employment.

That the office of clause (*c*) of s. 6 is not further to define the right conferred by s. 4, but to preclude a defence based on default of the plaintiff is, if possible, made still more clear from its collocation. Thus by clause (*a*) the defence of common employment is excluded; by clause (*b*) the possible coexistence of another statutory right under employers' liability legislation is rendered immaterial; by clause (*d*) the defence *volenti non fit injuria* is taken away. I cannot understand how a section whose obvious office is, unnecessarily it may be, to preclude certain matters being set up by way of defence can be used to modify, either by enlargement or restriction, the right, conferred by an antecedant section, which it postulates—how a claim not otherwise within the right-conferring section can be brought within it by a provision which assumes its existence and merely enacts that it shall not be defeated by certain matters ordinarily available as defences in actions of tort. Section 6 (*c*) does not confer on the workman a right to compensation where what he is doing when injured is not within s. 4, merely because the doing of it involved negligence.

DUFF J. (dissenting).—I concur with Newcombe J.

MIGNAULT J.—The question on this appeal is whether the appellant is entitled to recover compensation from the respondent under the Saskatchewan Workmen's Compensation Act (R.S.S., 1920, c. 210) for injuries suffered by him

(1) [1914] A.C. 62, at p. 69.

(2) [1920] A.C. 1001, at pp. 1018-19.

1925

MACKENZIE v. THE G.T.P. RY. CO.

Mignault J.

in March, 1923. The action, as brought, was an ordinary action based on negligence, but at the trial the appellant withdrew his demand under the common law, and asked the court to assess compensation under the Workmen's Compensation Act, as permitted by section 8 of the Act. The question we have to decide is whether he has made out a case for relief under the statute.

The facts found by the learned trial judge can be stated in his own words:—

> The plaintiff was employed as a mechanic at the roundhouse of the defendant at Melville for some months prior to March 22, 1923. At midnight on March 22 he finished his shift and proceeded to his home by the road which he and his fellow workers had followed during the whole time of his engagement and which had been followed by the workmen for years; that is to say, he proceeded from the shop where he was employed to the office where he "clocked out" and thence across the defendant's railway tracks of which there were several, toward his home northwest of of the tracks. There was another way by which he could have gone home which was much longer and which went around one end of the defendant's yard, emerging into a Government road allowance and which necessitated the crossing of only the company's main or lead track. But the evidence is that no workmen went that way and none of the witnesses called on either side could recall of ever having seen a workman go in that direction. On one of the tracks in the yard, which had to be crossed if this path were followed, the plaintiff and another workman found a freight train standing. The plaintiff endeavoured to climb and pass through between two adjoining cars. As he was about to do so the train moved, presumably without any signal, and the plaintiff was permanently injured in one of his feet.

The learned trial judge refused compensation on the ground that, assuming that the appellant, with the implied consent of the respondent, had the privilege of going home after his work by the path he followed on the night of the accident, he was nevertheless limited to a reasonable user of that way, and his attempt to climb and pass between two cars in a train which he knew was liable to move, and would undoubtedly move in a very few minutes, was not a reasonable user by him of the privilege permitted by the respondent.

The appellant having appealed to the Court of Appeal of Saskatchewan, that court allowed him to adduce additional evidence to show, if such were the fact, that the workmen were in the habit, with the acquiescence of their employers, of crossing the respondent's railway in the way he did, by passing between the cars if the line was blocked by a standing train. Evidence was led by both parties on

this issue, and, by the final judgment on the appeal, this evidence was considered inconclusive, and it was held that the appellant was not entitled to compensation, Mr. Justice Lamont dissenting. The appeal is from that judgment.

The learned judges of the court below have exhaustively discussed the questions raised by this appeal and have reviewed all the English cases bearing upon the right to compensation in circumstances similar to those found by the learned trial judge. It is obvious, however, that decisions where there is a mere similarity of circumstances are an insecure guide, and moreover the provisions of the Saskatchewan statute must be carefully considered, for if they differ from those of the English Workmen's Compensation Act, decisions under the latter Act, even if the facts are identical, and they rarely are, cannot assist us in determining whether this appellant is entitled to compensation.

The two sections of the Saskatchewan statute which must be examined are sections 4 and 6. The first deals with the right to compensation; the second excludes certain defences which at common law would be available to the employer in an action based on negligence. I will give these two sections in full.

4. (1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to compensation in accordance with the provisions of this Act; Provided that the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least one week from earning wages at the work at which he was employed.

(2) Any contract whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall, for the purposes of this Act, be void and of no effect.

6. Such employer shall be liable to pay such compensation whether or not:

(*a*) the injury or death resulted from the negligence of any person engaged in a common employment with the injured employee; or

(*b*) the injury or death was caused by the negligence of the employer or of any person in his service, or by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, building or premises connected with, intended for or used in the business of the employer; or

(*c*) the workman contributed to or was the sole cause of the injury or death by reason of his own negligence or misconduct; or

(*d*) the injury or death resulted from a risk arising out of or incidental to the nature of the employment and which the workman expressly or impliedly assumed.

We are here concerned with paragraph 1 of section 4 and paragraph (*c*) of section 6. Reading them together, as they

1925

MACKENZIE v. THE G.T.P. RY. CO.

Mignault J.

should be read, the Saskatchewan statute provides for compensation to workmen for personal injury by "accident arising out of and in the course of the employment," and the employer is liable to pay "such compensation" whether or not the workman contributed to or was the sole cause of the injury or death by reason of his own negligence or misconduct.

Paragraph 1 of section 4 is taken almost verbatim from section 1 of the English Workmen's Compensation Act, 1906, and the words "accident arising out of and in the course of the employment" are textually those of the English statute. Paragraph (*c*) of section 6 is not in the English Act, nor in any other Workmen's Compensation Act that I have been able to discover, and counsel for the appellant informed us that this paragraph was drafted by the Attorney General of the province and not taken from any other statute. The English Workmen's Compensation Act, as amended in 1923, has a section (section 7) providing that an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business. Paragraph (*c*) of section 6 of the Saskatchewan statute was of course enacted before the English amendment of 1923, and no useful purpose would be served by comparing the two provisions, both intended further to protect the workman. It may be added that the Saskatchewan Workmen's Compensation Act has not reproduced the enactment of the English Act concerning the "serious and wilful misconduct" of the workman (section 1, subsection 2, paragraph (*c*), which, in England, and in several of the Canadian provinces, is a limitation upon the employer's liability.

To determine what is the right of action which the statute confers on the injured workman, it is clear that we must look at paragraph 1 of section 4 of the Saskatchewan statute. It is "such compensation," that is to say the compen-

sation granted by that paragraph, that the employer, under section 6, paragraph (*c*), is liable to pay whether or not the workman contributed to or was the sole cause of the injury or death by reason of his own negligence or misconduct. On the one hand therefore, the accident must arise out of and in the course of the employment, and on the other the employer is liable to pay the compensation although the workman contributed to or even was the sole cause of the injury or death by reason of his own negligence or misconduct.

It was stated by Lord Finlay, L.C., in *Davidson* v. *M'Robb* (1), that "arising out of the employment" signifies arising out of the work which the man was employed to do and what is incident to it—in other words, out of his service, and that "arising in the course of the employment" must mean in the course of the work which the man is employed to do and what is incident to it—in other words, in the course of his service. It does not mean during the currency of the time of engagement.

In a later case, *St. Helens Colliery Co.* v. *Hewitson* (2), Lord Atkinson, at pp. 75-76 said that the words "arising out of" suggest the idea of cause and effect, the injury by accident being the effect and the employment, i.e., the discharge of the duties of the workman's service, the cause of that effect.

At first reading of paragraph 1 of section 4 and paragraph (*c*) of section 6, it may seem difficult to appreciate how an injury or death by accident, of which the workman was the sole cause by reason of his negligence or misconduct, can be said to be the effect of another cause, the employment, so as to arise out of the employment. But without entering into any metaphysical discussion of cause (remote, proximate or determining) and effect, and giving to the language of the statute the meaning which no doubt the legislature of Saskatchewan placed on it, there is no necessary inconsistency between an injury by accident arising out of the employment, as explained or defined by Lords Finlay and Atkinson, and an injury by accident of which the workman was the sole cause by reason of his own negligence or misconduct. Excluding a deliberate in-

(1) [1918] A.C. 304, at p. 314. (2) [1924] A.C. 59.

1925

MACKENZIE v. THE G.T.P. RY. CO.

Mignault J.

jury inflicted by the workman on himself, which could not be described as an accident, a workman may by his negligence or misconduct be the sole cause of his injury by accident, for instance by negligently placing his hand in contact with rapidly moving machinery, or by using his hands when a regulation directed the use of another instrument, and yet the accident may, none the less, arise out of the employment, that is to say out of the work which the man was employed to do. In that way, it may be said, perhaps rather loosely, that the employment or the work the man was employed to do, for instance the man's proximity to the machinery, was the cause of the injury inflicted, although without the man's negligence or misconduct there would have been no injury. It is not a question here of discussing the strict accuracy of the language of the statute when it speaks of the workman being the sole cause of an injury which, to give right to compensation, must arise out of the employment. It is our duty to place on this language a reasonable construction as applied to the every day conditions of the industrial world. This being understood, for the legislature certainly contemplated here an accident arising out of the employment and not foreign thereto, there is no real inconsistency or contradiction between the two enactments. Negligence or misconduct of the workman, which, within the meaning of paragraph (*c*), is the sole cause of the injury, is excluded as a defence for the employer only when the latter is liable for the injury under section 4 as arising out of and in the course of the employment. So the statute necessarily supposes that liability exists under section 4, when it states that the employer shall be liable to pay the compensation granted by that section whether or not the workman contributed to or was the sole cause of the injury by reason of his own negligence or misconduct.

Applying now the statute as construed to the circumstances of this case, we have to consider the finding of the learned trial judge that the appellant, having finished his shift and " clocked out " at the office, proceeded across the track by the usual road followed by the workmen to go to his home northwest of the tracks. He found the lead track occupied by a standing freight train which had been there some time, and instead of waiting for the train to move,

or going round it, and not being able to see whether there was or was not an engine on the train, he endeavoured to climb between two adjoining cars. At that moment the train started to move and the appellant's foot was crushed in the couplings.

I am inclined to think that when he crossed the tracks in the usual way to go to his home after finishing his work, the appellant was acting in the course of his employment, that is to say in the course of the work which he was employed to do and what was incident to it. It was his duty when his work was done not to loiter on the premises but to leave them without delay, and he was entitled to go by the accustomed road. Had he taken the other and longer road mentioned by the learned trial judge, and which nobody followed, he would still have had to cross the main tracks of the respondent, for his home was on the other side of the railway. He could not leave his work without passing over some tracks.

The crucial question however is whether the injury sustained by the appellant, when he endeavoured to pass between the two cars, arose "out of his employment," and here we must not lose sight of paragraph (*c*) of section 6. But, as I have said, to establish liability against the employer, the accident must have arisen out of the employment, and then the negligence or misconduct of the workman is immaterial. That there was negligence or misconduct of this appellant is obvious. This, however, would not disentitle him to recover compensation if he could show that the accident arose out of the employment.

In my opinion this accident did not arise out of the employment of the appellant. It certainly did not arise out of the work which he was employed to do, or anything incidental thereto. Granting that the appellant could return to his home by crossing the railway where he did, nothing in any way connected with his work required or allowed him to climb between two cars to get to the other side of the railway track, when he could have gone around the train, or have waited until it moved away. He assumed a risk which did not arise out of and was not incidental to the nature of his employment and which is not within the contemplation of paragraph (*c*) of section 6, or paragraph (*d*) of the same section.

1925

MACKENZIE v. THE G.T.P. RY. CO.

Mignault J.

The learned trial judge thought that the decision of the English Court of Appeal in *Gane* v. *Norton Hill Colliery Co.* (1), had been overruled by the House of Lords, otherwise he would have accepted it as entitling the plaintiff to succeed.

In that case, the workman had completed his work and was injured while crawling under the buffers of a train which blocked the road that the workmen always followed to leave their place of work, and the finding of fact was that this was the usual way and manner the workmen left the works to the knowledge of the company. The Court of Appeal granted compensation.

The *Gane Case* (1) was not overruled by the House of Lords, but on the contrary the decision was approved as applicable to the facts found by the trial judge. In *Lancashire and Yorkshire Ry. Co.* v. *Highley* (2), Lord Findlay, L.C., said that it proceeded entirely upon the finding that passage across a line of railway by going under the trucks which were upon it was recognized and authorized by the company. And, in the same case, Lord Atkinson (at pp. 336-369) discusses the *Gane Case* (1) at length and approves of the decision of the Court of Appeal on the finding that the workmen were authorized by their employers not only to cross the rails at the particular point, but that when they should find their progress obstructed by trucks standing upon the rails they were also authorized to get through the line of tracks by passing under the buffers. He added (pp. 368-369) that if the Court of Appeal

> meant to decide that, wherever permission or authority is given by an employer to his workman merely to cross a line of railway, that necessarily impliedly authorizes them to pass under or over any trucks they may, when crossing, find in front of them, even when they can readily deviate and walk round those trucks, then in my view the decision was erroneous, and I refuse to follow it.

It was to give the appellant the opportunity to establish, if he could, a state of facts similar to those found in the *Gane Case* (1) that the Court of Appeal in this case allowed him to adduce additional evidence. I agree with the majority of that court that he has failed to show that the railway employees were authorized by their employers to pass between cars liable to move which blocked their egress. Unless facts sufficiently establishing such an au-

(1) 78 L.J.K.B. 921. (2) [1917] A.C. 352, at p. 358.

thorization are proved, the appellant cannot rely on the *Gane Case* (1) as explained by the House of Lords.

The argument which the appellant bases on the *Gane Case* (1) and like cases shows the danger of relying on decisions merely because of an assumed similarity in the facts. To use the language of Lord Haldane, *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (2), there are few more fertile sources of fallacy.

And the argument founded on subsection (*c*) of section 6 of the Saskatchewan Act really seeks to find a cause of action in a provision the object of which is merely to exclude certain defences to an action based on section 4. If the appellant cannot bring his case within the latter section, my opinion is that he has no right of action.

I would dismiss the appeal.

NEWCOMBE J. (dissenting).—If the plaintiff, when proceeding to his home on the night of his injury, had found the railway tracks unencumbered by cars, but nevertheless, using due care in the crossing, had met with an accident, causing him personal injury, I apprehend that it could not reasonably be said, consistently with the true interpretation of the statute or the decisions, that the accident did not arise out of and in the course of his employment; and the statutory consequence would have been that his employer would have been liable to pay him the compensation for which the Act provides.

To say that it was an extremely hazardous and uncontemplated proceeding on the plaintiff's part to attempt to pass between the cars of the train, which occupied the crossing, when he knew that the train was about to start, or when he did not know whether it would move or not while he was between the cars, is merely to express in other words a cause of liability which is directly within the statutory condition enacted by s. 6 (*c*) which declares that the employer shall be liable whether or not " the workman contributed to or was the sole cause of the injury * * * by reason of his own negligence or misconduct". The real defence which the railway company urges is the workman's negligence, and, upon my reading of the Act, that is to be excluded as a consideration affecting the question whether

(1) 78 L.J.K.B. 921. (2) [1914] A.C. 25, at p. 40.

1925

MACKENZIE v. THE G.T.P. RY. CO.

Newcombe J.

the accident arose out of and in the course of the workman's employment.

If it be said that when the workman attempted to pass between the cars he added a peril or risk of accident to which, in the language of the English Decisions, his employer had given no sanction, or to which the workman was not required or authorized to expose himself by reason of anything connected with his employment, or which was foreign to the ordinary perils of his employment, the answer is that the peril or risk arose by reason of his own negligence or misconduct, a cause notwithstanding which the statute provides that the employer shall be liable.

I have no doubt that it was contemplated and known by the railway authorities having charge of the service at the station where the injury took place, that the workmen employed at the round house, who lived on the further side of the tracks, would cross and did cross these tracks by the direct route which the plaintiff was endeavouring to pursue when he met with his unfortunate accident, and that this course of going and coming was consequent upon the employment at the round house of workmen who resided on the other side of the railway yard, and therefore incident to or arising out of and in the course of that employment.

Effect must be given to s. 6 (*c*), which is one of the provisions of the Workmen's Compensation Act of Alberta distinguishing it from that of the United Kingdom, and it serves, I think, in accordance with the obvious legislative intent, to make inapplicable many of the numerous and instructive decisions which have been pronounced in the exposition of the latter Act.

For the reason which I have thus briefly stated, I would allow this appeal.

RINFRET J.—I am of opinion that the appeal should be dismissed for the reasons stated by my lord the Chief Justice and by Mr. Justice Mignault.

Appeal dismissed with costs.

Solicitors for the appellant: *Anderson, Bayne & Bigelow.*
Solicitor for the respondent: *C. E. Gregory.*

H. ROBERGE AND ANOTHER (DEFENDANTS IN WARRANTY) ..... APPELLANTS;

AND

P. L. DAIGNEAU (DEFENDANT AND PLAINTIFF IN WARRANTY)

AND

J. B. MARTIN (PLAINTIFF) ..... RESPONDENT.

1925
*Nov. 13.

1926
*Feb. 2.

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

Servitude—Right-of-way—Subdivision plan—"Lane"—"Destination du père de famille"—Registration—Arts. 17 (12) 551, 2116a, 2175 C.C.

In 1908, the appellants prepared a subdivision plant of lot 82, situated in the village of Thetford Mines, which plan was deposited, in accordance with article 2175 C.C., in the office of the Commissioner of Crown Lands, with a book of reference, both certified by the appellants. This plan showed, *inter alia*, two rows of building lots of a uniform width of 50 feet by 90 feet in depth, and between each row there was a narrow strip of land measuring, by the plan, 20 feet in width by a depth of 900 feet. The book of reference described this strip of land, which bore subdivision number 52-82, as a lane. Subsequently the appellant sold lots abutting on the lane, without in express terms having granted a right-of-way over the lane to the purchasers. The respondent, having purchased subdivisions nos. 86, 87 and 88 of lot 82, claimed the right of passage over this strip of land, and the appellants, who intervened in this case on the demand of the defendant to whom they had sold a portion of the lane, denied the existence of any servitude in favour of the respondent.

Held that a servitude "par destination du père de famille" over the strip of land had been created, and that the plan and book of reference were a sufficient specification in writing of the nature, the extent and the situation of the servitude, as required by art. 551 C.C.

Held also that the provisions of article 2116a C.C. with respect to the registration of real, discontinuous and unapparent servitudes constituted by title, do not apply to a servitude created by "destination du père de famille," such servitude not being a contractual servitude.

Judgment of the Court of King's Bench (Q.R. 39 K.B. 374) affirmed.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court and maintaining the respondent's action.

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

A. Perrault K.C. and *J. E. Perrault K.C.* for the appellants.

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

(1) [1925] Q.R. 39 K.B. 374.

1926

ROBERGE v. MARTIN.

Mignault J.

A. Lemieux K.C. and *S. Deschamps K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—Deux questions se présentent en cette cause:—

I. Le droit de passage réclamé par l'intimé, comme affectant le lot n° 82-52 du plan de subdivision du lot n° 82 (Thetford Mines, auparavant Kingsville) déposé par les propriétaires de ce terrain en 1908, a-t-il été valablement constitué comme servitude par destination du père de famille conformément aux exigences à l'article 551 C.C.?

Cet article se lit comme suit:—

551.—En fait de servitude, la destination du père de famille vaut titre, mais seulement lorsqu'elle est par écrit, et que la nature, l'étendue et la situation en sont spécifiées.

Ce plan de subdivision a été déposé au bureau du Commissaire des Terres de la Couronne avec le livre de renvoi au désir de l'article 2175 C.C. Le Commissaire, après l'avoir approuvé, en a transmis copies au régistrateur, et ces copies ont été déposées au bureau d'enregistrement de la division où se trouvent les terrains affectés par la subdivision.

Le plan montre, entre autres choses, deux rangées de lots à bâtir d'une largeur uniforme de 50 pieds et de 90 pieds de profondeur, et entre chaque rangée il y a une lisière étroite mesurant 20 pieds sur une longueur de 900 pieds. Cette lisière est décrite au livre de renvoi comme "ruelle", et porte le numéro 82-52. Pour les raisons données par le juge-en-chef de la cour d'appel et par le juge Dorion, nous croyons que l'intention de créer une servitude de passage sur cette ruelle au bénéfice des propriétaires et occupants des lots riverains est suffisamment manifestée. Nous croyons aussi que le plan et les énonciations du livre de renvoi équivalent à une déclaration par les propriétaires que la lisière ou ruelle servirait de passage pour l'avantage des lots et que, dans leurs transactions avec les acheteurs de lots, ils se baseraient sur l'état de choses constaté au plan et au livre de renvoi.

Le point en contestation est de savoir si dans ces circonstances la nature et l'étendue de la servitude sont spécifiées au désir de l'art. 551 C.C. Nous croyons que s'il y a un écrit, même mal rédigé, dont une cour de justice puisse tirer la conclusion, conformément aux règles de l'interprétation juridique, que l'intention a été d'établir une servi-

tude de passage au bénéfice d'un autre terrain, il y a alors la spécification que l'article exige. A tout événement, il paraît hors de doute que l'article 551 C.C. peut être ainsi interprété, et comme cette interprétation, qui a été acceptée par la cour d'appel, est conforme à la justice et satisfait aux besoins de la pratique en matière de subdivision de lots, nous croyons devoir l'adopter comme se conformant suivant toute vraisemblance à l'esprit de la loi.

Du reste, ce n'est pas parce que la spécification de la servitude serait faite dans un plan que ce plan ne pourrait être considéré comme l'écrit dont parle l'article 551 C.C. Aux termes du paragraphe 12 de l'art. 17 C.C.,

les termes "écritures," "ecrits" et autres ayant la même signification, comprennent ce qui est imprimé, peint, gravé, lithographié, ou autrement tracé ou copié.

Et l'original du plan de subdivision en question a été signé par tous les propriétaires des terrains subdivisés.

2. La seconde question, telle que les appelants la posent, est celle-ci: Y a-t-il eu "défaut d'enregistrement" au sens de l'article 2116*a* du code civil? Nous croyons cependant que la véritable question à résoudre dans l'espèce, est de savoir si cet article s'applique à la servitude de passage que réclame l'intimé, qui est une servitude créée par la destination du père de famille. Sur ce point, nous sommes d'avis que cette servitude n'est pas une des servitudes visées par l'article 2116*a* C.C. Cet article dit:—

à défaut d'enregistrement, nulle servitude réelle, contractuelle, discontinue et non apparente n'a d'effet vis-à-vis des tiers acquéreurs et créanciers subséquents dont les droits ont été enregistrés.

L'amendement de 1916 (6 Geo. V., c. 34), qui a ajouté au code le nouvel article 2116*b* C.C., et qui ne s'applique pas à cette cause où il s'agit d'une servitude créée avant le 1er janvier 1917, a considérablement élargi cette disposition en l'appliquant à toutes les servitudes réelles et contractuelles. Il n'y a au code civil aucune autre disposition exigeant l'enregistrement des servitudes—car l'article 2116*a* C.C., malgré sa forme négative, n'est pas une exception d'où l'on puisse conclure à l'existence d'une règle générale requérant l'enregistrement des servitudes—et dans le cas de l'article 2116*a* C.C. comme de l'article 2116*b* C.C., il ne s'agit que des servitudes contractuelles, c'est-à-dire créées par un contrat, ce que le texte anglais de ces articles traduit par les mots "constituted by title". La servitude par destination du père de famille n'est pas une servitude contractuelle. Elle résulte d'un fait, c'est-à-dire de l'arrangement effectué

1926
ROBERGE
v.
MARTIN.
Mignault J.

par le propriétaire de deux fonds ou de deux parties d'un même fonds, par lequel il destine l'un des fonds ou une partie distincte d'un même fonds au service de l'autre. On ne peut concevoir qu'elle soit créée par un contrat, car au moment où la destination intervient il n'y a qu'un seul propriétaire du tout, et c'est par lui que l'arrangement ou la disposition des fonds est fait. Et on ne peut dire non plus que la servitude ait été " constituted by title ", bien que la destination vaille titre quand elle satisfait aux exigences de l'article 551 C.C., car " valoir titre " n'est pas " être créé par un titre ", ce qui, le texte français des articles 2116*a* et 2116*b* C.C. le démontre, s'entend d'une servitude créée par un contrat. Il nous paraît donc clair que l'article 2116*a* C.C. que les appelants invoquent ne s'applique pas à la servitude dont il s'agit en cette cause. Il n'est pas nécessaire d'en discuter autrement la portée.

L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Perrault, Lavergne & Girouard.*

Solicitor for the respondent: *S. Deschamps.*

1925
*Nov. 11, 12.
1926
*Feb. 2.

QUYON MILLING COMPANY LIMITED (PLAINTIFF) ..... APPELLANT;

AND

THE E. B. EDDY COMPANY LIMITED (DEFENDANT) ..... RESPONDENT.

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

Watercourses—Driving timber—" Damages resulting "—Reparation—Riparian rights—Ownership of logs—Culling—Final delivery—Meaning of art. 7302a R.S.Q.—Arts. 7298 and 7349 (2) R.S.Q.—(Q) 4 Geo. V, c. 56.

The appellant company was owner of a lot comprising land on both sides of the Quyon river, in the county of Pontiac, and of the water power, water rights and hydraulic privileges connected therewith. It built thereon a flour and grain mill and a concrete dam for the purposes of developing and using the water power. The Quyon river is neither navigable nor floatable except for single pieces of timber and loose logs. The respondent company made, as buyer, a contract with B. & A. as sellers, " for the purchase and sale of spruce pulpwood and pine logs to be taken out by the sellers and delivered to the Upper Ottawa Improvement Company, Limited, on the Ottawa river at the

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

mouth of the Quyon river for the buyers * * *." B. & A. were at liberty to cut the logs and pulpwood wherever they chose and they were to pay all claims for Crown timber dues. The "drive" was made under the exclusive direction and control of B. & A. The price was made payable partly when the wood should have been cut and skidded, partly when hauled and delivered on the Quyon river and the balance "when the contract shall have been completely fulfilled." Under the memorandum of agreement, the logs and pulpwood were to be measured, culled and checked in the bush and before they were hauled for floating down the Quyon river, and they were then to be axe marked and hammer stamped with the timber mark of the respondent company. On or about May 20, 1923, pulpwood and logs cut by B. & A., while being floated down the river, reached the mill of the appellant company, which was situated at a point above the place of delivery to the respondent company, and piled with great force and pressure against and upon the dam and works of the mill, which they injured and in part destroyed. The appellant company, alleging carelessness and negligence on the part of those handling and driving on behalf of the respondent company, sued the latter for $3,140; and the main defence was a denial of ownership and possession of the logs and pulpwood and of responsibility for the drive.

Held that the respondent company was not liable, as it was not the owner of the logs and pulpwood when the damages to the dam and works of the appellant company occurred, since title to these logs and pulpwood would only pass to the respondent company upon "final delivery" being made on the Ottawa river.

Held, also, that art. 7302a R.S.Q., as enacted in 1914 (4 Geo. V, c. 56) does not apply to a person who, although not the owner, has some interest in logs floated down rivers and streams and it merely embodies an interpretation recently given by judicial authority to art. 7298 R.S.Q. as it then stood. Art. 7302a does not extend the responsibility for floating and transmitting timber down rivers and streams beyond that imposed by art. 7349 (2), under which the obligation to make compensation does not rest on persons who neither own the logs, nor control, as mandators or otherwise, the floating operations.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and dismissing the appellant's action.

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

H. Aylen K.C. and *J. A. Aylen* for the appellant.

T. P. Foran K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—The respective rights and obligations of riparian owners and of persons engaged in the floating or transmission of logs and timber down rivers and streams in the province of Quebec have already formed the subject of a series of cases; and, so long as the law contained both in the codes and the statutes remains as it is, they are well

1926

v.

QUYON MILLING CO.

v.

E. B. EDDY CO.

Rinfret J.

settled by jurisprudence. *McBean* v. *Carlisle* (1); *Pierce* v. *McConville* (2); *Laurin* v. *The Charlemagne and Lake Ouareau Lumber Co.* (3); *Atkinson* v. *Couture* (4); *Bazinet* v. *Gadoury* (5); *Vézina* v. *The Drummond Lumber Co.* (6); *McKelvie* v. *Miller* referred to in *Ward* v. *Township of Grenville* (7); *King* v. *Ouellet* (8); *Green* v. *Blackburn* (9); *Therrien* v. *Edwards* (10); *Pepin* v. *Villeneuve* (11); *Richardson* v. *Paradis* (12); *Tanguay* v. *Price* (13); *Ward* v. *Township of Grenville* (7); *Gale* v. *Bureau* (14); *Club de chasse de Ste. Anne* v. *Rivière Ouelle Pulp & Lumber Co.* (15); *Fraser* v. *Dumont* (16). The right of lumbermen or others floating or "driving" timber is not a paramount right but an easement, which must be exercised with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of the rivers, streams and watercourses, and the effect of the decisions is that persons who avail themselves of the privilege thereby conferred are obliged to make compensation for all damages resulting from its exercise, except in regard to such as cannot be avoided by reasonable care and skill and those to which the riparian proprietor himself may have contributed, or which have been occasioned by his own fault.

Navigable or floatable rivers (whether they be dependencies of the Crown domain or subject of private property), and the rights of user of these rivers for the purposes of navigation or the carriage of timber have already been defined by the Supreme Court of Canada (*Tanguay* v. *Canadian Electric Light Company* (17) and by the Judicial Committee of the Privy Council (*Maclaren* v. *Attorney General for the province of Quebec* (18).

(1) [1874] 19 L.C.J. 276.
(2) [1898] 5 R. de J. 534.
(3) [1899] 6 R. de J. 49.
(4) [1892] Q.R. 2 S.C. 46.
(5) [1891] M.L.R. 7 Q.B. 233.
(6) [1904] Q.R. 26 S.C. 492.
(7) [1902] 32 Can. S.C.R. 510, at p. 526.
(8) [1885] 14 R.L. 331.
(9) [1910] 16 R.L.n.s. 420.
(10) [1915] 21 R.L.n.s. 526.
(11) [1913] Q.R. 22 K.B. 520.
(12) [1914] Q.R. 24 K.B. 16.
(13) [1906] 37 S.C.R. 657.
(14) [1910] 44 Can. S.C.R. 305.
(15) [1910] 45 Can. S.C.R. 1.
(16) [1912] 48 Can. S.C.R. 137.
(17) [1907] 40 Can. S.C.R. 1.
(18) [1914] A.C. 258.

In the present case, the Quyon Milling Company Limited was in possession as owner of a certain lot comprising land on both sides of the Quyon river, in the village of Quyon, in the county of Pontiac, and of the water power, water rights and hydraulic privileges connected therewith. It built thereon a flour and grain mill and a concrete dam for the purposes of developing and using the water power.

It says in its declaration that this Quyon river is neither navigable nor floatable, except for single pieces of timber and loose logs (" à buches perdues ").

On or about May 20, 1923, so it is alleged, pulpwood, logs, timber and wood goods said to belong to the E. B. Eddy Company Limited, while being floated down this river, reached the mill of the Quyon Company and piled with great force and pressure against and upon the dam and works, which they injured and in part destroyed.

The Quyon Company said that this was due to the carelessness and negligence of those handling and driving these logs and pulpwood on behalf of the Eddy Company, and therefore prayed that the latter be adjudged and condemned to pay $3,140 with interest and costs.

The Eddy Company, while asserting that the damage done was due to the inherent weakness of the dam and works and their incapacity to resist the natural pressure of water suddenly increased in the river at that time of the year, mainly rested its defence upon a denial of ownership and possession of the logs and pulpwood in question and pleaded that the floating or driving thereof was in no sense made or carried on under its control.

To this, the Quyon company answered that even if the logs were being driven by independent contractors, who were to deliver them to the Eddy Company on the Ottawa river, at or below the mouth of the Quyon river, the damages could not be recovered from the contractors, who were of weak financial standing, and the Eddy Company could not by its contracts exclude or relieve itself from liability for these damages.

The trial judge found that, on the 20th May, 1923, the logs, etc., were not the property of the Eddy Company, that they were not under its control, but that the floating and " drive " was being operated by Messrs. Bolam & Rich-

1926

QUYON MILLING CO. v. E. B. EDDY CO.

Rinfret J.

ard, acting not as mandatories of the Eddy Company but on their own account.

Having reached such conclusions, he felt it unnecessary further to examine the cause of the collapse of the Quyon works or the nature and extent of the damages and he dismissed the action. Upon appeal, his judgment was unanimously confirmed by the Court of King's Bench.

Our attention was drawn to a statute enacted on the 19th February, 1914, being 4 Geo. V, c. 56, which, by section 3, added article 7302a to the Revised Statutes of Quebec, 1909. This amendment relates to the responsibility of those bringing logs down rivers and streams, and provides that

> No person can exercise the rights and privileges conferred by this subsection without being liable for the damages caused by his operations on rivers, streams, creeks, lakes or ponds, or on the banks or shores of the same.

The "subsection" there referred to is s.s. II of par. 2 of section VIII of the first chapter of Title XII of the Revised Statutes, 1909. It deals with the

> right of floating and transmitting timber, etc., down rivers, streams and creeks, and of executing works for that purpose.

It begins by art. 7298, which reads as follows:

> 7298. Subject to the provisions of this subsection, any person, firm or company may, during the spring, summer and autumn freshets, float and transmit timber, rafts and craft down all rivers, lakes, ponds, streams and creeks in this province.

It was argued at Bar that art. 7302a so added to the "subsection" was meant to apply to any person having any interest whatever in the logs and was therefore sufficient to fasten responsibility upon the Eddy Company in this case, even if it was not the owner of the logs, because eventually these logs were to be delivered to it and it was proven to have advanced money against the price of the logs, under the terms of its contract with Bolam & Richard.

We do not think however that this was the intent of the amendment.—It was enacted shortly after the judgments of the Supreme Court of Canada in *Dumont* v. *Fraser* (18th February, 1913) (1), and of the Court of King's Bench in the case of *Pepin* v. *Villeneuve* (18th June, 1913) (2). In the course of these judgments, both courts pointed to the apparent inconsistency between R.S.Q. 7298, as it then stood, and R.S.Q. 7349 (2):

(1) 48 Can. S.C.R. 137. (2) Q.R. 22 K.B. 500.

7298. Subject to the provisions of this subsection, any person, firm or company may, during the spring, summer and autumn freshets, float and transmit timber, rafts and craft down all rivers, lakes, ponds, streams and creeks in this province.

7349 (2). It shall be lawful, nevertheless, to make use of any river or water-course, lake, pond, ditch, drain or stream, in which or to the maintenance of which one or more persons are interested or bound, and the banks thereof, for the conveyance of all kinds of lumber, and for the passage of all boats, ferries and canoes, subject to the charge of repairing, as soon as possible, all damages resulting from the exercise of such right, and all fences, drains or ditches damaged.

After having gone most completely into the history of this legislation, both courts held that

the privilege of transmitting timber down watercourses in the province of Quebec given by article 7298 of the Revised Statutes of Quebec, 1909, was not granted in derogation of the obligation imposed upon those making use of watercourses for such purposes to make reparation for damages resulting therefrom by article 7349 (2) of the Revised Statutes of Quebec.

Admittedly however this interpretation was not free from difficulty; and it is only natural to assume that in enacting article 7302a, the legislature had in view nothing more than to do away with the seeming discrepancy between the two earlier articles and thus to indicate that it was in complete agreement with the views already expressed by the court of final resort in the province and the court of final appeal in the country. This, in our opinion, is the true import of s. 3 of c. 56 of 1914 (Que.). This statute introduced nothing new. It only declares legislatively what had been by judicial authority pronounced to exist in fact. It does not extend the responsibility of those floating and transmitting timber down rivers and streams beyond that to which art. 7349 (2) already subjected them; and it was never suggested until now that, under art. 7349 (2), the obligation to make compensation could rest on persons having neither ownership of the logs, nor the control, as mandators or otherwise, of the floating operations.

That being so, we think the trial judge and the court of appeal were right in their view that this question of ownership or control had first to be decided, and if, as they held, the logs were not the property of the Eddy Company nor under its control on the 20th May, 1923, it follows that the action of the Quyon Company was rightly dismissed.

These are, therefore, the questions presently to be examined. The answer to them must depend upon the par-

1926

QUYON MILLING CO. v. E. B. EDDY CO.

Rinfret J.

ticular contract and the special circumstances of the case (*Joyal* v. *Beaucage* (1)).

The memorandum of agreement, dated the 10th February, 1923

between The E. B. Eddy Company, Limited, of Hull, Quebec, as buyers and Wm. Bolam and Albert Richard, of Campbell's Bay, Quebec, as sellers (provides), for the purchase and sale of spruce pulpwood and pine logs to be taken out by the sellers and delivered to the Upper Ottawa Improvement Company, Limited, on the Ottawa River at the mouth of the Quyon River for the buyers, and also for the purchase and sale of spruce and balsam pulpwood, delivered f.o.b. cars on the Pontiac line; also for white pine logs to be taken out by the sellers and delivered to the Upper Ottawa Improvement Company on the Ottawa River between Ottawa and Allumette Island for the buyers.

Then follow specifications as to the approximate quantities of the " river wood," the " rail wood " and the " white pine " forming the subject of the agreement, the proportions of qualities, the diameters and the lengths. We are concerned only with the " river wood " and therefore leave out anything relating to the " rail wood."

The contract goes on:

All the above pulpwood and logs to be sound and cut from live or green trees, free from rot or doze, straight and cut square at the ends, and the knots trimmed flush with the body of the wood; the said pulpwood and pine logs to be measured, culled and checked by the culler of the buyers, such measurements to be final and binding on both parties.

The sellers agree to supply boom timber and chains to contain all said river pulpwood and pine logs, and to boom out and deliver same to the Upper Ottawa Improvement Company on the Ottawa River at the mouth of the Quyon River, or elsewhere on the Ottawa River for part of the pine logs at as early a date as possible during the spring of 1923.

* * * * *

The sellers further agree to indemnify the buyers against any and all claims for Crown timber dues, and tolls for use of improvements on streams on which any of said pulpwood and pine logs are floated into the Ottawa river.

They also agree to axe mark each log of river wood and pine on both ends and on opposite sides about a foot from each end with the letter " N " a sufficient depth in the wood to insure a good plain mark, and also to hammer stamp each log at least four times on each end with a stamping hammer " E " supplied by the buyers.

The price, which the buyers agree to pay " at their office in Hull, Quebec," is then fixed at varying " rates " for the spruce and balsam " for river shipment," and for the white pine. It is made payable partly when the wood shall have been cut and skidded; partly when hauled and delivered

(1) [1920] Q.R. 59 S.C. 211, at pp. 213-215.

on the Quyon river, and the balance " when the contract shall have been completely fulfilled."

All above payments to be made on receipt of cullers' certificate that the wood has been delivered as per contract.

It is also understood that any money advanced on said spruce and balsam pulpwood and white pine logs taken out under this contract and not delivered in the spring of 1923, as per contract, shall bear interest at the rate of six per cent (6%) per annum dating from January 1, 1923, until final delivery is made of such spruce and balsam pulpwood and white pine logs.

It will at once be seen that this is not a contract to cut standing trees or to float and deliver logs already owned by the Eddy Company or taken out of " limits " belonging to it. Bolam & Richard could cut the logs and pulpwood wherever they chose. Their obligation was to manufacture logs and pulpwood and to deliver them for the buyers to a company indicated and at a place fixed in the contract.

They are to pay all claims for Crown Timber dues.

For the purpose of floating down the Quyon river and of delivery to the Upper Ottawa Improvement Company, they agree " to supply boom timber and chains," " to boom out " the logs and pulpwood and to pay the

tolls for use of improvements on streams on which any of said pulpwood and pine logs are floated into the Ottawa river.

It is proven that the Eddy Company did not hire any of the men on the " drive," nor pay any of them, nor " get any accounts from any of them " and that it " had no authority over the way they drove " the logs and pulpwood.

Incidentally, therefore, it is apparent, both by the terms of the agreement and from the evidence, that the holding of the trial judge that the " drive " was made under the exclusive direction and control of Bolam & Richard cannot in fact be questioned—subject to the consideration of the further point whether Bolam & Richard were then acting merely as the mandataries of the Eddy Company which, it is argued, had measured, culled and accepted the logs and pulpwood in the bush, before the " drive " began.

The contract does say that a certain payment is to be made when the logs and pulpwood have been " cut and skidded " and that, for the purpose of such payment, certificates are to be issued by the culler after he has " measured, culled and checked " the wood. As the contract reads, however, the like operation would be equally required for the payment stipulated to be made when

1926

QUYON MILLING CO. v. E. B. EDDY CO.

Rinfret J.

the logs have been "hauled and delivered on the Quyon river" and also for the final payment "when the contract shall have been completely fulfilled." So that, under the terms of the agreement, the measurements before the "drive" are only provisional and gone into for the purpose of ascertaining the amount of money which is to be "advanced," and which "shall bear interest at the rate of six per cent (6%) per annum, dating from January 1, 1923," as a loan against the price that will be due "when the contract is completely fulfilled" and "final delivery is made of such spruce and balsam pulpwood and white pine logs."

The measurements and culling in the bush and on the Quyon river were necessary to carry out the contract with respect to these advances and for the purpose of determining their quantum. It is evident that these measurements are declared "to be final and binding on both parties" for that purpose only and in the sense that the decision of the culler was not open to discussion by the parties, for it cannot be understood to mean that the measurements in the bush will conclusively determine and appropriate the subject matter of the contract, since the provision that the culler's measurements "shall be final and binding on both parties" applied alike to measurements in the bush, on the Quyon river and on delivery at the mouth of that river.

In practice, Mr. Seymour Fisher, manager of the Woodsland division of the Eddy Company, explains how the operations were carried out:

> Witness: The bark mark and hammer mark were placed on the logs for identification purposes, so we could distinguish our logs from those of other people, and also to see that we got delivery at our mill of the amount of logs placed in the river.
>
> Q. When the logs would have reached the Ottawa river, according to the contract which I read as follows: "to be taken out by the sellers and delivered to the Upper Ottawa Improvement Company on the Ottawa River between Ottawa and Allumette Island for the buyers"—when the logs would have been delivered there in the Ottawa river how would you know you got all the logs contracted for or for which an account was sent to you?
>
> A. Well, you would know just by having your culler travel the river and see that a good drive had been made and no logs left along the bank of the river, and then you would get a second check by checking up the logs when they came to Ottawa.
>
> Q. And how would you check them at Ottawa?

A. Only by the hammer and bark marks.

Q. And how check them along the Quyon?

A. Only by the hammer marks or bark mark—any log that did not contain those marks we could not consider as our logs.

Q. Supposing you had hammered and bark-marked 10,000 logs in the bush and on the bank of the river in the winter time and you found 5,000 at the mouth of the Quyon or in the hands of the "Upper Ottawa Improvement Company," what payment would you make?

A. We would pay only for the logs that were delivered.

Q. Delivered where?

A. At the mouth of the Quyon on the Ottawa River.

Q. And before making that payment what would you do with regard to the Quyon?

A. We would have the man who measured the pulpwood and saw logs travel the banks of the river and ascertain whether it was all driven or not.

Q. And if you found several hundred logs still on the banks of the Quyon river what would you do?

A. We would only pay for the logs delivered at the mouth of the river, at the Ottawa.

The terms of the agreement therefore and the manner in which it was being carried out bring this case within the line of decisions where, provision being made for several successive measurements during the progress of the contract, it was held that title to the goods did not pass until the final measurement has been made, such as *Théberge* v. *Lavoie* (1), where the holding was:

Confirming judgment of the Superior Court which had dismissed appellant's petition in revendication, that the making of the first payment of $3.50 per thousand feet made pursuant to calculation of the estimated lumber contents of the logs and stamping thereof with the buyer's mark by his culler, could not be considered a payment of the price of the logs and an acceptance of delivery thereof such as to pass the ownership of them to the buyer; the object of the operation of culling and stamping being, in view of the contract, to determine the amount of advances to which the seller was entitled before sawing and that consequently the insolvent still remained proprietor of the logs which had not yet been sawn.

See also *Loiselle* v. *Boivin* (2); *Villeneuve* v. *Kent* (3); *Curtis* v. *Miller* (4).

However, the logs and pulpwood were not only measured, culled and checked in the bush and before they were hauled for the floating on the Quyon river, they were also, as provided for by the memorandum of agreement, axe marked and hammer stamped with the timber mark of the Eddy Company; and it is urged that this, at least, was a setting

(1) [1908] 15 R. de J. 279.
(2) [1910] 16 R. de J. 50.
(3) [1892] Q.R. 1 Q.B. 136.
(4) [1898] Q.R. 7 Q.B. 415.

1926

QUYON MILLING CO. v. E. B. EDDY CO.

Rinfret J.

apart sufficient to vest in that company the ownership of the logs and pulpwood.

In the words of Demolombe (vol. 24, no. 478),

> La solution depend des circonstances et des caractères plus ou moins extérieurs et probants de la marque.

The *Timber Marking Act* (c. 72, R.S.C., 1906), enacts that a

> person who registers such timber mark shall thereafter have the exclusive right to use the same to designate the timber got out by him and floated or rafted

by him and that no other person shall mark any timber with any mark so registered, but it does not go the length of saying that the mere marking or stamping of logs or timber is in itself evidence of ownership. In each of the cases above referred to: *Théberge* v. *Lavoie* (1); *Loiselle* v. *Boivin* (2); *Villeneuve* v. *Kent* (3), and *Curtis* v. *Millier* (4), the lumber had been so marked or stamped and the Court of King's Bench refused to accept that as sufficient to pass the title in the lumber to the purchaser.

Stamping and marking are no doubt an important, but not a determining factor. Here, it was merely an incident in the carrying out of the agreement and it is made clear by the evidence that the marks " were placed on the logs for identification purposes," so that they would be followed through the drive and " distinguished from those of other people "—to earmark the logs and pulpwood against the price of which the loan had been advanced.

The real point in the agreement between Bolam & Richard and the Eddy Company is that the logs and pulpwood respectively bought and sold are not logs and pulpwood "cut" and skidded" in the bush, not logs and pulpwood "hauled and delivered on the Quyon river," but logs and pulpwood " delivered to the Upper Ottawa Improvement Company, Limited, on the Ottawa river at the mouth of the Quyon river." Those words, contained in the initial paragraph of the memorandum of agreement, are descriptive of the subject-matter of the sale. Until delivery had been so made on the Ottawa river, the subject-matter had not been ascertained, for it was only the logs and pulpwood which reached such delivery point that the Eddy Company bought. It

(1) 15 R. de J. 279.
(2) 16 R. de J. 50.
(3) Q.R. 1 Q.B. 136.
(4) Q.R. 7 Q.B. 415.

was only as to such logs and pulpwood that "the contract (was) completely fulfilled" and that the company agreed to pay the price fixed, provided they were so "delivered in the spring of 1923." As for logs in the bush or along the Quyon river there exists no agreement to buy them, nor to pay for them. "Any money advanced" in respect of them stands as a loan which shall bear "interest at the rate of six per cent (6%) per annum dating from "January 1, 1923," and which must be reimbursed by Bolam & Richard after the "spring of 1923," being the time stipulated for "final delivery."

It was only when this "final delivery" was made on the Ottawa river that the title in the logs and pulpwood passed to the Eddy Company. That company was not therefore the owner, when these logs and pulpwood are alleged to have demolished the dam and works of the Quyon company on the 20th May, 1923.

A case in point is *Logan* v. *LeMesurier* (1) decided by the Privy Council (1):

Messrs. H. L. & Co., of Montreal, entered into a written contract with Messrs. L. & Co., for the sale of a quantity of red pine timber, then lying above the rapids, Ottawa river, stated to consist of 1,391 pieces, measuring 50,000 feet, more or less, to be deliverable at a certain boom at Quebec, on or before the 15th of June, then next, and to be paid for by the purchasers' promissory notes of ninety days from that date, at the rate of 9½d. per foot, measured off; if the quantity turned out more than above stated, the surplus was to be paid for by the purchasers at 9½d. per foot, on delivery; and if it fell short, the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate, was paid by Messrs. L. & Co. according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale, and when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, whereby the greater part of the timber was dispersed and lost. Messrs. L. & Co., after the storm, collected such of the timber as could be saved, paid salvage for it, and applied the timber saved to their own use. In an action brought by Messrs. L. & Co. against Messrs. H. L. & Co., to recover the amount paid on their promissory notes, and for a breach of the contract, and for the difference between the contract price of 9½d. per foot and 10½d. per foot, the market price when the timber was to have been delivered;

It was

held by the Judicial Committee, affirming the judgment of the Court of Appeals in Lower Canada,

I. That the action was maintainable.

II. That, by the terms of the contract, until the measurement and delivery of the timber was made, the sale was not complete; and that the

(1) [1847] 6 Moore's P.C. 116.

1926

QUYON MILLING CO. v. E. B. EDDY CO.

Rinfret J.

transfer of the property was postponed until the measurement at the delivery; and that the risk remained with the sellers.

III. That the taking possession of a part of the timber by Messrs. L. & Co., after the day mentioned for the delivery thereof, in the contract, and not at the place, could not be considered as an acceptance of the whole; nor could it be considered as an admission, that the property in the timber passed to them before the storm which broke up the raft.

The Court of Appeals of Lower Canada had held (p. 125) that the stipulation of admeasurement and of delivery at a particular place, rendered the sale conditional and incomplete until the occurrence of those events, and that in the meantime the risk *periculum rei venditae* is not to be borne by the purchasers, etc.

There the circumstances were more favourable to the vendor company's contention than they are here to that of the Quyon Company. *The timber was*

fully specified by the description and the place where it lay,

the price was "fixed in reference to an assumed measurement," the price was paid immediately, but

with a reserved right for the one party to recover part of that price, and for the other party to receive more, in case that assumption should prove to have been incorrect,

yet the transfer of property was held to be "postponed until the measurement at the delivery."

In the present case, at the time the contract was entered into, no determined or ascertained timber was in existence to form the subject-matter of the contract; the logs and pulpwood bought and sold were stated to be those that would be delivered on the Ottawa River to the Ottawa Improvement Company, and any logs and pulpwood which did not reach such delivery point were not part of the subject-matter of the contract; no price was fixed, only the rates were agreed upon; no price was paid, but money was only advanced. It seems clear that *a fortiori*, under the present agreement, the intention of the parties was that the E. B. Eddy Company should become the owner only at the point of delivery on the Ottawa river and, as a consequence, only of such logs and pulpwood as would eventually reach that point.

In this view, this case must be distinguished from *King* v. *Dupuis* (1), and *Dallaire* v. *Gauthier* (2). In the former case, the agreement amounted to an absolute sale of the mill output for the season. It was not a question of goods sold by weight or measure but a "lump" sale of effects,

(1) [1898] 28 Can. S.C.R. 388. (2) [1903] Q.R. 24 S.C. 495.

certain, fixed and well defined. The logs had been culled and stamped and, upon the receipt of the return of the cullers, they had been paid for. Yet this stamping of the logs was looked upon as a presumption only until "the contrary be proved." The title was held to have passed because

the presumption was supplemented by oral evidence that a transfer of property was really intended.

and because

the proof of the sale (appeared) upon the face of the written agreement.

It was

therein stipulated that all logs paid for by the purchasers shall be their property and shall be received and stamped with their name.

Dallaire v. *Gauthier* (1), in the Superior Court at Chicoutimi, was a similar case. It was found there that, by culling and stamping the wood, the parties had intended respectively to deliver and to accept it.

After all, as Lord Brougham said in *Logan* v. *LeMesurier* (2) (p. 132):

The question must always be: what was the intention of the parties in this respect; and that is, of course, to be collected from the terms of the contract.

In the present case, we think the contract shows that the parties did not intend the ownership to pass until the logs and pulpwood had reached the Ottawa river.

If the ownership had not passed, it becomes unnecessary to consider whether, had the Eddy Company been the owner, it would have been relieved from liability because the damage was done while the logs were being transmitted by another person under contract with it. In *Dickie* v. *Campbell* (3), it was held that any one intending to carry on the transmission of logs down rivers in Nova Scotia, under the authority of R.S.N.S. (1900) c. 95, s. 17, could not, on account of the provisions of that statute, get rid of his liability for all damages caused thereby

by simply having the operations put into execution by a contractor.

Whether this would also hold good in Quebec and under Quebec law and statutes may be considered as an open question, notwithstanding the judgment of the Court of Review in *Le Club de Chasse et de Pêche de Ouiatchouan*

(1) Q.R. 24 S.C. 495. (2) 6 Moore's P.C. 116.
(3) [1903] 34 Can. S.C.R. 265.

1926

QUYON MILLING CO. v. E. B. EDDY CO.

Rinfret J.

v. *La Compagnie de Pulpe de Ouiatchouan* (1), in view of the different expressions of opinion in *Dumont* v. *Fraser* (2). In the present case, the sellers were entitled to float logs and pulpwood in their own right and to keep to themselves the privilege of driving them.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Aylen & Aylen.*
Solicitor for the respondent: *T. P. Foran.*

1925

*Oct. 15.
*Dec. 10.

CALIFORNIA PRUNE AND APRICOT GROWERS, INC. (PLAINTIFF)..... } APPELLANT;

AND

BAIRD AND PETERS (DEFENDANT)..... RESPONDENT.

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

Agency—Contract—Sale of goods—Conditions—Warranty—Routing of goods—Right to repudiate

The appellants, under a written contract entered into on the 27th May, 1920, sold to the respondents one carload of prunes, growers' brand, to be delivered f.o.b. Pacific Coast shipping point. The contract contained four terms and conditions which were given special prominence, viz.,—"Destination—St. John, N.B.; Routing—Delivery routing may be given later; Consigned to—Order of seller; Time of shipment—October." Other terms of importance were: "Boxing specifications may be changed by buyer, provided such changes are received at this office prior to September 1, 1920." "Seller shall, where possible, recognize routing named by buyer, but seller has option of selecting the initial line." "No unimportant variation in the performance of this contract shall constitute basis for a claim." "Brokers or salesmen not authorized to sign this contract nor change terms or wording without written authorization by the seller." The sale was arranged through a representative of Sainsbury Bros., who advertised themselves to be the "direct representatives in Canada" of the appellant with its knowledge and acquiescence. Boxing specifications were given by the respondents to the agent and the same were acted upon by the appellant, and later routing instructions were given in writing to the agent and provided that the car should be routed C.N.R. from Chicago to destination. The car was, in fact, routed C.P.R., and upon its arrival in Saint John

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

(1) [1907] Q.R. 31 S.C. 133.

(2) [1913] 48 Can. S.C.R. 137, at pp. 139, 141, 149, 153, 154, 160, and 161.

the respondents refused to accept the goods, holding that the failure to comply with their routing instructions was an important variation in the contract entitling them to repudiate. The appellant thereupon brought this action to recover damages for the alleged breach of contract.

Held, that the notice to the agent as to the routing of the goods was given in the manner contemplated by the contract.

Held also, that the mode of shipment is a material and indeed an essential term of the contract. The consequence is that its non-performance is not "an unimportant variation," which should in the present case be excluded as constituting a "basis for a claim," but on the contrary "may fairly be considered by the other party as a substanital failure to perform the contract at all." (*Wallis* v. *Pratt* [1911] A.C. 394).

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick, affirming a judgment of the trial judge, Mr. Justice Crockett, and dismissing the plaintiff's action. Appeal dismissed with costs.

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

Wallace K.C. and *W. R. Scott* for the appellant.

Harrison K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—By a contract made in writing and dated the 27th day of May, 1920, the respondent (a New Brunswick firm), bought and the appellant (a California company), sold one carload of prunes to be delivered f.o.b. Pacific Coast rail shipping point.

The following terms and conditions were set forth on the contract with special prominence:

Destination: Saint John, N.B.
Routing: Delivery routing may be given later.
Consigned to: Order of seller.
Time of shipment: October.

There were further stipulations, amongst others, as follows:

Boxing specifications may be changed by buyer, provided such changes are received at this office (meaning no doubt the office at San José, California), prior to September 1, 1920.

Seller shall, where possible, recognize routing named by buyer, but seller has option of selecting the initial line.

No unimportant variation in the performance of this contract shall constitute basis for a claim.

Brokers or salesmen not authorized to sign this contract nor change terms or wording without written authorization by seller.

1925

CALIFORNIA PRUNE AND APRICOT GROWERS v. BAIRD AND PETERS.

Rinfret J.

On October 15, 1920, the appellant shipped from Red Bluff, California, to the respondent at Saint John, N.B., and consigned to the order of the appellant a carload of prunes of the brand and assortment conforming to the specifications provided by the respondent.

The carload of prunes was sent from Chicago to Saint John, N.B., over the line of the Canadian Pacific Railway and arrived in Saint John early in December.

The price of the prunes, with the freight added, amounted to $8,604.21. A sight draft for that amount, with bill of lading attached, was presented to the respondent, who refused to accept it. They moreover disclaimed any obligation on their part to receive the prunes and to pay for them. Their ground was that, by a notice in writing, they had directed the appellant to route the carload of prunes via Canadian National Railways from Chicago; that the appellant had failed to comply with the terms of this notice, which were in effect part of the contract; that the change in the routing as ordered was an important variation in the contract and that they were thereby relieved from any liability.

Whether the breach complained of gave rise to a right to reject the prunes and treat the contract as repudiated is therefore the important question to be determined in this case.

There is, however, another point raised by the appellant and which must first receive our attention.

It is admitted that no notice of delivery routing was given to the appellant direct; but, by letter under date of August 30, 1920, the respondent requested W. S. Clawson & Co., of the city of Saint John, to instruct the appellant to ship the carload of prunes by Canadian National Railway from Chicago to Saint John. The appellant alleges that this was not a delivery routing given in the manner contemplated by the contract.

As against this contention, there stands in the appellant's way the concurrent findings of the two courts of New Brunswick. The trial judge said:

> I have not the slightest doubt of the truth of Mr. Clawson's evidence and have no hesitation in finding that he negotiated this contract with the defendants as the agent of Sainsbury Bros. Neither have I any doubt that Sainsbury Bros. were the direct representatives in Canada of the plaintiff as they advertised themselves to be, and as the plaintiff by its

circular letter of February 15, 1919, addressed to Canadian buyers, informed the trade in Canada they were. I am of opinion that the defendants gave the delivery routing in the manner contemplated and in ample time to entitle them to have the goods shipped as directed by them.

Mr. Justice White, delivering the unanimous judgment of the appeal division of the Supreme Court of New Brunswick, confirms the holding of the trial judge in these words:

I have carefully read the evidence in the case and am satisfied that the learned judge could not properly have found the facts otherwise than as he found them.

On this matter, therefore, the appellant finds itself in a position of considerable difficulty.

It is not disputed that Mr. William S. Clawson was the agent of Sainsbury Bros. at Saint John.

A member of the firm of Sainsbury Bros., Arthur H. Sainsbury, was asked what was its chief business. He answered:

It was the agent for Canada for the California Prune and Apricot Growers, and three or four other California dry fruit concerns.

He states there was no agreement in writing, but said:

We had a letter that they (the appellant) had issued to the trade in Canada advising that we were the agents for the Canadian territory for the sale of their products.

This letter was produced. It is dated at San José, March 14, 1918, and reads:

This will introduce Mr. A. H. Sainsbury, who, with his brother, Mr. G. O. Sainsbury, will be the direct representatives of the California Prune & Apricot Growers Inc., in the Dominion of Canada.

(Sgd.) CALIFORNIA PRUNE & APRICOT GROWERS, INC.,
H. G. COYKENDALL,
General Manager.

This was supplemented by a circular letter from the appellant addressed "to Canadian buyers," on February 15, 1919, which states:

We have just completed our arrangements with the firm of Sainsbury Bros. for our exclusive and direct representation throughout entire Canada * * * We feel that the interests of this association and the interests of the wholesale trade of Canada as well will be in the proper hands, as Sainsbury Bros. have been with this association ever since its incorporation and are thoroughly conversant with the prune and apricot business from start to finish. We feel that no one is better qualified to handle a prune and apricot account. * * * * Furthermore, it is only through Sainsbury Bros. that you will be able to purchase our "Sunsweet brand" of either prunes or apricots.

On their own letterheads, Sainsbury Bros. styled themselves "direct representatives" of the appellant. These were used regularly in their correspondence with the latter and no exception was taken by them.

1925

CALIFORNIA PRUNE AND APRICOT GROWERS v. BAIRD AND PETERS.

Rinfret J.

In 1919, the year before the present contract, the respondent purchased a carload of prunes from the appellant. The bought and sold note then given to the respondent by Mr. Clawson was signed by Sainsbury Bros. Again it described them as the representatives of California Prune and Apricot Growers Inc., and asserted that they sold "for account of California Prune & Apricot Growers Inc." This contract was acted upon by the appellant, who then treated Sainsbury Bros. as their agents for purposes of receiving boxing specifications and routing instructions.

On such previous occasion, the course of dealing between the parties was exactly the same as that followed in the present case. In fact, it appears to have been the almost invariable practice for the buyer to give routing instructions in the manner which is shown to have been adopted here.

Moreover, all negotiations regarding the present contract took place between the respondent and Mr. Clawson. The appellant never had any correspondence with the respondent. Any communications on its behalf were given to the respondent by Sainsbury Bros. through Clawson. It was the latter who arranged the sale, took the written contract to the respondent to be signed, and later was requested to find out from the respondent and got from them the specifications as to assortment and boxing and also as to routing.

The respondent's instructions with regard to boxing specifications were given in precisely the same way as their routing instructions; no exception was taken to the method of notifying the sellers and the notice so given as to the former was acted upon.

Under all these circumstances, and even although there may be on the part of the traffic or sales managers of the appellant some statements, here and there, tending to the contrary, it is impossible to conclude that the concurrent holdings of the two courts below should be reversed.

It must be taken therefore that Sainsbury Bros. were the agents of the appellant and that they had authority to receive on its behalf routing instructions in connection with the contract in question.

It follows that the notice in the letter of August 30 from the respondent to Mr. Clawson:

bill our car of prunes to Saint John and route it Canadian National Railway from Chicago

amounted to a stipulation which, having been made in ample time, must be read into the contract.

There remains the question whether the breach of this stipulation gave rise to a right to reject the goods.

The law is now well settled that in mercantile contracts the time and the place of shipment are material or essential parts of the description of the goods sold and full compliance therewith is a condition precedent to the seller's right to recover.

In *Bowes* v. *Shand* (1), the contracts were for 8,200 bags of rice to be shipped at Madras during the months of March and April. The bags of rice (outside of 1,080), were put on board vessel, at Madras, in February. The rice was refused because it had not been shipped during March and April. The House of Lords held that the contract had not been complied with.

Norrington v. *Wright* (2), is a decision of the Supreme Court of the United States to the same effect. The time of shipment was there declared to be a material element in a contract, which must be strictly complied with and a breach of which justifies repudiation of the goods by the buyer.

The same court, in the case of *Filley* v. *Pope* (3), held that the place of shipment was also

a statement descriptive of the subject matter or of some material incident.

in a mercantile contract, and was to be regarded as a condition precedent, upon the non-performance of which the party aggrieved may repudiate the whole contract.

In that case, Pope & Bros., of New York, had sold to Mr. Filley, of St. Louis, 500 tons of pig iron to be shipped from Glasgow as soon as possible. The pig iron was shipped from Leith instead of Glasgow, because an earlier vessel could be got from that port. The iron in fact arrived sooner than if it had been shipped at Glasgow. The pig iron was refused on the ground that the seller had not complied with the terms of the contract as to place of shipment. In an action for non-acceptance, and without any evidence of damage being adduced, this sole ground of rejection was held good.

(1) [1877] 2 App. Cas. 455. (2) [1885] 115 U.S.R. 188.
(3) [1885] 115 U.S.R. 213.

1925

CALIFORNIA PRUNE AND APRICOT GROWERS v. BAIRD AND PETERS.

Rinfret J.

It will be well to examine the reasons given in these cases to see how far they can be made to apply to the present one.

In *Bowes* v. *Shand* (1), Lord Cairns L.C., said (p. 463):

My lords, if that is the natural meaning of the words, it does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contract stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer.

* * * * *

My Lords, I must submit to your Lordships that if it be admitted, as the Lord Justice is willing to admit, that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get ride of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.

Lord Hatherly said (p. 474):

Now under these circumstances, and with the plain meaning of the contract lying, as it appears to me, on its surface, we are not entitled to speculate on the reasons and motives which have induced those who are engaged in this particular trade, those who have this "usual run," as the witness describes it, of contracts before them from time to time, and who must have pondered upon the matter, to frame their contracts in the manner which pleases them best.

Lord O'Hagan said (p. 479):

I do not think that we are at liberty to speculate as to motives, or to consider what comparative benefit might practically have arisen from a shipment in February or a shipment in March.

Lord Gordon said (p. 485):

Now, the terms which are used in these contracts are naturally the result of the intelligence of the merchants who are engaged in making them, and we may rely upon this, that they have considered well the terms of the contract before they entered into it. What your Lordships are proposing to do is to adhere to the words of the contract.

In *Filley* v. *Pope* (2), Mr. Justice Gray said (p. 219):

The court has neither the means, nor the right, to determine why the parties in their contract specified "shipment from Glasgow," instead of using the more general phase "shipment from Scotland," or merely "shipment," without naming any place; but is bound to give effect to the terms

(1) 2 App. Cas. 455. (2) 115 U.S.R. 213.

which the parties have chosen for themselves. The term "shipment from Glasgow" defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination.

There does not seem to exist any sound reason why the principles thus enunciated with regard to time and to place of shipment should not receive equal application to a stipulation in respect of mode of shipment.

Lord Blackburn, in *Bowes* v. *Shand* (1), had already said (p. 480):

It was argued, or tried to be argued, on one point, that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject matter of the contract went, its being shipped at another and a different time being (it was said) only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. I think, to adopt an illustration which was used a long time ago by Lord Abinger, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at *Madras* or the coast of *Madras*. Equally good rice might have been shipped a little to the north or a little to the south of the coast of *Madras*. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to take anything in fulfilment of that contract it must be shewn not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it.

Benjamin on Sale (6th ed., p. 679), expresses the view that

the extract from Lord Blackburn's opinion above quoted shows that the place or mode of shipment may be as material a part of the description of the goods as the time.

At p. 401, the same author had written:

* * * if a particular mode of transmission be expressly or impliedly prescribed by the contract, as, for example, delivery to a specified carrier

(1) 2 App. Cas. 455.

1925

CALIFORNIA PRUNE AND APRICOT GROWERS v. BAIRD AND PETERS.

Rinfret J.

or by a particular route, the goods must be delivered to that carrier, or by that route.

See also Williston on Sales, 2nd ed. 585-587.

Moreover, this very question came up squarely for decision before the British Court of Appeal in the case of *L. Sutro & Co.* v. *Heilbut, Symons & Co.* (1).

The contract was for the sale of rubber

to be shipped during the months of March, April, 1916, by vessel or vessels (steam or motor) from the east to New York direct and/or indirect with liberty to call and/or transship at other ports.

The cargo was sent by steamship to Seattle and thence by rail to New York. The buyers refused to accept it because it had not been conveyed by sea to New York. No particular damage was shown.

Under a clause in the contract, the buyers' objection was submitted to arbitration; and the arbitrators found that, owing to the outbreak of war, it had become usual, at the time of this contract, to send by sea and rail shipments from the east which heretofore had gone the whole distance to New York by water. It was well known to those engaged in the trade that rubber sold on contracts in the form of the one in question would be forwarded by steamer to a port of the United States; hence they would be transmitted by rail to destination.

The Court of Appeal however held, affirming Mr. Justice Lush

that the contract provided for a sea carriage from the port of loading to New York; that the usage (assuming it was a usage), found by the arbitrators was inconsistent with the terms of the contract, and therefore was not applicable thereto; and that the tender was not a good tender and the buyers were not bound to accept the same.

Swinfen Eady L.J., delivering the judgment of the Court of Appeal, said (page 355) that it was not necessary for the buyers

to justify in a court of law the mercantile reasons for inserting any particular stipulation in a contract. The observations on this point of Lord Cairns in *Bowes* v. *Shand* (2) are very relevant.

He then proceeds to quote from Lord Cairns' judgment in the latter case the passage at page 463 to which reference has already been made above; and he goes on to say:

The court assumes that a merchant, in entering into a mercantile transaction, has regard to his arrangements for paying for goods purchased, and his intention about reselling them in the ordinary course of his trade.

and he concludes by saying that

(1) [1917] 2 K.B. 348. (2) 2 App. Cas. 455.

where a particular method of conveyance is stipulated for, it is not permissible to inquire whether there is not some other usual method; and a finding that there is another usual method is irrelevant.

The same underlying principle will be found in this decision of the Court of Appeal as in *Bowes* v. *Shand* (1) and *Filley* v. *Pope* (2) that

it is not for the court to speculate on the reasons or motives which have induced the parties to a mercantile contract to agree upon any particular term or to consider what practical benefit might have arisen from the performance of any particular term of the contract.

In the words of Williston on Sales, 2nd ed., p. 585,

the property will not pass if the goods are too many, or too few, or they are sent at a materially different time, or by a different route or method of shipment, or are misdirected. *Bidwell* v. *Overton* (3).

In that view, the mode of shipment is a material and indeed an essential term of the contract. The consequence is that its non-performance is not "an unimportant variation" which may, under the present contract, be excluded as constituting a "basis for a claim;" but, on the contrary,

may fairly be considered by the other party as a substantial failure to perform the contract at all.

(*Wallis* v. *Pratt* (4)).

If it were necessary, attention may be drawn to the fact that in the contract itself the parties, in this case, have given to "routing" the same conspicuous place as they have to "destination," "consigned to" and "time of shipment." These are the four conditions of the contract which appear to have been singled out as specially important.

When instructing Mr. Clawson, on the 30th August, the respondent wrote:

We want you to be particular to call their attention to the routing, as this car must come by C.N.R. from Chicago.

And, when transmitting these instructions to his principals, Mr. Clawson in turn insisted:

Be sure and see that car comes "Canadian National Railway from Chicago."

Moreover, the variation in the routing of this shipment has proven in the event to be of importance to the respondent. The evidence shows that the latter had an agreement with the Canadian National Railway for the hauling of its carload from Chicago to Saint John, whereby it would have been able to ship portions of the carload to its branches in New Brunswick while the car was in transit. The breach made this impossible.

(1) 2 App. Cas. 455.
(2) 115 U.S.R. 213.
(3) 26 Abbott's Cas. N.Y. 402.
(4) [1911] A.C. 394.

1925

CALIFORNIA PRUNE AND APRICOT GROWERS v. BAIRD AND PETERS.

Rinfret J.

Both courts in New Brunswick have decided that the appellant's action to recover damages for non-acceptance of the prunes should be dismissed with costs. For the reasons which we have given, we think those decisions ought to be upheld.

Appeal dismissed with costs.

Solicitors for the appellant: *MacRae, Sinclair & MacRae.*
Solicitors for the respondent: *Barnhill, Sanford & Harrison.*

1925

*Nov. 3.

1926

*Feb. 2.

P. E. EMILE BELANGER (DEBTOR)
AND
LARUE, TRUDEL AND PICHER (TRUSTEES) ..... APPELLANTS;
AND
THE ROYAL BANK OF CANADA (CLAIMANT) .....
AND
THE ATTORNEY GENERAL FOR QUEBEC (INTERVENING) ..... RESPONDENTS.

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

Constitutional law—Bankruptcy—Dominion Act—Civil law—Judgment—Registration—Judicial hypothec—Realization and distribution of assets—Bankruptcy Act, D. (1920), c. 34, s. 6, enacting ss.s. 1 and 10 of s. 11.

The Royal Bank of Canada, having recovered judgment against Bélanger for $14,036 caused it to be registered and with it a notice describing real estate of the debtor. Twenty months afterwards the debtor made an assignment under the Bankruptcy Act and the appellants were appointed trustees. The bank filed its claim with the trustees for the amount of the judgment, asserting a privilege in the nature of a judicial hypothec under the terms of art. 2121 C.C. which enacts that "the judgments and judicial acts of the civil courts confer hypothecs when they are registered * * *." Subsequently the trustees, acting under s. 53 of the Bankruptcy Act, disallowed the bank's claim in so far as it set up a privilege or hypothec upon the immovables, saving however the costs of registration, on the ground that the assignment took precedence of the bank's claim under subs. 10 of s. 11 of the Bankruptcy Act. That subsection provides that, from and after registration, a receiving order or authorized assignment in bankruptcy

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

"shall have precedence of all certificates of judgment, judgments "operating as hypothecs * * *."

Held, Rinfret J. dissenting, that the disallowance of the bank's claim by the trustees was valid. When the Dominion Parliament enacted in terms, by subs. 10 of s. 11, that an order or assignment in bankruptcy should have precedence of all certificates of judgment and judgments operating as hypothecs, that priority attached for all purposes, including distribution as well as realization of the assets.

Held, also, Rinfret J. dissenting, that the words "certificates of judgment," "judgments operating as hypothecs" contained in subs. 10 of s. 11 include judgments and judicial acts of the civil courts which confer hypothecs under art. 2121 C.C.

Held, also, Rinfret J. dissenting, that subss. 1 and 10 of s. 11 of the Bankruptcy Act, belong and have strict relation to the subject of bankruptcy and insolvency and are within the powers of the Dominion Parliament.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and maintaining the bank respondent's claim against the trustees.

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

The judgment appealed from was reversed (1).

St. Laurent K.C. for the appellants.

Lanctot K.C. and *Thomson* for the bank respondent.

Lanctot K.C. and *Geoffrion K.C.* for the Attorney General for Quebec.

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

NEWCOMBE J.—The Royal Bank of Canada, one of the respondents, recovered judgments against P. E. Emile Bélanger on 25th March, 1922, for $14,036.44, and caused the judgment to be registered in the registration division of Quebec, on 6th April, 1922, also, at the same time, causing to be registered a notice describing real estate of the debtor, as required by art. 2121 of the Civil Code, and later, on 11th April, 1922, a further notice, describing additional lands. The article reads as follows:

2121. The judgments and judicial acts of the civil courts confer hypothecs when they are registered, from the date only of the registration of

(1) Appeal to Privy Council.

1926

LABUE v. ROYAL BANK OF CANADA.

Newcombe J.

a notice specifying and describing the immovables of the debtor upon which the creditor intends to exercise his hypothec.

Afterwards, on 24th December, 1923, the debtor made an authorized assignment for the benefit of his creditors under the *Bankruptcy Act* of the Dominion, c. 36 of 1919, and the appellants were, on 15th January, 1924, appointed trustees under this instrument; the assignment and appointment were registered as required by the *Bankruptcy Act,* ss. 8 and 9 of s. 11, the former as amended by s. 14 (2) of c. 31 of 1923. The bank filed its claim with the trustees for the amount of the judgment, asserting a privilege in the nature of a judicial hypothec against the real estate of the debtor described in the registered notices. Subsequently, on 8th May, 1924, the trustees, pursuant to their powers under s. 53 of the *Bankruptcy Act,* disallowed the bank's claim, in so far as it set up a privilege or hypothec upon the immovables in virtue of the judgment, saving however the costs of registration. The ground of the disallowance was that under s. 11, subss. 1 and 10, the assignment had precedence of the bank's claim. The bank appealed to the Superior Court at Quebec, alleging that the trustees had misinterpreted the relevant provisions of s. 11, or that, if their interpretation were correct, these provisions were incompetent to the Parliament of Canada; and, pursuant to the statutory requirements, the bank gave notice of its appeal, and of the constitutional question involved, to the Attorney General for Canada, and likewise to the Attorney General of Quebec. The latter filed an intervention in the case, supporting the contention of the bank in so far as it denied the validity of the legislation. The appeal was heard in the Superior Court before the learned Chief Justice, who reversed the decision of the trustees and restored the claim. He held that upon the true interpretation of the *Bankruptcy Act* the bank was not disentitled to recognition as a privileged creditor, and that therefore the question of legislative power did not arise, but that, if the enactment were intended to avoid the privilege or priority of the bank as a registered judgment creditor under the provisions of the Civil Code, the intention would fail to operate for lack of enacting authority. The trustees appealed to the Court of King's Bench and that court unanimously affirmed the judgment of the Superior Court.

The provisions of the *Bankruptcy Act* which were considered by the courts below, and must be reviewed upon this appeal, are those already mentioned; they are contained in s. 11, subss. 1 and 10, as enacted by s. 6 of c. 34 of 1920, and s. 10 of c. 17 of 1921. These two subsections, the former in its amended form, are here set out as follows:

11. (1) Every receiving order and every authorized assignment made in pursuance of this Act shall take precedence over,—(*a*) all attachments of debts by way of garnishment, unless the debt involved has been actually paid over to the garnishing creditor or his agent; and

(*b*) all other attachments, executions or other process against property, except such thereof as have been completely executed by payment to the execution or other creditor; and except also the rights of secured creditor under section six of this Act; but shall be subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing, attaching or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment execution or other process against property.

(10) From and after such registration or filing or tender thereof (*referring to the requirements for registration and filing contained in the preceding subsections 8 and 9*) within the proper office to the registrar or other proper officer, such order or assignment shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land (except such thereof as have been completely executed by payment) within such office or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees, of such judgment, execution or attaching creditors as have registered or filed within such proper office their judgments, executions or attachments.

It should be observed that by subs. 16, added to s. 11 by c. 34 of 1920, it was enacted that the provisions of subsections 1 and 10, above quoted, should not apply to any judgment or certificate of judgment registered against real or immovable property in Nova Scotia or New Brunswick prior to the coming into force of the *Bankruptcy Act*, and which became, under the laws of the province wherein it was registered, a lien or hypothec upon such real or immovable property. And, subsequently, by c. 31, s. 5, of 1925, this subsection was repealed and re-enacted to include the province of Quebec. The provisions of subs. 16 distinctly shew that in 1925 Parliament considered that subss. 11 (1) and (10) had previously applied to judgments or certificates of judgment registered against immovable property in the province of Quebec, but they have no application in this case, because it was, as I have shewn, after the

1926

LABUE v. ROYAL BANK OF CANADA.

Newcombe J.

coming into force of the *Bankruptcy Act* that the judgment was recovered and registered.

I have come to a conclusion differing from that of the courts below upon both branches of the case.

First, as to the interpretation, it will be perceived that subs. 10 of s. 11 provides explicitly that, from and after registration, a receiving order or authorized assignment in bankruptcy shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land, except those which have been completely executed by payment. The learned chief Justice considers that this is a mere rule of procedure for the execution and application of the *Bankruptcy Act*, and does not affect the civil rights of hypothecary creditors, except so far as to provide that registration of the receiving order or assignment shall suspend the creditors' execution upon the immovables of the bankrupt, and that it endows the receiving order or assignment only with a priority,

une préférence à ces modes d'exécution, sans préjudice aux droits des créanciers, lesquels droits, au lieu d'être exercés par eux, le seront par le syndic.

He says, moreover, as to the statutory expressions, "certificates of judgment," and, "judgments operating as hypothecs," that they are not known in the province of Quebec. To the like effect is the view expressed by the learned Chief Justice of Quebec, speaking for the Court of King's Bench.

I confess, with great respect for the learned judges below, that I am unable to follow the interpretation or the reasoning by which they qualify and expound the meaning and effect of subs. 10 in its application to the province of Quebec. I find nothing, either in this subsection or in any other part of the *Bankruptcy Act*, to justify the opinion that, when Parliament enacted in terms that the order or assignment in bankruptcy should have precedence of all certificates of judgment and judgments operating as hypothecs, the priority should not apply for all purposes, including distribution as well as realization of the assets. If it had been intended, as the learned judges seem to suggest, that, although the trustee in bankruptcy was to realize upon the immovables against which a judgment is registered, the proceeds when realized should nevertheless be

subject to the charge which the creditor had obtained by registration of his judgment before the making of the receiving order or of the assignment, it is difficult to see what different or additional security is afforded to the creditor with regard to his costs, which are, by the subsection, expressly declared to enjoy a lien, that is a preference—the same sort of preference I suppose as, upon the interpretation propounded by the learned judges, the creditor would have in respect to the whole amount secured by his judgment. It is not easy to express the meaning of the statute in words which make it more clear than those of the text; and, when s. 51, providing for the priority of claims, is read along with s. 11, the intention becomes manifest; I do not doubt that Parliament meant to create equality in the distribution as between ordinary creditors and judgment creditors, except as to the costs, which were to retain their priority.

Moreover, it seems impossible to exclude from the description, "certificates of judgment," "judgments operating as hypothecs," the judgments and judicial acts of the civil courts which confer hypothecs under art. 2121 of the Civil Code. These judgments may, under the provisions of the article, be registered, and the registration is effected not otherwise than by producing to the registrar, accompanied by the statutory notice identifying the lands, an exemplification or certified copy of the judgment, which is the document in respect of which the requisite entries are made by the registrar; it is from the registration that the hypothecs result, and I should think therefore that these judgments and judicial acts, when registered, are not inappropriately described as "certificates of judgment" or "judgments operating as hypothecs." Subsection 10 clearly was enacted for the whole of the Dominion, including the province of Quebec. The word "hypothec" is apt to refer to the real right described in the code under that name (arts. 2016 *et seq.* C.C.). A judgment operates as a "hypothec" in the province of Quebec when it is registered upon immovable property belonging to the debtor (arts. 2034, 2121 C.C.), and the "hypothec" thereby acquired is the "judicial hypothec" which, in the language of the code, "results from the judgments." (Arts. 2020, 2034 C.C.).

1926

LARUE v. ROYAL BANK OF CANADA.

Newcombe J.

Secondly, upon the question of legislative authority, it was contended that Parliament, in the execution of its powers of bankruptcy and insolvency, cannot alter the *status quo* as between debtor and creditor, in relation to privilege or priority, existing at the time when the act of bankruptcy is committed; that all rights then subsisting must be recognized, and that Parliament can provide only for the realization and distribution of the estate, subject to such creditors' charges, preferences and priorities as exist under the provincial laws at the time when the condition of the debtor's affairs make the Dominion procedure applicable. But this narrow definition of the enumerated powers of Parliament rejects the doctrine of the common or unoccupied field, where place must be found for the powers which are described as ancillary or incidental, or those possessing a double aspect, and is at variance with the course of legislative practice which has prevailed since the Union, and with the ruling cases.

The *Insolvent Acts*, c. 16 of 1869, and its successor, c. 16 of 1875, contained provisions for invalidating fraudulent preferences and conveyances, and they provided, moreover, that no lien or privilege, upon either the personal or real estate of the insolvent, should be created for the amount of any judgment debt by the issue or delivery to the sheriff of any execution, or by levying upon or seizing the effects or estate of the insolvent under any such writ, if before payment to the plaintiff of the moneys actually levied the estate of the debtor should have been assigned to an interim assignee or placed in compulsory liquidation under the Act, saving however the judgment creditor's lien or privilege for his costs. The *Insolvent Act* of 1875 and its amending Acts were repealed by c. 1 of 1880, and, two years later, an Act was passed respecting insolvent banks, insurance companies, loan companies, building societies and trading corporations, c. 23 of 1882. This Act was consolidated in the Revised Statutes, 1886, c. 129, as the *Winding-Up Act*, and, by s. 66, it was provided, not only that there should be no lien or privilege created for the amount of any judgment debt by the issue or delivery to the sheriff of any execution, or by levying upon or seizing under such writ the effects or estate of the company, but also that no

lien, claim or privilege should be created upon the real or personal property of the company by the filing or registering of any memorial or minute of judgment, if, before payment over to the plaintiff of the moneys actually levied, paid or received under such writ, memorial or minute, the winding-up of the business of the company had commenced, saving in like manner the plaintiff's lien or privilege for costs. Sec. 66 remains in force as s. 84 of the *Winding-Up Act,* Revised Statutes, 1906, c. 144. The authority of Parliament to enact these provisions has certainly never been successfully attacked, and so far as I am aware has not been questioned, and when, at the argument, the attention of counsel was directed to the winding-up legislation they were not able to point to any decision in which the legislative power had been denied or doubted.

It was pointed out in *Citizens and Queen Insurance Companies* v. *Parsons* (1), that some of the classes of subjects assigned to the provincial legislatures unavoidably run into and are embraced by some of the enumerated classes of subjects in s. 91, and that, while it is not intended that the powers exclusively assigned to the legislatures shall be absorbed by the Parliament, nevertheless, with regard to certain classes of subjects, it is the duty of the courts to ascertain, and to define, in the particular cases before them, the limits of the respective powers belonging to Parliament and to the legislatures. Later, in *Hodge* v. *The Queen* (2), we are told that the principle which the *Parsons Case* (1) illustrates is that subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91. Another exposition of the competing powers of legislation as between the Dominion and the provinces is very concisely expressed by Lord Dunedin in *Grand Trunk Railway Co.* v. *Attorney General for Canada* (3), as follows:

> The construction of the provisions of the *British North America Act* has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894, viz., *Attorney General of Ontario* v. *Attorney General of*

(1) [1881] 7 App. Cas. 96, at p. 107-9.
(2) [1883] 9 App. Cas. 117, at p. 130.
(3) [1907] A.C. 65, at pp. 67-8.

1926

LABUE v. ROYAL BANK OF CANADA.

Newcombe J.

Canada (1), and *Tennant* v. *Union Bank of Canada* (2), seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

That the enumerations of s. 91 describe exclusive Dominion powers has been frequently affirmed and is not denied. It was pointed out long ago by Lord Selborne, when he delivered the judgment of the Judicial Committee of the Privy Council in *L'Union St. Jacques de Montréal* v. *Bélisle* (3), that the words "bankruptcy and insolvency," as mentioned in the 21st enumeration of s. 91,

> describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent according to the rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.

And, in *Cushing* v. *Dupuy* (4), Sir Montague Smith, delivering the judgment of the Committee, said:

> It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization and distribution of the estate, and the settlement of the liabilities of the insolvent.

Then came the judgment of Lord Herschell in *Attorney General for Ontario* v. *Attorney General for Canada* (the *Assignments and Preferences Case* (1), where the question was as to the validity of s. 9 of the Revised Statutes of Ontario, 1887, c. 124, entitled "*An Act respecting Assignments and Preferences by Insolvent Persons.*" This section reads as follows:

> An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands.

It was contended on behalf of the Attorney General for Canada that this enactment was incompetent to the legislature of Ontario as affecting the exclusive Dominion power of bankruptcy and insolvency. At that time the former

(1) [1894] A.C. 189.
(2) [1894] A.C. 31.
(3) L.R. 6 P.C. 31.
(4) [1880] 5 A.C. 409, at pp. 415-6.

Dominion *Insolvent Acts* had been repealed, and the Dominion field of bankruptcy and insolvency was, except as to the companies to which the *Winding-Up Act* applied, unoccupied. It will be perceived that the declared intention of the legislature was to displace the precedence which had belonged to judgment or execution creditors, except as to costs, and to give priority to assignments for the general benefit of creditors. In the present case, the contention is, conversely, that Parliament cannot give effect to a similar provision with regard to the operation of a receiving order or compulsory assignment in bankruptcy as against a creditor who, under the provincial law, is first in the race for execution. It is apparent I think that the observations of Lord Herschell, at pp. 200-1 (1), effectively dispose of this contention. His Lordship said:

> It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define what is covered by the words "bankruptcy" and "insolvency" in s. 91 of the *British North America Act*. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.
>
> In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the *British North America Act*. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority

(1) [1894] A.C. 189.

1926

LARUE
v.
ROYAL BANK OF CANADA.

Newcombe J.

of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

This decision clearly recognizes the necessity, or at least the propriety, of including in general bankruptcy legislation such provisions as those of s. 11 (1) and (10) of the *Bankruptcy Act;* and, following the view expressed by their Lordships, I hold that these enactments belong or have strict relation to the subject of bankruptcy and insolvency, and are therefore, as provisions of the *Bankruptcy Act,* within the paramount authority of Parliament.

I would allow the appeal with costs throughout, and the disallowance should be restored.

RINFRET J. (dissenting).—La loi de faillite exige que toute ordonnance de séquestre et toute cession autorisée soit enregistrée ou déposée " au bureau régulier dans chaque district ", etc., où sont situés les biens appartenant au failli ou au cédant.

Elle ajoute (article 11, paragraphe 10):

A compter et à la suite de cet enregistrement ou de ce dépôt ou de cette offre de ces actes ou pièces de ressort du bureau régulier au registraire ou à un autre officier autorisé, cette ordonnance ou cession doit avoir priorité sur tous certificats de jugement, jugement opérant comme hypothèques, exécutions et saisies-arrêts contre des terres (sauf la partie qui en est complètement satisfaite par paiement) du ressort de ce bureau ou de ce district, comté ou territoire desservi par ce bureau, mais assujettis à un privilège pour les frais d'enregistrement et les honoraires du shérif, de ce jugement, des créanciers exécutants ou saisissants qui ont enregistré ou déposé à ce bureau régulier leurs jugements, exécutions ou saisies-arrêts.

Le juge en chef de la Cour Supérieure et la Cour du Banc du Roi présidée par le judge en chef de la province ont été unanimement d'avis que les expressions " certificats de jugement " et " jugement opérant comme hypothèques " étaient inconnues dans la langue juridique du Québec et que, par conséquent, l'article de la loi reproduit plus haut ne pouvait affecter l'hypothèque judiciaire réclamée par la Banque Royale du Canada dans la cession autorisée de P. E. Bélanger, que les syndics ont rejetée en s'appuyant sur ce paragraphe de la loi.

Sur le sens de ces expressions et la question de savoir si, dans cette province, elles correspondent à une réalité quelconque, je ne saurais rien ajouter à ce qu'ont déjà dit les deux jugements qui sont portés en appel devant cette cour.

On objecte que leur interprétation ne tient aucun compte des mots " assujettis à un privilège pour les frais d'enregistrement ". La réponse me paraît être que: s'il n'y a dans la province ni " certificats de jugement ", ni " jugement opérant comme hypothèques," la phrase accessoire qui les suit et les qualifie (" assujettis à un privilège pour les frais d'enregistrement ") ne peut non plus s'appliquer à quoi que ce soit dans la province et il n'y aurait donc pas lieu de s'en occuper, lorsqu'on discute un litige de cette province.

Sans doute, cette interprétation est stricte, mais on ne saurait l'être trop, lorsqu'il s'agit d'accepter une prétention qui aurait pour effet de faire disparaître une garantie hypothécaire reconnue par le droit civil et dont les origines remontent à l'Ordonnance de Villers-Cotterets (1539) et à l'Ordonnance de Moulins (1566).

Les notes des juges de la Cour Supérieure et de la Cour du Banc du Roi me dispensent de tracer l'historique de l'hypothèque judiciaire. Elle est, dans son essence, identiquement semblable à l'hypothèque légale et à l'hypothèque conventionnelle. Elle n'a rien de la procédure, mais est uniquement matière de droit civil.

Comme tout instrument hypothécaire, elle se divise en deux parties: l'obligation et la garantie. L'obligation personnelle (convention, loi ou jugement de condamnation) est de nature différente dans chaque genre d'hypothèque; mais la garantie elle-même, qu'elle soit conventionnelle, légale ou judiciaire, est régie exactement par les mêmes règles de droit (arts. 2016 à 2081 C.C.) et produit les mêmes effets. En sorte que, dans le cas actuel, si Bélanger avait, avant sa cession autorisée, cédé sa propriété affectée par l'hypothèque judiciaire de la Banque Royale, cette dernière aurait continué d'avoir sa réclamation hypothécaire contre le tiers-détenteur, tout en conservant son jugement contre Bélanger.

C'est donc avec raison, dans mon humble opinion, que la Cour Supérieure et la Cour du Banc du Roi ont envisagé la créance de la Banque Royale sous son double aspect: dont l'un, en tant que jugement exécutoire, est du ressort de la procédure; mais dont l'autre, en tant que garantie hypothécaire, constitue un droit acquis, auquel on hésite à supposer que le législateur fédéral ait voulu attenter.

Il me semble que toute l'économie de la loi de faillite

1926

LARUE v. ROYAL BANK OF CANADA.

Rinfret J.

repousse cette supposition. Par la définition de la loi elle-même, la Banque Royale est un " créancier garanti " (2gg). Or, il serait oiseux de démontrer que cette loi opère en dehors des créanciers garantis. (Exemples: arts. 6-8b-13 (16)-42 (10) et (16). Cette particularité avait déjà frappé cette cour dans la cause de *Riordon Co.* v. *Danforth Co.* (1) et M. le juge Mignault y disait:

> The general scheme of the Bankruptcy Act appears to be that secured creditors are considered as creditors of the insolvent debtor, for all purposes such as proving claims, voting at meetings of creditors and receiving dividends, only after deducting the value of their security. They may keep their security and remain entirely outside the bankruptcy proceedings. Under section 46 they may surrender their security and prove their debt for the whole, or realize it and prove for the balance, if any, of their debt; they have the further option of valuing their security which the trustee may redeem at its valuation or require it to be offered for sale, and the secured creditors rank only for the balance. Where they have done none of these things they are excluded from all share in any dividend. The case of the landlord is a special one and is dealt with in section 52.

L'article 51 en est une preuve éclatante puisque, en donnant l'ordre de priorité des réclamations, il ne parle pas du tout des créanciers garantis.

Les modifications que la loi a subies depuis n'en ont pas changé l'aspect sous ce rapport.

Il est d'ailleurs logique qu'il en soit ainsi. L'hypothèque est un démembrement de la propriété. On peut considérer la propriété hypothéquée comme étant en dehors du domaine du failli jusqu'à concurrence du montant de la dette hypothécaire; et la cession des biens appartenant au failli ne concerne véritablement que " l'équité " ou valeur excédant le montant de l'hypothèque.

Dans une loi qui, de cette façon, fait exception constante du créancier garanti, i.e. du créancier hypothécaire, on est justifiable de décider que le paragraphe 10, article 11, n'a pas pour but de l'affecter, à moins qu'on ne soit contraint à la décision contraire par un texte positif ou une déduction inéluctable.

Or, si l'on examine le texte dont il s'agit à la lumière des observations qui précèdent, l'on constate ce qui suit:

La Banque Royale a un jugement contre Bélanger et elle a en même temps une hypothèque judiciaire.

Le paragraphe dit que, à la suite de son enregistrement, l'ordonnance de séquestre a priorité sur les " certificats de jugement " ou " jugement opérant comme hypothèques ".

(1) [1923] S.C.R. 319.

Assumons que ces expressions puissent s'adapter à la procédure dans le Québec. Il est certain, en tout cas, qu'un " certificat de jugement " n'est pas une hypothèque judiciaire. Il est également certain qu'un " jugement opérant comme hypothèque " n'est pas une hypothèque judiciaire.

Un créancier obtient d'abord un jugement. Cela n'opère pas comme hypothèque. Cela ne confère au créancier aucun droit hypothécaire, mais, si l'on veut, c'est la première étape dans la procédure requise pour acquérir une hypothèque judiciaire (art. 2034 C.C.).

Ayant son jugement, et ne désirant pas l'exécuter, mais voulant s'en servir pour obtenir une hypothèque judiciaire, le créancier s'en fait remettre une copie certifiée par l'officier autorisé. (N.B. C'est ce qui se rapproche le plus du certificat de jugement). Ce serait là la seconde étape de la procédure.

Le créancier dépose ensuite la copie certifiée de son jugement entre les mains du régistrateur avec " un avis spécifiant et désignant les immeubles du débiteur sur lesquels le créancier entend faire valoir son hypothèque " (arts. 2034, 2026, 2121 C.C.). C'est la troisième étape.

Le régistrateur fait alors dans le registre la transcription de la copie certifiée du jugement qui a été déposée, l'inscription " au moyen d'un bordereau ou sommaire " du jugement (arts. 2131, 2132, 2136, 2139 C.C.). C'est la quatrième étape. Ce n'est qu'alors que le créancier acquiert son hypothèque judiciaire. Elle n'est pas un mode d'exécution, elle crée sur l'immeuble spécialement désigné un droit réel en tout point semblable à l'hypothèque conventionnelle. Dans un sens, elle cesse d'être un jugement. Elle est devenue une hypothèque avec une existence distincte; bien que le jugement subsiste indépendamment d'elle comme mode d'exécution.

On conçoit donc que le paragraphe 10 de l'article 11 veuille dire que la cession de biens a priorité sur tout jugement, c'est-à-dire que, dès l'enregistrement de la cession de biens, le créancier ne pourra plus se servir de son jugement pour commencer la procédure nécessaire pour acquérir une hypothèque judiciaire. L'enregistrement de la cession de biens empêche le jugement d'être utilisé pour acquérir une hypothèque judiciaire. Il arrête le créancier dans la marche de sa procédure vers l'acquisition de cette hypothèque judi-

1926

LABUE v. ROYAL BANK OF CANADA.

Rinfret J.

ciaire. Et comme il se peut que cet arrêt ou cette suspension ne se produise qu'après la deuxième ou la troisième étape, l'article prévoit que le créancier, en voie d'acquérir son hypothèque judiciaire mais arrêté en chemin avant d'avoir franchi la quatrième étape, aura un privilège pour lui assurer les frais qu'il aura faits jusque-là pour les fins de l'enregistrement de son jugement.

Cette clause relative aux frais peut également prévoir le cas d'un créancier qui ferait enregistrer son jugement avant d'avoir connu l'existence de l'ordonnance de séquestre ou de la cession autorisée; comme, par exemple, entre le " dépôt " de cette ordonnance ou de cette cession au bureau du district ou " l'offre de ces actes " au registraire et l'enregistrement lui-même de l'ordonnance ou de la cession. Cet enregistrement est sans doute un avis suffisant pour en enformer le créancier porteur de jugement; mais il n'en est pas ainsi du dépôt ou de l'offre de l'ordonnance de sequestre ou de la cession au registraire. D'après le paragraphe 10, ce simple dépôt ou cette offre seule arrête immédiatement l'effet futur de tout jugement ou de toute exécution et saisie-arrêt bien que le public et les créanciers porteurs de jugement n'ont aucun moyen d'en être informés avant l'enregistrement proprement dit de l'ordonnance ou de la cession de biens, et que, durant cet intervalle, ils ont pu encourir de bonne foi des frais d'enregistrement inutiles.

Mais, toujours en assumant que les expressions s'adaptent à la loi du Québec, ce paragraphe ne donne priorité à la cession de biens que sur un jugement ou une copie certifiée de jugement. Il ne dit pas et veut pas dire priorité sur une hypothèque judiciaire.

Le détenteur d'un jugement ne pourra plus s'en servir soit pour faire saisir et vendre les biens de son débiteur, soit pour obtenir une hypothèque sur ces biens; et les procédures déjà commencées pour arriver à l'une ou l'autre de ces fins sont arrêtées par l'enregistrement de la cession de biens.

Ainsi interprété, le paragraphe 10 a l'avantage de s'harmoniser avec tous les autres paragraphes de l'article 11. *Noscitur a sociis.* Il arrête, suspend ou prévient une procédure en marche ou un mode d'exécution. Cette interprétation est d'ailleurs confirmée par l'article 51 de la loi, qui, au deuxième alinéa, définit les frais " régis par les dispositions

de l'article 11, paragraphe 10", comme étant "les frais du créancier exécutant". (*Loi de faillite,* art. 51 (1), 2e alinéa).

En passant—comme le fait très justement observer sir François Lemieux,—ce paragraphe "ne fait que donner 'une priorité, une préférence'". Il n'annule pas; il ne fait rien disparaître. Il pourrait tout au plus vouloir dire, s'il s'appliquait à l'hypothèque judiciaire, que les droits du créancier de cette dernière, au lieu d'être exercés par lui-même, le seront par le syndic. Mais même cette interprétation restreinte serait incompatible avec les privilèges reconnus au créancier garanti par les articles 6 et 8b de la loi.

Mais il faut surtout insister sur le fait que le paragraphe 10 ne parle que de jugements, et nullement d'hypothèque judiciaire. Il ne suggère en aucune façon l'intention d'anéantir une hypothèque judiciaire et de dépouiller un citoyen d'un droit complété et acquis.

En adoptant le point de vue des jugements des deux cours de la province de Québec et celui que je viens d'exposer, on évite une conséquence qui conduirait à cet étrange résultat: la loi protégerait les hypothèques conventionnelles, c'est-à-dire celles qui ont été consenties au gré du failli; et elle répudierait les hypothèques judiciaires, c'est-à-dire celles qui sont acquises sous le contrôle des officiers de la loi.

Elle ferait pis encore. Elle rayerait complètement du code civil le chapitre de l'hypothèque judiciaire, car il ne semble pas y avoir de réponse à l'argument de l'intimé:

> If the interpretation of the trustees is correct, then the whole economy of our civil law regarding judicial hypothecs is upset. If such a hypothec is only valid when the debtor is solvent, its usefulness is gone, and the protection it affords the creditor is illusory. If the debtor is solvent and remains solvent, a judicial or any other hypothec is of little or no value, as all creditors will be paid in full. It is precisely when a debtor is not solvent and there is not enough to pay all his creditors that the privilege which the law accords to the holder of a judicial or any kind of hypothec is of real value, and it is precisely in this case that the Bankruptcy Act suppresses it, if the trustees are right in their interpretation of such act.

Tout en se bornant à décider la cause sur l'interprétation qu'ils ont donnée au paragraphe 10 de l'article 11 de la *Loi de faillite,* les juges de la province de Québec ont indiqué que si la loi eût empiété sur les droits des créanciers hypothécaires, elle serait, dans leur opinion, inconstitutionnelle. Sir François Lemieux dit

1926

LARUE v. ROYAL BANK OF CANADA.

Rinfret J.

qu'il n'était pas nécessaire pour le fonctionnement de la loi de faillite d'enlever aux créanciers hypothécaires leur droit d'hypothèque judiciaire; et le juge Lafontaine ajoute:

Toucher, en effet, à l'hypothèque judiciaire, c'est toucher à l'hypothèque conventionnelle comme à l'hypothèque légale, et, par conséquent, à une matière appartenant à la propriété et aux droits civils; et l'annulation des hypothèques judiciaires, pas plus que des hypothèques conventionnelles, n'a rien de commun avec le fonctionnement d'une loi de faillite.

Les caractéristiques essentielles d'une loi de faillite sont l'institution des procédures pour faire reconnaître l'insolvabilité, l'adoption des mesures conservatoires pour préserver les biens du failli, l'organisation d'un système *(machinery)* pour l'administration de ces biens, la punition de l'insolvable pour les actes qu'il a commis au préjudice de ses créanciers ou à l'encontre de l'honnêteté, et la libération du failli (Duncan, Law and Practice of Bankruptcy in Canada, p. 30). J'adopterai la définition qu'en donne le juge de première instance:

Le but de la loi de faillite, c'est de liquider, par l'entremise d'officiers spéciaux nommés par le tribunal ou par la loi, les biens de l'insolvable; de distribuer les deniers provenant de la liquidation aux créanciers suivant leurs droits respectifs et leurs privilèges; de permettre au failli d'obtenir un concordat et une décharge, s'il est dans les conditions voulues par la loi.

En examinant " l'autorité législative exclusive du parlement du Canada " tirée du paragraphe 21 de l'article 91 de l'*Acte de l'Amérique britannique du Nord,* il n'est pas utile à la décision de cette cause de poser des principes généraux et il suffit de se borner à l'étude de la question qui est soulevée par le présent litige. C'est le conseil que donnait déjà sir Montague Smith dans *Citizens Insurance Co.* v. *Parsons* (1):

In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

Nous avons ici une situation bien définie: la faillite de Bélanger, qui est du ressort de la législation fédérale, et l'hypothèque judiciaire de la Banque Royale, qui, en vertu du paragraphe 13 de l'article 92 de la constitution, tombe dans la catégorie de sujets sur lesquels les législatures provinciales ont un pouvoir exclusif.

L'on ne saurait dire que l'annulation des hypothèques judiciaires acquises avant l'existence de l'insolvabilité (comme dans le cas actuel) ait une relation essentielle, ou

(1) 7 A.C. 96, at p. 109.

soit une conséquence nécessaire de " la banqueroute et la faillite " (art. 91, par. 21). Elle n'est pas, suivant les décisions qui ont défini les pouvoirs respectifs des législatures fédérale et provinciales, " strictly related to the subject " de la banqueroute et la faillite, ni " truly substantive legislation on the subject or properly ancillary thereto ". La doctrine du pouvoir accessoire ou auxiliaire (ancillary) telle qu'elle a été définie dans *Attorney General for Ontario* v. *Attorney General for the Dominion* (1):

Where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91,

telle qu'on la retrouve à satiété dans *City of Montreal* v. *Montreal Street Railway* (2), et telle qu'elle a été développée dans les décisions plus récentes du Conseil Privé, écarte le pouvoir d'annuler une hypothèque judiciaire créée en vertu de la loi de la province de Québec sous prétexte qu'il serait auxiliaire du droit de légiférer sur la banqueroute et la faillite en vertu du paragraphe 21 de l'article 91. Il n'est pas du tout nécessaire à l'exercice du pouvoir fédéral en matière de banqueroute et de faillite de détruire la préférence et le droit acquis qui résultent de l'hypothèque judiciaire. Ce pouvoir n'a rien à voir avec les

provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to the rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation the manner in which it is to be brought into operation, and the effect of its operation,

dont il est question dans *L'Union Saint-Jacques de Montréal* v. *Bélisle* (3).

Il est clair qu'une législation relative à " la banqueroute et la faillite " devra d'une certaine façon empiéter sur certains " droits civils dans la province " et, en particulier, devra pourvoir à un mode de procédure spécial

for the vesting, realizing and distribution of the estate and the settlement of the liabilities of the insolvent.

Cushing v. *Dupuy* (4). Toute la procédure en matière de banqueroute tombe nécessairement dans le domaine fédéral et l'on ne saurait concevoir une loi de faillite qui ne substituerait pas sa procédure spéciale aux procédures provinciales. C'est pourquoi il est logique que, dès l'ordonnance de séquestre ou la cession de biens, les procédures en marche

(1) [1896] A.C. 348, at p. 360.
(2) [1912] A.C. 333, at pp. 343, 344 and 346.
(3) L.R. 6 P.C. 31, at p. 36.
(4) 5 A.C. 409, at pp. 415-6.

1926

LABUE v. ROYAL BANK OF CANADA.

Rinfret J.

soient immédiatement suspendues. L'état de faillite crée une situation nouvelle. Dès que cette situation est officielle ou judiciairement reconnue, tout doit être arrêtée et rester dans le *statu quo*. Les droits qui ne sont pas encore acquis sont perdus, parce que les nécessités de la faillite empêchent de continuer la procédure requise pour les acquérir. Ainsi les saisies-arrêts et les exécutions qui n'ont pas été " complètement satisfaites par paiement " (art. 11, par. 10) sont assujetties et subordonnées à la faillite; il n'est plus permis de les continuer.

En plus, il est des privilèges et des droits qui naissent de l'état de faillite; comme, par exemple, de la suspension du louage de services ou de l'interruption de bail d'une propriété. La faillite entraîne une modification des droits respectifs du locateur et du locataire; et l'on conçoit qu'il convienne que le pouvoir fédéral, en adoptant une législation concernant la faillite, règle, en même temps, entre le locateur et le locataire, les nouvelles relations qui sont le résultat de la faillite elle-même.

L'on comprend également que le pouvoir fédéral inclue dans sa législation les dispositions voulues pour écarter et mettre de côté les transactions qui ont eu lieu dans un certain délai précédant la déclaration judiciaire de faillite. Cela paraît raisonnable, vu la présomption d'insolvabilité qui existait durant cette période antérieure à la banqueroute, et cela fait donc logiquement partie de toute législation relative à cette banqueroute.

Mais il n'en est pas ainsi des droits et des privilèges complètement acquis en vertu des lois provinciales, antérieurement à la faillite et à la période de temps pendant laquelle il n'existe aucune présomption d'insolvabilité.

Pour ces raisons, et en tout respect, je trouve, comme les tribunaux de la province de Québec, que la destruction de l'hypothèque judiciaire ne fait pas partie du pouvoir direct de législation sur la banqueroute et la faillite, ni du pouvoir accessoire ou auxiliaire.

L'historique des Actes d'insolvabilité ou de faillite qui ont précédé la loi de 1919 (actuellement en vigueur) ne va pas à l'encontre des propositions que je viens de soumettre. Les actes de 1869 et de 1875 pourvoyaient à l'invalidation des transactions frauduleuses, empêchaient un jugement de créer une charge ou un lien sur les biens de l'insolvable, par

suite de la remise d'un bref d'exécution au shérif ou par suite d'une saisie-exécution effectuée, et enlevaient toute efficacité à tout ce qui avait besoin d'être complété après la cession de biens ou la liquidation forcée. C'est là, comme j'ai tenté de le faire remarquer plus haut, légiférer sur des questions qui sont du ressort propre de la banqueroute ou de la faillite; régler des transactions faites au moment où l'insolvabilité était présumée exister ou refuser de permettre à des créanciers de parfaire des droits par la continuation de leurs procédures après qu'une faillite a été déclarée. Il y a loin entre empêcher d'acquérir des droits après que la banqueroute est prononcée et détruire des droits acquis longtemps auparavant, comme on voudrait le faire en l'espèce.

L'Acte de 1882 et l'Acte des liquidations *(Winding-Up Act)* c. 129 des statuts revisés de 1886 ne sont pas allés au delà.

Les syndics ont fait grand état de l'article 66 de cette loi qui est devenu l'article 84 du chapitre 144 des statuts revisés de 1906 et qui se lit comme suit:

84. Aucune charge ou privilège n'est crée ni sur les biens meubles ni sur les immeubles de la compagnie, pour le montant d'un jugement, ou pour les intérêts de ce montant, par l'émission ou la délivrance au shérif d'un bref d'exécution, ni par la saisie ou vente en vertu de ce bref des biens ou effets de la compagnie.

2. Aucun droit ni privilège n'est non plus créé sur ses biens, meubles ou immeubles, ni sur aucune de ses dettes actives, échue ou devenue exigible, par le dépôt ou l'enregistrement d'un sommaire ou d'une minute de jugement, ni par la délivrance d'un bref d'arrêt simple ou d'arrêt en mains tierces, ou autre ordre, si, dans ces cas, la liquidation de la compagnie s'ouvre avant la remise au demandeur des deniers recouvrés, payés ou perçus en vertu du dit bref d'exécution, sommaire, minute, bref d'arrêt simple au d'arrêt en mains tierces, ou autre ordre; mais le présent article ne touche point au droit ou privilège que le demandeur a pour ses frais d'après la loi de la province où le bref d'exécution, le bref d'arrêt simple ou d'arrêt en mains tierces ou autre ordre a été donné.

Je ne puis y voir quoi que ce soit qui ressemble à la prétention que l'on émet maintenant en vertu du paragraphe 10 de l'article 11 de la *Loi de faillite.* Cet article 84 dit simplement que, après que la liquidation des affaires de la compagnie a commencé, l'on ne saurait acquérir un lien, privilège ou réclamation sur les biens de la compagnie au moyen d'une saisie ou du dépôt ou de l'enregistrement d'un bordereau ou d'une copie de jugement. Il parle du futur; il empêche la création de nouveaux droits après la faillite;

1926

LARUE
v.
ROYAL BANK OF CANADA.

Rinfret J.

il ne détruit pas les droits acquis antérieurement; et il n'a jamais, que je sache, été interprété autrement.

On remarquera également que les articles 66 du chapitre 129 et 84 du chapitre 144, lorsqu'ils font exception pour le " droit ou privilège que le demandeur a pour ses frais ", ne parlent que du " bref d'exécution, bref d'arrêt simple ou d'arrêt en mains tierces ou autre ordre ". Il n'y est nullement question des frais d'enregistrement d'un jugement. Ces articles n'ont jamais envisagé l'idée d'annihiler l'hypothèque judiciaire régulièrement acquise avant la faillite. Jamais, avant la présete cause, pareille prétention a-t-elle été soulevée dans la province de Québec. Autant vaudrait anéantir l'hypothèque conventionnelle ou les " mortgages " et les " liens " assurés aux porteurs d'obligations ou de " débentures " par les contrats de fidéicommis et les " trust deeds ".

Je ne puis donc voir l'analogie entre la législation antérieure et celle qui nous occupe dans la présente cause; et je suis humblement d'opinion que si le paragraphe 10 de l'article 11 a réellement le sens que les syndics lui ont donné, ce paragraphe ne peut s'appuyer sur l'histoire de la législation fédérale en matière de banqueroute et de faillite (ce qui, d'ailleurs, ne serait pas une justification suffisante pour le rendre constitutionnel), ni sur le paragraphe 21 de l'article 91 de l'*Acte de l'Amérique britannique du Nord.*

Mais je suis également d'avis que ce paragraphe 10 ne peut être interprété comme l'ont fait les syndics; et je conclurais au rejet de l'appel avec dépens.

Appeal allowed with costs.

Solicitors for the appellants: *St. Laurent, Gagné, Devlin & Taschereau.*

Solicitors for the respondent (The Royal Bank of Canada): *Pentland, Gravel, Thomson & Hearn.*

Solicitor for the Attorney General for Quebec: *Charles Lanctôt.*

IN THE MATTER OF A REFERENCE AS TO THE JURISDICTION OF THE EXCHEQUER COURT, OR A JUDGE THEREOF, AND THE APPLICATION OF THE RAILWAY ACT AND THE EXPROPRIATION ACT IN CONNECTION WITH LAND TAKEN BY THE CANADIAN NATIONAL RAILWAY COMPANY UNDER THE PROVISIONS OF CHAPTER 13 OF THE STATUTES OF CANADA, 1919.

1925
*Oct. 6.
*Nov. 2.

THE CANADIAN NATIONAL RAILWAY COMPANY (PETITIONER)..... } APPELLANT;

AND

ELLEN BOLAND (RESPONDENT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Canadian National Railways—Expropriation Act, R.S.C., c. 143, s. 21—Jurisdiction of the Exchequer Court—Railway Act, 1919, c. 68—Special Act incorporating Canadian National Railway Company (1919), c. 31, ss. 13, 15.

Expropriation proceedings by The Canadian National Railway Company to obtain possession of land are governed by the provisions of the *Expropriation Act* and not by those of the *Railway Act*.

A judge of the Exchequer Court of Canada has jurisdiction to issue a warrant for possession under s. 21 of the *Expropriation Act* and may exercise it before the commencement of proceedings to fix compensation.

Judgment of the Exchequer Court of Canada ([1925] Ex. C.R. 173) reversed.

APPEAL from a decision of the Exchequer Court of Canada (1) dismissing the appellant's petition.

By an order of the Board of Railway Commissioners for Canada dated June 5, 1924, the appellant company was directed *inter alia* to construct a subway on Bloor St., Toronto, after plans of work had been filed with and approved by the Board. Under provisions of the *Expropriation Act*, R.S.C., c. 143, the railway company took certain land owned by the respondent who resisted the expropriation proceedings contending that provisions for taking land in s. 257 (2) of the *Railway Act*, 1919, were applicable

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

(1) [1925] Ex. C.R. 173.

1925

IN RE RAILWAY ACT AND EXPROPRIATION ACT

CAN. NAT. RY. CO. v. BOLAND.

Anglin C.J.C.

to the case and not those of the *Expropriation Act*. The appellant's petition to the Exchequer Court of Canada under the provisions of s. 21 of the *Expropriation Act* for a warrant to put it in possession was dismissed for want of jurisdiction.

Pending an appeal by the railway company, the following questions were referred to this court by order in council of May 29, 1925, pursuant to the authority of s. 60 of the *Supreme Court Act:*

In the case of lands or interests therein taken by the Canadian National Railway Company under the provisions of chapter 13 of the statutes of Canada, 1919:

1. Are the provisions of the *Railway Act* or the *Expropriation Act* applicable to proceedings by the company to obtain possession of such lands?

2. Has the Exchequer Court of Canada, or a judge thereof, jurisdiction to entertain an application by the company for a warrant of possession under section 21 of the *Expropriation Act* as made applicable *mutatis mutandis* to the company by section 13 of the Canadian National Railways Act, 1919?

3. If question 2 be answered in the affirmative, has such court or judge power to issue such warrant prior to the commencement of proceedings by notice of expropriation or otherwise to ascertain the compensation payable in respect of the taking of such lands or of interests therein?

The appeal and the reference were heard together.

Lafleur K.C. for Attorney General of Canada, upholding the jurisdiction of the Exchequer Court.

Geoffrion K.C. for Attorney General of Canada, *contra.*

Geo. F. Macdonnell for the Canadian National Railway Company.

Smyth K.C. for respondent Boland.

The judgment of the court on the reference (and on the appeal), was delivered by

ANGLIN C.J.C.—In regard to "the taking or using of lands," s. 13 of the statute 9-10 Geo. V, c. 13, enacts, by exception, that the provisions of the Expropriation Act (R.S.C., c. 143), shall apply to the Canadian National Railway Company in lieu (*inter alia*) of the sections of the Railway Act which deal with these subjects. The answers to the questions submitted by Order in Council for our consideration depend upon whether proceedings to obtain possession of lands to be acquired compulsorily for the purpose of the railway are to be regarded as included in the exception so made by s. 13 to the general application of

the Railway Act, or whether they should be regarded as incidental to proceedings for the ascertainment of compensation with which they are grouped in the Railway Act (ss. 215-243, 9-10 Geo. V, c. 68) under the heading EXPROPRIATION PROCEEDINGS, whereas a preceding fasciculus (ss. 189-214) carries the heading THE TAKING AND USING OF LANDS.

Apart from any inference to be drawn from collocation in the statute, the obtaining of possession would seem to fall naturally within "the taking of" lands rather than within "the ascertainment of the compensation" to be paid for them.

Upon careful examination the entire set of provisions embraced in ss. 189-243 of the Railway Act are seen to relate to the acquiring of lands for the purposes of the railway and it seems clear that, notwithstanding the fact that the heading EXPROPRIATION PROCEEDINGS is in the same type as the earlier heading THE TAKING AND USING OF LANDS, namely small capitals, whereas sub-headings in the same statute are printed in *italics*, the sections dealing with proceedings for acquisition by expropriation, commencing with no. 215, must be regarded for present purposes as relating to, and a sub-division of, what is comprised under THE TAKING AND USING OF LANDS. S. 214, which is found under that heading and immediately precedes the heading EXPROPRIATION PROCEEDINGS makes this abundantly clear. It reads as follows:

> 214. In cases of disagreement between the parties or any of them, all questions which arise between them shall be settled as hereinafter provided.

Sections 215 *et seq.* proceed to provide for the mode of acquisition where transfer of the lands and settlement of matters incidental thereto by agreement under s. 213 is not feasible.

In this view of the matter ss. 239 *et seq.* which deal with the obtaining of possession in cases of resistance, must be regarded as having to do with "the taking or using of lands" and therefore within the purview of the exception to the application of the Railway Act made by s. 13 of the Canadian National Railway Company Act.

In conformity with this view we find a specific provision made by clause (*c*) of subs. 2 of s. 13 for the application to

1925

IN RE RAILWAY ACT AND EXPROPRIATION ACT

CAN. NAT. RY. CO. v. BOLAND.

Anglin C.J.C.

expropriations by the Canadian National Railway Company of the provisions of the Railway Act respecting the ascertainment of compensation, which might otherwise be deemed to have been excluded under the general exception made in regard to " the taking or using of lands."

While, therefore, the subsequent proceedings in regard to the ascertainment and payment of compensation for lands to be acquired by the Canadian National Railway Company are to be taken under the sections of the Railway Act commencing with s. 215, which provides for the notice of expropriation, it is the jurisdiction for the acquisition of possession conferred by s. 21 of the Expropriation Act (R.S.C., c. 143) which the company must invoke in order to obtain possession compulsorily.

Although the Canadian National Railway Company is admittedly a corporation entirely distinct from the Crown and is not to be regarded as a department of the Government of Canada, its national character and the fact that it is an instrument created by statute for the management, operation and control of the Canadian National Railway System must not be ignored. Lands to be acquired compulsorily by it being vested in the company (s. 13 (2) (*b*), 9-10 Geo. V, c. 13), by and upon the deposit of plans under the Expropriation Act, no good reason has been suggested why immediate possession of such lands should not be available to the company as provided for by s. 21 of the Expropriation Act. The provisions of ss. 239-240 of the Railway Act as to payment into court of compensation money or the giving of security therefor would seem to be unnecessary and inappropriate.

By subs. 1 of s. 13 of the Canadian National Railway Company Act the provisions of the Expropriation Act are made to apply only when not " inconsistent with this Act " and *mutatis mutandis*. But we are unable to discern anything in s. 15 of the Canadian National Railway Company Act which excludes, as inconsistent, the exercise by the Exchequer Court of the jurisdiction conferred on it by s. 21 of the Expropriation Act where lands are acquired by the Canadian National Railway Company. The jurisdiction of the judge of the Exchequer Court under s. 21 of the Expropriation Act is concurrent with that of " any judge of

any superior court." S. 15 of the Canadian National Railway Company Act is permissive; it is declaratory of the powers of a judge of any court of competent jurisdiction in Canada; the definition in subs. 2 of a court of competent jurisdiction is not framed as exclusive; the entire section is consistent with the existence of jurisdiction in the judge of the Exchequer Court concurrent with that of the judges of the provincial superior courts. The apparent office of s. 15 is to dispense with the necessity of a *fiat* which might otherwise have been deemed a prerequisite to proceedings against the company in view of its national character, and to provide for the right of appeal, notwithstanding that the judge acting under s. 15 might be regarded as *persona designata*. Unusual as it undoubtedly is that the Exchequer Court should entertain proceedings as between subject and subject, except in matters concerning patents, copyrights and trade-marks, having regard to the national character of the Canadian National Railway Company and its relation to the Government of Canada, it seems not inappropriate that that court should be vested with the jurisdiction here in question.

To the questions submitted we, therefore, make the following answers:

Question No. 1: The provisions of the Expropriation Act apply.

Question No. 2: Yes.

Question No. 3: Yes.

IN RE C.N.R. *v.* BOLAND

ANGLIN C.J.C.—For the reasons stated above we are, with respect, of the opinion that the judgment of the learned judge of the Exchequer Court declining jurisdiction in this case was erroneous.

For the reasons stated by Mr. Justice Middleton in delivering the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of Orde J., in *Boland* v. *Canadian National Railway Co.* (2), we agree with the conclusions of that court that the impugned expropriation

falls within the provisions of the Railway Act, 1919, and that the order

(1) 56 Ont. L.R. 653. (2) 29 Ont. W.N. 41.

1925

IN RE RAILWAY ACT AND EXPROPRIATION ACT

CAN. NAT. RY. CO. v. BOLAND.

Anglin C.J.C.

of the Board of Railway Commissioners of Canada was sufficient to justify all that has been done by the railway company.

The appeal will accordingly be allowed with costs and the proceedings will be remitted to the learned judge of the Exchequer Court to be pursued under s. 21 of the Expropriation Act.

Appeal allowed with costs.

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*

Solicitor for the Canadian National Railway Co.: *George F. Macdonnell.*

Solicitors for the respondent Boland: *Macdonell & Boland.*

1925

*Nov. 10, 11
*Dec. 10.

BELGIAN INDUSTRIAL CO. *v.* CANADA CEMENT CO.

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

Contract—Agreement—Sale—Cement—Delivery—Price

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and maintaining the respondent's action.

The appellant company, whose plant is situated at Shawinigan Falls, is the successor of the Belgo Canadian Pulp and Paper Co. and the alleged liability is a liability of the latter company under a contract it made with the respondent company, a manufacturer of cement. The Belgo Company, in July and August, 1920, agreed to purchase from the respondent company 5,000 barrels of cement. On account of the press of orders at its Montreal plant, the respondent company agreed to deliver this cement from its plant at Exshaw, Alberta, for a price inclusive of freight of $6.55 per barrel, any increase in the freight rates to be borne by the Belgo Company. Under this contract, certain quantities of cement had been shipped from Exshaw, when, on October 1, 1920, an agreement was arrived at to hold up further shipments from Exshaw. Seventeen cars

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

of cement alleged to have been sent in September from Exshaw were charged to the appellant at Exshaw price. Out of that shipment six cars had previously been shipped in September to a firm in Alberta and refused by it as failing to pass the test of fitness and the same six cars had been re-shipped to the appellant on October 1. The latter, having also refused delivery of these six cars, undertook, on October 12, to pay the Exshaw price on six cars of cement shipped from Montreal to replace those refused, upon the representation by the respondent company that these cars had been shipped before the 1st of October. The Belgo Company paid the Montreal price for these six carloads of cement and the respondent claimed that it should have paid the Exshaw price. The appellant's demand is for payment of the difference between the latter price and the Montreal price, $4,354.18, forming with interest the sum of $4,556.67.

The respondent failed in the Superior Court, but obtained judgment for the amount of its claim in the Court of King's Bench, Greenshields and Guerin JJ. dissenting.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment and, on a subsequent day, allowed the appeal with costs.

Appeal allowed with costs.

Perron K.C. and *Genest K.C.* for the appellant.
Laurendeau K.C. and *Chipman K.C.* for the respondent.

1925
*Nov. 4, 5, 6
1926
*Feb. 2.

IN THE MATTER OF A REFERENCE BY HIS HONOUR THE LIEUTENANT GOVERNOR OF THE PROVINCE OF QUEBEC IN COUNCIL TO THE COURT OF KING'S BENCH (APPEAL SIDE), OF CERTAIN QUESTIONS RELATIVE TO THE EDUCATIONAL SYSTEM IN THE ISLAND OF MONTREAL.

MICHAEL HIRSCH AND ANOTHER.....APPELLANTS;

AND

THE PROTESTANT BOARD OF SCHOOL COMMISSIONERS OF MONTREAL,

AND

THE CATHOLIC BOARD OF SCHOOL COMMISSIONERS OF MONTREAL,

AND

JOSEPH SCHUBERT,

AND

THE ATTORNEY GENERAL FOR QUEBEC } RESPONDENTS.

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

Constitutional law—Quebec educational system—Rights of persons professing Jewish religion—Common and dissentient schools—"Protestants"—Education Act as to Jews (Q) 1903, 3 Edw. VII, c. 16—Ultra vires—Reference—Jurisdiction—Education Appeals Act, (Q) 1925, 15 Geo. V, c. 19—Public Education Act, Cons. S. of L.C., 1861, 24 Vict., c. 15—B.N.A. Act, 1867, ss. 93 (1), 93 (2)—Supreme Court Act, R.S.C. (1906), c. 139, s. 42a.

The Quebec Legislature in 1903 (3 Edw. VII, c. 16) passed "an Act to amend the law concerning education, with respect to persons professing the Jewish religion." Section 1 provides that "in all the municipalities of the province, * * * persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants, and for the said purposes shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter." Sections 2, 3, 4 and 5 deal with school revenues and taxation and, speaking generally, provide that such taxation payable by persons professing the Jewish religion and revenue for school purposes derived from them, or from their properties, shall go to the support

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ. and Maclean J. *ad hoc*.

of the Protestant schools, where they exist. Section 6, so far as is material, reads as follows: "* * * children of persons professing the Jewish faith shall have the same right to be educated in the public schools of the province as Protestant children, and shall be treated in the same manner as Protestants for all school purposes."

Held that, inasmuch as c. 19 of 1925 (Q), providing for the right of appeal presently exercised, is within the literal terms of s. 42a of the supreme Court Act, jurisdiction to entertain this appeal should not be declined; but *semble* that, Parliament in enacting s. 42a did not contemplate enabling a provincial legislature to single out a particular reference and to make the opinion already pronounced upon it by the provincial court appealable to this court.

Held, also, that provincial legislation repugnant to subs. 2 of s. 93 of the B.N.A. Act, equally with legislation in conflict with subs. 1, is "absolutely void and inoperative" and is not appealable under subs. 3 to the Governor in Council;

Held, further, that in the *Public Education Act* of 1861 the term "Protestants" is not synonymous with non-Catholics in that it excludes non-Christians; and of Christians it includes only such as accept what are generally regarded as the principles and doctrines of the Reformation of the sixteenth century;

Held, also, that, at Confederation, the entire population of the province of Quebec was, for purposes of legislation upon educational matters, divided into two great religious denominations—the one Roman Catholic and the other Protestant—and non-Catholics and non-Protestants were ignored; that all the schools of the cities of Montreal and Quebec, although denominational (Roman Catholic and Protestant respectively), were "common schools," any one of which every child in each of those cities was entitled to attend; that "dissentient schools" of a religious minority existed only in "rural" municipalities and that the privilege of excluding therefrom adherents of another religious faith (then enjoyed by the Roman Catholic minority in Ontario in regard to their separate schools), was extended by s. 93 (2) of the B.N.A. Act to such "dissentient schools" in Quebec. In "rural" municipalities Jewish children could attend as of right only the common denominational schools of the religious majority.

Held, also, that although, *ex facie,* s. 1 of the Act of 1903 (c. 16) standing alone would confer upon adherents of the Jewish religion all rights regarding educational matters possessed by Protestants, including the establishment of separate schools controlled by Jewish commissioners or trustees, its intent, when taken with the context, is that whatever rights its confers should be enjoyed in connection with the Protestant schools; and that, while legislation infringing the right of Protestants to exclusive control of their schools would be *ultra vires* the Act of 1903 (c. 16) merely declares the right of Jewish children to education as Protestants, making consequent equitable provisions as to taxation and revenue;

Held, further, that, except in so far as it would confer the right of attendance at dissentient schools upon persons of a religious faith different from that of the dissentient minority, the Act of 1903 is *ultra vires;*

Held, further, that, legislation providing for the appointment of Jews to the Protestant Committee of Public Instruction would be competent and that legislation providing for the establishment of separate schools

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

for persons who are neither Roman Catholics nor Protestants, if so framed as not to affect prejudicially any right or privilege with regard to education enjoyed by either Roman Catholics or Protestants at Confederation, might be validly enacted.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, to which were referred, for hearing and consideration, a series of questions relating to the educational system in the island of Montreal. The Quebec legislature, in 1903 (3 Edw. VII, c. 16) passed an "Act to amend the law concerning education with respect to persons professing the Jewish religion." The immediate occasion for that legislation, as indicated in its recital, was the refusal of the Protestant Board of School Commissioners of the city of Montreal to recognize the right claimed by persons professing the Jewish religion to have their children received and educated at the schools under the control of the School Corporations established by law, to which Jewish parents had theretofore sent their children almost exclusively. The recitals continued—and the validity of such pretension (of the Protestant School Board) has been judicially established. By order in council of the 3rd of February, 1925, a series of questions relating to the educational system in the Island of Montreal were referred to the Court of King's Bench for hearing and consideration. The conclusions of the various questions submitted at which the Court of King's Bench arrived are summarized as follows:

Question 1: Is the statute of Quebec of 1903, 3 Edw. VII, c. 16, *ultra vires?*

Answer (unanimous): Yes.

Question 2: Under the said statute: (*a*) Can persons of Jewish religion be appointed to the Protestant Board of School Commissioners of the city of Montreal? (*b*) Is the Protestant Board of School Commissioners of Montreal obliged to appoint Jewish teachers in their schools should they be attended by children professing the Jewish religion?

Answer (unanimous): (*a*) Yes. (*b*) No.

Question 3: Can the provincial legislature pass legislation providing that persons professing the Jewish religion be appointed: (*a*) To the Protestant Board of School Commissioners of the city of Montreal; or (*b*) To the Protest-

ant Committee of Public Instruction; or (*c*) As advisory members of these bodies?

Answer (unanimous): (*a*) No; (*b*) No; (*c*) No.

Question 4: Can the provincial legislature pass legislation obliging the Board of School Commissioners of the city of Montreal to appoint teachers professing the Jewish religion in their schools should they be attended by children professing that religion?

Answer (unanimous): No.

Question 5: Can the provincial legislature pass legislation providing for the appointment of persons professing the Jewish religion on the proposed Metropolitan Financial Commission, outlined in the project submitted by Messrs. Hirsch and Cohen?

Answer (unanimous): No.

Question 6: Can the provincial legislature pass legislation to establish separate schools for persons who are neither Catholic nor Protestants?

Answer (Judges Greenshields, Rivard and Letourneau): No. (Judges Flynn and Tellier): Yes.

Question 7: Assuming the Act of 1903 to be unconstitutional, have the Protestants the right, under the present state of the Quebec law, to allow children professing the Jewish religion to attend the schools: (*a*) As a matter of grace? (*b*) As of right? (*c*) Can the province force the Protestants to accept children professing the Jewish religion under such conditions?

Answer: (*a*) (unanimous) Yes. (*b*) Judges Greenshields, Rivard and Letourneau: Yes (save the distinctions and reserves indicated in the notes of Judges Rivard and Letourneau). Judges Flynn and Tellier: No. (*c*) Judges Flynn, Tellier & Rivard: No. Judges Greenshields & Letourneau: Yes.

The Quebec statute, c. 19 of 1925, declared that the opinion or view of the Court of King's Bench shall be deemed to be a final judgment delivered by the highest court of final resort of the province of Quebec, and that an appeal shall lie therefrom to the Supreme Court of Canada in conformity with section 42a of the *Supreme Court Act*.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

The validity of the impugned statute was challenged before this court on the main ground that its provisions either prejudicially affect some right or privilege with respect to denominational schools which (some) class of persons (had) by law in the province at the Union (B.N.A. Act, s. 93 (1)), or derogate from "powers, privileges and duties" then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects, which are, by provision 2 of s. 93 of the B.N.A. Act, extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

Nesbitt K.C. and *St. Laurent K.C.* for the appellants.

Laurendeau K.C., Campbell K.C. and *Creelman K.C.* for the Protestant Board of School Commissioners.

A. Perrault K.C. for the Catholic Board of School Commissioners.

L. Fitch K.C. for the respondent Schubert.

Lanctot K.C. and *Geoffrion K.C.* for the Attorney General of Quebec.

The judgment of the court was delivered by

ANGLIN C.J.C.—By order in council of the 3rd of February, 1925, the Lieutenant-Governor of the province of Quebec, under art. 579 of the Revised Statutes of Quebec, 1909, referred to the Court of King's Bench (Appeal Side), for hearing and consideration, a series of

questions relating to the educational system in the Island of Montreal.

The Quebec statute, c. 19 of 1925, assented to on the 3rd of April, declares that the opinion or view of the Court of King's Bench (Appeal Side), expressed upon these questions on the 11th of March, 1925,

shall be deemed to be a final judgment delivered by the highest court of final resort of the province of Quebec,

and that

an appeal shall lie therefrom to the Supreme Court of Canada in conformity with section 42a of the *Supreme Court Act*.

Section 42a of the *Supreme Court Act*, enacted in 1922, (12-13 Geo. V, c. 48), reads as follows:

42a. An appeal shall lie to the Supreme Court from an opinion pronounced by the highest court of final resort in any province on any matter referred to it for hearing and consideration by the Lieutenant-Governor of such province whenever it has been by the statutes of the said province declared that such opinion is to be deemed a judgment of the said highest

court of final resort, and that an appeal shall lie therefrom as from a judgment in an action.

This provision seems to contemplate the enactment of provincial legislation applicable generally to references made to the highest court of final resort in the province by the Lieutenant Governor in Council. Such statutes have been enacted by six of the other provinces. Cameron, Supreme Court Practice, 3rd edition, p. 179. It would seem improbable that Parliament contemplated enabling a provincial legislature to single out a particular reference and to make the opinion pronounced upon it by the provincial court appealable to this court—still less that a specific judgment already rendered and not appealable when given should, as in this instance, become the subject of such legislation. The Quebec statute of 1925, would, however, appear to be within the letter of s. 42a and it does not seem sufficiently clear that it lies without its intendment to warrant our declining jurisdiction to entertain the present appeal.

The reference now before us chiefly concerns the validity and interpretation of the Quebec statute of 1903, c. 16, entituled " An Act to amend the law concerning education with respect to persons professing the Jewish religion." The present appeal is brought from the judgment of the Court of King's Bench by two of the Jewish members of a special commission of education appointed by the Provincial Government, who had been represented before that court. The respondents are the Protestant and Catholic Boards of School Commissioners of the city of Montreal, the third Jewish member of the special commission, and the Attorney General of Quebec, all of whom had likewise taken part in the hearing of the reference.

The Court of King's Bench unanimously held the statute of 1903, c. 16, to be *ultra vires*. But differences of opinion developed in the individual views of the several members of the court upon some of the other questions propounded by the order in council.

The validity of the impugned statute is challenged on the ground that its provisions either

prejudicially affect some right or privilege with respect to denominational schools which (some) class of persons (had) by law in the province at the Union (B.N.A. Act, s. 93 (1)),

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

or derogate from "powers, privileges and duties" then

by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects,

which are, by provision 2 of s. 93 of the B.N.A. Act,

extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

Legislation of the Quebec legislature repugnant to either of these provisions of the B.N.A. Act is

to the extent of such repugnancy * * * absolutely void and inoperative. (Colonial Laws Validity Act, 1865, (Imp.), c. 63, s. 2.)

The remedy of persons aggrieved by such legislation is to "invoke the jurisdiction of the ordinary courts of the country." The right of appeal to the Governor General in Council given by provision 3 of s. 93 of the *British North America Act* does not apply to such a case. *Brophy* v. *Attorney General of Manitoba* (1). In this decision of the ultimate appellate tribunal it is also pointed out (pp. 222-3) that the "absolute" power of provincial legislatures in relation to subjects specified in s. 92 of the *British North America Act,* and not falling within those set forth in s. 91, does not extend to the matter of education

which is specially dealt with and has its own code . . . in the *British North America Act* (s. 93),

the "provisions" whereof

define the conditions under which alone the provincial legislature may legislate in relation to education, and indicate the limitations imposed on, and the exceptions from, their power of exclusive legislation. It would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision 1 (s. 93). *Ottawa Separate Schools Trustees* v. *Mackell* (2);

and this is equally true of any

powers, privileges and duties * * * extended to the dissentient schools * * * in Quebec

by provision 2. Provincial legislation affecting them is incompetent.

It is authoritatively established that

the class of persons to whom the right or privilege is reserved (under provision 1 of s. 93) must * * * be a class of persons determined according to religious belief and not according to race or language. In relation to denominational teaching Roman Catholics (in Ontario) together form, within the meaning of the section, a class of persons, and that class cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held. *Ottawa Separate School Trustees* v. *Mackell* (2).

(1) [1895] A.C. 202, at pp. 216, 219.

(2) [1917] A.C. 62, at p. 69.

It is contended that, for the purpose of s. 93 (1), Roman Catholics in Quebec form such a class, and that Protestants in that province, as a whole—and taken together, form another like class not susceptible of subdivision according to their diversities of religious belief. That the latter are so regarded for the purposes of s. 93 (2) would seem to be clear. Section 93 (1), however, deals only with rights and privileges in regard to denominational schools which a class of persons, determined according to religious belief, had by law at Confederation. On this aspect of the case, therefore, we are presently concerned to ascertain what were the classes of persons who had by law in the province of Quebec at Confederation rights and privileges with respect to denominational schools, and in what such rights and privileges consisted; and, in addition, we must take account of any enlargement of, or accession to, such rights and privileges effected by provision 2 of s. 93. The pertinent inquiry will then be whether, and to what extent, the legislation of 1903 would, if valid, prejudicially affect any such right or privilege.

It was common ground at bar that the rights and privileges in regard to denominational schools enjoyed at Confederation by any class of persons in Quebec are to be found in the legislation consolidated in caps. 15 and 16 of the *Consolidated Statutes of Lower Canada, 1861*. The powers, privileges and duties of the Roman Catholic Separate schools and separate school trustees in Upper Canada at the Union were those conferred by the *Separate Schools Act* of 1863 (26 Vic., c. 5). These statutes must now be considered.

Chapter 16 of the *Lower Canada Consolidated Statutes* deals with *Fabrique* schools and is in no wise affected by the legislation of 1903.

Chapter 15, which deals with "Education—and Normal and Common Schools," requires careful study and analysis. Its most striking features affecting the matter presently before us appear to be the following:

A. It gave to every child between the ages of five and sixteen years resident in any school district an equal right to attend the school thereof (s. 66); and, in each of the cities of Montreal and Quebec, such children from any

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

part of the city might attend any school established by, or under the control of, the Commissioners (s. 129). The statute, therefore, conferred on every child resident in any school district in the province the right to education in some public school established under its provisions in such district. It is perhaps unnecessary to observe that this was not a right enjoyed by a class of persons with respect to denominational schools; it pertained to the individual as a citizen. Accordingly it did not fall within the protection of s. 93 (1). But the correlative obligation of Boards of School Commissioners and Trustees may have been limitative of some right or privilege claimed for Quebec denominational schools.

B. Chapter 15 of the *Consolidated Statutes* of 1861 made distinct provisions, quite different in their scope and character, for the cities of Montreal and Quebec, on the one hand, and for the other municipalities in the province (which we shall, for convenience, call "rural municipalities"), on the other (*a*). The present reference has to do with the educational system of the Island of Montreal, which comprises, in addition to the city of Montreal, municipalities falling within the category which we designate rural. Both divisions of the statute must, therefore, be considered. The signal difference presently material is that the provisions for "dissentient schools" (which were likewise "common schools" for many purposes of the statute (s. 138) but were in other respects clearly distinguished from them) applied only to the rural municipalities. These schools were governed by Board of "Trustees." All the schools of the cities of Montreal and Quebec were "common schools" under Boards of "Commissioners," each of these cities being considered one municipality not divided into school districts (s. 129). It being thus "otherwise provided," the provisions with regard to dissentient schools did not apply to them (s. 128). Under the Act of 1861 there were no "dissentient schools" either in Montreal or in Quebec, although, no doubt, the schools in these cities were "denominational schools." This situation

(*a*) The city of Three Rivers is expressly excluded from the rural municipalities (s. 28). It appears to have had special provisions for the organization, control and management of its schools. *Vide* 9 Vic., c. 27, s. 2, and c. 78; 23 Vic., (1860 c. 74; 1 Edw. VII, (1901), c. 44, s. 222 *et seq.*

has continued down to the present day and with it we must deal.

C. A third noteworthy feature of the Act of 1861 is that it appears to divide the population for school purposes into two great classes, the one Roman Catholic, the other Protestant. In this view all the learned judges of the Court of King's Bench agree. As used in this statute and throughout the educational laws of the province of Quebec, the meaning of the term "Roman Catholics" admits of no doubt; nor does the connotation of the term "Protestants" present any difficulty. It is not synonymous with non-Catholic, in that it excludes all persons who do not profess to be Christians; and of these it includes only such as accept what are generally regarded as the principles and doctrines of the Reformation of the 16th century. For present purposes, either of the following definitions of "Protestant" may be accepted:

> A member or adherent of any of the Christian churches or bodies which repudiated the papal authority, and separated, or were severed from the Roman communion in the Reformation of the 16th century, and, generally, of any of the bodies of Christians descended from them; hence, in general language, applied to any Western Christian or member of a Christian Church without the Roman communion. (Murray's New English Dictionary.) A member or an adherent of those Christian bodies which are descended from the Reformation of the 16th century; in general language opposed to Roman Catholic and Greek. (Century Dictionary).

In the fasciculus of sections of the Act of 1861 specially affecting the cities of Montreal and Quebec (ss. 128-134) the classification is unmistakable. The twelve school commissioners for each of these cities, appointed by the respective municipal councils, formed two separate and distinct corporations, one for the Roman Catholics and the other for the Protestants (s. 130), each having exclusive control and management of the schools of the denomination it represented and of the funds apportioned for their support (s. 131).

In the general provisions of the Act affecting rural municipalities the denominational division between Roman Catholics and Protestants is perhaps not quite so obvious; but the indications of it appear to be sufficient. Two classes of schools were provided for: one, common schools for the majority in the district, carried on by Commissioners; the other, dissentient schools for a minority professing a re-

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

ligious faith different from that of the majority, carried on by trustees (ss. 27, 55). Dissentients with a religious faith common at least in some distinctive characteristics were contemplated. Thus children from other districts might attend one of these schools only if

> of the same faith as the dissentients for whom the school was established (s. 56 (2)).

The *curé*, priest or officiating minister had

> the exclusive right of selecting the books having reference to religion and morals for the use of the schools for children of his own religious faith (s. 65 (2)).

Boards of Examiners in Montreal and Quebec were (s. 103 (2)), and in other districts might be, if the Governor in Council so ordered (s. 108), organized in two divisions, Roman Catholic and Protestant respectively. No priest, minister or ecclesiastic might visit any school belonging to inhabitants not of his own persuasion, except with the consent of the Commissioners or Trustees of such school (s. 131). While the terms " religious majority " and " religious minority," were not defined until 1869 (32 Vic., c. 16, s. 37) to mean

> the Roman Catholic or Protestant majority or minority as the case may be,

and this definition, although declaratory in form, must therefore, for present purposes be disregarded, the various provisions of the Act of 1861 alluded to seem to be inconsistent with any other classification of the inhabitants of Lower Canada for educational purposes having been intended by the legislation embodied in that statute. Indeed such a division had persisted in the several earlier school Acts of 1841 (4-5 Vic., c. 18), 1845 (8 Vic., c. 16), 1846 (9 Vic., c. 27), 1849 (12 Vic., c. 50), 1853 (16 Vic., c. 1208), 1856 (19 Vic., c. 14), and 1859 (22 Vic., c. 52). As. Mr. Justice Davidson said in *Pinsler v. Protestant Board of School Commissioners* (1),

> these cleavages on religious lines in regard to the schools in the country parts and their management have so existed since 1841 * * * It is certain that the division between the two classes of schools is not one of mere administration; the cleavage is religious and denominational as well.

Everybody in the least familiar with the history of education in the province of Quebec knows that in 1867 in " rural municipalities " the " common schools " were in fact the

(1) Q.R. 23 S.C. 365, at pp. 371, 377.

schools of the majority, and the "dissentient schools" in fact the schools of the minority, Catholic or Protestant as the case might be. It cannot be seriously disputed that prior to 1867 the non-Catholic non-Protestant elements of the population of Lower Canada were numerically negligible and were so treated in legislation respecting educational matters. The dissentient schools were almost universally Protestant. But common schools and dissentient schools were alike frankly denominational and Christian. This was their character recognized and provided for by law; and the present case is thus clearly distinguished from *Maher* v. *Portland,* Wheeler's Confederation Law of Canada, at p. 367 (1). The dissentient school came into existence only because the religious minority of a school municipality found the regulations and arrangements for the conduct of the common school of the religious majority not agreeable to it. The law so provided (s. 55 (1)).

The Trustees of the dissentient schools, when established, had the same rights, powers and duties of management and control over them as the Commissioners had in regard to common schools (s. 55 (2)): the appointment of teachers, the regulation of courses of study, the erection, maintenance and repair of school houses, the control of school property, the making of general rules for the management of the schools, the fixing of public examinations—all these matters, with their incidents—were in their hands (s. 65); and, what is perhaps most important, the moneys for the support of the schools derived from taxes, fees and Government grants were exclusively at their disposal.

Although under the Act of 1861 neither the Commissioners of common schools nor the Trustees of dissentient schools would appear to have had the right to exclude any child from the schools under their control on religious grounds (s. 66), in the case of dissentient schools of the religious minority the right of excluding non-Protestants or non-Catholics, as the case might be, would seem to have been conferred by provision 2 of s. 93 of the B.N.A. Act of 1867. An analysis of the *Separate Schools Act of Upper Canada* of 1853, c. 5, makes it reasonably clear that in that province only Roman Catholics had the right of privilege

(1) [1873] 14 N.B. Rep. 251.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

of sending their children to Catholic Separate Schools, although non-Catholic children might be admitted to them as a matter of grace (s. 12). The separate school could be established only by Roman Catholics (ss. 2-3) and "for Roman Catholics" (s. 2): only Roman Catholics could become separate school supporters (s. 14) or withdraw their support (s. 18): only Roman Catholics who were separate school supporters were exempted from the payment of public school taxes (s. 14): only Roman Catholic pupils might be taken account of in the apportionment of the legislative grant for common schools (ss. 12, 20, 22). As a privilege

> at the Union by law conferred in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects,

the power of excluding the adherents of other religious faiths was by s. 93 (2) extended to the "dissentient schools," but not to the "common schools" of the province of Quebec. The latter remained subject to the provisions of ss. 66 and 129 of the Act of 1861.

As already pointed out, in 1867, only common schools were provided for in the cities of Montreal and Quebec; dissentient schools were confined to the rural municipalities. It cannot be supposed that this state of the law was not present either to the minds of the Canadian public men who negotiated and settled the terms of Confederation, or to the mind of the Imperial Parliament when it enacted the *British North America Act*. It follows that in the city of Montreal every child between the ages of five and sixteen years resident within the municipality retained after 1867 the right conferred by the Act of 1861 to attend any school under the control of the Commissioners, whether Catholic or Protestant; and the correlative obligation to receive and provide for them incumbent upon both bodies of Commissioners likewise remained unimpaired.

In this connection it is important to bear in mind that since 1867 much territory, constituting or comprised in several suburban municipalities, has been annexed to the city of Montreal and now forms part of it for municipal purposes. There was no discussion at bar as to the effect of such annexation on school rights in the annexed territory. In regard to the dissentient school rights a question

may arise as to the effect on them of such annexation. But this aspect of the case was not adverted to in argument and we express no opinion upon it. It must therefore be understood that, in the several answers to questions submitted in the present reference, when we speak of the city of Montreal we mean that city as it was as the date of Confederation, and by rural municipalities we mean municipalities which are still without the city limits. Only as to these are definite answers given. As to territory now included in the municipality of the city of Montreal by virtue of annexations made since 1867, the application of the answers to questions no. 1 and (*b*) and (*c*) of no. 7 would appear to depend upon how far dissentient schools rights in such territory may persist notwithstanding its incorporation in the city for municipal purposes.

The only further observation upon the Act of 1861 which it seems important to make is that it provided for a Council of Public Instruction to consist of not more than fifteen and not less than eleven members to be appointed by the Governor (s. 18). Nothing is said as to religious qualifications of the appointees. It was not until 1869 (c. 16, s. 1) that the personnel of the Council was fixed at

> twenty-one persons, fourteen of whom shall be Roman Catholics and seven Protestants.

Moreover, by subs. 4 of s. 21 of the Act of 1861 it was provided that the power of selecting books to be used in the schools of the province, conferred on the Council of Public Instruction, should not extend to books having reference to religion and morals, the selection of such books for each school being given to "the *curé*, priest or officiating minister (s. 65 (2)." It is, however, contended that the spirit of the Act of 1861 required that membership of the Council of Public Instruction should be confined to Roman Catholics and Protestants. That view prevailed in the Court of King's Bench. We are, with respect, not prepared to attribute such an unexpressed intention to the legislature. The safeguarding provision as to the selection of books having reference to religion and morals would seem rather to be indicative of the absence of such an intent. Moreover, the proportion of members of each faith was not fixed, and, for aught that was provided to the contrary, the Council might be wholly Catholic or wholly Pro-

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

testant. The Christian community (Roman Catholic and Protestant) as a whole was nowhere treated as a "class of persons" which had, within the purview of s. 93 (1), any right or privilege with respect of denominational schools. The Act of 1861 did not recognize or provide for such a right or privilege in regard to the personnel of the Council of Public Instruction.

We may now consider the provisions of the statute of 1903 (c. 16). The immediate occasion for that legislation, as indicated in its recital, was the refusal of the Protestant Board of School Commissioners of the city of Montreal to recognize the right claimed by persons professing the Jewish religion

to have their children received and educated at the schools under the control of the School Corporations established by law,

or

to acknowledge any obligation to receive in the schools under their control children of the Jewish faith whose parents are not proprietors of immovable property subject to taxation for the benefit of the said schools,

to which Jewish parents had theretofore sent their children almost exclusively. The recital continued—

and the validity of such pretension (of the Protestant School Board) has been judicially established.

It was further recited that

the Protestant Board of School Commissioners of the city of Montreal have by resolution expressed their consent that the above mentioned difference be settled in the manner set forth in the following provisions,

and, finally, that

it was expedient to prevent similar differences arising in other localities in the province.

The enacting sections of the statute open with a provision (s. 1) framed in very general terms, as to the construction and scope of which there was not a little discussion at bar. This is followed by five sections (ss. 2-6) which deal with particular matters which are the *specialia* of the statute. It will be most convenient first to consider the latter sections.

Section 6, so far as is material, reads as follows:

After the coming into force of this Act, children of persons professing the Jewish faith shall have the same right to be educated in the public schools of the province as Protestant children, and shall be treated in the same manner as Protestants for all school purposes.

Jewish children in common with all other children in the city of Montreal had, under the Act of 1861, the right to attend any school under the control of the Commission-

ers. Section 6, in its application to the Protestant common schools of that city, therefore, does not appear to transcend the legislative power conferred on the provincial legislature by s. 93 of the B.N.A. Act: it is not repugnant either to provision 1 or to provision 2. But as to the Protestant dissentient schools in the rural municipalities, s. 6 disregards and derogates from a privilege conferred on them, as already explained, by provision 2 of s. 93 of the B.N.A. Act and is, in its application to those schools, *ultra vires*.

Sections 2, 3, 4 and 5 deal with school revenues and taxation and, speaking generally, provide that such taxation payable by persons professing the Jewish religion and revenue for school purposes derived from them, or from their properties, shall go to the support of the Protestant schools, where they exist, and that, in arriving at the basis of the division for school purposes of moneys derived from school taxes and of revenue payable in proportion to population, persons professing the Jewish religion shall be counted amongst Protestants.

We do not find in these provisions, in so far as they apply to the city of Montreal, anything which necessarily exceeds the legislative power conferred in the provincial legislature by s. 93 of the B.N.A. Act. They are in reality complementary of, or consequent upon, section 6. It is not *ex facie* apparent, and it has not been shewn by evidence or otherwise, that any right or privilege enjoyed by any class of persons in regard to denominational schools at the Union is prejudicially affected by them. No increased burden is imposed on the Protestant schools and school commissioners; they were already bound in 1867 to receive Jewish pupils, and, as the statute recites, the Jews took full advantage of this privilege. On the contrary, the Protestant schools derive a distinct financial benefit from the provision that persons professing the Jewish faith shall be considered Protestants in regard to the matters dealt with by ss. 2-5. While the Catholic schools lose a portion of their former revenue, the formal declaration of the obligation of the Protestant schools and their Commissioners to provide for the education of Jewish children, having regard to what appears as to the cost of making such provision, may well afford more than adequate compensation.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

No grievance on the part of the Catholic schools or school Commissioners in the city of Montreal has been suggested in this connection and on the case now before us we cannot say that their rights and privileges in regard to their denominational schools were prejudicially affected by the provisions of these four sections.

In the rural municipalities, however, the situation is entirely different. There the common schools of the majority alone were open as of right to Jewish children, at all events after 1867, owing to the privilege of exclusion then conferred on the dissentient schools by s. 93 (2) of the B.N.A. Act. These common schools were all Roman Catholic and distinctly denominational. A right or privilege of the Roman Catholic majorities in the rural municipalities in regard to revenues available for the support of their denominational common schools, which they enjoyed as a class of persons at the Union, would be prejudicially affected by ss. 2-5 of the Act of 1903.

Upon the foregoing premises the decision of the Judicial Committee of the Privy Council in *Attorney General for Canada* v. *Attorney General for Ontario et al* (1), and s. 2 of the *Colonial Laws Validity Act* (Imp., 1865, c. 63) warrant a judgment upholding the validity of ss. 2-6 of the Act of 1903 in so far as they apply to the cities of Montreal and Quebec, although they should be regarded as *ultra vires* in so far as they affect rural municipalities, to the extent which will be indicated in the answer to question no. 1.

Section 1 of the statute of 1903 reads as follows:

> Any provision to the contrary notwithstanding, in all the municipalities of the province, whether governed, as regards schools, by the *Education Act* or by special laws, or by the *Education Act* and by special laws, persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants, and for the said purposes shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter.

This section contains the *generalia* of the statute. If it stood alone and entirely divorced from its context, its *ex facie* construction would be that it conferred upon persons professing the Jewish religion in Quebec all the rights regarding educational matters possessed by Protestants, in-

(1) [1898] A.C. 700, at p. 714.

cluding the right to establish and maintain separate schools —" common " in the cities of Montreal and Quebec and " dissentient " in the rural municipalities,—controlled by Jewish Commissioners or Trustees. Not as Protestants, but as Jews, persons professing the Jewish religion, would, upon the natural and literal interpretation of s. 1, have the like educational obligations, rights and privileges as Protestants, including the enactment in their behalf of school laws the same as those relating to Protestants, as nearly as the latter could be adapted to the case.

But it requires only a momentary glance at the context to make it clear that this was not the intent of s. 1. It is obvious from the whole Act that whatever rights it was designed to confer on persons professing the Jewish religion were to be enjoyed in connection with the schools under the control of the Protestant school corporations. In order to reconcile the various provisions, including the preamble, an intention must be attributed to s. 1, though ill-expressed, not to provide for the establishment of separate Jewish schools, but that the Jews shall, for the school purposes to which the statute relates, be included and considered as Protestants, or as belonging to the Protestant denomination, and subject to the obligations and entitled to the rights and privileges which appertain to Protestants; or, conversely, that Protestants shall be deemed for such purposes to include persons professing the Jewish religion. These purposes are defined not otherwise than as " school purposes " except in s. 6 where the expression is " all school purposes." In other words s. 1 serves as a limited definition section.

There is, therefore, here a case for the application of Art. 12 of the Civil Code of Quebec which provides that:

> 12. When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it is passed. The preamble which forms part of the act, assists in explaining it.

One must, of course, have regard to the subject matter with which the legislature was dealing. The occasion for the Act of 1903, as already stated, was the rejection by the Protestant Board of School Commissioners of the city of Montreal of the claims of persons professing the Jewish religion to have their children received and educated

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

in the Protestant Separate Schools which they had theretofore attended; the purpose of the statute was to give legal sanction to agreed terms on which the Jewish pupils were to be accepted; but the reconstitution of the governing body of these schools, or the admission of the Jews to a voice in their government or regulation, was not a subject of the agreement as recited, or of the legislation by which it was sanctioned.

Section 1 of the Act of 1903 is, no doubt, expressed in the most general terms. It was admitted on all sides at the hearing that the statute was intended to establish the right of Jewish children to be admitted to the Protestant schools, but it was argued that s. 1 went so far as also to sanction the eligibility of persons professing the Jewish religion for appointment to the Boards of Protestant School Commissioners, and therefore to declare that Jews should be considered as Protestants for the purposes of s. 130 of the Consolidated Act of 1861; the argument is founded upon the words:

> persons professing the Jewish religion shall for school purposes be treated in the same manner as Protestants, and, for the said purposes, shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter.

But, assuming that these words by themselves might be interpreted to authorize the admission of Jews to representation upon the Protestant School Board, that interpretation must, we think, be rejected, when, applying the principles enunciated by Lord Blackburn in *River Wear Commissioners* v. *Adamson* (1), the statute is considered as a whole. The provisions of the Act following upon s. 1, and already adverted to, are special or particular enactments, providing for and defining obligations, rights and privileges which seem to be generally comprehended under s. 1. Now by the tenth rule of Bacon's Maxims "*verba generalia restringuntur ad habilitatem rei vel personae*"; and he says

> all words, whether they be in deeds or statutes or, otherwise, if they be general, and not express or precise, shall be restrained unto the fitness of the matter or person.

In *Earl of Kintore* v. *Lord Inverury* (2), Lord Westbury said that:

(1) [1877] 2 A.C. 743, at pp. 763-765.

(2) [1865] 4 Macq. 520, at p. 522.

If to general words special words are added, the rule specialia derogant generalibus has been applied, and the general words have been limited to the things denoted by the special words of addition; and if, on the other hand, words of general comprehension are added to special words denoting particular things, the general words are confined in their extent and reduced to signify things ejusdem generis with those which are properly denoted by the special expressions.

In *Gunnestad* v. *Price* (1), Cleasby, B., said that

if the language is general, and so general that it appears inapplicable without some limitation, then we are entitled to see by the immediate context, or the subsequent matter to which they (the words) are intended to apply, what, if any, limitation ought to be put upon them.

He adds that "the maxim that general words are limited in their application is constantly acted upon." And he repeats the words of Bacon quoted above

Lord Halsbury in *Cox* v. *Hakes* (2), emphasized the difficulty of supposing that the legislature intended to abrogate or alter long established rights "by mere general words without any specific provision" as to them. He added that

it is impossible to contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy.

And he cited the great case of *Stradling* v. *Morgan* (3), in which, at p. 205a, occurs this passage:

The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded on the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion.

See, too, *Heydon's Case* (4). Both these great authorities were quoted recently by Lord Atkinson in *Banbury* v. *Bank of Montreal* (5).

The rule is thus well established, and this seems to be a case where nothing is lacking to justify its application; and when the preamble of the statute is considered, it be-

(1) [1875] L.R. 10 Ex. 65, at p. 69.
(2) [1890] 15 A.C. 506, at p. 517.
(3) [1560] 1 Plowd. 199.
(4) [1584] 3 Co. Rep. 7b.
(5) [1918] A.C. 626, at p. 691.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

comes reasonably certain that the school purposes referred to in the general provision of s. 1 were not intended to include purposes other than those which are the subject of, or ancillary to, the particular sections which follow.

In *Bradlaugh* v. *Clark* (1), Lord Blackburn said

> All statutes are to be construed by the courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject matter and for the object with which that statute was made; it being a question to be determined by the court and a very important one, what was the object for which it appears the statute was made.

He cited the passage in *Stradling* v. *Morgan* (2) to which Lord Halsbury referred in *Cox* v. *Hakes* (3) and he said he thought that in modern times more weight had been given to the natural meaning of words than was done in time of Elizabeth; but, he added, at p. 373,

> The Civil Code of Canada, article 12, well expressed what I think is the principle, and also the qualification which I think must now be put on the older authorities. "When a law is doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it was passed. The preamble, which forms part of the Act, assists in explaining it."

The last observation has additional force in this case which is concerned with the interpretation of a Quebec statute, and, therefore, governed directly by the rule which Lord Blackburn adopts.

In *Minet* v. *Leman* (4), Romilly M.R., stated as a principle of construction which he said could not, as a general proposition, be disputed, that:

> The general words of an Act are not to be construed so as to alter the previous policy of the law unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched.

This may be rather a broad expression, but it serves to show at least that an intention to change the law must be clearly expressed or necessarily implied. Maxwell, in his work on The Interpretation of Statutes (6th ed.), at p. 149, cites it as authority for the proposition that

> general words and phrases, however wide and comprehensive in their literal sense, must usually be construed as being restricted to the actual objects of the Act and as not altering the law beyond.

(1) [1883] 8 A.C. 354, at p. 372.
(2) 1 Plowd. 199.
(3) 15 A.C. 506.
(4) [1855] 20 Beav. 269, at p. 278.

It is true, as Lord Davey suggested in *Powell* v. *Kempton Park Racecourse Co.* (1), that one must not lose sight of the possibility that the legislature took the recited facts only as the occasion of the enactment and deliberately used large words to prevent the same kind of mischief in other forms; but, in the drafting of this statute, we see no satisfactory evidence of an intention to disturb the constitution of the controlling authority of the Protestant schools. Indeed it is apparent that the main purpose, if not the only purpose which at the time was considered of present consequence, was the admission of the Jewish children to the Protestant separate schools as they existed at Montreal, and, when we find that all the provisions in detail necessary for that purpose were specially enacted, it cannot be supposed that the design to transfer a right to participate in the government of the Protestant schools to the Jews, presumably to an extent proportionate to their numerical strength, with all the rights and incidents attendant upon such a change in the constitution of the governing board, would have escaped special mention had anything so important been within the contemplation of the legislature.

In *Reigate Rural District Council* v. *Sutton District Water Co.* (2), Channell J. said

> It is always necessary in construing a statute, and in dealing with the words you find in it, to consider the object with which the statute was passed, because it enables one to understand the meaning of the words introduced into the enactment. Where the meaning of the words is absolutely clear beyond any doubt the court has no right to go beyond them, because if they did they would be introducing new legislation. They would be improving upon the legislation which has in fact been passed, under the idea that they could do something better, and this would not be a legitimate thing to do. But when words are capable of one meaning and at the same time of a more extended meaning, whether they are to have the one meaning or the more extended meaning is to be dealt with according to what the court sees to be the object and policy of the Act.

The principle of interpretation thus expressed cannot, we think, be doubted, and we see nothing in the object or policy of the Act of 1903 which would justify the court in extending the school purposes referred to in s. 1 to include a declaration of eligibility on the part of those professing

(1) [1899] A.C. 143, at p. 185.

(2) [1908] 99 L.T.R. 168, at pp. 170-171.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

the Jewish religion to become members of the Protestant Boards of School Commissioners at Quebec and Montreal.

There is another consideration which strengthens this view. It was well known to the legislature at Quebec in 1903 that its exclusive power to legislate for education was limited by the constitutional provisions subject to which it was conferred, and that the legislature was powerless prejudicially to affect any right or privilege with respect to denominational schools which any class of persons had by law at the Union. Nobody doubted that the Roman Catholic and Protestant separate schools at Quebec and Montreal were denominational schools, or that the Protestants were a class of persons whose rights and privileges were protected; and it could not then, we should think, have been within the region of uncertainty that the right of Protestants to manage and govern their separate schools, as provided by the Consolidated Act of 1861, was perhaps the most important of the rights assured to them, and, therefore, a right from which the legislature could not derogate. In these circumstances the court would, of course, be disposed to interpret legislation at Quebec as intended to operate within the constitutional powers of the legislature, and would seek to apply to any doubtful or ambiguous provision an interpretation according to which it might be upheld compatibly with constitutional limitations. "There are two modes of reading an instrument," said Lord Brougham in *Langston* v. *Langston* (1),

> where the one destroys and the other preserves, it is the rule of the law, and of equity, following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall), that you should rather lean towards that construction which preserves than towards that which destroys. *Ut res magis valeat quam pereat* is a rule of common law and common sense.

And *In re Florence Land and Public Works* (2), James L.J. said

> it is a cardinal rule of construction that all documents are to be construed *ut res valeat magis quam pereat.*

Moreover, as is pointed out in Craie's Statute Laws, 3rd ed., at p. 162, it is the settled policy of the Privy Council

(1) [1834] 2 Cl. & F. 194, at p. 243.

(2) [1878] 10 Ch. D. 530, at p. 534.

not to decide that Colonial Acts are *ultra vires* if it can avoid that conclusion, but rather to read general words as subject to some limitation. *Macleod* v. *Attorney General for New South Wales* (1); *Blackwood* v. *The Queen* (2). Therefore, upon the application of this principle of construction, there should be no unnecessary extension of the provisions of s. 1 of the Act of 1903 to formulate a legislative project by which persons professing the Jewish religion should be made eligible for appointment to the Boards of Protestant School Commissioners at Quebec and Montreal.

From what has been said it is apparent that we would regard legislation designed to impair the right of Protestants, as a class of persons in the province of Quebec, to the exclusive control, financial and pedagogic, of their schools, as *ultra vires* of the provincial legislature.

In our opinion, however, the purview of c. 16 of the Quebec statute of 1903 is confined to a declaration of the right of children of persons professing the Jewish religion to education in the public schools of the province as Protestant children, and to making consequential equitable provisions in regard to taxation and revenue.

We may now proceed to deal with the several questions submitted.

Question no. 1: Is the statute of Quebec, 1903, 3 Edw. VII, c. 16 *ultra vires?*

Answer: No, except in so far as it would confer the right of attendance at dissentient schools upon persons of a religious faith different from that of the dissentient minority.

Question no. 2: Under the said statute (*a*) can persons of Jewish religion be appointed to the Protestant Board of School Commissioners of the city of Montreal?

(*b*) Is the Protestant Board of School Commissioners of the city of Montreal obliged to appoint Jewish teachers in their schools should they be attended by children professing the Jewish religion?

Answer to part (*a*): No.

to part (*b*): No.

Question no. 3: Con the provincial legislature pass legislation providing that persons professing the Jewish religion

(1) [1891] A.C. 455, at p. 458. (2) [1882] 8 A.C. 82, at p. 98.

1926

HIRSCH v. PROTESTANT BOARD OF SCHOOL COMMISSIONERS

Anglin C.J.C.

be appointed: (*a*) To the Protestant Board of School Commissioners of the city of Montreal; or (*b*) To the Protestant Committee of Public Instruction; or (*c*) As advisory members of these bodies?

Answer to part (*a*): No.

Answer to part (*b*): This Committee is the creature of post-union legislation and, therefore, its personnel is subject to provincial legislative control; but, as it is presently constituted, only Protestants are eligible for appointment to it;

Answer to part (*c*): This question can be answered only when the powers and duties of such advisory members shall have been defined.

Question no. 4: Can the provincial legislature pass legislation obliging the Board of School Commissioners of the city of Montreal to appoint teachers professing the Jewish religion in their schools should they be attended by children professing that religion.

This question is not restricted in its application to the Protestant Board of School Commissioners of the City of Montreal, although, probably, that was intended. We answer it as put, however, treating it as applicable to both the Protestant and Roman Catholic Boards of the School Commissioners of the City of Montreal.

Answer: No.

Question no. 5: Can the provincial legislature pass legislation providing for the appointment of persons professing the Jewish religion on the proposed Metropolitan Finance Commission, outlined in the project submitted by Messrs. Hirsch and Cohen?

Answer: No.

Question no. 6: Can the provincial legislature pass legislation to establish separate schools for persons who are neither Catholics nor Protestants?

Answer: Yes. Such legislation would not necessarily interfere prejudicially with rights and privileges enjoyed either by Roman Catholics or Protestants as a class at the Union. Such interference, of course, could not be allowed. Mr. Justice Tellier deals with this aspect of the case succinctly and satisfactorily. There are some rights and privileges of the existing dissentient schools which it might not

be competent to the legislature to confer on separate schools so to be established.

This question relates solely to legislative power and we so deal with it. Considerations of policy in no wise concern us. This was the only question discussed by counsel representing the Catholic Board of School Commissioners.

Question no. 7: Assuming the Act of 1903 to be unconstitutional, have the Protestants the right, under the present state of the law, to allow children professing the Jewish religion to attend the schools:

(*a*) as a matter of grace;

(*b*) as a matter of right;

(*c*) can the province force the Protestants to accept children professing the Jewish religion under such conditions?

It is impossible to answer this question categorically and difficult to answer it intelligently. We deal with it as follows:

We assume that the question is to be answered having regard to the law of the province of Quebec bearing on educational matters in so far as such law is valid, exclusive of the Act of 1903, and that "Protestants" in the question means the Protestant Board of School Commissioners of the city of Montreal and the Trustees of the Protestant dissentient schools in rural municipalities,

To part (*a*) the answer is: Yes;

To part (*b*): Further assuming that the inquiry intended is whether Jewish children have the right to attend Protestant schools, with a correlative obligation on the part of the Boards of Protestant School Commissioners and Trustees to admit children professing the Jewish children to the schools respectively under their control and to provide therein for their education, the answer is: In the city of Montreal, Yes;

In the rural municipalities, No;

To part (*c*): The words "under such conditions" are quite unintelligible. It is impossible to discern what conditions are meant to be imported. Eliminating them from the question, the answer is:

In the city of Montreal, Yes;

In the rural municipalities, No.

1926

*Feb. 11.
*Mar. 13.

NEW YORK LIFE INSURANCE COMPANY (DEFENDANT) ..... } APPELLANT;

AND

GUY J. L. DUBUC (PLAINTIFF) ..... RESPONDENT.

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

Insurance—Life and accident—Medical treatment since examination—Accident after issue and before delivery of policy—Premium—Payment by note—Delivery of policy.

Provisions in the application form for a policy of life and accident insurance stipulated that "the insurance thereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant" and that the insurance applied for should take effect "only if the applicant has not consulted or been treated by any physician since his medical examination." The policy, however, stated that "this policy takes effect as of date policy is written (twenty-sixth day of June, 1924)." The accident to the plaintiff and his consequent medical attendance took place on the 4th of July and the policy was handed to his father for the insured about 12th July, having been in possession of the local agent for some time before the insured was injured.

Held that the policy must be considered as in force at the time of the accident. The provision that the applicant shall not have consulted or been treated by a physician must be limited to the period between the medical examination pertaining to the application and the date stipulated by the contract for the coming into force of the policy.

Held, also, that the policy had been effectively delivered to the applicant although the agent who handed it over to the applicant had delivered it notwithstanding the instructions of the company not to deliver the policy unless the agent "first satisfies himself that the applicant has not consulted or been treated by any physician * * *." The company cannot, consistently with its obligations, impose conditions upon the delivery of the policy which were not provided for by the contract; and moreover the company's agent, exercising as such his own judgment upon the questions of fact involved in the instructions, must be deemed to have acted on behalf of the company in delivering the policy.

Held, further, that the premium must be regarded as paid at the time of the accident, inasmuch as on the 30th of June the company's agent had received through discount from the bank, without recourse, the proceeds of a promissory note which was given by the father of the insured in payment of the premium.

Judgment of the Appellate Division ([1925] 3 W.W.R. 386) aff.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial court and maintaining the appellant's action.

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

(1) [1925] 3 W.W.R. 386.

1926

NEW YORK LIFE INS. CO. v. DUBUC.

NewcombeJ.

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

Lafleur K.C. for the appellant.

Geoffrion K.C. and *F. O. McKenna* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The question is whether a policy of life insurance, upon which the plaintiff (respondent) claims for permanent disability, is to be considered as having taken effect or attached at the time of the injury which the insured received and for which he claims.

The plaintiff, who is a young man, at the suggestion of his father, who is a physician, signed an application for the insurance in the usual printed form of the defendant company, dated 13th June, 1924. The application was submitted to Mr. Braniff, the company's agent at Pincher Creek. At the same time the plaintiff's father gave his promissory note, dated 13th June, payable six months after date to the order of Mr. Braniff for $65.58, the amount of the semi-annual premium. The plaintiff underwent his medical examination on 17th June; Mr. Braniff sent the application papers to the Calgary office on 19th June, whence they were forwarded to the head office of the company in New York, where the risk was accepted and the policy executed, dated 26th June, and dispatched on the following day to the Calgary agent, who received it in due course and sent it to the agent at Pincher Creek for delivery. In the meantime, on 30th June, Mr. Braniff had endorsed Dr. Dubuc's note without recourse, discounted it at the Union Bank of Canada at Pincher Creek, and received the proceeds. Subsequently, at maturity, the note was paid by the maker. The plaintiff, on 4th July, met with an accident in which he sustained serious injury to his spine, on account of which he was laid up for a long time, and was still incapacitated at the time of the trial. The policy was delivered by Mr. Braniff to Dr. Dubuc about the middle of July.

By the application it is specified that the policy is "to take effect as of date policy is written," and by one of the subsequent printed paragraphs of the application form

It is mutually agreed as follows: 1. That the insurance hereby applied for

1926

NEW YORK LIFE INS. CO. v. DUBUC.

NewcombeJ.

shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination.

When the insured met with the accident, he was travelling with his father in the state of Idaho. The automobile in which they were left the road and went down an embankment. The plaintiff emerged from the wreck badly injured and became unconscious. His father treated him on the spot, had him conveyed to Bonner's Ferry, where he went into hospital in charge of a doctor, whence he was removed on the following day to Calgary, where he was again placed in hospital in charge of Dr. McEachern.

The whole defence arises upon the clause in the application which I have quoted, and the principal point is that inasmuch as the applicant had consulted or been treated by a physician during the time intervening between his medical examination and the delivery of the policy, the insurance did not take effect.

The policy itself contains the following clause:

> This policy takes effect as of the twenty-sixth day of June, nineteen hundred and twenty-four, which day is the anniversary of the policy.

I shall have something more to say about the delivery of the policy, but I think it must be taken to have been duly completed when Dr. Dubuc actually received the policy; moreover I think that the premium must be regarded as paid when, on 30th June, the company's agent received from the bank, without recourse, the proceeds of the note which was given in payment of the premium. Therefore, assuming delivery and receipt of the policy, and payment of the premium, the sole question for consideration is as to the interpretation and effect of the remaining stipulation

> and then only if the applicant has not consulted or been treated by any physician since his medical examination.

Now it will be perceived that it is necessary, in order that these words should be given an intelligible meaning, to interpret them reasonably and with the necessary implications. The word " then," in the context in which it stands, is to be understood as equivalent to " in that case " or, describing the case,

> in the event that the policy has been delivered and the first premium paid;

it would not do to interpret the word as an adverb of time, because not only is that not its natural significance in this

place, but moreover because the obvious reason of the clause is that failure of the applicant's health, so far as to cause him to consult a physician or to receive medical treatment, would naturally affect the basis of the application, and require reconsideration of the risk, which, unless re-accepted, would not attach at any time. Therefore, adopting the only meaning which I think permissible, the clause, in its application to a state of fact in which the applicant had consulted or been treated by a physician after his medical examination, would read as follows:

> It is mutually agreed as follows: that * * * the insurance hereby applied for shall take effect only if the applicant has not consulted or been treated by any physician since his medical examination.

When this clause is considered in relation to the provision that the policy shall take effect as of its date, it acquires a definite and reasonable meaning. The clause qualifies or creates an exception from the special stipulation that the policy is to take effect as of its date, and the words

> has not consulted or been treated by any physician since

have relation only to a time antecedent to that date; the insurance applied for, which, if it ever become effective, is to take effect as of the date of the policy, is not to take effect if the applicant has consulted or been treated by any physician since his medical examination. This protects the company against such an impairment of health between the date of the medical examination and the date of the policy as was considered apt materially to affect the condition of the applicant as represented by the application and the medical certificate, and the word "since" cannot consistently with the structure and intent of the application and the policy, when read together, have reference to any time subsequent to the date stipulated by the contract for the coming into force of the policy. Previously to this date the applicant had not consulted or been treated by any physician since his medical examination, and therefore the policy attached as of the date particularly mentioned both in the application and in the policy. Moreover any other reading of the clause would involve the extraordinary situation whereby the applicant for a policy to take effect as of its date, whose application had been accepted, whose policy, to take effect of its date, had been written and executed by the company, and whose premium, reckoned from the policy date, had been paid and accepted by the

1926

NEW YORK LIFE INS. CO. v. DUBUC.

NewcombeJ.

company, would remain subject to all the vicissitudes of delay, accident in transmission, negligence in delivery, and other fortuitous occurrences, which might render ineffectual or postpone the very risk which it was the object of the transaction to insure.

Then it is said that the policy was not delivered, and this rests upon the view that Mr. Braniff, the agent who actually handed out the policy to Dr. Dubuc about the middle of July, and who in ordinary course was the agent of the company through whom delivery should be made, had no authority to deliver the policy because of the instructions which accompanied it. This point arises because the plaintiff's counsel, upon examination for discovery of Mr. Blackey, the defendant's Calgary manager, called for production of the letter which accompanied the policy when it was sent to Mr. Braniff for delivery, and defendant's counsel informed him in reply that the defendant did not have the letter, but he produced a printed form which the plaintiff's counsel then put in as a part of the discovery with an admission that the letter which accompanied the policy, when it was sent from the Calgary office to the local agent at Pincher Creek, was in that form. In this form of letter the agent is told

> you are allowed not to exceed one month from this date to deliver these policies,

and, by a printed notice in the margin, it is said that a policy must not be delivered

> if any change whatever has occurred in the health or occupation of the applicant, or if he has consulted or been treated by a physician since the date of his medical examination. In such case the agent must at once return the policy to his branch office with full particulars and await further instructions.

And by a subsequent paragraph in the margin it is said:

> A policy must not be delivered to a third party tendering the premium unless the agent (by personal interview with the applicant if possible) first satisfies himself that the applicant has not consulted or been treated by any physician, and that there has not been any change whatever in the health or occupation of the applicant since the date of his medical examination.

Now the company could not, consistently with its obligations, impose conditions upon the delivery of the policy which were not provided for by the contract. I doubt that it was the intention of the company to instruct the agent to withhold delivery, except as authorized by the contract;

1926

NEW YORK LIFE INS. CO. v. DUBUC.

Newcombe J.

for the reasons which I have mentioned, I think that the insured was entitled to his policy when he received it, and therefore that the agent did not misinterpret his instructions; he still remains the company's agent; he was to exercise his own judgment upon the questions of fact involved in his instructions, and therefore I think that the delivery of the policy made by the agent must be regarded as delivery by the company.

Although, by the application, the policy was not to take effect unless and until delivered, there is nothing to indicate an intention that, when delivered, it should not operate according to its terms, and therefore as of 26th June.

For these reasons the appeal should be dismissed with costs.

IDINGTON J.—For the reasons assigned by the learned judges in the appellate court below, and in this court by my brother Newcombe J., I agree that this appeal be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lougheed, McLaws, Sinclair & Redman.*

Solicitor for the respondent: *F. O. McKenna.*

NATIONAL LIFE ASSURANCE COMPANY OF CANADA (DEFENDANT)... } APPELLANT;

AND

FLORENCE McCOUBREY (PLAINTIFF)..RESPONDENT

1926

*Mar. 4, 8.
*Mar. 13.

Life insurance—Designation of preferred beneficiary in policy—Subsequent will—Right to recover under policy without furnishing letters probate—Life Insurance Act, Alta., 1924, c. 13—Ontario Insurance Act. 1924, c. 50—Appeal to Supreme Court of Canada—Supreme Court Act, s. 2e.—Final judgment—Order in "exercise of judicial discretion"—Quashing appeal as being manifestly devoid of merit.

S. 28 of *The Life Insurance Act of Alberta* (1924, c. 13) or s. 139 of *The Ontario Insurance Act,* 1924 (c. 50), in expressly creating a trust of the insurance moneys in favour of the beneficiary (or beneficiaries) in the preferred class, not only takes the moneys out of the estate of the insured, but makes clear the status of the designated preferred beneficiary to recover the same from the insurer, without intervention of the insured's personal representatives, as a trust fund in the hands of the insurer of which such beneficiary is the owner in equity.

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

1926

NATIONAL LIFE ASS. CO. v. McCOUBREY.

If, where either of said statutes apply, a wife is named as sole beneficiary in a policy of insurance on her husband's life, and it appears that subsequent to the date of the policy he made a will, produced and sworn to by her as his last will, which declares her to be the sole beneficiary of his life insurance, and no reason is shown for believing that any alteration in the designation of beneficiary has been made, the insurer is not entitled to require the production of letters probate as a condition precedent to payment to such beneficiary. A requirement of the policy that the "title of the person claiming shall be duly proven" is satisfied by the production of the policy naming the claimant as sole beneficiary. Letters probate of the deceased's will form no part of her chain of title.

If an appeal, though within the jurisdiction of the court, be manifestly entirely devoid of merit or substance, the court will entertain favourably a motion to quash it.

The plaintiff sued to recover the amount of a policy of insurance and interest thereon, and, having begun action by a specially endorsed writ, moved before a judge in chambers for speedy judgment under Order XIV, r. 1 of the Rules of the Supreme Court of British Columbia, and it was ordered that judgment be entered for the plaintiff for the sum mentioned in the policy and that the action should poceed as to the demand for interest. The order was affirmed by the Court of Appeal for British Columbia.

Held, the order for judgment was a "final judgment" as now defined in s. 2 (*e*) of the Supreme Court Act (R.S.C, 1906, c. 139, as amended); also it was not an order amounting merely to an exercise of judicial discretion within the purview of s. 38 of said Act; and grounds urged under those sections against the defendant's right of appeal to the Supreme Court of Canada were not maintainable; but the court, applying the principles stated in the first part of this head-note, quashed the appeal on the ground that it was manifestly devoid of merit.

MOTION by the plaintiff (respondent) to quash an appeal taken by the defendant from the judgment of the Court of Appeal for British Columbia affirming an order made by a judge in chambers, on a motion for speedy judgment under Order XIV, r. 1 of the Rules of the Supreme Court of British Columbia, that judgment be entered for the plaintiff against the defendant for the principal sum mentioned in a policy of life insurance, and that the action should proceed as to the demand for interest.

W. D. Herridge for the motion.

G. F. Macdonnell contra.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff (respondent) sues in the Supreme Court of British Columbia to recover the amount of a policy of insurance ($7,500) on the life of her late hus-

band, and interest thereon. She is the sole beneficiary named in the policy. The defendant company, under authority of a judge in chambers, entered a conditional appearance. It, no doubt, intended to dispute the jurisdiction of the British Columbia court, although it does business in that province and is registered there as an extra-provincial company. The insured made application for the insurance at Calgary, Alberta, where he then resided. He removed to Vancouver a short time before his death which occurred there on the 29th of March, 1925. The head office of the insurance company is at Toronto and the policy is payable there. Objection to the jurisdiction of the British Columbia Court appears to have been subsequently abandoned.

"Proofs of loss" were duly made by the claimant on forms furnished by the defendant company. The only exception taken to their sufficiency was the absence of probate of the last will of the insured. To a question in the forms as to the existence of such a will the answer made by the claimant was: "Yes, but not yet probated." The plaintiff declined to comply with the demand of the company that she should furnish probate on the ground that the will of the insured was not an element in her title to the insurance moneys and that to obtain it would put her unnecessarily to very great expense. She did, however, furnish the company with what she, in her affidavit made in support of the motion for judgment, swore to be

her husband's last will and testament which was executed by him just before he went to St. Paul's Hospital in the city of Vancouver on his last illness.

This document bears date of 24th of January, 1925, and contains a clause which declares the plaintiff sole beneficiary of her husband's life insurance. The plaintiff also deposed that she is solely entitled to the insurance moneys in question.

Having begun this action by a specially endorsed writ, the plaintiff moved before a judge in chambers for speedy judgment under order XIV r. 1 of the rules of the Supreme Court of British Columbia. She was not cross-examined, as she might have been, on her affidavit filed in support of this motion which contained both the foregoing statements; nor were they contradicted.

1926

NATIONAL LIFE ASS. CO. v. MCCOUBREY.

Anglin C.J.C.

The only grounds of defence suggested in answer to the motion were the plaintiff's failure to produce the letters probate of her husband's last will and to furnish the defendant with a formal discharge for the moneys payable under the policy. In reply the plaintiff asserted that production of this discharge had been dispensed with by the company's officers. She has, nevertheless, executed such a document and offers to furnish that or any other form of release which the company may demand. No exception has been taken to the sufficiency in form of the discharge thus offered.

No material fact is in dispute and no fact is suggested in the affidavits filed on behalf of the defendant in answer to the motion for judgment which casts the slightest doubt on the plaintiff's right to immediate payment of the insurance moneys. The only ground for resisting her claim to judgment preferred at bar in this court is the absence of such further assurance as probate would furnish that the document which she has sworn is her husband's last will is such in fact. Subject to this objection, the liability of the defendant to pay the policy sued upon is admitted.

It is obvious that probate would not afford any assurance that the insured had not, subsequently to the 24th of January, 1925 (the date of the will sworn to), executed another "declaration" under the Life Insurance Act of Alberta (Alta. statute, 1924, c. 13, s. 25 *et seq.*), not in the form of a will or codicil, altering the designation of beneficiary as permitted by s. 29 of the statute. Identical statutory provisions exist in Ontario (Ont. statutes, 1924, c. 50, s. 136 *et seq.*) where the defendant suggests that the contract of insurance was made, British Columbia (R.S.B.C., 1924, c. 117, s. 25 *et seq.*), Manitoba (Statutes of 1924, c. 99, s. 25 *et seq.*), Saskatchewan (Statutes of 1924, s. 31, s. 194 (*d*) *et seq.*), New Brunswick (Statutes of 1924, c. 31, s. 25 *et seq.*), Nova Scotia (Statutes of 1925, c. 2, s. 25 *et seq.*) and Prince Edward Island (Statutes of 1924, c. 9, s. 25 *et seq.*). In the province of Quebec, chapter 244 of the Revised Statutes of 1925 makes provisions in some respects similar. For present purposes it is immaterial whether the rights of the parties in respect of the insurance moneys in question are governed by the Ontario statute or by the Al-

berta statute. So far as they are material the provisions of both are the same.

If the defendant company should be entitled in the present case, as a condition precedent to payment, to require the production of letters probate or other proof that the insured had not by subsequent "declaration" within s. 29 of the Alberta statute (s. 140 of the Ontario statute) altered the designation of the beneficiary named in the policy sued upon, wherever alteration of beneficiary is permitted under the law any claim by a preferred beneficiary for payment to him according to the tenor of a matured policy of life insurance may be successfully resisted on similar grounds without alleging, or offering evidence of, the existence of any reason for believing that any alteration in the designation of beneficiary has in fact been made. Section 28 of the Alberta statute (s. 139 of the Ontario statute), in expressly creating a trust of the insurance moneys in favour of the beneficiary (or beneficiaries) in the preferred class, not only takes the moneys out of the estate of the insured but makes clear the status of the designated preferred beneficiary to recover the same from the insurer, without intervention of the insured's personal representatives, as a trust fund in the hands of the insurer of which such beneficiary is the owner in equity. *Gregory* v. *Williams* (1); *Re Empress Engineering Co.* (2); *Gandy* v. *Gandy* (3). The case at bar is thus clearly distinguished from *In re Engelback's Estate, Tibbets* v. *Engelback* (4); and similar authorities. See *Re Fleetwood's Policy* (5).

The learned judge in chambers, on the 11th of August, 1925, ordered that judgment be entered for the plaintiff against the defendant company for the principal sum mentioned in the policy and that the action should proceed as to the demand for interest. On appeal this order was unanimously affirmed by the Court of Appeal for British Columbia on January 5, 1926, the court being of opinion that the affidavits filed on behalf of the defendant disclosed no defence to the action.

The defendant has appealed to this court. The plaintiff moves to quash the appeal. Two grounds were originally

(1) [1817] 3 Mer. 582.
(2) [1880] 16 Ch. D. 125.
(3) [1885] 30 Ch. D. 56, at pp. 57, 67.
(4) [1924] 2 Ch. 348.
(5) [1926] 1 Ch. 48.

1926

NATIONAL LIFE ASS. CO. v. MCCOUBREY.

Anglin C.J.C.

urged at bar in support of the motion, (*a*) that the order for judgment was not a final judgment within s. 2 (*e*), and (*b*) that it was an order made in the exercise of judicial discretion and, therefore, unappealable under s. 38 of the *Supreme Court Act*.

Formerly, when only

> a judgment, rule, order or decision whereby the action, suit, cause, matter, or other judicial proceeding (was) finally determined and concluded

was a "final judgment" for the purposes of appeal to this court, an order for judgment, however conclusive of the rights of the parties in controversy in the action, was not so regarded, *Rural Municipality of Morris* v. *London & Canadian Loan Co.* (1). But, under the present definition of "final judgment," i.e.,

> 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 (s. 2 (*e*)),

the final character of an order for judgment such as that before us is indubitable.

Nor does such an order amount merely to an exercise of judicial discretion within the purview of s. 38. In directing judgment the judge in chambers—and the Court of Appeal in affirming him—necessarily determined judicially that the matters urged in answer to the plaintiff's claim were devoid of merit and afforded no substantial ground of defence. Such a decision and the order giving effect to it are not discretionary, although an order dismissing a motion for judgment, if based on the view that the suggested defences disclose matter which should be disposed of after trial rather than summarily upon motion, may be discretionary as well as not final.

Upon the argument of the motion, however, it was suggested to counsel for the respondent that he should consider the advisability of asking that the appeal be quashed for such manifest lack of substance as would bring it within the character of vexatious proceedings designed merely to delay the plaintiff's recovery—"proceedings against good faith." *Supreme Court Act*, s. 50; *Fontaine* v. *Payette* (2). Every court of justice has an inherent jurisdiction to prevent such abuse of its own procedure,

(1) [1891] 19 Can. S.C.R. 434.

(2) [1905] 36 Can. S.C.R. 613, at p. 615.

Reichel v. *McGrath* (1). If an appeal, though within its jurisdiction, be manifestly entirely devoid of merit or substance, this court will entertain favourably a motion to quash it, as it does in cases where costs only are involved, (*Schlomann* v. *Dowker* (2); *Angers* v. *Duggan,* 19 Feb., 1907, Cameron, 3rd Ed., p. 92; *Moir* v. *Huntingdon* (3); *Assn. Pharmaceutique* v. *Fauteux,* 20 Feb., 1923), as a convenient way of disposing of the appeal before further costs have been incurred. The motion stood over to permit counsel to consider it from this aspect and was subsequently further argued.

After full consideration we are satisfied that the appeal lacks merit and that interference with the order for judgment, unanimously affirmed by the provincial appellate court, would be clearly unjustifiable.

Liability on the policy is admitted. The only defence suggested is that production of probate of the last will of the insured is a condition precedent to the plaintiff's right to payment. The policy requires that the

title of the person claiming shall be duly proven.

That condition was satisfied by the production of the policy which named the plaintiff as sole beneficiary. The statute makes her a preferred beneficiary and a cestui qui trust entitled to claim payment to herself on maturity of the policy. Letters probate of the will of the deceased form no part of her chain of title. Moreover, the statute —whether that of Ontario or that of Alberta applies— explicitly protects the insurer making payment to her as such beneficiary against any claim that might afterwards be made under an "instrument in writing affecting the insurance money" of which it had not received notice before such payment. (Alberta statute, s. 40; Ontario statute, s. 151). Under both statutes "instrument in writing" includes a will. There is no adverse claimant for the moneys and no suggestion that the insurer has received any notice of such an instrument. Nothing set up by the defendant affords it the shadow of a defence either in fact or in law.

The motion will accordingly be granted and the appeal dismissed with costs.

Appeal dismissed with costs.

(1) [1889] 14 A.C. 665.

(2) [1900] Can. S.C.R. 323, at p. 325.

(3) [1891] 19 Can. S.C.R. 363.

1926

*Feb. 4.
*Feb. 5.

ROLAND STUART (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Crown—Public work—Payment of mortgage on part of land as full compensation—New trial—Expropriation Act, R.S.C., 1906, c. 143, ss. 22, 26, 29, 33.

The Federal Government expropriated in 1923 five parcels of land, being lots 149, 9011, 9565, 9565a and 9566 in Kootenay district, B.C., belonging to the appellant, for the purpose of a public park. A mortgage in favour of M. upon the four last mentioned lots had been discharged by the Crown in 1922 by the payment to M. of the sum of $22,000. It was alleged by the Crown in its information exhibited in the Exchequer Court that it was willing to pay as compensation for the five lots "the sum of $22,000, including thereon the said sum of $22,000," paid to M. in advance and without reference to the appellant.

Held that the payment to M. of the mortgage, although satisfying any claim in respect of the four lots covered by the mortgage, could not be applied towards compensation for lot 149, and that the case should be remitted to the Exchequer Court to determine the amount of compensation for that lot.

APPEAL from a decision of the Exchequer Court of Canada 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 judgment now reported.

R. Cassidy K.C. for the appellant.

Geoffrion K.C. and *A. B. Macdonald K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—On the 29th of May, 1923, the Attorney General of Canada, on behalf of His Majesty the King, exhibited in the Exchequer Court an information to which Roland Stuart and John Roper Hull and the Royal Trust Company, executors of the estate of William James Roper, deceased, were made defendants. This information was exhibited under s. 26 of the *Expropriation Act* (R.S.C., c. 143) in the matter of the expropriation of five parcels of land, to wit: lots 149, 9011, 9565, 9565A and 9566 in group one, Kootenay district, British Columbia, containing an area of 615·97 acres, more or less. It alleged that these

*PRESENT:—Anglin C.J.C. and Duff, Mignault and Rinfret JJ. and Smith J. *ad hoc.*

lands were taken for the purpose of a public work of Canada, a public park, and that, on the 4th of April, 1922, a plan and description of the land was deposited of record in the land registry office of the Nelson Land Registration District. Information also states that the defendant Roland Stuart claims to have been the owner in fee simple of the lands at the time of filing the plan and description, subject however to the following registered mortgages: (*a*) a mortgage, dated 11th of December, 1911, over lot 149, in favour of one William J. Roper for $10,000, the full amount whereof had been paid to the trustees of the Roper's estate, but a final discharge of the mortgage had not yet been registered; (*b*) a mortgage dated the 11th of February, 1912, over lots 9011, 9565, 9565A and 9566 in favour of William J. Malcolm to secure payment of $16,230.80, with interest at 7 per cent per annum,

which said mortgage was discharged by His Majesty the King, through the Minister of the Interior of the Dominion of Canada on the 5th day of June, 1922, by the payment to the said William J. Malcolm of the sum of $22,000, and a formal discharge of the said mortgage has been registered in the said land registry office.

It was further alleged that His Majesty the King was willing to pay to whomsoever the court might adjudge to be entitled thereto, in full satisfaction of all estate, right, title and interest, and all claims for damages that may be caused by the expropriation,

the sum of $22,000, including therein the said sum of $22,000 paid as aforesaid to discharge the said mortgage held by William J. Malcolm.

The defendant Roland Stuart alone filed a defence to the action. He alleged that the tender of $22,000 was not a sufficient and just compensation for the lands expropriated and claimed as compensation $500,000, with interest and costs. No question was raised as to the payment of the Roper mortgage on lot 149.

On lot 149 there is a hot spring known as Sinclair Springs. Its temperature is about 112 degrees and it has a considerable flow. The other lots are about two and a half miles by road from lot 149.

The contention of the defendant Stuart briefly is that all these lots were purchased as parts of one and the same scheme. Lot 149, on which the spring is located, owing to its mountainous character, is not suitable for building purposes, but the other lots it is urged, are an admirable site

1926

STUART
v.
THE KING.

Mignault J.

for hotels, camps and a golf course, the whole in beautiful mountain scenery. The Banff-Windermere Highway passes close to the spring, but is open only for four months of the year. The defendant describes the property as being an ideal pleasure and health resort, and claims that it has a special adaptability as such. He further contends that it is expropriated by the Government for the same purposes as those for which he intended to use it himself.

The case after a somewhat lengthy trial, and production of evidence taken in England under a commission in which the spring and its surroundings were compared to other hot springs in America and Europe, was submitted to the learned President of the Exchequer Court, who also, in company with counsel for the respective parties, visited the property. By his judgment, the learned President declared the lands vested in the Crown, and adding ten per cent for compulsory taking to the $22,000 tendered, awarded $24,200 as compensation for the lands and for all damages resulting from the expropriation. He further declared that the defendant Stuart was entitled to recover from the Crown $2,200, together with interest on $24,200 from April 4, 1922, to June 5, 1922, and interest on $2,200 from the last mentioned date to the date of the judgment, the Crown having paid the balance of the damages to the mortgagee on account of the defendant.

From this judgment the defendant Stuart appeals.

The appellant at the trial relied on some highly speculative features in connection with the expropriated lots, but it appeared to us, after the very full argument submitted on his behalf, that the learned President had duly considered all the elements which can appropriately enter into the valuation of such a property, and that he had placed a value on the lands with any potentialities or special adaptability which they possessed at the date of the expropriation. The defendant's grievance, as alleged, is that this valuation is inadequate, but after considering all the evidence to which we were referred, we do not think we would be justified in disturbing the learned President's estimate of value.

A difficulty however arises in connection with the course adopted by the Crown in paying to the mortgagee Malcolm the $22,000 it tendered as compensation. Malcolm had a

mortgage on lots 9011, 9565, 9565A and 9566. He had no interest in lot 149, and under his mortgage could claim no part of the compensation granted for that lot. Undoubtedly Stuart was entitled to compensation for the compulsory taking of lot 149.

It may be observed that under the *Expropriation Act*, the compensation money stands in the stead of the land or property expropriated, and any claim to or encumbrance on such land or property is as respects His Majesty converted into a claim to the compensation money, or to a proportionate share thereof, and is void as respects the land or property taken (s. 22). The information which is exhibited by the Attorney General should set forth, *inter alia*, the persons who, at the date of the deposit of the plan and description of the land or property, had any estate or interest in such land or property and the particulars of such estate or interest, and any charge, lien or encumbrance to which the land was subject, so far as it can be ascertained, and also the sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance (s. 26). The expropriation proceedings, as far as the parties thereto are concerned, bar all claims to the compensation money or any part thereof, including any claim in respect of all mortgages, hypothecs or encumbrances upon the land or property, and the court makes

> such order for the distribution, payment or investment of the compensation money, and for the securing of the rights of all persons interested, as to right and justice, and according to the provisions of this Act, and to law appertain (s. 29).

S. 33 adds that the Minister of Finance may pay to any person, out of any unappropriated moneys forming part of the consolidated revenue fund, any sum of money to which under the judgment of the Exchequer Court he is entitled as compensation money or costs.

If the course mapped out by the statute had been followed, the Exchequer Court would have made an order indicating the persons (owners or mortgagees) entitled to the compensation money, or to a proportionate share thereof, and these persons in due course would have been paid by the Minister of Finance. The Crown however paid to Malcolm in advance, and without reference to Stuart, the whole amount which it tendered to the latter as compensa-

1926

STUART v. THE KING.

Mignault J.

tion for the expropriation of the five lots. The sum it paid on the Malcolm mortgage no doubt satisfied any claim for compensation in respect of the property covered by that mortgage, to wit lots 9011, 9565, 9565A and 9566, but that payment cannot be applied towards compensation for lot 149. We think therefore that the action should be remitted to the Exchequer Court to determine the amount of compensation payable in respect of lot no. 149.

Under all the circumstances, and as the appellant fails with respect to the greater part of his claim, we think that there should be no order as to the costs of this appeal. The costs of all proceedings in the Exchequer Court will be in the discretion of the judge when disposing of the matter referred back.

Appeal allowed, no costs.

Solicitor for the appellant: *Robert Cassidy.*
Solicitor for the respondent: *W. S. Edwards.*

1926

*Feb. 15.
*Feb. 22.

QUEBEC RAILWAY LIGHT & POWER COMPANY (DEFENDANT) ..... APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF) ..... RESPONDENT.

Railway—Crossing of tracks by two railways—Order of the Board of Railway Commissioners—Signalman paid by one company—Re-imbursement of half by other company—Injury to signalman—Joint liability.

The appellant company obtained leave from the Board of Railway Commissioners to cross the tracks of the respondent company and the Order of the Board provided that the respondent company "shall employ and pay the signalmen necessary to operate the interlocking plant, at the joint expense" of both companies.

Held that the compensation under the Workmen's Compensation Act granted to a signalman injured while lifting a semaphore lever was an expenditure within the terms of the order.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and maintaining the respondent's action. The material facts of the case and the questions at

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

issue are fully stated in the above head-note and in the judgment now reported.

St. Laurent K.C. and *P. Taschereau* for the appellant.

Tilley K.C. and *Gravel K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal by special leave of this court from a judgment of the Court of King's Bench, Quebec.

On the 24th of June, 1910, the appellant obtained leave from the Board of Railway Commissioners for Canada to cross the tracks of the respondent in St. Valier street, in the city of Quebec. By the order of the Board, certain directions were given as to the installation of semaphores, of a diamond and derails, of the interlocking plant and of an annunciator to warn signalmen of the approach of trains. The order further contained the following provision:—

7. The Canadian Pacific Railway Company shall employ and pay the signalman necessary to operate the interlocking plant, at the joint expense of the applicant company (the present appellant); the applicant company to reimburse the Canadian Pacific Railway Company to the extent of one half the said expense upon the rendering of monthly accounts by the Canadian Pacific Railway Company to the applicant company.

An accident having happened to a signalman while lifting a semaphore lever, the workman brought an action against the present respondent under the Quebec Workmen's Compensation Act (R.S.Q. 1909, ss. 7321 et seq.), and was awarded $3,000 as compensation, with interest and costs. The respondent had contested the plaintiff's action, so that it was condemned to pay a considerable sum for costs as well as for the interest on the capital sum awarded. The respondent paid the amount of the judgment, and claimed one half of its expenditure from the appellant. It was granted merely one half of the capital sum awarded to the signalman, the court being of the opinion that it had uselessly contested the latter's action, thus incurring by its own fault liability for the costs of contestation and for interest. This judgment having been affirmed by the Court of King's Bench, the appellant obtained special leave to appeal to this court.

1926

QUEBEC R. L. & P. Co. v. CAN. PAC. RY. Co.

Mignault J

We are all of opinion that the compensation granted to the signalman under the statute is an expenditure which comes fairly within the terms of the seventh paragraph of the order of the Board of Railway Commissioners. The respondent is ordered to employ and pay the signalmen necessary to operate the interlocking plant at the joint expense of the appellant, and the obligation of the latter is to reimburse the respondent to the extent of one half "the said expense." To borrow the language of their Lordships of the Judicial Committee in *Workmen's Compensation Board* v. *Canadian Pacific Railway Co.* (1), the right conferred on the workman, by the *Workmen's Compensation Act,* is the result of a statutory condition of the contract of employment made with him, and his right to compensation arises, not out of tort, but out of his statutory contract. The *Workmen's Compensation Act* in question in that case was the statute passed by the legislature of British Columbia, but the language of their Lordships applies with equal force to the Quebec *Workmen's Compensation Act.* The right to compensation under that Act does not arise out of a fault committed or presumed, but is a right possessed by the workman under his contract of employment. It follows that when the respondent paid this compensation to the signalman, it made a payment to which paragraph 7 of the order applies, and the liability of the appellant to reimburse one half of this payment cannot be questioned.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Laurent, Gagné, Devlin & Taschereau.*

Solicitors for the respondent: *Pentland, Grant, Thomson & Hearn.*

(1) [1920] A.C. 184, at p. 191.

THE ONTARIO JOCKEY CLUB (DEFENDANT) ..... } APPELLANT;

AND

SAMUEL McBRIDE (PLAINTIFF) ..... RESPONDENT.

1926

*Feb. 22.
*Mar. 1.

Practice and procedure—Special leave—Application after delay—Extension of time—Powers of appellate court—Supreme Court Act, R.S.C., c. 139, ss. 69, 71.

When an application to an appellate court for special leave to appeal to this court is brought on after the expiry of sixty days prescribed by s. 69 of the Supreme Court Act, the appellate court, by its order granting such leave, can also extend the time for bringing the appeal, under the power conferred by s. 71.

MOTION by the respondent to quash the appeal.

Geo. F. Macdonnell for motion.

F. Hogg K.C. contra.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff (McBride) seeks to compel the defendant club to register him as an assignee of a share of its capital stock. This relief, denied by the trial judge, having been accorded by the Appellate Divisional Court, the defendant now appeals to this court.

Under the authority of s. 41 of the *Supreme Court Act* the Appellate Divisional Court granted special leave to appeal and, the application therefor having been brought on after the expiry of the 60 days prescribed by s. 69 of the *Supreme Court Act,* the court by its order, exercising the power conferred by s. 71 of the *Supreme Court Act,* also extended the time for bringing the appeal to the 15th of February, 1926.

The appeal having been duly launched under the terms of this order the plaintiff now moves to quash it. The sole ground relied on at bar in support of the motion was that the power conferred by s. 71 cannot be exercised where special leave to appeal is necessary.

In our opinion this objection cannot be maintained. S. 39 of the *Supreme Court Act* subjects the right of appeal conferred by s. 36 to two alternative conditions: either (*a*) the amount or value of the matter in controversy must exceed $2,000, or (*b*) special leave to appeal must be obtained. Upon condition (*b*) being satisfied the same right

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

1926

ONTARIO JOCKEY CLUB v. MCBRIDE.

Anglin C.J.C.

of appeal exists as in cases which fall within condition (*a*) and there is no good reason why s. 71 should not apply equally to both classes of appeals.

Moreover, the matter appears to be covered by authority. In *Goodison Thresher Co.* v. *Township of McNab,* the court of appeal for Ontario on the 31st of December, 1909, made an order extending the time for appealing to this court from its judgment pronounced on the 13th of May, 1909. The value of the matter in controversy being less than $1,000, special leave to appeal was required, and by s. 48 (*e*) of the *Supreme Court Act,* as it then stood, this court or the court of appeal was empowered to grant such leave. This court having, on the 25th of February, 1910, refused leave on the ground that its right to grant it did not exist after the expiry of the 60 days prescribed by s. 69, notwithstanding the order of extension made by the court of appeal (1), the latter court on application to it on the 24th of March, 1910, gave special leave to appeal and further extended the time for appealing. The appeal was subsequently heard on the merits and dismissed (2). See also *Brussels* v. *McCrae* (3).

The motion will be dismissed with costs.

Motion dismissed with costs.

1926

*Feb. 15, 16.
*Mar. 13.

A. S. RODOVSKY AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CALIFORNIA ASSOCIATED RAISIN CO. (DEFENDANT) ..... } RESPONDENT.

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

Principal and agent—Mandate—Agency—Revocation—Commission—Damages—Quantum meruit—Art. 1756 C.C.

The plaintiffs sued for $23,055.85 as commissions earned by them under a contract on orders for the purchase of raisins of the crop of 1920 to the value of $924,420.58 obtained by them as brokers or agents for the defendant company prior to the revocation of their agency on May 10, 1920.

---

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

(1) [1910] 42 Can. S.C.R. 694. (2) [1910] 44 Can. S.C.R. 187.
(3) Cameron (3rd ed. 1924) 332.

Held, that the plaintiffs were not entitled to the commission stipulated in the contract of agency as, at the date of its revocation, they had not taken any orders and had not performed various other duties for the discharge of which the stipulated commission would remunerate them.

Held, also, that assuming the revocation of the plaintiff's agency to have been unfair and actuated by reprehensible motives, it was not open to them to have a judgment based upon a right not asserted in their declaration or at trial, to recover damages for unlawful revocation of the agency.

Per Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.—Neither can compensation be allowed on a *quantum meruit* basis for whatever benefit the defendant company may have derived from such work as the plaintiffs had done before the revocation of their mandate.

Judgment of the Court of King's Bench (Q.R. 40, K.B. 97) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court and dismissing the appellants' action.

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

Geoffrion K.C. and *Badeaux* for the appellants.

John T. Hackett K.C. for the respondent.

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

ANGLIN C.J.C.—The plaintiffs sue for $23,055.85 as commissions earned by them under a contract on orders for the purchase of raisins of the crop of 1920 to the value of $924,420.58 obtained by them as brokers or agents for the defendants.

The learned trial judge gave judgment for $2,833 as damages for revocation of the plaintiffs' agency at an inopportune time and without cause, computed on the basis of orders which he held had been obtained by the plaintiffs in the course of their agency and which were subsequently filled by the defendants.

The Court of King's Bench (Lafontaine C.J., Dorion, Tellier, Hall JJ.—Greenshields J. dissenting) reversed this judgment and dismissed the action. The majority of the court held that the brokers' employment was revocable at the will of the principals; that it was revoked before any

(1) [1925] Q.R. 40 K.B. 97.

1926

RODOVSKI v. CALIFORNIA ASSORTED RAISIN Co.

Anglin C.J.C.

orders had been obtained; that the commission at the fixed rate would be earned only when the brokers had performed other important services subsequent to obtaining the orders; that no claim for *quantum meruit* had been preferred or attempted to be proved at the trial; that no claim for damages for wrongful revocation of the agency had been put forward by the plaintiffs and that they had failed to establish the only cause of action which they had presented.

The facts out of which this litigation arose are fully stated in the judgment of Mr. Justice Hall and in the dissenting opinion of Mr. Justice Greenshields. The latter learned judge concludes his opinion in these words:

> Lest there be any uncertainty as to my holding, I do not maintain the action as an action for damages, but I maintain it as and for commission earned under a contract. If my concluding statement is incorrect, the action of respondents is unfounded and should be dismissed (1).

It is, therefore, apparent that the Court of King's Bench unanimously took the view that it was not open to the plaintiffs to have in the present action a judgment based upon a right to damages for wrongful revocation of their agency.

Whatever recourse the plaintiffs might have on the footing of an unfair and inopportune (*intempestive*) revocation of their agency. (*Galibert* v. *Atteaux* (2); *Baugh* v. *Porcupine et al* (3); *Labonté* v. *Desjardins* (4); *Cyr* v. *Lecours* (5); *Comp.* 2 Colin & Cap., 3 ed., 717; 6 Aubry et Rau, 6 ed., 186; Fuzier Herman Rép., vo. Mandat, no. 783), it seems to be impossible to accord such relief in this action. The defendants have not been called upon, and have been given no opportunity, to meet such a demand.

Neither can compensation on a *quantum meruit* basis for whatever benefit the defendants may have derived from such work as the plaintiffs had done before the revocation of their mandate be now allowed. If, under the circumstances of this case, such a demand could be made, no claim was preferred on that basis and evidence at the trial was not directed to establishing the value of what the plaintiffs had done up to the time of the revocation.

(1) Q.R. 40 K.B. 97, at p. 104.
(2) [1895] Q.R. 23 S.C. 427.
(3) [1911] 17 Rev. de J. 415.
(4) [1911] Q.R. 40 S.C. 521.
(5) [1914] Q.R. 47 S.C. 86.

It has also been suggested that from the defendants' circular letter of the 11th of March:

To our brokers:

Effective May 1, 1920, brokerage covering the sale of raisins for the account of this company will be paid upon the basis of 1½ per cent. On sales made prior to May 1, 1920, brokerage will be paid at the rate of 2½ per cent.

Raisins have advanced so greatly in price during the last few years that the brokerage is out of proportion with the service rendered, hence the revision.

Please advise us by return mail if you desire to continue representing this company, in the territory assigned to you, upon the basis of 1½ per cent brokerage.

and the plaintiffs' letter of the 22nd of March accepting the new basis of remuneration, which was couched in these terms:

Dear sir:

We have received your brokers' letter dated March 11 pertaining to reduction of commission.

We certainly wish to remain as representatives for the California Assorted Raisin Co. in the assigned territory as in the past, even if at a new rate of commission * * *.

it is a fair inference that the plaintiffs were engaged to represent the defendants at least until the close of the business year then about to open. But what the defendants asked was whether the plaintiffs desired " to continue representing " the company and the plaintiffs' assent was to remain such representatives " as in the past." The plaintiffs had been acting as selling agents for the defendants from 1916. There is no suggestion that during that period there ever was an engagement for any definite time, or that the plaintiffs' mandate was not revocable at any moment at the will of the defendants. The continuing mandate contemplated in the letters quoted was evidently to be on the same footing as formerly as to all its terms except the rate of commission. It would require something much more definite and precise to exclude the application to it of the general rule of law expressed in the Civil Code:

Art. 1756. The mandator may at any time revoke the mandate * * *.

This is a term recognized by law in every contract of agency (*Cantlie* v. *Coaticook Cotton Co.* (1), Pand. Belges, 1896, no. 222), unless clearly excluded, when, of course, *conventio vincit legem.* The basis of the plaintiffs' action

(1) [1887] M. L.R. 4 Q.B. 444.

1926

RODOVSKI v. CALIFORNIA ASSORTED RAISIN CO.

Anglin C.J.C.

is a contract of agency or mandate, inherent in which is the risk of revocation at the will of the principal.

On the evidence it is clear that the plaintiffs were not in a position to obtain, and they did not in fact obtain any orders for the year 1920, although they did certain preparatory work in the mutual interest of themselves and of the defendants, which would probably have proved advantageous to both parties had the plaintiffs subsequently received, as they expected, and probably with good reason, authority to solicit and take actual orders. The plaintiffs in fact did none of the manifold things which they would have been obliged to do in order to become entitled to the stipulated commission had their agency not been revoked. That commission was a single fixed percentage to cover all the services to be rendered by the plaintiffs in the course of their duty as defendants' agents. It could be earned only by, and no part of it was payable until. the complete fulfilment of those services.

It may be that the revocation of the plaintiffs' agency was as unfair and was actuated by motives as reprehensible as they suggest. To whatever liability such action of the defendants may have subjected them, that liability was not the contractual obligation to pay commission which is the sole basis of the claim made in this action.

The appeal fails and must be dismissed with costs.

MIGNAULT J.—The appellant's action, as I read it, and I have very carefully read it, is not an action in damages for breach of contract by reason of the termination of his agency. He claims commission under the agency contract for orders which he alleges he obtained for the sale of the defendant's raisins between the 28th of January and the 4th of May, 1920. To be entitled to that commission, it did not suffice to secure what are called memorandum orders, but commission was due only on sales actually carried out. The appellant did not carry out the sales. It may well be that he was prevented from so doing by the termination of his agency early in May, 1920, but if this termination was a breach of his contract, he had a cause of action against the respondent which he has not asserted in this case. We must deal with his action as brought, and it would not be permissible to transform it into a claim for damages for wrongful dismissal.

Having thus stated my reason for concurring in the judgment dismissing the appeal, I do not wish to be taken as agreeing in the conclusion that the respondent had the right to terminate the appellant's agency during the season of 1920, having regard to the circular letter of the 11th of March offering the agency to the appellant at a commission of 1½ per cent on sales subsequent to May 1st, 1920, and the acceptance by the appellant of this agency on these terms. The respondent terminated the agency shortly after May 1st, so that the appellant had no opportunity thereafter to earn his commission. If this was a breach of the agency contract, the appellant had the right to claim damages, but, as I have stated, this is not the cause of action which he asserts in these proceedings.

I therefore think that his appeal fails.

Appeal dismissed with costs.

Solicitors for the appellant: *Buchanan, Badeaux & Buchanan.*

Solicitors for the respondent: *Foster, Mann, Place, MacKinnon, Hackett & Mulvena.*

THE ONTARIO EQUITABLE LIFE AND ACCIDENT INSURANCE COMPANY (DEFENDANT) ..... APPELLANT;

AND

HESTER ANNE BAKER (PLAINTIFF) ....RESPONDENT.

1926
*Feb. 8.
*Mar. 13.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Insurance—Life—Premium—Payment—Receipt for premium on agent's life signed by agent—Prima facie proof of payment—Onus

A receipt for an insurance premium on the life of a district agent of the insuring company countersigned by the district agent himself and found among his papers after his death, admitted in evidence in an action on the policy, did not in the circumstances constitute *prima facie* proof of the payment of the premium.

The onus of proof of the issue as to payment of the premium was not, by the production of the receipt, shifted to the defendant company but rested upon the plaintiff uninterruptedly from the beginning to the end of the case.

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

1926

ONT. EQUIT. LIFE & ACC. CO. v. BAKER.

Newcombe J.

The production of the receipt should have been treated by the trial judge merely as one fact in the case, i.e., as a part or incident of the whole body of the evidence.

The evidence adduced in this case by the company held sufficient to show that the premium had not in fact been paid.

Judgment of the Court of Appeal (19 Sask. L.R. 571) rev.

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

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

Gordon for the appellant.
Bastedo for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff (respondent) sued as beneficiary under a policy of insurance upon the life of her son, the later Wilbur Fletcher Baker, who lived with her at Moose Jaw, in the province of Saskatchewan, alleging that the deceased had paid the premiums which had become due upon the policy at the time of his death. The defendant (appellant) denied the payment of the premium which became payable on 1st September, 1923, the last to mature. It is upon the issue so raised that the right of recovery depends.

The policy, dated 27th August, 1922, covered the life of Wilbur Fletcher Baker for the term of three years next following. It was payable to his mother, Hester Anne Baker, the respondent, if living, at the death of the insured, otherwise to his executors or administrators. The amount of the premium was $27.70, and was, by the terms of the policy, payable

> on the delivery of this policy * * * a like amount on or before the 1st day of March and September in every year during the continuance of the contract, until the premiums for three years shall have been fully paid.

By the conditions of the policy, thirty days of grace were allowed for the payment of renewal premiums, and, if any premium were not paid when due, the policy was to be void and all liability of the company thereon to cease: provided that the company might revive the policy within the

(1) [1925] 19 Sask. L.R. 571; [1925] 2 W.W.R. 378.

time and upon the terms thereby stipulated. It was further provided that

all premiums are payable at the head office of the company, but will be accepted elsewhere in exchange for the company's printed receipts, signed by the president, and countersigned by any authorized agent.

The head office of the appellant company is at Waterloo in the province of Ontario. By agreement of 1st September, 1921, the company appointed Lewis B. Willan its agent for Southern Saskatchewan

to solicit personally and through sub-agents for applications for life insurance, and to receive premiums for the said company,

and, within this district, he was to have power to appoint sub-agents, subject to the approval and rules of the company. He was to be responsible for all moneys received for or on behalf of the company either by himself or by his agents, and it was stipulated that such moneys should be treated as trust funds of the company, and should be used for no purpose other than as specifically authorized by the agreement. It was also provided that at the close of each month or oftener, as required by the company, the agent should make, on the forms furnished for that purpose, a full report of all collections, the report to be made to the head office not later than the first day of the next succeeding month. By the company's instructions, which accompanied the contract, renewal premiums, due on the first of the month, were to be reported by the sixth of the month following.

By agreement of 1st February, 1922, Mr. Willan, who is therein described as general agent for the appellant company, appointed the above named Wilbur Fletcher Baker district agent for the company

within the limits and under the instructions contained in the company's manual of rates, book of instructions to agents and requirements and provisions herein stated, or that may hereafter be communicated to him by the company, to solicit, personally and through sub-agents, for applications for life insurance, and to receive premiums for the said company, all of which applications and premiums so received by the district agent shall be delivered to the general agent (Willan) at his office in the Aldon Building in the city of Regina.

By this agreement the area within which the district agent had permission to operate was defined as the city of Moose Jaw and its environs, as thereby described, and the sub-agent had authority within his district to appoint sub-agents, subject to the approval and rules of the company.

1926

ONT. EQUIT. LIFE & ACC. CO. v. BAKER.

NewcombeJ.

It was moreover stipulated that the district agent should be responsible for all moneys received for or on behalf of the company, or on behalf of the general agent, either by him or by agents or other persons appointed or employed by him, and that

all such moneys shall be treated as trust funds of the general agent, and shall be used for no purpose other than as herein specifically authorized.

Then it was provided that

promptly at the close of each month, or oftener if required by the general agent, the district agent shall make, on the forms furnished for that purpose, a full report of all collections, enclosing therewith proper vouchers for commissions and authorized expenses and a remittance for the amount due to the general agent. This report must be made to the general agent at his office in the Aldon Building in the city of Regina, Saskatchewan, not later than the first day of the next succeeding month.

Moreover, it was stipulated that

All records of business done for the company by the district agent shall be entered upon records belonging to the general agent and all books of account, together with card records, bank books, policy registers, documents, vouchers and all other books and papers connected with the business of the company, whether paid for by the district agent or not, shall be at any and all times open to the officers of the company, and of the general agent in particular, or their respective representatives, for inspection, and freely exhibited and delivered to the general agent at any time on demand.

This agreement, by its terms, took effect as of 1st February, 1922, a date antecedent to the policy.

The insured paid the first and second premiums; these payments are not disputed. The policy was by its terms to be computed as from 1st September, 1922. The assured met with an accident on 7th or 8th September, 1923, followed by erysipelas, from which he died on 7th October following.

The respondent in making her case at the trial produced a receipt for the semi-annual premium of 1st September, 1923, made out in the company's printed form, signed by the company's president and managing director, and countersigned, dated September 1, 1923, W. F. Baker, Agent.

Following this counter-signature on the form of receipt is the printed note,

This receipt is not binding unless signed by an agent or cashier of the company.

The respondent testified that the counter-signature "W. F. Baker," was that of her son, the insured, and that the receipt was found after her son's death in her room, where he and Mr. Willan had been transacting some busi-

ness during her son's illness. It was on 13th September that Mr. Willan was there, and Mrs. Baker says that

after Mr. Willan left, the papers were there and that receipt was put in my room.

The deceased had an office in the Grayson Block on Main street where he transacted his insurance business, but he lived with his mother at her home. She says that her son did not visit his office after he was injured on 7th or 8th September; that he kept his business papers there, and the policy and his private papers at home; that she thought that the premium receipts, other than the one in question, were kept along with the insurance policy; that at the time Mr. Willan was there, her son had a good many of his office papers at the house going over them; that the policy was always kept in a private drawer; that she found the receipt "just where he left it for her." Then the respondent's son, Fred Baker, was called as a witness on her behalf. He said that previously to his brother's death, they (meaning his mother and he) could not find the September receipt; that the other receipts were kept with the policy which was in the desk at home; that the September receipt was not with the policy; that it was found after his brother's death in his mother's dresser. Ernest George Cook was called for the appellant and he testified that he had been appointed a sub-agent for the appellant company by the deceased, and he produced his agency agreement, whereby he was authorized to procure applications for insurance in the appellant company upon terms which were defined, or to be communicated. He said that Fred Baker came to his office on Saturday afternoon, a day or two before the expiration of the days of grace for paying the premium, and told him that he did not know whether the premium upon his brother's policy had been paid; that he wanted to make sure of it, and wanted him to see Mr. Willan; that he, Cook, then told Baker that Mr. Willan would be coming to Moose Jaw on the following Monday; that Mr. Coleman of his office had been talking to Mr. Willan on the telephone, and that he had told Mr. Coleman that he would be coming on Monday. He said:—

A. I suggested to Fred Baker that he should wait and see Mr. Willan on Monday, and he thought he would do so, I know his intention was to

1926

ONT. EQUIT. LIFE & ACC. CO. v. BAKER.

NewcombeJ.

pay the premium then, if it was not paid, I think he did not know whether it had been paid or not.

Q. As far as you know he was not sure one way or the other? Did he tell you that he would tender it on Monday?

A. Yes, he did.

Q. He said he would do so?

A. Yes.

In cross-examination Mr. Cook testified that he had no authority to receive the premium for the company, and that he told Fred Baker so. Mr. Coleman said that, on the Saturday mentioned, Mr. Willan had telephoned from Regina to enquire as to the condition of Wilbur F. Baker; that he, Coleman, had answered the telephone, and that in the conversation Mr. Willian "mentioned that he would be up to Moose Jaw on Monday." Then Fred Baker was recalled, and he testified that, as a result of the conversation which he had with Mr. Cook, he had refrained from remitting the premium to Mr. Willan at Regina on Saturday, relying upon the assurance received from Cook, such as it was, that Mr. Willan would be at Moose Jaw on the following Monday, which was the last day for payment of the premium; that it transpired however that Mr. Willan did not come until Tuesday; that on Tuesday he tendered the premium, but that Mr. Willan would not accept it.

Upon this evidence the plaintiff rested her case. There was no proof of payment of the premium, except in so far as the receipt operated as an acknowledgment; no books, accounts or entries were produced to show the payment; no evidence of any appropriation for the purpose. The defendant then moved for judgment.

The insured and the agent to receive the premium and to give the receipt being the same person, it is obvious that, upon the question of actual payment, the mere production of a receipt signed by the district agent, who was also the insured and the beneficiary under the policy, if he survived his mother, if evidence at all, was of very little value. It was the duty of the agent to keep account of his receipts for the company, and to keep the moneys so received separate from his own. If then the premium had been paid to the district agent, or appropriated by him for the company, one would naturally expect to find trace of it in his accounts.

Although no such evidence was produced, and the plaintiff's case rested solely upon the receipt, the learned judge, upon the motion for judgment intimated that he would not allow the motion without serious consideration, and the defendant's counsel, being unwilling to rest his case upon the material before the court, proceeded to call his witnesses.

It was proved for the defence that, on 1st September, 1923, the deceased was indebted to Mr. Willan, the company's general agent, in the sum of $648.32; that on 13th September, while the deceased was ill, Mr. Willan went to his house to assist him in the preparation of his report and statement for the preceding month; that a statement was then prepared showing $389.42 due for August premiums; that the deceased had not the money to pay the amount so due; but that he borrowed from the Canadian Bank of Commerce by discounting a note, the proceeds of which were credited to the deceased's bank account no. 1, and applied to the extent of $200 in payment of a cheque for that amount which the deceased gave to Mr. Willan on account, leaving a balance due of $189.42, which he promised to pay, saying that

> as soon as he got around he would be able to square the whole thing, not only that but the other amount that I owe as well.

The August statement did not include amounts payable to the general agent for premiums collected during June and July. Mr. Willan gave evidence that the total deficit when discovered was $1,343.30. It appeared that the deceased kept at the Canadian Bank of Commerce an account described as trust account no. 2, upon which he drew the cheques which he remitted to the general agent in payment of premiums collected. Senator Laird, the vice-president of the appellant company, testified that he had an interview with the deceased on 3rd April, 1923, when he instructed him

> that all the company's business and all company funds should be done through a specific trust account for that purpose;

that the deceased told him that he already had a trust account that he called no. 1, but that he would open a trust account, no. 2, for the purpose of carrying the company's business, and Mr. Laird says he understood that this account would be opened in the Bank of Commerce.

1926

ONT. EQUIT. LIFE & ACC. CO. v. BAKER.

NewcombeJ.

These bank accounts were produced; no. 1 begins on 31st March, 1923, and continues to the end of September, showing a credit balance of $11.29 on 17th September, 1923, the date of the last transaction, except a deposit of $31 on 3rd October. September opened with a credit balance of $1.36, and during that month were deposited $15 on the 1st, $50 on the 4th, $50 on the 5th, and $240.03, proceeds of discount, on the 14th. There is no evidence of the source of the three earlier deposits, amounting to $115. Trust account no. 2 was opened by a deposit of $336.75 on 4th May, 1923, the month following Mr. Laird's instructions. This account was active until 23rd July following, when it showed a balance of $1.42. There are no subsequent deposits or withdrawals shown upon this account. The bank manager explained that the deceased told him that his cheques might be charged to either account. It appeared that the deceased had sent to the general agent cheques on account of monthly settlements for which there were not sufficient funds. Senator Laird testified that the first he heard of these was in June, and that the deceased was in arrears from that time until his death. Mr. Willan and Senator Laird proved the system of issuing and distributing the official receipts, including the one upon which the plaintiff relies. It was shown that these receipts were issued by the head office and sent to the general agent about two months before the premiums became due, and that, when received by the general agent, they were sent out by him to the district agents, with bills for the premiums; that the deceased's receipt was accordingly sent to him a month or two before the expiry of the days of grace. The head office at the time of forwarding these receipts also sent notices to the policyholders, informing them of the dates when their premiums became payable, and therefore, in ordinary course, the deceased would receive notice of the maturity of his premium about the time that his September billing, accompanied by the receipt forms, including his own, came to hand. It was through this process that the deceased came into possession of the receipt for the premium in question, signed by the president of the company, and there is no doubt that he countersigned that receipt, presumably on 1st September, because it bears no other date.

The learned trial judge considered that the receipt was *prima facie* proof of payment which had not been refuted by the evidence which he describes as

referring to Baker's shortage in his accounts and his banking business, and that the burden was on the defendant to show that the payment acknowledged by the receipt had not been made. He reviewed the evidence as to the efforts made by Fred Baker on 29th September and 1st October to pay the premium to the sub-agent, Cook, or to Willan, and he finds

that Fred Baker was acting as agent for his brother, the insured, or his mother, the plaintiff, and that the tender (which he made to Willan on 2nd October) was good, although not made until one day after the expiration of the thirty days grace, either on the doctrine of estoppel or on the ground that the thirty days grace were extended by the actions of Willan;

he referred to *Tattersall* v. *Peoples Life Assurance Co.* (1). He found moreover,

that Fred Baker did not send the premium to Regina solely on account of the assurance that Willan would be in Moose Jaw on October 1, and that he had not sent it to Regina on October 1, because he was assured that Willan would be in Moose Jaw on October 2. If the action of the defendant through Willan did not amount to an estoppel, then it seems to me there was an extension of the time for one day on account of Willan's actions and statements.

Here it may be observed that if, as the learned judge found, Fred Baker, in his endeavours to pay the premium at the end of September and on 1st and 2nd October, was acting as agent for the insured or his mother, that fact is in direct conflict with any probability that the individual whose agent he was considered at the time that the premium had been paid on 1st September, the date of the receipt.

In the Court of Appeal Lamont J.A., who pronounced the judgment, having summarized the trial judgment, says that the evidence shews that it was a breach of the agent's duty to countersign and deliver a receipt for renewal of premium before he actually obtained the money; that a breach of duty will not be presumed; that the receipt was *prima facie* evidence of payment, because the deceased had authority to receive the premium and deliver the receipt to the insured, and that

the onus of displacing the plaintiff's *prima facie* proof of payment was on the defendants, and the question is, have they succeeded in establishing that the premium was not in fact paid by Baker to himself as agent of the company.

(1) [1904] 9 Ont. L.R. 611.

1926

ONT. EQUIT. LIFE & ACC. CO. v. BAKER.

Newcombe J

The learned Justice of Appeal considered that the evidence did not shew that the premium had not been paid; he says that, although the contract required the insured to treat the moneys of the company as trust funds, Baker had in practice been permitted by Willan to retain out of his collections the amount to which he was entitled for commissions, and to remit the balance only; that, for the months of June, July and August, Baker had not been remitting the full amount of the balances shewn in his reports; that if therefore he had collections in his pocket, the use by him of that money, up to the amount coming to him for commissions, would appear to have been sanctioned by the existing practice, and that at any rate the evidence did not warrant a finding that

> Baker committed a breach of his duty by handing over to himself, as a policyholder, the receipt for payment of the premium without first having received the same.

I have already shewn that the evidence of payment of the premium, if any, furnished by the facts which the plaintiff proved is of a very fragile character. The case is that the receipt was found in the plaintiff's room, which the insured had been using, and where he had been working with Mr. Willan upon his accounts; that his business papers had been brought there from his office; that the receipt when found was countersigned by the deceased, without whose signature it was expressed not to be binding, and that the receipt was not with the policy, although the policy was also in the room. It is the inference to be drawn from these facts which constitutes the alleged *prima facie* case of the plaintiff; but, whatever might otherwise have been the strength of this proof, it has to be considered with the evidence subsequently adduced by the defendant company in its defence, where it is shewn, as appears from the foregoing narrative, that the insured was in default in payment of premiums collected in June, July and August; that his bank balances had been found deficient and that payment of his cheques had been refused in consequence; that the balances to the credit of his two bank accounts on 1st September were only $1.36 and $1.42 respectively; that there was no deposit to the credit of either account which could be identified as including the premium in question; that on 13th September, when the

deceased, with Willan's assistance, prepared his August statement, he could not pay the premiums, amounting to $389.42, which he had collected for that month, and that the $200 which he paid on account were borrowed from the bank; that the combined balances in both accounts at the end of the accounting period of September amounted to only $12.71; that the state of the accounts was inconsistent with any right to make deductions for commissions; that the receipt forms signed by the president of the company, including Baker's, were sent to the district agent for collection, and that his possession of the receipt in question was therefore no evidence in itself that he had paid his premium. There was no suggestion of any record, credit, entry or note of the payment. It was of course the duty of the insured, as agent, to keep separate the company's money, and to have a just account of his receipts and agency transactions always available for the information of his principal. *Guerreiro* v. *Peile* (1), *Clarke* v. *Tipping* (2). In *Gray* v. *Haig* (3), the Master of the Rolls said:—

> It cannot, however, be too generally known or understood, amongst all persons dealing with each other, in the character of principal and agent, how severely this court deals with any irregularities on the part of the agent, how strictly it requires that he who is the person trusted shall act, in all matters relating to such agency, for the benefit of his principal, and how imperative it is upon him to preserve correct accounts of all his dealings and transactions in that respect.

It is suggested by the judgment on appeal that "Baker had collections in his pocket." That is mere conjecture, but, if he had the money wherewith to pay his premium, that does not, in the absence of other requisite evidence, establish the appropriation or payment of it to his principal's account.

In view of these facts, it is, I think, impossible, having regard to the weight of evidence, to find that the premium was paid. At best there is only some evidence of payment. Although ordinarily a receipt is *prima facie* proof of payment, here it is very questionable that, having regard to the facts and circumstances which accompanied the proof of the receipt, it could be taken as any evidence, still less as affording sufficient weight or probability to

(1) [1820] 3 B. & Ald. 616, at p. 618.
(2) [1846] 9 Beav. 284, at p. 292.
(3) [1854] 20 Beav. 219, at p. 239.

1926

ONT. EQUIT. LIFE & ACC. CO. v. BAKER.

NewcombeJ.

make *prima facie* proof. In any event I would have thought that any inference of payment which was admissible upon the plaintiff's case was overborne by the facts established for the defence.

But the fatal infirmity of the judgment consists in the misdirection that the onus of proof of the issue as to payment of the premium was, by the production of the receipt, shifted to the defendant, upon whom it thereafter devolved to establish that the premium had not been paid. On the contrary the burden of proving the affirmative of that issue rested upon the plaintiff uninterruptedly from the beginning to the end of the case. If, as the learned judges hold, the receipt, which was the plaintiff's exhibit, should be regarded as *prima facie* evidence of payment, and if, in the plaintiff's case, as rested at the trial, there was no evidence to negative or to disparage the presumption of payment arising from the possession of the receipt, then there was at that stage a burden upon the defendant to adduce evidence in answer to the *prima facie* proof—a burden which I think was amply satisfied; but the plaintiff had propounded the allegation that the premium was paid and the burden always rested upon her to establish that issue. Then, if at the end of the case the learned judge who tried the facts were left in uncertainty as to how the issue should be found, it was not the defendant who should have suffered; the trial judge ought rather to have regarded the receipt simply as one fact in the case, upon which there was no attendant or consequential shifting of the burden to prove the issue, and to be considered not otherwise than as a part or incident of the whole body of the evidence. *Abrath* v. *North Eastern Railway Co.* (1), *Smith* v. *Nevins* (2), per Duff J. The truth is that the judgments have confounded two different rules connected with proof which for the justice of the case it is necessary to distinguish, namely, the rule which requires that the burden of establishing an issue of which the proof is essential to the plaintiff's case shall rest upon the plaintiff, and the rule applicable to the condition which arises in the course of a trial, when a stage has been reached at which there is *prima facie* proof or presumption of the truth of

(1) [1883] 11 Q.B.D. 440. (2) [1925] S.C.R. 619, at p. 638.

an allegation, which ought therefore to be found true in the absence of further evidence; and this confusion has resulted in a finding which, I have no doubt, the evidence as a whole does not justify.

It remains to consider briefly the view expressed by the learned trial judge that the conversations which took place on 29th September and 1st October between Fred Baker, Mr. Cook, the sub-agent of the defendant company at Moose Jaw, and Mr. Willan, the general agent at Regina, operated either to estop the defendant company from denying the payment of the premium, or as an extension of the time for payment until 2nd October, when it was actually tendered by Fred Baker to Willan. It is clear that neither Cook nor Willan had any authority to extend the time for payment, and not only that, but Mr. Willan was expressly instructed in the documents defining his agency that renewal premiums were not to be received after the expiry of the days of grace, unless the policy were revived upon proof satisfactory to the company; and moreover, the evidence upon which the plaintiff relies to establish estoppel is lacking in the requisite elements. To mention only one particular, the information which Mr. Willan communicated to Mr. Cook by telephone, to the effect that he would be at Moose Jaw on 1st October, can justly be regarded as no more than a statement of intention, which, although not executed, did not lay the foundation for estoppel.

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

Appeal allowed with costs.

Solicitors for the appellant: *Gordon & Gordon.*
Solicitors for the respondent: *Haig & Haig.*

1926
*Feb. 2.

DOMINION TEXTILE COMPANY (DEFENDANT) ..... } APPELLANT;

AND

DAME M. L. SKAIFE (PLAINTIFF) ..... RESPONDENT.

Appeal—Jurisdiction—Interlocutory judgment—Inscription in law—Final judgment—Supreme Court Act, R.S.C., c. 139, s. 2 (e).

In an action for damages by the owner of certain land which he alleged had been flooded by the illegal raising of the level of the water in an adjoining lake, the defendant company denying any liability pleaded in justification that the dams and constructions existing from 1835 or replaced since had approximately the same elevation and that certain work done by its predecessors in title had in fact prevented the waters from raising to their normal height. The plaintiff filed an inscription in law asking that these allegations be struck from the plea. Judgment maintaining the inscription was affirmed by the appellate court.

Held that the judgment appealed from was a "final judgment" within the meaning of par. e of s. 2 of the Supreme Court Act.

MOTION by way of appeal from a decision of the Registrar of the Supreme Court of Canada refusing to affirm jurisdiction. Motion granted with costs.

The plaintiff claims to be the owner of lands in the township of Magog, in the province of Quebec, abutting on Lake Memphremagog and complains that the defendant company, as owner of certain dams at the outlet of the lake, has by its use and maintenance, injured her property by flooding and undermining the bank of the lake, and claims over $2,000. The plaintiff seeks an injunction as well as damages. The defendant company, besides denying all the plaintiff's allegations except its ownership of the dam, sets up in paragraphs four and five the following pleas:

4. That dams or constructions at the point in question have existed since the year 1835, and have moreover existed at the same elevation since the year 1882, the dam erected in that year having been carried away in 1915. The said dam or construction was replaced by a temporary dam erected in the same year which was replaced by the present dam in the year 1920 and 1921, all of which dams or constructions had approximately the same elevation.

5. So far from having caused the waters in the said lake to rise beyond their normal and usual height, defendant's autorus, by means of removing certain obstructions from the outlet of the said lake, and enlarging its sluice openings, prevented the waters in the said lake from rising to their normal height at times of freshets.

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

The defendant also by other pleas alleges that the plaintiff owing to the situation of the land in question, and by her own neglect, is herself the author of the damage in question, and finally by paragraph 9 claims that the action is prescribed. The plaintiff inscribed in law against paragraphs four and five, alleging that they did not constitute in law valid reasons in support of the defendant's conclusion, asking for the dismissal of the plaintiff's action and on other grounds. The matter of inscription came up before a judge of the Superior Court who maintained the inscription in law and ordered the two paragraphs struck from the defence. The defendant company appealed to the Court of King's Bench and the judgment of the trial court was affirmed.

The defendant company, having appealed to this court, made a motion before the Registrar for an order affirming the jurisdiction of the court to entertain the appeal. The Registrar having refused to grant the order, the defendant company made a motion before the court by way of appeal from that decision.

The Supreme Court of Canada, after hearing counsel, granted the motion with costs and affirmed its jurisdiction to entertain the appeal, holding that the judgment appealed from was a "final judgment" within the meaning of par. e of s. 2 of the Supreme Court Act.

Motion granted with costs.

Aimé Geoffrion K.C. for motion.
A. C. Casgrain K.C. contra.

1926

*Feb. 2.

MARY SIMMONDS (PLAINTIFF).....APPELLANT;

AND

CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

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

Appeal—Jurisdiction—Jury trial—Verdict for plaintiff—Appellate court directing new trial—Judicial discretion

The Supreme Court of Canada should not interfere with the exercise of discretion by an appellate court in directing a new trial in an action for damages maintained upon the verdict of a jury.

MOTION by the respondent for an order quashing the appeal on the ground that the judgment appealed from having been rendered in the exercise of judicial discretion, no appeal lies to the Supreme Court of Canada.

The appellant sued the respondent railway for $40,000 damages resulting from an accident at a level crossing, in the city of Toronto, when her husband was killed while driving a motor car. The jury found a verdict for the plaintiff for $13,904 and judgment was rendered accordingly. The respondent company appealed to the Appellate Division and that court directed a new trial, stating that "we should exercise our discretion and require the case to be retried."

The plaintiff appealed from that judgment to this court.

The Supreme Court of Canada, after hearing counsel, granted the motion with costs.

Motion granted with costs.

J. P. Pratt for motion.
Campbell contra.

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

THE GRESHAM LIFE ASSURANCE SOCIETY, LTD. (DEFENDANT) ..... } APPELLANT;

AND

LA BANQUE D'HOCHELAGA (PLAINTIFF) ..... } RESPONDENT.

1926

*Feb. 16, 18.
*Mar. 13.

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

Insurance—Life—Representations—Warranty—Answer by assured—Sober and temperate habits—Onus

The respondent bank, as assignee, sued the appellant company for the amount of an insurance policy on the life of M. The company resisted the claim on the ground that the assured had answered falsely to the question whether he was, at the time of the issue of the policy and for some years before, of sober and temperate habits. The policy contained a clause to the effect that the declarations made by the assured were, in the absence of fraud, to be considered as representations, and not as warranties.

Held that, according to the law of Quebec, the onus rests upon the insurer to establish misrepresentation of a fact of a nature "to diminish the appreciation of the risk or to change the object of it" and further, that he was induced to enter into the contract by such misrepresentation.

Held, also, that the appellant company had not sufficiently discharged the onus of establishing that the assured was not of sober and temperate habits.

Judgment of the Court of King's Bench (Q.R. 38, K.B. 529) aff.

APPEAL from a 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 judgments now reported.

John T. Hackett K.C. for the appellant.

Geoffrion K.C. and *Prud'homme K.C.* for the respondent.

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

DUFF J.—This appeal is concerned with a claim by the respondent bank as the assignee of a policy of insurance on the life of the late Joseph Emile Octave Morin, who died at some date between October, 1920, and April, 1921.

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

(1) [1925] Q.R. 38, K.B. 529.

1926

GRESHAM LIFE ASSUR. CO. v. LA BANQUE D'HOCHELAGA

Duff J.

The appellant company resisted the claim on the ground that the applicant's answer to one of the questions in the application was untrue. The question was:—

Avez-vous maintenant et avez-vous toujours eu des habitudes de sobriété et de tempérance?

and to this, the applicant answered "Oui."

The policy contains a clause to the effect that the declarations made by the assured are, in the absence of fraud, to be considered as representations, and not as warranties. The effect of such a clause was considered in *Kiernan* v. *Metropolitan Life Insurance Co.* (1), and the result of the examination of the law there is that in the province of Quebec the onus rests upon the insurer to establish misrepresentation of a fact of a nature

to diminish the appreciation of the risk or to change the object of it,

and further, that he was induced to enter into the contract by such misrepresentation.

The learned trial judge, applying himself to the issues of fact, first, whether the representation complained of was an untrue statement of fact; second, whether, if untrue, it was calculated to "diminish the appreciation of the risk," expresses himself satisfied that the assured, Morin, had enjoyed the confidence and esteem of his fellow-citizens; that he had always "*passé*," first, in his village of St. Jean Port Joli, and afterwards at Vilmontel and Amos,

comme un homme ayant plutot des habitudes de tempérance ou sobriété;

that it had not been established, and indeed that there was nothing to shew that his representations on this subject were calculated to diminish the appreciation of the risk; and that Morin might honestly have made the representations complained of. Nevertheless, after observing upon the difficulty of drawing the line of demarcation between people who can be described as being sober and temperate and those whose habits fall within the description "intemperate," he would not be disposed to say either that Morin's habits were those of sobriety and temperance or that he was an habitual drunkard.

The appreciation of the findings of the learned trial judge is, perhaps, a task of a little delicacy. His view, I think, may not unjustly be summed up thus: Morin was

(1) [1925] S.C.R. 600, at pp. 602, 603 and 604.

a man given to the habitual moderate use of intoxicating liquor, and at times to the excessive use of it. He was classed by his neighbours and by those familiar with his life as a man rather temperate in his habits, and although strictly the learned trial judge himself was not disposed to characterize his habits as "sober and temperate," he considered that the departure from accuracy in the statement of the assured was not sufficiently serious to prejudice an insurer in his appreciation of the risk; in other words, if a reasonable insurer had known the facts as the learned judge conceived them to be, the judgment of the insurer would not thereby have been influenced adversely to the application.

In the Court of King's Bench, three of the learned judges appear to have taken the view that in substance there was no misrepresentation. One, Mr. Justice Greenshields, expresses no opinion as to the proper characterization of Morin's habits, but finds as a fact that, assuming there was misrepresentation, the company was not induced thereby to issue a policy. The fifth of the learned judges of the Court of King's Bench, Mr. Justice Howard, thought the company was entitled to succeed on the ground that, although at the time the policy was issued, and for several years before, Morin had been of sober and temperate habits, such epithets could not properly be applied to his habits at an earlier period—in 1913, 1914 and 1915—when he was a member of the Quebec legislature; and on that ground, as well as on the ground that the representations constituted warranties, he dissented from the judgment of the court.

The question addressed to Morin had relation to his habits. Occasional excess is not necessarily, within the meaning of the words employed, inconsistent with an affirmation that the habits of the applicant are temperate. and, in applying the standard indicated by the question, as the Law Lords pointed out in *Weins* v. *Standard Life* (1), it would be useless to attempt a precise definition of such terms. What would be excess in one might be moderation in another. Differences in the capacity for imbibing strong drink are such that quantity does not in itself necessarily

(1) 21 Scot. L.R. 791.

1926

GRESHAM LIFE ASSUR. CO. v. LA BANQUE D'HOCHELAGA

Duff J.

afford a test. Then, as Lord Watson says, at p. 797, in judging of a man's sobriety for the purposes of applying such a standard, his occupation and position in life and the habits of those among whom he lives and works must always be taken into account.

There is virtual unanimity in the Court of King's Bench upon the character of Morin's habits at the time the policy was issued and for some years before. In support of this view, there is a very weighty body of evidence, and of special weight is the evidence given by the agent of the respondent bank at Amos, Rivard. It was Rivard's duty, and he says he was exact in discharging that duty, to report to his head office upon the habits of the customers of the bank, if there was anything in those habits worthy of remark. Morin was one of his customers, and although he was in the habit of drinking in moderation, Rivard considered him on the whole a temperate, hard-working man. He had made two reports upon him, the second of which he produced, and in which there was no reference to Morin's habits. The first report, fifteen months earlier, was not produced, and he was unable to speak positively as to its contents, but said that if there had been any reference to Morin's habits in the first report, it probably would have been repeated in the second. Rivard may properly be considered a witness not wholly disinterested, but his testimony as to Morin's habits is corroborated by the nature of his reports to the head office, and to his evidence importance must be attached.

To the same effect is the evidence of Dr. Bigué, the rsepondent company's medical examiner at Amos, of Joseph Germain, the respondent company's local agent, and of Mons. Paré, a King's Counsel there; and this evidence is supported by that of other respectable witnesses.

As against this evidence, there is testimony given by one witness, a total abstainer, and obviously not without bias, and by another who, admittedly, was not on friendly terms with Morin during his lifetime. The testimony of these two witnesses cannot be reconciled with the other evidence as to Morin's habits, during the period of which they speak, nor can it be reconciled with the learned trial judge's finding, as to Morin's reputation in Vilmontel and in Amos. There is really no sound juridical reason for

rejecting the testimony of those witnesses who aver that, during his residence at Vilmontel, Morin was not a man of intemperate habits within the contemplation of the question.

Much more serious was the attack made upon Morin's habits at an earlier period; that is to say, from 1912 to 1915; during the greater part of which period he was a member of the Quebec legislature. The most important witnesses called by the appellant company were Lavallée and Roy. As to these witnesses, Lavallée is obviously unreliable. As for the evidence of Roy, who was the barkeeper at the Mountain Hill hotel in Quebec, it must be contrasted with that of Fortin, who was the owner of the hotel, who knew Morin intimately, and declares that his use of liquor was moderate. On this statement, Fortin was not cross-examined.

The evidence of both these witnesses, Lavallée and Roy, must, moreover, be appraised in light of the finding of the learned trial judge, that there was nothing in the evidence to shew that any departure from strict accuracy in Morin's answers was calculated to diminish the company's appreciation of the risk. The learned trial judge rightly emphasized the fact that the company was informed that Morin indulged in the moderate use of liquor, and the conduct of the company in accepting the risk with this knowledge may properly be regarded as satisfactory evidence that such a use of intoxicants would not necessarily be incompatible with temperate habits, within the meaning of the application, as understood by the company. The learned trial judge's finding, coupled with his findings as to Morin's reputation at the village at which he lived during the same period, seem to shew that the learned judge did not consider that the evidence of these witnesses could be accepted without substantial qualification, and that this evidence, in so far as he accepted it, did not, in his view, justify the conclusion that, in the answer complained of, Morin had fallen into any serious misrepresentation.

The judgment of the Court of King's Bench ought not to be disturbed.

1926

GRESHAM LIFE ASSUR. CO. v. LA BANQUE D'HOCHELAGA

Anglin C.J.C.

ANGLIN C.J.C.—I have had the advantage of reading the opinion prepared by my brother Duff. I fully concur in his view that the evidence sufficiently establishes that the habits of the insured at the time the policy was issued and for some years before were sober and temperate. But the evidence as to the earlier period, 1913-15, is far from satisfactory. That the insured's habits were then those of a sober and temperate man is in my opinion not established. A very slight addition to the evidence adduced by the defendant would, I think, warrant the determination of this issue in the negative and, if it had been proven that during that period the insured was not a man of sober and temperate habits, I should hesitate long before regarding the misrepresentation thus shewn as not material in the sense indicated in Kiernan's case. But the burden of convincing the Court that the deceased was not of sober and temperate habits rested on the defendant. Not being entirely satisfied with the proof adduced to discharge that onus, I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Foster, Mann, Place, MacKinnon, Hackett & Mulvena.*

Solicitors for the respondent: *Geoffrion, Geoffrion & Prud'homme.*

1926

*Mar. 1, 2.
*Mar. 13.

ST. MICHAEL'S COLLEGE (PLAINTIFF) ... APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) ..... } RESPONDENT.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Municipal corporation—Land of college taken for city street—Statutory exemption from expropriation—Possession taken under supposed agreement and street constructed—Compensation to be determined by arbitration—Dispute as to terms of agreement for compensation—Basis of compensation—Equitable considerations.

The defendant city, desiring, for purposes of a street extension, certain land of the plaintiff college, proposed to expropriate, the college, claiming, under s. 15 of the *University Act*, R.S.O., 1914, c. 279, that

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

the city had no right to expropriate, sued to restrain it. Negotiations took place, resulting, as the parties believed, in a settlement, the action begun by the college was dismissed by consent and the city took possession and constructed the street which became an important thoroughfare. A board of arbitrators was appointed, as had been agreed, to fix the amount of compensation to the college, but the parties, on appearing before it, were unable to agree as to the principle upon which compensation was to be assessed under the settlement agreement, and in the result the college brought this action, asking for specific performance of the agreement as it conceived and alleged it to be, and alternatively a judgment setting aside the consent order dismissing its former action, on the ground that the order was founded upon a supposed agreement which had never, in fact, been concluded. At trial Riddell J. held the agreement had been made on the terms asserted by the college and was binding on the city. The Appellate Division varied this judgment, holding that, as the parties had differently understood what the terms of the agreement were, they were never *ad idem*, there had, therefore, been no agreement, and as, under the circumstances, the parties could not be restored to their former position, what had been done should stand and the city should compensate the college on certain basis laid down (see statement of the case *infra*) and directed a reference to the Master. The college appealed to the Supreme Court of Canada.

Held, that although there were disputes in certain respects as to the terms of the agreement, both parties understood that the college was to be fairly compensated; if there was no agreement the college must be compensated on equitable terms; so in the practical result it mattered little whether the right to compensation was considered as springing out of a specific agreement or resting upon equitable considerations; fair compensation would include payment of the value of the lands taken, not necessarily limited to the market value, but the value to the college in view of the purposes for which the land was used, and to which it had been dedicated; also compensation for any loss in respect of the diminution in value to the college of the remaining property in view of the purposes for which the property was in use or had been dedicated, whether caused by the construction or maintenance of the street or the severance of the lands taken; also indemnity for any loss consequent upon changes necessitated by the severance of the lands taken, such, for example, as the destruction and re-erection of buildings, in so far as this head of compensation was not included under the next preceding head; the value of the lands taken and the diminution in value of the property retained should be ascertained as of the date when the city took possession, and interest should be allowed from that date.

The judgment also provided for the closing of a certain street under certain conditions, and of a lane, and conveyance to the college, as had been agreed; for certain allowances to the city; and for assessment of compensation by the board of arbitrators which had been already constituted. It not having been explicitly agreed that the city should bear the expense of providing additional lands for the site of an Arts College, the question whether the cost of re-instatement in that sense would be a proper measure, in whole or in part, of the loss caused by the construction and maintenance of the street opened by the city must be one for the arbitrators.

1926

ST. MICHAEL'S COLLEGE v. CITY OF TORONTO.

The difficulties usually attending an action to compel specific performance of an agreement to refer to arbitration did not arise. The action was strictly an action founded upon the equity vested in the college, in consequence of the acceptance of possession by the city and its subsequent acts, to have the terms upon which possession was given carried into effect. In such a case, the absence of statutory formalities touching the evidence of those terms is not an answer, as it would be in a common law action—for services, for example, as in *McKay* v. *Toronto* ([1920] A.C. 208)—and the court will not hesitate to exert its powers as far as possible to see that the agreement is carried out, even though some of its terms should not be susceptible of enforcement by process *in personam*. *Wilverhampton & Walsall Ry. Co.* v. *London & N.W. Ry. Co.* (L.R. 16, Eq. 433). In view of the fact that the board of arbitrators had been constituted, it was a proper case for a declaratory judgment.

APPEAL by the plaintiff college from the judgment of the Appellate Division of the Supreme Court of Ontario, dated June 27, 1925, varying the judgment of Riddell J., the trial judge, dated June 9, 1924, in favour of the college.

The city of Toronto (defendant, respondent) had provided by by-law for a certain street extension and for the expropriation of part of the land occupied by the college lying on the line of projected extension. After certain communications had taken place between the city's assessment commissioner and the college, the city proposed to take expropriation proceedings, whereupon the college, which is a "federated college" associated with the University of Toronto, relying upon the exemption from compulsory taking of real property of federated colleges created by s. 15 of the *University Act*, R.S.O., 1914, c. 279, sued to restrain the city from interfering with its possession and enjoyment of its lands, and procured an interim injunction, which was dissolved upon an undertaking by the city to expedite the trial. Negotiations were resumed, resulting, as the parties believed, in an agreement of settlement, the action begun by the college was dismissed by consent, and the city went into possession and constructed the street (now known as Bay street), which became an important thoroughfare. A board of arbitrators was appointed, as had been agreed, to fix the amount of compensation to the college, but the parties, on appearing before it, were unable to agree as to the principle upon which compensation was to be assessed, the college contending, and the city denying, that certain letters between Rev. Father Carr, acting

for the college, and the city's assessment commissioner formed part of the settlement agreement, and the arbitration, therefore, did not proceed. The college then brought this action, asking for specific performance of the agreement as it conceived and alleged it to be, and alternatively a judgment setting aside the consent order dismissing the former action, on the ground that the order was founded upon a supposed agreement which had never, in fact, been concluded.

The trial judge, Riddell J., gave judgment for the college, declaring that the agreement had been made on the terms asserted by it and was binding on the city. He also held that the college land was not liable to expropriation by the city, his holding in this respect being not disturbed on appeal and its soundness not contested upon the present appeal.

Upon appeal by the city the judgment of Riddell J., was varied by the Appellate Division, which held (under its formal judgment based on reasons of the majority of the court, certain varying views being expressed on certain questions), that the former action was dismissed under a mistaken belief of both parties that a settlement had been agreed upon, the college believing that the city had assented to the terms stipulated for by the college and the city believing that the college had assented to the terms stipulated for by the city, whereas the parties were never *ad idem;* that in the belief aforesaid the parties delivered possession of certain lands and made changes, alterations and expenditures thereon and on the remaining lands of the college; that the parties could not be restored to their former position, and that what had been done should stand; the city should retain the lands possession of which had been delivered to it by the college; the college should retain the land formerly part of a certain lane which the city had closed and given to it; that the college was entitled to receive from the city by way of compensation for the lands possession of which was delivered to the city, the market value thereof on November 11, 1921 (the date of taking possession) and interest thereon from that date, and such damages, if any, as it sustained by reason of the severance of the said land from the remaining lands of the college, or by reason of the remaining lands of the college being in-

1926

ST. MICHAEL'S COLLEGE v. CITY OF TORONTO.

juriously affected by reason of the city's public work for the purposes of which the lands of the college were taken, less the value of any benefit or advantage which the college had derived or might derive from the said public work for which the lands were taken, and less the value of the land formerly part of the lane aforesaid, and less the value to the college of any changes, alterations and expenditures made by the city on the remaining lands of the college or on the buildings and erections thereon. A reference was directed to the Master to inquire and report on the amount of compensation. The college appealed to the Supreme Court of Canada.

N. W. Rowell K.C. for the appellant.

G. R. Geary K.C. and *W. G. Angus* for the respondent.

The judgment of the court was delivered by

DUFF J.—In 1920, by-laws were passed by the proper authority of the respondent corporation, providing for the extension northward of Terauley street and for the expropriation of part of the land occupied by the appellant college between Ste. Mary and St. Joseph streets lying on the line of the projected extension. Communications took place between the college and the respondent's assessment commissioner first on the subject of a possible deviation, in order to avoid any interference with the college property, and afterwards, that being abandoned, on the subject of compensation to the college. Some months after the opening of these communications, the corporation announced that it would proceed in the ordinary way, under the expropriation by-law, to take possession of so much of the college property as might be necessary to allow the street extension to proceed. Thereupon, the college, which is a "federated college," associated with the University of Toronto within the meaning of the *University Act,* R.S.O. 279, took proceedings, relying upon the exemption from compulsory taking of real property of such federated colleges created by s. 15 of that statute, and procured an interim injunction, which was dissolved upon an undertaking by the corporation to expedite the trial. Negotiations having been resumed, by consent the action was dismissed, and the corporation went into possession, and since then the street has been constructed according

to the projected plan, and, with the usual concomitants of a city thoroughfare (including two tramway lines), is now and has been for some time in use as a highway.

The dismissal of the action and the entry upon the college lands were concurred in by both parties under the belief that they had agreed upon the terms of a complete settlement. One of the stipulations about which there was no dispute was that the question of compensation was to be passed upon by three arbitrators, one of whom, the chairman, was to be Sir Thomas White, the others to be appointed by the College and the corporation respectively. These appointments having been made and the board having been duly constituted, the parties, upon appearing before it, were unable to agree as to the principle upon which compensation was to be assessed under the arrangement, and in the result the action out of which this appeal arose was brought, in which the college prayed specific performance of its agreement with the corporation as it conceived and alleged it to be, and alternatively, a judgment setting aside the consent order dismissing its former action, on the ground that the order was founded upon a supposed agreement which had never, in fact, been concluded.

As already mentioned, the first action of the college was founded upon the contention that, being a "federated college," associated with the University of Toronto, the corporation, by force of the enactments of the *University Act*, was debarred from taking any part of its lands compulsorily; and the soundness of this position was not contested upon the appeal before us. Without the assent of the college, therefore, the assumption of possession by the corporation would have been wrongful. Possession, however, was assumed, and, under the belief that a valid assent had been given, works were constructed which have become affected with a public interest, and private rights have been acquired on the faith of the permanence of the altered situation, and it is not now suggested that restoration to the College of the property taken would be a practicable or permissible solution of the difficulties that have arisen. But the maintenance of the *status quo* necessarily involves one of two consequences; either the corporation must carry out the agreement under which it entered, if

1926

ST. MICHAEL'S COLLEGE v. CITY OF TORONTO.

Duff J.

there was such an agreement, or, if there was none, the college must be compensated on equitable terms, in view of the prejudice its interests have suffered in consequence of the extension of the street.

The college puts its case alternatively, but in the practical result it would appear to matter little whether the right to compensation is considered as springing out of a specific agreement or resting upon equitable considerations. Up to a certain point, there is little room for dispute. The burden of the communications between the parties is that the college is to be fairly compensated. Proposals as to specific methods for reaching this end are put forward, and are in part or wholly rejected, but there is nothing in the communications to suggest that the college ever abandoned this position, or that on part of the corporation the college was supposed to have abandoned it. The college authorities were trustees of the college property. They were masters of the situation in a legal sense, and, while a stiff and uncompromising stand on the *apex juris,* with the possibility of an acrimonious discussion, would no doubt have been distasteful, and possibly inadvisable in the larger interests of the college, still it was their duty to protect the College patrimony, not to set up extortionate or extravagant claims, but, on the other hand, to require just and reasonable compensation. The corporation must have recognized this, and no doubt did so, and Mr. Forman's report, construed in light of the information in his possession and in that of the Board of Control, as to Father Carr's attitude, and of the subsequent conduct of the parties, seems to be fairly capable of a reading in harmony with this.

Fair compensation would include payment of the value of the land taken, not necessarily limited to the market value but the value to the college in view of the purposes for which the land was used, and to which it had been dedicated. It would also include compensation for any loss in respect of the diminution in the value to the college of the remaining property in view of the purposes for which the property was in use or had been dedicated, whether caused by construction or maintenance of the street or the severance of the lands taken. It would also include indemnity in respect of any loss consequent upon

changes in the college grounds or in the property purchased for an arts college site necessitated by the severance of the lands taken, such, for example, as the destruction and re-erection of buildings, in so far as this head of compensation is not included under the next preceding head.

The value of the lands taken and the diminution in value of the property retained should be ascertained as of the date when possession was taken by the corporation, the 11th of November, 1921, and interest should be allowed from that date. It was specifically agreed that the northerly 315 feet of the lane bounding the old college grounds on the west, running from St. Mary street to St. Joseph street, should be closed, and possession of the site delivered to the college. This, apparently, has been done. It was also a term of the agreement that in the event of the college acquiring the property on both sides of Elmsley Place, the corporation would close that street, and the residue of the lane above mentioned, extending from St. Joseph street to St. Mary street, both parcels to be conveyed to the college.

It was also specifically agreed that the corporation should pay the difference in value between the lands taken and such part of the lands acquired by the college for the site of an arts college as it might be obliged to use for any extension of its playgrounds to the west caused by the severance, if the value to the college of the property required for this extension were found to be greater than the value of the property taken by the corporation. This item, however, would appear to be sufficiently provided for by the second of the heads of compensation already mentioned.

There seems to be no obstacle in the way of giving effect to what appears to have been in substance the understanding between the parties as to the terms upon which possession was to be taken. As already stated, one term of the arrangement was that compensation should be assessed by a board of three arbitrators, and the members of the board have been appointed, and the board has been duly constituted. The difficulties usually attending an action to compel specific performance of an agreement to refer to arbitration do not arise. The action is strictly an action founded upon the equity vested in the college, in

1926

ST. MICHAEL'S COLLEGE v. CITY OF TORONTO.

Duff J.

consequence of the acceptance of possession by the corporation and its subsequent acts, to have the terms upon which possession was given carried into effect. In such a case, the absence of statutory formalities touching the evidence of those terms is not an answer, as it would be in a common law action—for services, for example, as in *McKay* v. *Toronto* (1)—and the court will not hesitate to exert its powers as far as possible to see that the agreement is carried out, even although some of its terms should not be capable of enforcement by process *in personam*. *Wolverhampton* v. *Walsall* (2). In view of the fact that the board of arbitrators has been constituted, it seems a proper case for a declaratory judgment.

It may prove to be a task of delicacy and difficulty to ascertain the value to the college of the lands taken and the diminution in value of the property retained, whether caused by the severance or by the construction and maintenance of the street; it will be for the arbitrators to decide what that value or diminution in value is, in so far as it can be appraised in pecuniary terms with reasonable certainty.

To prevent misconception, it should be stated that it was no part of the explicit understanding between the parties that the corporation should bear the expense of providing additional lands for the site of an arts college. Whether the cost of reinstatement in that sense would be a proper measure, in whole or in part, of the loss caused by the construction and maintenance of Terauley street, must be a question for the arbitrators.

The judgment of the Appellate Division should be varied in accordance with the subjoined minute. The appellant college to have the costs of the action and of the appeal to this Court; the corporation to have the costs of the appeal to the Appellate Division.

JUDGMENT:

Declare that the corporation took possession under an agreement (*a*) that, in the event of the college acquiring the property on both sides of Elmsley Place, as shewn on plan 65-e, the corporation should close the street known

(1) [1920] A.C. 208. (2) L.R. 16 Eq. 433.

as Elmsley Place and, likewise, the balance of the lane to the east extending northerly from St. Joseph street to connect with the lane to be closed southerly from St. Mary street, a distance of three hundred and fifteen feet, both parcels to be conveyed to the College free of cost; and (*b*) that the college was to be compensated for the loss caused by the construction and maintenance of Terauley street, through the college property, such compensation to be determined by a board of arbitrators, which has since been constituted. Declare that such compensation ought to include:—

(1) Compensation in respect of the value to the college of the land taken.

(2) Compensation in respect of the diminution in value to the college of the college property retained by it, including the lands recently acquired for an arts college site, caused by the construction and maintenance of Terauley street, and by the severance of the lands taken, allowance to be made for the value of the site of the lane vested in the college and of any beneficial expenditures made by the corporation on the college grounds.

(3) Interest on the sums allowed in respect of the two preceding heads of compensation from the 11th of November, 1921.

(4) Indemnity in respect of loss incurred in consequence of the removal of buildings and erections, and otherwise in alterations in the college property necessitated by the severance of the lands taken, in so far as this is not allowed for under the second head above mentioned. Further directions reserved, and all parties to have liberty to apply.

The judgment of the Appellate Division is to be varied in accordance with this minute.

Appeal allowed in part with costs.

Solicitors for the appellant: *Day, Ferguson & Walsh.*
Solicitor for the respondent: *C. M. Colquhoun.*

1926

PORTER v. ARMSTRONG.

*Feb. 3.
*Mar. 13.

ROBERT PORTER & SONS LIMITED (PLAINTIFFS) ..... } APPELLANTS;

AND

J. H. ARMSTRONG AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

AND

WILLIAM WASHBROUGH FOSTER (DEFENDANT).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale of land—Agreement—Co-purchasers—Covenant to pay—Joint or several—Intent to re-sale at a profit—Partnership

K., whose rights have been acquired by P., sold to F. and W.M. a piece of land for $10,000 payable $3,000 cash, $5,500 by assuming a mortgage to P. and $1,500 at a later date. The agreement for sale contained the following covenant: "The purchasers covenant with the vendor that they will pay to the vendor the said sum * * *." The agreement also contained the following clause: "The terms 'vendor' and 'purchasers' in this agreement shall include the executors, administrators and assigns of each of them." P. sued F. with A. and W. A. M., W. M's. executors, for the balance of the purchase price, alleging that the covenant was a joint and several covenant, or, alternatively, that F. and W. M. were partners in the purchase of the land and therefore jointly and severally liable.

Held that the covenant was in form joint and not several and that W.M's. executors were not liable. *White* v. *Tyndall* (13 App. Cas. 263) foll.

Held, also, that although the property was bought by F. and W.M. with the intention of turning it over at a profit, there was no evidence from which to infer an agreement in the juridical sense that the property was to be held as partnership property.

APPEAL from a decision of the Court of Appeal for British Columbia reversing the judgment of the trial court and dismissing the plaintiff's action as against the respondents.

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

D. Donaghy and *J. F. Smellie* for the appellant.

Geo. F. Henderson K.C. for the respondents.

The judgment of the court was delivered by

DUFF J.—I see no reason to differ from the conclusion of the majority of the Court of Appeal founded on

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

the authority of *White* v. *Tyndall* (1), that the covenant in question, assuming there was no partnership, is a joint covenant. The argument based upon the stipulation in the agreement that "vendor" and "purchasers" in the agreement shall include the executors, administrators and assigns of each of them, is conclusively answered by the observations of Lord Herschell at pp. 276 and 277.

The question raised by the allegation of the appellants that the debt sued upon is a partnership debt, presents more room for controversy. Foster and Miller unquestionably intended to buy the property, to sell it again at an enhanced price, and thereby to make profit. Indeed, the sole object of purchasing the land was to dispose of it profitably. No doubt they intended to share the outlay equally between them. As regards the purchase money, the law would, of course, give to either of them a right of contribution against the other for any payment on the joint debt in excess of his own proper share, and on a sale, each would be entitled to share in the price according to his interest. The inevitable result, if the property was held in common and sold, would be that, as between Foster and Miller themselves, the right to share in the profits and the legal responsibility for losses would be equally distributed. But these consequences all flow from the fact that these two persons were jointly responsible for the purchase money, and that each was entitled to an undivided moiety in the equitable estate vested in them, as the result of the contract of purchase.

Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing. It is not sufficient there should be community of interest; there must be contract. In the first chapter of Story's book on Partnership, there is this passage:—

> In short, every partnership is founded on a community of interest; but every community of interest does not constitute a partnership; or, as Duranton expresses it: "*La société aussi produit une communauté; en un mot, toute société est bien une communauté; mais toute communauté n'est point une société. Il faut pour cela la volonté des parties.*"
>
> The Roman law has recognized the same distinction: "*Ut sit pro socio actio, societatem intercedere oportet: nec enim sufficit rem esse*

(1) 13 A.C. 263.

1926
PORTER
v.
ARMSTRONG.
Duff J.

communem, nisi societas intercedit. Communiter autem res agi potest etiam citra societatem; ut puta, cum non affectione societatis incidimus in communionem, ut evenit in re duobus legata; item si a duobus simul empta res sit; aut si hereditas vel donatio communiter nobis obvenit; aut si a duobus separatim emimus partes eorum, non socii futuri. Nam cum tractatu habito societas coita est, pro socio actio est; cum sine tractatu in re ipsa et negotio, communiter gestum videtur." And again: "Qui nolunt inter se contendere, solent per nuntium rem emere in commune, quod a societate longe remotum est!"

Pothier's comment on the words "*si a duobus simul empta res sit*" is this: "*Scilicet non animo contrahendae societatis*" 17 Pand. II. 30 n.

The real question is whether, from the evidence before us, one ought to infer an agreement in the juridical sense that the property these two persons intended dealing with was to be held jointly as partnership property, and sold as such. Is this what they contemplated? Had they in their minds a binding agreement which would disable either of them from dealing with his share—that is to say, with his share in the land itself—as his own separate property? A common intention that each should be at liberty to deal with his undivided interest in the land as his own would obviously be incompatible with an intention that both should be bound to treat the corpus as the joint property, the property of a partnership. English law does not regard a partnership as a *persona* in the legal sense. Nevertheless, the property of the partnership is not divisible among the partners in specie. The partner's right is a right to a division of profits according to the special arrangement, and as regards the *corpus*, to a sale and division of the proceeds on dissolution after the discharge of liabilities. This right, a partner may assign, but he cannot transfer to another an undivided interest in the partnership property in specie.

Now Foster's arrangement with MacDonald was obviously not a transfer of a partner's right to his share of the profits, nor did it involve the introduction of MacDonald by agreement with Miller, as a partner in Miller's place. Nothing in the correspondence points to this. And I cannot accept Mr. Donaghy's contention that the transfer to MacDonald was a transfer resulting from an understanding between Foster and Miller. Miller's letters indicate very clearly, and in Foster's evidence there is nothing inconsistent with this, that both Miller and Foster as-

sumed that Foster was entitled to assign his interest in the property. It is true, no doubt, that in the special circumstances under which Miller advanced the funds for the first payment, Miller had, as between himself and Foster, a lien on Foster's undivided interest for the amount of the advance; a lien which, it may be (the evidence is not sufficiently explicit to enable one to form an opinion upon the point), was, as against MacDonald and his creditors, displaced by the operation of the Land Registry Act, although I think it quite probable that it was not. But this lien was not a partner's lien. It was a lien in the nature of salvage, which the law vests in one co-owner, who advances money at the request of the other to make a payment to save or protect the common property. The fair conclusion from all the facts appears to be that the learned trial judge and the majority of the Court of Appeal were right in their view, that a partnership was not constituted.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Sydney Child.*
Solicitor for the respondents: *E. A. Boyle.*
Solicitor for the defendant: *E. A. Dickie.*

THE SHIP "CLACKAMAS" (DEFENDANT) ..... } APPELLANT;

AND

THE OWNERS OF THE SCHOONER "CAPE D'OR," (PLAINTIFFS)..... } RESPONDENTS

1925
*Oct. 14.
*Dec. 10.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT

Admiralty law—Shipping and navigation—Collision—Fog—Excessive speed—Proper signals

It is a general rule that, in a fog, a steamship is going too fast if, by reason of her speed, she is unable to avoid a collision with a vessel from which she is bound to keep clear, and the risk of whose proximity she would reasonably be assumed to anticipate under existing conditions; only such speed is lawful as will permit her to avoid a collision by slacking speed or by stopping and reversing within the distance at which another vessel can be seen.

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

1925

SHIP *Clackamas* v. SCHOONER *Cape d'Or.*

Judgment of the Exchequer Court of Canada, Nova Scotia Admiralty District (Mellish L.J.A.), holding defendant steamship liable for damages for collision between it and plaintiffs' schooner, affirmed.

Plaintiffs' schooner held, in the circumstances, not to have been a vessel "not being under command, or unable to manoeuvre" within art. 15 (*e*) of the Regulations, and not to have erred in her signals.

Semble, a sailing vessel lying to in a fog, but having some of her sails up, is "under way," and is governed by art. 15 (*c*) (*Burrows* v. *Gower*, 119 Fed. Rep. 616).

APPEAL from the decision of the Exchequer Court of Canada, Nova Scotia Admiralty District (Mellish L. J. A.) given 18th June, 1925, holding the defendant steamship *Clackamas* solely responsible for a collision between it and the plaintiffs' schooner *Cape d'Or*, and giving judgment for the plaintiffs for damages to be assessed.

C. J. Burchell K.C. for appellant.

W. C. Macdonald K.C. for respondents.

The judgment of the court was delivered by

NEWCOMBE J.—The schooner *Cape d'Or*, while on a voyage from Turk's Island to La Have with a cargo of salt, was sunk off the south coast of Nova Scotia, about ten miles from La Have Head, in collision with the ss. *Clackamas*, which was making her way from Newport News to Halifax, laden with a cargo of coal. This happened in the afternoon of 30th April, 1925, at about 4.30 o'clock. There was a thick fog and strong easterly breeze. At noon on the day of the accident the schooner had come within about five miles of the coast, standing in by the wind about N.N.E., when, finding it too foggy to attempt to go closer or to enter the harbour, she wore or came about and hove to, heading off shore, waiting for the weather to clear. The fog increased during the afternoon; the wind hauled somewhat to the southward; at the time of the collision it was about E.S.E., and the schooner, as described, was hove to on the port tack, heading about south, and making three or perhaps four points of leeway; speed estimated at about three-quarters of a knot.

The course of the steamship is given as N. 80 E.; the sea was quite heavy, and at times broke over the ship's bow; her speed as found was four miles or more through the water. Both vessels were sounding the prescribed fog signals at the proper intervals; but, according to the testimony of the steamship's witnesses, the schooner's horn was

not heard on board the steamship until the vessels were very close to each other. The steamship was heavily laden and down by the head; her lookout was stationed on the bridge. The second mate who was in charge of the watch, when asked if a lookout could not have been placed on the bow, answered:

> Not with safety. The sea was breaking over and might have washed him off his feet and washed him overboard. There is no protection on the boat.

The distance from bridge to stem is more than 100 feet. James Poole, able seaman, who says he is a certified quarter-master, and who came on duty with the watch at four o'clock, was charged with the duty of keeping the lookout. He tells us that he was stationed

> right on the port side of the bridge, the wing of the bridge on the port side.

The effect of his evidence is that he heard from the schooner, first, "one blast close to our port bow, close to, ahead." This he reported to the officer of the watch. Asked what came next, he said:

> There were two blasts in succession, but not directly after—probably several seconds; probably minutes—I could not be sure about that, and then there was a vessel (the schooner) hove in sight.

In cross-examination he said that, after reporting the one blast, he reported the two blasts; and, in answer to the court, he said, regarding the orders from the bridge, that, following the first blast, the order was port,

> and then, when the next blast was heard at the longer interval, it was hard aport, and, as soon as the second blast and the second signal was given, it was hard aport again.

The distance at which the vessels became visible to each other is variously estimated at from 600 feet to 300 feet; the master of the schooner considers that the collision took place perhaps two minutes from the time he saw the loom of the steamship; the mate says that about three minutes elapsed between the time when he saw the steamer break through the fog and the actual impact; Dunsworth, the only member of the crew who survived, can give no estimate, either of distance or of time. The master of the steamship and his officer of the watch say that the interval was about one minute. These are, of course, mere estimates or impressions of distance and of time, and were not intended to be exact, but they are useful to show, and indeed make it evident, that the interval of vision was

1925

SHIP *Clackamas* v. SCHOONER *Cape d'Or.*

Newcombe J.

very brief; moreover, it is noteworthy, and not without significance, that, in the judgment of the officers of the schooner, who were aware of the approach of the steamship some ten minutes before they could see her, and were therefore alert to the situation, the limit of visibility was appreciably greater than that given by the officer of the steamship's watch.

There was no change of course or speed by the schooner; on the steamship there were the port and hard aport movements of the wheel, to which the ship is said to have responded two points, and the reduction of speed consequent upon the execution of reverse orders.

Here I may observe, although my decision is not affected by the doubt which I entertain, that I am by no means convinced that the port and hard aport orders which were given by the officer of the watch were compatible with that careful regard to the existing circumstances and conditions which the regulations require; he realized that he was in thick fog; he realized also, if alive to his duty, that he was in a locality where vessels were not unlikely to be met, and that the transmission of signals was unreliable, owing to natural caprice and the noises of the elements and of his own ship; suddenly there was reported by his lookout, and he heard, one blast from the fog horn of a sailing vessel close to ahead on his port bow; no vessel could be seen; his speed against wind and sea was at the time at least between four and five knots. Was he, in these circumstances, reasonably entitled to assume that the sailing vessel was going away from him on the starboard tack to the northward, when in fact she was standing to the southward across his bow, and so to put the steamship hard aport, with the object of increasing the intervening distance; or was it not rather the part of prudence and good seamanship to stop and make sure of the position and course of the signalling vessel before the execution of any manœuvre, especially one which in the result served to aggravate, if not to cause, the collision?

The master of the steamship testifies that previously to the first dog watch he had been on the bridge practically all of the afternoon, but that when the watch was changed at four o'clock, he went to the chart room, which is directly under the wheel house, and is reached by a stairway of

nine steps leading down from the bridge. What happened is tersely described by the second mate as follows:

Q. The fog was thick?—A. Yes, fog, quite thick at the time.

Q. Will you tell us just what happened in connection with the collision, the first thing you heard, and all about it?—A. The first thing I heard one blast of a horn, just at the same instant the lookout man reported one blast of a horn. I immediately went in the wheel house and gave the order hard aport. The captain rushed up and grabbed the telegraph and started to put it on for full speed astern. Just as the words were out of my mouth, the vessel appeared out of the fog, a little on the port bow, not much more than the length of our own ship (269 feet) from us. I stayed on the bridge until we came together, and then I left the bridge immediately to get the lifeboat out.

Q. How long elapsed between the time you heard this one blast of the horn and the actual collision?—A. About a minute.

The learned trial judge found no fault on the part of the schooner.

The steamship was proceeding in thick fog in the track of the coastwise traffic; seaward only a few miles from La Have and Lunenburg, which are ports of considerable resort; prevented by her structure and equipment, or lack of equipment, and the breaking of the sea over the forecastle head, from placing a lookout aloft or within 100 feet of her bow. In these circumstances prudence and due regard to the existing conditions required very cautious navigation; the master of the schooner testifies that other steamers were in the immediate vicinity; it is not unreasonable therefore to hold that the speed of the steamship should have been so regulated as, at least, to enable her to avoid another vessel which it was her duty to avoid. The fact that she not only came into collision with such a vessel, but also with such force as to cause that vessel immediately to sink, is very suggestive of excessive speed or of deficient lookout by the steamship, or perhaps of both; and, when these faults are found against her at the trial, the appellants must, in order to succeed upon the facts, demonstrate very clearly that the findings are against the evidence. This I think they failed to do.

The appellants contend that the collision was the result of inevitable accident, but the learned trial judge was not satisfied with the lookout which was kept on the steamer, and moreover, he considered that in the circumstances of the case her speed was excessive. He says, very justly, that the requisite speed, which, according to the regulations, must be "moderate," should be determined relatively, hav-

1925

SHIP *Clackamas* v. SCHOONER *Cape d'Or.*

Newcombe J.

ing regard to the attendant conditions, and he finds that the steamship was going too fast if, by reason of her speed in the fog, she "was unable to avoid a collision with the vessel from which she was bound to keep clear, and the risk of whose proximity she would reasonably be assumed to anticipate under existing conditions". No doubt each case must depend upon its own facts, but in this general conclusion the learned judge follows a rule which has frequently been enunciated and is well established by authority, *The Resolution* (1), *The Campania* (2), a decision of Gorrell Barnes J., which was reviewed and upheld by the Court of Appeal, in which the facts of the case and the authorities are carefully reviewed; reference is made to the fact that in some cases four miles an hour, and in one case three and a half miles an hour, were held to be an improper rate of speed, and it is there laid down as a general rule that

> speed such that another vessel cannot be avoided after being seen is excessive.

The Oceanic (3) was held to be at fault by the House of Lords in a case which bears her name, because

> she was going at a speed which rendered it impossible to stop within the limit of observation,

and in that case Lord Halsbury observes that:

> A good deal depends in each case upon the facts and circumstances as they are proved, and the President of the Admiralty Court had an opportunity of judging the evidence of the different witnesses in a way which we have not. So far as the judgment is affected by the particular facts put in proof I must accept what he has found, but, of course, a great deal turns, not upon any conflict of testimony, but upon the inferences which are to be drawn from facts which hardly appear to be disputed on either side. Now the rule appears to me to be a very intelligible and commonsense one to avoid danger to vessels in the navigation of the seas, and the question what is or is not a moderate speed in a fog must depend in a great measure whether the fog is slight or dense, and whether there is an opportunity of seeing the near approach of a ship so as to know what can be done or ought to be done by nautical skill to avoid collision. Apart from any rule, one would think that where it was known that two bodies were approaching, and that there was no absolute means of knowing the direction in which they were coming and the danger which was to be avoided, the commonsense thing would be to stop until the direction was ascertained, and also whether it was possible to avoid the serious danger which might arise.

In *The Counsellor* (4), Bargrave Deane J. states the rule thus:

(1) [1889] Asp. M.L.C. 363.
(2) [1901] P. 289.
(3) 88 L.T.R. 303.
(4) [1913] P. 70.

I think a very fair rule to make is this, and it is one which has been suggested to me by one of the Elder Brethren: You ought not to go so fast in a fog that you cannot pull up within the distance that you can see. If you cannot see more than 400 feet you ought to be going at such a speed that you can pull up. If you are going in a fog at such a speed that you cannot pull up in time if anything requires you to pull up, you are going too fast. If you cannot retain steerage way at such a speed, then you should manage by alternately stopping and putting the engines ahead.

The same rule is applied in the District Court of the United States, *The Normandie* (1), and in the Circuit Court, *The Raleigh* (2), where it is said with reference to the ship:

it is enough to establish her liability that she was proceeding at a speed under which she could not, by any degree of promptitude and skill, avoid a collision by reversing her engines within the distance at which she could discover approaching or stationary vessels. The rule is that such speed only is lawful or moderate speed in a fog as will permit a steamer seasonably and effectually to avoid a collision by slacking speed, or by stopping and reversing, within the distance at which another vessel can be seen. If this rule is a severe one, and practically requires a steamship to come to a stop, and remain stopped, when navigating a river having an extensive commerce, or in a crowded harbour, it is too well established to be disregarded.

To the same effect is the decision of the Circuit Court in *The Bolivia* (3), where the ship was held to blame because

under the existing state of the fog, and exercising the best vigilance, she could not discover another vessel more than 300 or 400 feet away, yet maintained such a speed that, after reversing, her headway through the water could not be stopped within three times that distance. The locality was one frequented by numerous vessels in the coasting trade, and lay in one of the paths of the ocean traffic between Europe and the principal commercial port of this country.

There is some contradiction or confusion as between the lookout and the officer of the steamship's watch; they agree that the first signal heard from the schooner was a single blast, which would indicate that the schooner was on the starboard tack, and it was presumably for this reason that the officer immediately gave the orders, "port" and "hard aport"; but the officer, according to his evidence, did not hear the two blasts which the lookout says he heard and reported, following the single blast, before the schooner came into sight through the fog. The steamship was sounding her prolonged blast regularly, and there was, of course, considerable noise due to the wind, and the breaking of the seas, which may have interfered with the reception and report of the signals.

(1) 43 Fed. Rep. 151, at p. 156. (2) 44 Fed. Rep. 781.
(3) 49 Fed. Rep. 169, at p. 171.

1925

SHIP *Clackamas* v. SCHOONER *Cape d'Or.*

Newcombe J.

It is not and, having regard to the evidence and findings, cannot be denied that the schooner was at intervals sounding two blasts upon her fog horn, the efficiency of which is not in question; but it is a ground of the appeal that the master of the schooner erred in moving the schooner's fog horn, after he first heard the steamship's signal, from the gallant forecastle deck to the lazarette hatch, abaft the deck house, where the captain himself took charge of the horn and worked it up to the time of the collision. This was done, as the captain explains, in order that the signals might be heard better by the oncoming ship which seemed to be directly abeam. He says

> he was of the opinion it would be heard better by the approaching ship from a position aft, clear of all sails, different wind currents.

Upon this there is no evidence in conflict with the opinion so expressed.

It is said, however, that the schooner's blasts were not sounded at the intervals prescribed by the regulations relating to sound signals for fog. A sailing vessel under way should sound, at intervals of not more than one minute, when on the port tack, two blasts in succession. It was not suggested at the trial that two blasts in succession were not the appropriate signals; the master of the schooner testified that he gave these blasts at intervals of about one minute, and he was not asked for anything more definite than this answer; it was not suggested to him that the interval was either too long or too short; he had been personally sounding the fog horn aft for about ten minutes before the collision; nevertheless an objection is now taken by reason of the following evidence, given by the officer of the watch in his direct examination:—

> Q. Had your course remained the same from the time you first heard the signals until the collision?—A. Yes.
>
> Q. Were your signals being sounded?—A. Yes, continuously, with the proper intervals between.
>
> Q. Remember how many signals there were given?—A. Two blasts every 1½ minutes.

And, although the officer was not cross-examined upon his answer, "two blasts every one and one-half minutes," it is urged upon the appeal that the schooner did not comply with the regulation which requires the signals to be given, in the words of the rule, "at intervals of not more than one minute." I do not consider, however, in view of the master's testimony, the course of the trial as explained,

and the questions which were there in controversy, that the learned judge's finding can be disturbed.

Finally, it is submitted by the appellant's factum, although the point was neither discussed nor mentioned at the hearing of the appeal, nor, so far as appears, at the trial, that the schooner was

> a vessel under way which was unable to get out of the way of an approaching vessel, through not being under command, or unable to manoeuvre as required by these rules,

within the meaning of art. 15 (*e*), rather than "a sailing vessel under way," within the meaning of art. 15 (*c*) of the regulations, and therefore that she erred in giving two blasts in succession; it is said that the signal ought to have been one prolonged blast, followed by two short blasts. But, in my view, although the schooner was in the circumstances justified in not attempting to execute any manœuvre in order to avoid the steamship, and, although, having regard to the wind and sea and set of her sails, and the course and bearing of the steamship, it may not have been possible for the schooner, after the position of the steamship was discovered, to keep out of the way by the execution of any manœuvre on her part, nevertheless she cannot accurately be described as a vessel not under command or unable to manœuvre. Indeed her master says that she could have manœuvred, although not usefully, having regard to the conditions to which I have referred, and the second mate of the steamship, the officer in charge, testifies in direct examination that the proper signal for a schooner hove to on the port tack is two blasts; therefore he was not misled by the signals actually given. I observe moreover that it was held in the United States District Court in *Burrows* v. *Gower* (1), that a sailing vessel lying to in a fog, but having some of her sails up, is "under way," and is governed by art. 15 (*c*), and that therefore, when on the starboard tack, the proper fog signal is one blast, adopting the application of the article as expounded by Marsden on Collisions, see 8th ed., p. 345.

I conclude, applying the words of Lord Halsbury in the case of *The Oceanic* (2), that the local judge in Admiralty

> had an opportunity of judging the evidence of the different witnesses in a way which we have not. So far as the judgment is affected by the

(1) 119 Fed. Rep. 616. (2) 88 L.T.R. 303.

1925

SHIP *Clackamas* v. SCHOONER *Cape d'Or.*

NewcombeJ.

particular facts put in proof, I must accept what he has found, but of course a great deal turns, not upon any conflict of testimony, but upon the inferences which are to be drawn from facts which hardly appear to be disputed on either side. Neither the findings nor the inferences are, in my opinion, unjust, and I would therefore dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *C. J. Burchell.*

Solicitor for the respondents: *L. A. Lovett.*

1925

*Nov. 25.

*Dec. 10.

J. P. BICKELL & COMPANY (DEFENDANT) ..... } APPELLANT;

AND

LIONEL FORBES CUTTEN (PLAINTIFF) ..... } RESPONDENT.

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

Agency—Broker and client—Transactions in foreign country carried out by broker's correspondents there—Right of client to benefit of exchange.

The judgment of the Appellate Division of the Supreme Court of Ontario (57 Ont. L.R. 113) was affirmed (Duff and Newcombe JJ. dissenting), sustaining plaintiff's right to be credited in the Canadian equivalent of New York funds, according to the rate of exchange prevailing on the dates when the moneys were received in the transactions, in arriving at the profit for which defendant, his broker, was accountable to him on transactions carried out by defendant's correspondents in New York. *Barthelmes* v. *Bickell* (62 Can. S.C.R. 599) applied.

Defendant's contention that upon the facts there was an understanding or implied agreement that all accounts were to be settled in Canadian funds was negatived by the court on the evidence, Duff and Newcombe JJ. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1), affirming in part the judgment of Mowat J. in favour of the plaintiff.

The plaintiff, who resided in Toronto, Ontario, employed the defendant broker in Toronto, as his broker in respect of certain purchases and sales which were carried out on

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

(1) 57 Ont. L.R. 113.

1925

BICKELL v. CUTTEN.

Anglin C.J.C.

the New York Cotton Exchange and the New York Stock Exchange. The defendant had an arrangement with its New York correspondents under which the latter made purchases and sales on the Exchanges upon the defendant's instructions. The correspondents had an account in a bank in Toronto and moneys payable by the defendant were deposited to the credit of the correspondents in this account, while moneys payable to the defendant by the correspondents were paid to them by cheques drawn upon it. The correspondents and defendant accepted payments reciprocally in Canadian funds, the understanding being that no charge was to be made for exchange in respect of any of such payments. The plaintiff did not know of this arrangement. During the period in which the transactions in question were carried out Canadian funds were at a discount in New York. The transactions resulted in a profit to the plaintiff. He claimed that in arriving at the profit for which the defendant was accountable to him as his agent he was entitled to be credited in terms of New York funds for the moneys received in respect of the transactions, in other words, that he was entitled to be credited in Toronto in respect of any New York funds so received in their equivalent in Canadian funds, according to the rate of exchange prevailing on the date of receipt, and that debits, of course, should be dealt with on a like principle. The defendant contended that the facts established an understanding and agreement between the parties that all accounts between them were to be settled in Canadian funds, and that the facts differentiated the case from that of *Barthelmes* v. *Bickell* (1).

W. N. Tilley K.C. for the appellant.

A. G. Slaght K.C. and *F. J. Hughes* for the respondent.

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

ANGLIN C. J. C.—The material facts of this case sufficiently appear in the judgments of the learned trial judge and of the Appellate Divisional Court (2).

The question before us is purely one of fact—whether the circumstances in evidence warrant the inference of an implicit agreement by the respondent that the defendant,

(1) 62 Can. S.C.R. 599. (2) 57 Ont. L.R. 113

1925
BICKELL
v.
CUTTEN.
Anglin C.J.C.

admittedly his broker, should, in addition to its regular commission and charges for the transactions carried on for him, be allowed to retain for its own benefit, or for that of its sub-agents, out of the profits made on sales of commodities for the respondent, a sum equal to the exchange difference between Canadian and United States funds at the dates of such sales. That the respondent is entitled to the profit of the exchange in the absence of a special agreement, or a custom binding on him, entitling the appellant to retain these moneys, is concluded by the authority of the decision of this court in *Barthelmes* v. *Bickell* (1), if, indeed, authority for anything so elementary in the law of fiduciaries be needed. No such custom was alleged or proved. That no such agreement was explicitly made is admitted. The learned trial judge and the Appellate Divisional Court affirming him have held that the circumstances in evidence do not justify an inference of assent by the respondent to such an arrangement.

Any successful attempt to affect the respondent's rights by the custom or arrangement which is said to have obtained between the appellant and its New York correspondents, but was unknown to the respondent, is also precluded by the authority referred to. Other matters relied upon to show that the respondent had knowledge during the currency of the transactions of the appellant's intention to assert the right to retain the moneys in question, such as the rendering of a few statements showing credits to him at par for Canadian funds deposited by him with it, and balances apparently arrived at on the basis of treating Canadian and United States funds as of equal value, fall short of establishing such an appreciation by him of the appellant's assertion of a claim in derogation of a right which the law ordinarily imputes to a principal as would be essential to an inference of assent by him to forego that right. When the respondent demanded the moneys in question from the appellant his right thereto was not challenged on the ground of any arrangement to the contrary express or implied. Acquiescence on his part in the appellant's retention of them was not even suggested. The arrangement between the appellant and its New York correspondents was then communicated to him, which he was told prevented

(1) 62 Can. S.C.R. 599.

the appellant recovering the sum in question from its correspondents, and it was suggested that the adjustment of the matter should be deferred until the respondent's brother should come to Toronto, as he "knew the way cotton was handled and traded in". The evidence discloses that when Mr. A. W. Cutten came he did not agree with the appellant's view of its rights in the matter.

We have carefully considered all the evidence. No useful purpose would be served by attempting to review it. Not only are we satisfied that it does not disclose the case of manifest error requisite to entitle the appellant to a reversal of the concurrent findings in the provincial courts, but it rather leaves us with the impression that had it been held below that the respondent had assented to the broker's retention of the moneys in question, that holding could not have been supported.

The appeal fails and must be dismissed with costs.

The judgment of Duff and Newcombe J. J., dissenting, was delivered by

DUFF J.—This litigation originated in a dispute touching the reciprocal rights and liabilities of the appellants and the respondent arising out of certain transactions carried out by the appellants in New York pursuant to orders from the respondent between the 9th of April, 1919, and the 16th of January, 1920. During this period, Canadian funds were at a discount in New York. The appellants had an arrangement with their New York correspondents, who were members of the New York Cotton Exchange and of the New York Stock Exchange, under which these correspondents made purchases and sales on the exchanges upon the instructions of the appellants. The New York correspondents had an account in a bank in Toronto, and moneys payable by the appellants were deposited to the credit of the correspondents in this account, while moneys payable to the appellants by the correspondents were paid to them by cheques drawn upon it. The correspondents and the appellants accepted payments reciprocally in Canadian funds, the understanding being that no charge was to be made for exchange in respect of any of such payments.

The dealings on behalf of the respondent resulted on the whole in a very considerable profit; and the respondent

1925

BICKELL v. CUTTEN.

Duff J

contended, and still contends in this litigation, that in arriving at the profit for which the appellants are accountable to him as his agents, he is entitled to be credited in terms of New York funds for the moneys received in respect of the transactions carried out for him by the appellants' New York correspondents in New York; in other words, that he is entitled to be credited in Toronto in respect of any New York funds so received in their equivalent in Canadian funds, according to the rate of exchange prevailing on the date of receipt; and that, of course, debits should be dealt with on a like principle.

In the absence of any agreement expressed either in words or by conduct to the contrary, the respondent would indisputably be entitled to call upon the appellants to account for all profits realized out of transactions undertaken for him on the New York Exchange, and would at the same time be bound to indemnify the appellants in respect of any losses entailed by such transactions. The arrangement between the appellants and their New York correspondents was not communicated to the respondent, whose rights are not therefore in any way affected by it. The question in controversy is a question of fact, whether, namely, the appellants have established by satisfactory evidence an agreement between the respondent and themselves that the business was being conducted on the footing that, as between them, the risk of fluctuations in exchange between New York and Canada was to be borne entirely by the appellants.

Express agreement in words is not contended for. Broadly, it is said on behalf of the appellants that the respondent was informed by them and became aware early in course of the dealings between them that the appellants considered, and were acting upon the belief, that the business between them was being conducted on the footing that moneys received in New York on behalf of the respondent should be credited to him in corresponding figures in Canadian funds, and that moneys paid for him in New York were to be debited in the same way; and that the respondent, having become aware that the appellants were proceeding on this basis, acted in such a way as to preclude himself from disputing that such were the terms of the understanding between them.

The sole question is: does the evidence establish this? The evidence relied upon consist of the accounts and statements furnished from time to time, as above mentioned, beginning with the ninth of April, and the evidence of Cashman and Bickell on behalf of the appellants, and of Cutten himself. In the documents, credits and debits are dealt with on the principle mentioned. It will not be necessary to examine the documents in detail, but one or two illustrative entries may be mentioned: In April, 1919, a sum of $10,000, paid by the respondent in Toronto in Canadian funds as margin, was credited to him without deduction, Canadian funds being then in New York at a discount of a little more than two per cent; in September, 1919, a loss of twenty-three thousand odd dollars in New York funds on the sale of 2,000 bales of March cotton was debited to him in Canadian funds at par, the exchange being then about four per cent; in November, 1919, the sum of $3,000, received on behalf of the respondent on the 31st of October as dividends in New York, and in New York funds, was credited to him in Canadian funds as $3,000. In the same month, $100,000 paid to the respondent in Canadian funds on account of his profits on a sale of cotton, was charged to him at par, the exchange being then at four per cent. Later, in the same month, the respondent paid the appellants $50,000 as margin in Canadian funds, and this sum was also debited to him at par, the exchange being then at five per cent.

In all the numerous statements of account, during this period, debits and credits were treated in the same way; moneys paid and received in Canada are debited and credited without deduction in Canadian funds; moneys received and paid out in New York are credited and debited in terms of Canadian funds in figures identical with those expressing in New York funds the sums received or paid there. In every case the balance is struck on the principle that all credits and debits are computed and expressed according to the same standard, that standard being obviously, to anyone who compared the figures of the accounts with the facts of the transactions, the Canadian dollar. It is undisputed that the respondent understood this; and when one looks at the form which these statements assume, one cannot doubt that the respondent must have realized that the appellants were proceeding upon the

1925

BICKELL v. CUTTEN.

Duff J.

assumption that such was the footing on which the business was being conducted. It is hardly denied that the accounts and statements were carefully checked by the respondent personally. He admits that therein the appellants were dealing with the moneys "as Canadian funds in a Canadian account"; that he recognized the profits or losses shown in them as net profits or losses in Canadian funds, "without anything being added for American exchange." He says:

> the accounts I received from Mr. Bickell were accounts in Canadian funds; no question about that; (and) when I got any statement from Mr. Bickell, I naturally would see it was in Canadian funds.

Nor is there any room for suggestion that Cutten regarded the principle of the account, as manifested by these documents, as merely provisional, and subject to revision. His attention was attracted to the subject early in November. He tells, indeed, of a conversation with Cashman, manager of the appellants, in which he says he raised the question of the payment of profits in American funds. For reasons to be mentioned presently, it seems quite clear that this conversation did not occur until after the transactions now in question had been closed. But that the question of his right to be paid in New York funds was actually present to his mind in the course of these transactions seems to be made clear by what he says about a credit for dividends already mentioned, received on the 31st of October and included in a November statement. He says:

> I came to the conclusion—I saw the dividend somewhere—that the dividend was earned in New York, and that dividend should have been given to me in American funds.

Asked why he made no protest, his explanation was that they had already refused to allow him American exchange, and that it had been agreed that the question should stand over for further discussion with his brother. As I have said, it is impossible to accept his statement that this last mentioned incident took place earlier than January. But the evidence leaves little room for doubt that he understood the appellants' statements as involving a notice to him that the appellants were dealing with him on the basis of crediting and debiting all moneys received and paid respectively as Canadian funds.

Had the appellants in express terms informed the respondent during the course of these transactions that this was the basis upon which their dealings with him were being conducted, and he had proceeded without demur to enter into further dealings and to receive accounts and statements without protesting, nobody, of course, would argue that he could, as to later transactions affected by an abnormal rise or fall in exchange, seek to take advantage of this situation by repudiating his previous tacit acquiescence in the proposal or declaration of the appellants. His failure to demur in such circumstances could only be construed as an acceptance of the appellants' declaration as constituting the terms governing their relations. And if such was the effect of the communications which in fact passed from the appellants to the respondent as the respondent, as a reasonable business man, ought to have conceived it, and as he did in fact conceive it, then the result must be the same. With great respect, I can entertain no serious doubt that such was the effect of these communications as the respondent ought to have conceived it and as he did in fact conceive it, and that the appellants, having proceeded to conduct their affairs without any protest or demur, according to the principle expressed in their communications, are entitled to insist that such was the arrangement between them. The principle, that a man is bound by the reasonable interpretation of his words and conduct by another who reasonably interprets such words or conduct as meant to be acted upon, is a principle which, as Lord Haldane said, in *London Joint Stock Bank Ltd.* v. *McMillan* (1),

> is essential to the conduct of business between the members of every well-ordered community. It is generally recognized in ordinary social life as imposing obligation of honour as much as of law.

The business would have borne an entirely different colour had the respondent succeeded in establishing, as he sought to do, that he did protest, and that by arrangement with Cashman the matter of exchange was left open. Cashman's evidence as to the date of the conversation is explicit, and the failure of the respondent to refer to this conversation in the correspondence in January, when the fact that it had occurred would have been a complete

(1) [1918] A.C. 777, at p. 818.

1925

BICKELL v. CUTTEN.

Duff J.

answer to the position assumed by Cashman in his letter, seems to show clearly enough that at the trial the respondent's recollection was seriously at fault.

While the question involved in the appeal is purely the question of fact, it is a question which does not depend, except as regards the conversation just mentioned—and as to that there is no finding by either court—upon any view as to the credibility of witnesses. The primary facts are not seriously in controversy; the sole question is, what is the proper inference to be drawn from them? Nor is it at all useful to consider the previous decision of this court in *Barthelmes* v. *Bickell* (1). The view taken in that case was that the facts did not afford sufficient ground to support the inference of any understanding between the customer and broker on the subject of exchange. There, as here, it was a question of fact. The considerations pointing to the conclusion that such an agreement ought to be inferred in this case are vastly more powerful than in the former case. But it is, perhaps, not unimportant to add, in view of some observations in the courts below, that it is a misconception of the doctrine which governs the use of precedent in the law of England to suppose that it applies to decisions which are decisions solely upon points of fact. Lord Halsbury said, in *London Joint Stock Bank* v. *Simmons*, at p. 208 (2):

> If, as I believe, it be accurate that the question is one which is to be determined upon the facts of the case, no one case can be an authority for another;

and Lord Herschell said, at p. 221, speaking of *Sheffield* v. *The London Joint Stock Bank* (3):

> It may, perhaps, be a binding authority as to the conclusions of fact arrived at, where the facts are identical, but not otherwise.

There are observations much to the same effect by Lord Macnaghten in *Colls* v. *Home & Colonial Stores Limited* (4).

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

Appeal dismissed with costs.

Solicitors for the appellant: *Tilley, Johnston, Thomson & Parmenter.*

Solicitors for the respondent: *Hughes & Agar.*

(1) 62 Can. S.C.R. 599.
(2) [1892] A.C. 201.
(3) 13 App. Cas. 333.
(4) [1904] A.C. 179, at pp. 191 and 192.

THE ESTATE OF JAMES P. FAIRBANKS AND THE ATTORNEY-GENERAL OF CANADA (INTERVENANT) ..... } APPELLANTS;

1925 *Nov. 23.
1926 *Feb. 8.

AND

THE CITY OF HALIFAX..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Constitutional law—Municipal taxation—Premises leased to Dominion Government for railway ticket offices—Business tax—Statute making owner liable where lessee exempt—Indirect taxation—Ultra vires——B.N.A. Act, ss. 92 (2), 125.

The Halifax city charter provided for the levying of a "business tax," which should be "payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt * * * and shall be payable by the occupier whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not." The tax was based on the value of the premises occupied. S. 394 provided: "Except as is herein otherwise provided, if any property is let to the Crown or to any person, corporation or association exempt from taxation, such property shall be deemed to be in the occupation of the owner thereof for business or residential purposes as the case may be, and he shall be assessed and rated for household tax or business tax according to the purpose for which it is occupied."

The appellant estate leased to His Majesty the King, represented by the Minister of Railways and Canals of Canada, premises for a ticket office of the Canadian National Railways. The lessee was to pay "the business taxes, if any." The city assessed the appellant estate for business tax.

Held, Duff J. dissenting, reversing the decisions of the Supreme Court of Nova Scotia in banco (57 N.S.R. 461), (which divided equally) and of Rogers J., that the appellant estate was not liable for the tax; that the tax made payable by the owner by force of s. 394 of the city charter was an indirect tax and not within provincial powers given by s. 92 (2) of the B.N.A. Act.

A tax is indirect which is imposed upon a person in contemplation that another will pay it; the intention or expectation that the burden will be shifted may be shown by the form in which the tax is imposed, or may be ascertained by the general tendencies of the tax and the common understanding of men as to those tendencies; in the present case it could not be supposed that the legislature expected that the person upon whom the tax was imposed would ultimately bear it; the landlord was put in the position of the tenant because the tenant was exempt, and made responsible for the taxes levied for the

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

1926

FAIRBANKS v. THE CITY OF HALIFAX.

use of the premises by the tenant for the business purposes for which they were leased, from which it must be anticipated that the taxes would be passed on to the tenant as part of the rent; the ordinary and natural course of business and the substantial character of the tax, based as it was upon the value of the premises occupied and having relation only to the tenant's occupation, showed that the ultimate burden would not rest with the landlord. *City of Montreal* v. *Attorney-General for Canada* ([1923] A.C. 136), disc. and dist.

Per Duff, J. (dissenting): The question of the incidence of local rates levied on occupiers and owners of real property respectively is one so complex and obscure, depending so often upon the appreciation of variable factors, that it must be presumed that the legislation creating the tax contemplated only the person called upon to pay it as the person of incidence, and such legislation cannot be treated by the courts as *ultra vires* unless it is affirmatively established to be so. The present case is in principle governed by *City of Montreal* v. *Attorney-General for Canada* ([1923] A.C. 136.)

APPEAL from the decision of the Supreme Court of Nova Scotia *en banc* (1) affirming by an equal division of the court the judgment of Rogers J. holding that the appellant estate was legally liable for payment of a certain business tax assessed against it by the respondent city.

The matter came before Rogers J. by way of a case stated under the provisions of s. 410 of the Halifax city charter. The case stated was as follows:—

1. At all times material to this case the estate of James P. Fairbanks was the owner of the ground floor of premises known as no. 107-109 Hollis street in the city of Halifax.

2. The said premises were leased by the said estate of James P. Fairbanks to His Majesty the King by lease dated the 22nd day of March, A.D. 1922, a true copy of which is hereto annexed and forms part of this case.

3. At all times material to this case the said premises were in occupation of His Majesty the King as a railway ticket office.

4. Section 370 of the Halifax city charter provides as follows: "The taxation of the city shall consist of: (*a*) Business tax, (*b*) Household tax, (*c*) Licenses and special taxes, (*d*) Poll tax, (*e*) Real property tax, all as hereinafter specified and defined."

5. Section 371 of the Halifax city charter provides as follows: "(1) The business tax shall be a tax payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt as is herein provided, and shall be payable by the occupier whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not.

(2) Such tax shall be at the rate fixed as hereinafter provided on fifty per cent of the value of the premises so occupied, except in the case of premises, the value of which is less than two thousand dollars, and occupied solely for the purpose of selling merchandise by retail, in

(1) 57 N.S.R. 461.

respect to which the tax shall be at the said rate on twenty-five per cent of the value of the premises so occupied."

6. Section 394 of the Halifax city charter provides as follows: "Except as is herein otherwise provided, if any property is let to the Crown or to any person, corporation or association exempt from taxation, such property shall be deemed to be in the occupation of the owner thereof for business or residential purposes as the case may be, and he shall be assessed and rated for household tax or business tax according to the purpose for which it is occupied."

7. The assessor for the city of Halifax purported to assess the said estate of James P. Fairbanks, in respect to the said premises, for a business tax for the year beginning May 1, 1924, and ending April 30, 1925.

8. The said estate of James P. Fairbanks duly appealed from the said assessment to the Court of Tax Appeals for the city of Halifax.

9. The said Court of Tax Appeals dismissed the said appeal and confirmed the said assessment.

The questions for the opinion of the trial judge were:—

1. Whether the said estate of James P. Fairbanks is legally liable for the payment of the said business tax.

2. Whether section 394 of the Halifax city charter is *intra vires* the legislature of the province of Nova Scotia.

3. Whether the said Court of Tax Appeals was right in dismissing the said appeal and confirming the said assessment.

The lease was made by the Fairbanks estate to His Majesty the King, represented therein by the Minister of Railways and Canals of Canada, acting under the authority of an Order in Cuncil, and was for five years from May 1st, 1922, at an annual rental of $3,000, and stipulated that the lessee should pay "the business taxes, if any," and the water taxes, the lessors to pay "the yearly assessment" of the premises and all other taxes, and that the lessee should only use and occupy the premises for the purpose of a ticket office of the Canadian National Railways.

Rogers J. held that the Fairbanks estate was liable for the tax and that s. 394 of the Halifax city charter was *intra vircs*. His judgment was sustained by the Supreme Court of Nova Scotia *en banc*, on an equal division of the court, Harris C.J. and Ritchie E.J. supporting the judgment below and Mellish and McKenzie J.J. *contra*. Mellish J., however, adopted the ground that the Crown could not be said to be occupying the premises "for the purposes of any trade, profession or other calling" within s. 371; that the Crown could not be said to be engaged in or exercising any trade, profession or other calling even although the purposes of government might require the servants and agents of the Crown to engage in doing that

1926

FAIRBANKS v. THE CITY OF HALIFAX.

which *per se* might be so described; and he therefore found it unnecessary to deal with the question of the validity of s. 394.

Special leave to appeal to the Supreme Court of Canada was granted by the Supreme Court of Nova Scotia *en banc* to the Fairbanks estate and to the Attorney-General of Canada who had asked to be joined as intervenant.

J. L. Ralston K.C. and *C. J. Milligan* for the appellants.—The city was attempting to impose a direct tax on Crown property. The statutory fiction attempted in s. 394 does not alter the fact that the Crown remains in actual possession under its lease, and it is the occupancy by the Crown which is actually taxed. Such taxation is invalid.

If not a direct tax on the Crown property, it is an indirect attempt to subject the Crown to taxation and is *ultra vires*. See *City of Montreal* v. *Attorney-General of Canada* (1). In that case and in *Smith* v. *Vermillion Hills* (2) the validity of the taxation was upheld because the tax in question was held to be an occupation tax levied on the beneficial interest of the tenant in the lands. The *Montreal Case* (1) is not the converse of the present case. The cases are clearly distinguishable. That the tax in the present case is invalid; see *Attorney-General of Canada* v. *City of Montreal* (3).

S. 394 is indirect taxation and *ultra vires*. B.N.A. Act, s. 92 (2); *Manitoba "Grain Futures Taxation Act" Case* (4); *Cotton* v. *The King* (5); *Bank of Toronto* v. *Lambe* (6); *Attorney-General for Quebec* v. *Reed* (7); *Security Export Co.* v. *Hetherington* (8).

S. 371, defining the tax, only makes it payable by an occupier "for the purposes of any trade, profession or other calling carried on for purposes of gain." His Majesty is not such an occupier, and the tax cannot therefore be levied on anyone in respect to His Majesty's occupancy.

F. H. Bell for the respondent: The tax is not on property of the Crown. It is levied directly on the owner of property in the city and properly subject to its taxing auth-

(1) [1923] A.C. 136 at p. 140.
(2) 49 Can. S.C.R. 563; [1916] 2 A.C. 569.
(3) 13 Can. S.C.R. 352.
(4) [1924] S.C.R. 317; [1925] A.C. 561.
(5) [1914] A.C. 176.
(6) 12 App. Cas. 575, at p. 582.
(7) 10 App. Cas. 141.
(8) [1923] S.C.R. 539.

ority. It is a tax on persons, in respect of property, but not on property. The contention that the Crown is affected or concerned is based wholly on speculation as to its effect and ultimate incidence.

The tax is not "indirect" within any of the interpretations by this court or the Judicial Committee. The interpretations in the leading cases: *Bank of Toronto* v. *Lambe* (1); *Cotton* v. *The King* (2); *Barthe* v. *Alleyn-Sharples* (3), and the *Manitoba "Grain Futures Taxation Act Case"* (4); seem to confine it to cases where the tax is laid on commodities intended for sale, or to transaction such as sales, or on persons acting in a representative capacity, as executors, agents or trustees, who must necessarily be considered as passing the tax on to their principals. The fact that a tax may possibly, even probably, be shifted in whole or in part, does not make it indirect. It may happen in the case of every direct tax. See *Brewers and Maltsters' Association of Ontario* v. *Attorney General for Ontario* (5); *Barthe* v. *Alleyn-Sharples* (6). The tax in question cannot be differentiated in this respect from any other tax on the owner of land.

The decision in *Attorney-General of Canada* v. *City of Montreal* (7), cannot stand in view of subsequent decisions by the Judicial Committee. The reasoning of Strong J., dissenting, is entirely in accordance with those decisions and is confirmed by them. See *Smith* v. *Vermillion Hills* (8); *City of Montreal* v. *Attorney General of Canada* (9). The last mentioned case is the exact converse of the present one and its reasoning is wholly applicable.

As to the ground taken by Mellish J., that s. 394 is inapplicable, because the Crown cannot be considered as carrying on any description of trade, there is no supporting authority. The question is covered by *Brighton College* v. *Marriott* (10). The judgment of Harris C. J. below on this point is supported by *Mersey Docks* v. *Lucas* (11), and *Port of London Authority* v. *Inland Revenue Commissioners* (12).

(1) 12 App. Cas. 575.
(2) [1914] A.C. 176.
(3) 60 Can. S.C.R. 1; [1922] 1 A.C. 215.
(4) [1924] S.C.R. 317; [1925] A.C. 561.
(5) [1897] A.C. 231 at p. 237.
(6) 60 Can. S.C.R. 1 at pp. 13-14.
(7) 13 Can. S.C.R. 352.
(8) [1916] 2 A.C. 569.
(9) [1923] A.C. 136.
(10) 41 T.L.R. 165.
(11) 8 App. Cas. 891 at p. 905.
(12) [1920] 2 K.B. 612.

1926

FAIRBANKS v. THE CITY OF HALIFAX.

Newcombe J.

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

NEWCOMBE J.—This appeal comes before the court from the Supreme Court of Nova Scotia upon a case stated under the provisions of s. 410 of the city charter of Halifax, proclaimed to come into force 28th January, 1914, and the real question is whether s. 394 of that Act, as amended, is *intra vires* of the legislature of the province.

The estate of Fairbanks was the owner of the ground floor of nos. 107-109 Hollis St. in the city of Halifax, and these premises were leased by the estate to His Majesty the King, represented by the Minister of Railways and Canals, acting under the authority of an order in council of 31st May, 1922. The premises, as described in the lease, consist of

> certain space for passenger offices in the city of Halifax, being space 31 ft. 9 inches by 48 feet 3 inches, for a ticket office on the ground floor of a building adjoining Queen Hotel, nos. 107 and 109 Hollis street.

The lease is dated 22nd March, 1922, and it runs for the term of five years, commencing on 1st May, 1922. The annual rent reserved is $3,000. The lessee covenants to pay the rent

> and the business taxes, if any, and the water taxes during the term; the lessors binding themselves to pay the yearly assessment of the said leased premises and all other taxes of every kind which may be lawfully imposed or levied thereon during said term;

the lessee covenants moreover to use and occupy the premises only for the purposes of a ticket office of the Canadian National Railways.

By c. 39 of the Nova Scotia Act of 1916, it was enacted that immediately after the passing of that Act the city of Halifax should cause to be prepared an Act in amendment of ss. 369-483 of its charter relating to taxation, striking out therefrom all the provisions authorizing and requiring personal property to be assessed and rated for taxation within the city and substituting therefor provisions authorizing and requiring the imposition and rating of business and household taxes as thereby defined. The city charter so required to be amended is the revised and consolidated Act which was prepared and brought into force by proclamation of the Lieutenant-Governor on 28th January, 1914, pursuant to c. 67 of the Act of 1913.

The Act of 1916 defines "business tax" to be

a yearly tax based upon the assessed value of any premises used for the purposes of any business, trade or profession, to be paid by the occupier of the same.

There have been numerous amendments of the city charter since 1916, but this definition, so far as I have discovered, has not been expressly repealed, although it appears in the amending Act prepared by the city authorities, as subs. 1 of s. 371, in a form somewhat varied or limited, as follows:

371. (1) The business tax shall be a tax payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt as is herein provided, and shall be payable by the occupier whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not.

The "household tax" is a tax based upon the assessed value of any premises occupied for residential purposes, to be paid by the occupier. The ordinary business tax rate is one per cent of the value of the premises occupied. There are provisions for licenses and special taxes; for a poll tax; for taxes upon buildings and other improvements, and finally it is provided that the remainder of the amount yearly required by the city, after deducting the probable amounts to be yielded by the taxes above mentioned, shall be raised by a rate sufficient to produce that amount on the assessed value of the land apart from buildings or other improvements. By s. 11, it is enacted in effect that when the Act providing the necessary amendments shall have been prepared it shall be submitted to the Governor in Council who may approve subject to such further changes, amendments or additions as are considered desirable; that the Act may then be embodied in an order of the Governor in Council and declared to be in force, and that upon publication of the order in the Royal Gazette,

together with the said amended (*sic*) Act as a schedule thereto, and also specifying the sections so repealed, the said sections shall be repealed and the said amended Act shall be in force and effect in the place thereof.

By order in council of 24th August, 1918, reciting ss. 1 and 11 of c. 39 of 1916, and that the city of Halifax had caused to be prepared the Act therein referred to, the Lieutenant-Governor in Council approved the said Act and ordered and declared that it should be in force and effect, and that the sections of the Halifax city charter specified in the schedule were repealed to the extent mentioned in the

1926

FAIRBANKS v. THE CITY OF HALIFAX.

Newcombe J.

schedule. The amending Act is introduced as part V. of the Halifax city charter under the title "Taxation," and it comprises ss. 369 to 401-P inclusive, 413 and 416. The sections mentioned in the schedule as repealed are ss. 369 to 401, both inclusive, and ss. 413 and 416. The Act was published in the *Royal Gazette* of September 4, 1918, and is to be found at pp. 653 to 661 of the files of the *Royal Gazette* for that year. The amending sections which were so brought into force on 4th September, 1918, were, by statute, c. 79 of 1919, s. 2, ratified and confirmed and declared to have the same force and effect as though they had been contained in an Act of the legislature passed at that date.

It is provided by s. 370, as sanctioned by the amending Act, that

the taxation of the city shall consist of:

(*a*) Business tax,
(*b*) Household tax,
(*c*) Licenses and special taxes,
(*d*) Poll tax,
(*e*) Real property tax,

all as hereinafter specified and defined.

From the foregoing, it will be perceived that by the scheme of the legislation under review, the city revenue to be provided by taxes, in addition to the proceeds of the business and household taxes, licenses and special taxes, poll tax and tax upon the value of buildings and other improvements, is derived from a general levy against real property. By s. 391 some exemptions are provided, including

the property of His Majesty used for Imperial, Dominion or Provincial purposes.

It is provided by s. 394 of the Amending Act, as proclaimed by the Lieutenant Governor in Council, and confirmed by the legislature, following a like provision in the Act of 1916, that:

Except as is herein otherwise provided, if any property is let to the Crown or to any person, corporation or association exempt from taxation, such property shall be deemed to be in the occupation of the owner thereof for business or residential purposes as the case may be, and he shall be assessed and rated for household tax or business tax according to the purpose for which it is occupied.

The case must be considered upon the statement of it in which the parties have concurred as depending upon the questions submitted, which are as follows:

1. Whether the said estate of James P. Fairbanks is legally liable for the payment of the said business tax.

2. Whether section 394 of the Halifax city charter is *intra vires* the legislature of the province of Nova Scotia.

3. Whether the said Court of Tax Appeals was right in dismissing the said appeal and confirming the said assessment.

It is stated that the assessor for the city of Halifax assessed the estate of Fairbanks in respect to the premises for a business tax for the year ending April 30, 1925, the premises being, during that period, in possession of the King as a railway ticket office. The estate of Fairbanks appealed from the assessment to the Court of Tax Appeals for the city, and upon the appeal the assessment was confirmed. The court stated the case for the opinion of a judge of the Supreme Court of Nova Scotia, and the appeal was heard by Rogers J., who answered the questions submitted favourably to the city. The estate then appealed to the Supreme Court of the province sitting *en banc*. The judges who heard the appeal were the Chief Justice, Ritchie E. J. and Mellish and McKenzie JJ. The learned judges were equally divided in opinion, the Chief Justice and Ritchie E. J. holding that the appeal should be dismissed, and Mellish and McKenzie JJ. that the estate was not legally liable for the payment of the business tax, and that the Court of Tax Appeals erred in dismissing the appeal and confirming the assessment. The estate thereupon appealed to this court, and its objections are two: first, that the leasehold was land or property belonging to Canada and therefore exempted from taxation by s. 125 of the British North America Act, 1867; and, secondly, that the business tax, as defined by s. 371, and, by force of s. 394, made payable by the owner (i.e. the estate of Fairbanks) was an indirect tax, and therefore not within the powers of taxation committed to the province by s. 92 (2) of the British North America Act, 1867, as

direct taxation within the province in order to the raising of a revenue for provincial purposes.

The power of direct taxation was considered in *Attorney General for Quebec* v. *Queen Insurance Company* (1), where a question arose as to whether an Act imposing stamp duty on insurance policies, renewals and receipts, was direct taxation. Sir George Jessel, M.R., delivering the judgment of the Judicial Committee, held that, whether the words were considered as used in the sense of political

(1) 3 App. Cas. 1090 at pp. 1100-1101.

1926

FAIRBANKS v. THE CITY OF HALIFAX.

NewcombeJ.

economy, or as used in jurisprudence in the courts of law, there was a multitude of authorities to show that such a stamp imposed by the legislature was not direct taxation, and he said that

> all that is necessary for them (their lordships) to say is that, finding these words used in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the legislature of England to include it in the term "direct taxation," and therefore that the imposition of this stamp duty is not warranted by the terms of the second subsection of s. 92 of the Dominion Act.

In *Attorney-General for Quebec* v. *Reed* (1), a question arose as to the validity of the Quebec Act, c. 9 of 1880, which imposed a duty of ten cents upon every exhibit filed in court in any action pending therein, and Lord Selborne, pronouncing the judgment, said:—

> Now it seems to their lordships that those words (direct taxation) must be understood with some reference to the common understanding of them which prevailed among those who had treated, more or less scientifically, such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill and those who agree with him is less unfavourable to the appellant's arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation, as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

And in conclusion, he said:—

> Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment, and if at the time the ultimate incidence is uncertain then, as it appears to their lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question, still less can it be called so, if the other view, that of Mr. McCulloch, is correct.

In *Bank of Toronto* v. *Lambe* (2), the validity of a statute of Quebec, c. 22 of 1881, was in controversy. This Act imposed taxes on certain commercial corporations carrying on business in the province, including banks, as to

(1) 10 App. Cas. 141. (2) 12 App. Cas. 575.

which the tax imposed was a sum varying with the paid-up capital, and an additional sum for each office or place of business. Lord Hobhouse, who gave the judgment, considered the meaning of "direct taxation," and he adopted the definition of John Stuart Mill, to which Lord Selborne had referred in the *Reed Case* (1), as a fair basis for testing the character of the tax in question, and as embodying

with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

This definition, as quoted in the judgment, 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. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.

Lord Hobhouse said that the legislature could not possibly have meant to give a power of taxation, valid or invalid, according to its actual results in particular cases, but that it must have contemplated some tangible dividing line, referable to, and ascertainable by the general tendencies of the tax, and the common understanding of men as to those tendencies. And he held that, both according to the probabilities of the case and the frame of the Act, the Quebec legislature must have intended and desired that the very corporations from whom the tax was demanded should pay and finally bear it, and that it was carefully designed for that purpose; he said that it was not like a customs duty, which enters at once into the price of the taxed commodity.

There the tax is demanded of the importer while nobody expects or intends that he shall finally bear it.

In *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (2), we have Lord Herschell's comments upon the foregoing authorities. The question was as to the power of the legislature of Ontario to impose license duties upon brewers and distillers for the sale of liquor manufactured by them, and their Lordships con-

(1) 10 App. Cas. 141. (2) [1897] A.C. 231.

1926

FAIRBANKS v. THE CITY OF HALIFAX.

Newcombe J

sidered that, as in the case of *Bank of Toronto* v. *Lambe* (1), the tax was demanded from the very person whom the legislature intended or desired should pay it; that there was neither expectation nor intention that he should indemnify himself at the expense of some other person, and Lord Herschell observed that:

> No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposition of such a burden to tax the customer or consumer. It is of course possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax. It was argued that the provincial legislature might, if the judgment of the court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise.

In the case of *Cotton* v. *The King* (2), which has been much discussed, the question of direct taxation was considered with regard to the legislation of Quebec regulating succession duties. Lord Moulton pronounced the judgment. He considered the earlier cases, and he said that in their Lordships' opinion those decisions had established

> that the meaning to be attributed to the phrase "direct taxation" in s. 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill and that this question is no longer open to discussion.

He reviewed the succession duty Acts of Quebec, and he said that

> to determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation.

And he held the taxation invalid because the payment was obtained from persons not intended to bear it, within the meaning of the accepted definition.

Very recently the question came before the Judicial Committee again in *Attorney-General for Manitoba v. Attorney-General for Canada* (3). Lord Haldane, who

(1) 12 App. Cas. 575. (2) [1914] A.C. 176.
(3) [1925] A.C. 561.

pronounced the judgment, pointed out that by successive decisions of the Board the principle laid down by Mill and other political economists has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of the British North America Act. He said:—

> The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples.

The legislation in question provided that, upon certain contracts for the sale of grain for future delivery, the seller or his broker should pay to the province a tax computed upon the quantity sold or agreed to be sold, and that the person actually entering into the contract of sale, whether as principal, broker or agent, should pay the tax. Lord Haldane concluded:—

> Turning to the only remaining question, whether the tax is in substance indirect, and bearing in mind that by s. 5 the liability is expressed as if it were to be a personal one, it is impossible to doubt that the tax was imposed in a form which contemplated that some one else than the person on whom it was imposed should pay it. The amount will, in the end, become a charge against the amount of the price which is to come to the seller in the world market, and be paid by some one else than the persons primarily taxed. The class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of the property of the owners for whom they were acting.

By the foregoing authorities it is shown not only that a tax is indirect which is imposed upon a person in contemplation that another shall pay it, but also that the intention or expectation that the burden will be shifted may be shown by the form in which the tax is imposed, as in the last cited case, or may be ascertained by the general tendencies of the tax and the common understanding of men as to those tendencies, as explained by Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1). Common business experience and knowledge must of course be imputed to the legislature, and results which follow in the natural and ordinary course of common business transactions must be held to have been contemplated.

In *City of Montreal* v. *Attorney-General for Canada* (2), the Judicial Committee had to consider the validity of a tax imposed by the legislature of Quebec; land in the city

(1) 12 App. Cas. 575 (2) [1923] A.C. 136.

1926

FAIRBANKS v. THE CITY OF HALIFAX.

Newcombe J.

of Montreal, belonging to the Dominion Crown and leased to a tenant, who occupied it for industrial and commercial purposes, had been assessed under a section of the city charter of Montreal which enacted that persons occupying, for commercial or industrial purposes, buildings or land belonging to the Federal Government should be taxed

> as if they were the actual owners of such immovables, and shall be held to pay the annual and special assessments, the taxes and other municipal dues.

It was contended, first, that this legislation conflicted with the constitutional immunity provided by s. 125 of the British North America Act, which declares that no lands or property belonging to Canada shall be liable to taxation; and, secondly, that, if the taxation did not fail upon that ground, it was not direct taxation, and was therefore incompetent. Lord Parmoor, who delivered the judgment, reviewed the legislation; he said that the effect of it was that the occupant was made liable to pay on an annual assessment, not to exceed one per cent of the capitalized value of the occupied property, and he proceeded to say:—

> The method of assessment determines the amount for which an occupier is liable during his occupancy, but does not alter the incidence of the taxation or transfer the incidence from the occupant to the owner. There is no suggestion that the assessment, in the case under appeal, has not been fairly ascertained, or that there has been any attempt to differentiate between the tenants of the Crown lands and the tenants of private individuals or corporation, to the disadvantage of the Crown tenants. The ultimate incidence of taxation imposed on tenants, as the occupants of lands, is a matter on which economic experts have expressed different opinions. If, however, municipal taxation is to be regarded as *ultra vires*, on the ground that the ultimate incidence of taxation, or some portion of it, may or will fall on the owner, it is difficult to see in what form such taxation could be validly imposed. The question to be determined is the simpler one, whether the taxation, which is impeached, is assessed on the interest of the occupant, and imposed on that interest. In the opinion of their lordships the interest of an occupant consists in the benefit of the occupation to him during the period of his occupancy, and does not depend on the length of his tenure. The annual assessment, to which objection is taken, is an assessment for which the tenant is only liable so long as his occupancy continues and which ceases so soon as his occupancy is determined. If on the cessation of his tenancy the Crown chooses to leave the land unoccupied or to occupy the land by an official acting in his official capacity, there would be no further liability to taxation under art. 362-a of the charter affecting either the land or the Crown.

The objection that the tax was indirect had been distinctly put at the argument, and is thus reported:—

The article is *ultra vires*, because the taxation is not direct taxation according to the view in *Cotton* v. *The King* (1); a tenant taxed as owner will obtain an indemnity from the Crown in the form of the rent paid or otherwise.

It must therefore be inferred that in the opinion of their Lordships the tax was not indirect although the property, belonging to the Crown, was in the occupation of a tenant who was to be taxed as the actual owner, and held to pay the taxes so imposed. The judgment seems to have proceeded upon the view that it was the tenant's interest only that was assessed, the amount of the tenant's liability being determined by the method of assessment.

It was forcibly argued by Mr. Bell, on behalf of the respondent, that the present case was the exact converse of the *Montreal Case* (2) and concluded by the reasoning of the judgment in the latter; that in the *Montreal Case* (2) the municipal authority assessed the leased property at its full value as if the tenant were the owner, and this it might do notwithstanding that the property of the landlord was exempt from taxation; while in this case, where the property of an individual is leased to the Crown for its business purposes, it is still for these purposes deemed to be in the occupation of the owner, who is therefore made liable for the business tax; and he urged that there was no distinction in principle between the two cases; that whereas in the *Montreal Case* (2) the Crown would naturally, in the course of business, receive less rent by the amount of the tax levied in respect of the value of its interest in the demised property, it would, in the *Halifax Case,* naturally, and in the ordinary course, be required to pay more rent by the amount of the tax chargeable to the landlord by reason of the tenant's occupation of the property for business purposes and his exemption from the business tax which is ordinarily borne by the tenant. This argument is however shown to be unsound when it is considered that, in the view which the Judicial Committee seems to have taken of the *Montreal Case* (2), it was the occupier's interest which was assessed, and if I do not misinterpret the decision, the direction to tax the occupier as if he were the actual owner was intended only to regulate the method of assessment.

(1) [1914] A.C. 176. (2) [1923] A.C. 136.

1926

FAIRBANKS v. THE CITY OF HALIFAX.

Newcombe J.

It is said, and it seems obvious enough, that all taxation, including that nominally charged on things, is in the last resort paid by persons. Adam Smith (McCulloch's New Ed., 1839, p. 371 et seq.) considered that every tax must finally be paid from one or other of the different sources of revenue, rent, profit and wages, and accordingly he grouped taxes under those three headings, with their subdivisions. The ascertainment of the actual person by whom a particular tax is ultimately paid is, owing to the possibilities of shifting the burden as originally imposed, frequently a difficult problem; but, that there may be indirect taxation of land, or of persons in respect of land, in the sense in which the expression "direct taxation" has passed into the constitution of Canada, I see no reason to doubt. And such taxation is no more competent to the provinces than indirect taxation of persons in respect of their personal property, earnings or profits. It would seem to have been the view in the *Montreal Case* (1) that the taxation of a tenant in the ordinary case was not indirect by reason of the incidence of the taxation, and that therefore it was not necessary to attempt to ascertain where the burden would ultimately rest; it does not necessarily follow from the decision that the taxation of a tenant is not indirect if the assessment embrace the landlord's estate in the demised premises as well as that of the tenant, when the increased charge would cause the tenant to stipulate, and compel the landlord, if he would lease his property, to agree for an equivalent reduction of the sum which would otherwise represent the fair or obtainable rent. It may perhaps be gathered from the few brief lines in which Lord Parmoor disposes of the question of indirect taxation that in the facts of the case he found nothing to distinguish it in principle from the ordinary case of landlord and tenant, where there is a tax upon the rent, or upon the tenant's interest, to be paid by the tenant; that in such a case it could not be supposed that the legislature intended or contemplated any putting over of the tax, and that the court would therefore not follow the incidence of the taxation. We are told no more than that

> the ultimate incidence of taxation imposed on tenants as the occupants of lands is a matter in which economic experts have expressed different

(1) [1923] A.C. 136.

opinions. If however municipal taxation is to be regarded as *ultra vires* on the ground that the ultimate incidence of taxation, or some portion of it, may or will fall on the owner, it is difficult to see in what form such taxation could be validly imposed.

I can only conclude therefore that the Attorney-General failed in his alternative contention in the *Montreal Case* (1) for lack of evidence, either in the form of the tax as imposed, or in the facts of that particular case, to establish any legislative expectation or intention that the tenant would indemnify himself at the expense of the landlord; the burden being upon him to make out that it was expected or intended, having regard to the form of the tax and the facts and circumstances of the case, that the tax would be passed on by the tenant. In that view the decision does not affect the case now under consideration, where the tax appears to have all the indicia to which the judicial authorities have referred as definitive of indirect taxation. The motive and intention are reasonably apparent; seeing that the tenant is exempt from taxation, the landlord is made liable for the tax which would have otherwise been chargeable to the tenant in respect of the special purpose for which he occupied the premises; and, whatever may be said about the *Montreal Case* (1), the landlord is by the legislation now in question put in the position of the tenant, because the latter is exempt, and made responsible for the taxes levied for the use of the premises by the tenant for the business purposes for which they were leased, from which nothing is more to be anticipated than that the taxes will be immediately passed on to the tenant as part of the rent. A more inviting, indeed compelling, case for the landlord to exact indemnity from his tenant, for whose particular and beneficial enjoyment of the property he is obliged to pay a special tax, it is difficult to imagine.

It may I think be said of this business tax, with relation to the case of the exempted tenant, as was said by Lord Hobhouse in *Bank of Toronto* v. *Lambe* (2), with regard to Customs duty, that it enters at once into the price of the taxed commodity. The business tax is a tax payable by the occupier by reason of the trade which he carries on upon the demised premises. It is a tax which cannot be

(1) [1923] A.C. 136. (2) 12 App. Cas. 575.

1926

FAIRBANKS v. THE CITY OF HALIFAX.

Newcombe J.

levied save for the tenant's occupation for the particular purpose; but, when the tenant is exempt from taxation, the legislature would nevertheless avail itself of his occupation by declaring that it shall be deemed to be that of the owner, thereby making the owner liable for the tax which would have fallen upon the tenant if he had not been exempt. Consequently, in the competition for the leasehold, the tenant exempt from taxation is subject to the disadvantage that the rent which he offers is of less value to the landlord, by the amount of the tax, than it would be in the case of his non-exempt competitors. Therefore it seems out of question that the landlord would ultimately assume the burden of the tax. He did pass it on as was natural to expect; that was a result which is not likely to vary in particular cases, and the tenant, in paying the tax as part of his rent, pays no more than the annual value of the premises, or in the aggregate precisely the same as the non-exempt tenant would pay in rent and business tax combined. Thus it may justly be said that, as to tenants exempt from taxation, the tax enters immediately into the rent. In holding in the *Brewers and Malsters Case* (1), that the tax was not indirect, Lord Herschell said that no transfer of the burden would in ordinary course take place or could have been contemplated as the natural result of the legislation, having regard to the uniformity and trifling amount of the license fee, which was imposed upon all brewers and distillers without any relation to the quantity of the goods which they sold, and that it could not have been intended by the imposition of such a burden to tax the customer or consumer. The conditions in the present case are the very opposite. The ordinary and natural course of business and the substantial character of the tax, based as it is upon the value of the premises occupied, and having relation only to the tenant's occupation, show that the burden will not rest with the landlord. It would be doing less than justice to the intelligence, foresight or intention of the legislature to suppose that it anticipated or expected that the person upon whom the tax was imposed would ultimately bear it. In considering the character of the tax levied in the *Manitoba Case* (2), their Lordships of the Judicial Committee had regard to a statement of

(1) [1897] A.C. 231. (2) [1925] A.C. 561.

facts submitted with relation to the grain trade, showing the course of business in the sale and disposal of the commodity, and it is said that

> it is impossible to doubt that the tax was imposed in a form which contemplated that some one else than the person on whom it was imposed should bear it.

The form of the tax in the present case, in view of the implications of the statute, seems to be that inasmuch as the occupiers of all premises for business purposes are required to pay a tax based upon the value of the property so occupied, and inasmuch as certain persons may become occupiers who are exempt from taxation, therefore when the tenant is exempt and the landlord is not exempt, the landlord shall be deemed to be the occupier and shall pay the tax which would otherwise fall directly upon the tenant; thus conclusively pointing to the probability and intention that in the end the tax will become part of the rent. The landlord would obviously exercise the means of which he has the control to indemnify himself against the ultimate burden.

I would therefore answer the questions in the negative. In this result the appeal must be allowed with costs throughout to the appellant.

DUFF J. (dissenting).—The question mainly discussed in the courts below was whether or not the legislation in question, s. 394 of the charter of Halifax, offends against the prohibition of s. 125 of the British North America Act. This question is much the same as that which was passed upon in the *Montreal Case* (1). There, the legislation provided for the assessment of proprietors of land, and, subsidiarily, enacted that where land exempt from taxation, including Crown land of the Dominion or of the province, was occupied by a private person for industrial or commercial purposes, the occupant should be deemed, for the purposes of assessment to the property tax, to be the proprietor, and should be assessed accordingly.

It was contended on behalf of the Dominion that this in effect amounted to an assessment of Crown lands, where the lands assessed in virtue of such occupancy were the property of the Dominion, and that it was consequently obnoxious to s. 125. This contention was rejected on the

(1) [1923] A.C. 136.

1926

FAIRBANKS v. THE CITY OF HALIFAX.

Duff J.

authority of the previous decision in *Smith* v. *Vermillion Hills* (1).

In principle, this decision, in so far forth as concerns the suggestion that the legislation now before us infringes upon s. 125, seems to govern the present case.

But another contention is now advanced, which in effect is that the enactment upon which the impeached assessment rests cannot be sustained by the authority given to the provinces on the subject of "direct taxation"—in other words, that the tax is one which does not fall within the category of "direct taxation".

The able review of the decisions upon this subject in the judgment of my brother Newcombe is one which may be accepted for the most part without criticism. It is only when one comes to the application of the doctrine of the cases that difficulty arises.

The first paragraph in Mill's third chapter of Book V. has been adopted as affording a guide to the application of section 92 (2). But it would, I think, be going far beyond the authorities and would be a grave error to suppose that by force of the decisions of the Judicial Committee the whole of that chapter had become incorporated as a part of s. 92. I am inclined to think that one must, in applying the decisions, attend mainly to the thing decided, rather than to particular expressions.

Most of the cases in which provincial legislation in this field has been held invalid have been comparatively simple, not to say obvious, cases: taxes imposed upon trustees in respect of the property of their beneficiaries, as in *Cotton Case* (2), taxes imposed upon agents in respect of transactions on behalf of their principals, as in the *Manitoba Case* (3), and taxes universally classed as indirect, such as taxes on commodities or stamp duties (*Attorney General for Quebec* v. *Queen Insurance Co.* (4). *Reed's Case* (5) was a very special one. The stamp duty there in question was collected by means of the requirement that all exhibits in legal proceedings should be stamped—the ultimate liability to pay being ascertained only at the termination of the litigation, and then determined by law.

(1) [1916] 2 A.C. 569.
(2) [1914] A.C. 176.
(3) [1925] A.C. 561.
(4) 3 App. Cas. 1090.
(5) 10 App. Cas. 141.

The determination of the incidence of local rates on occupiers, building owners and land owners presents extraordinary difficulties. Mill treats the subject, in chapter 3, in a very summary way, as compared with the searching analysis it has received during the last thirty years, notably in the masterly treatise of Professor Seligman, published in 1898, in the memoranda presented to the Royal Commission of 1898 by the British economists, and in the commentary of Professor Edgeworth thereon. The subject is beset with difficulty and obscurity, and differences of opinion divide economists on most phases of it.

Mill, writing in 1848, says that the burden of a tax on occupiers remains where it is laid, while a house tax, levied on the builder or owner, is an indirect tax. Dr. Marshall, in a note retained in the edition of the "Principles" of 1920, says,

> The burden of * * * rates is * * * shifted from the occupiers of business premises partly on to their landlords, and partly on to their customers.

According to Professor Seligman, the incidence of such rates—that is to say, rates on urban land or urban buildings or urban occupiers—is determined by a great variety of factors, varying in character, as well as in force and activity, not only with the locality but with the economic conditions prevailing. All such rates as a rule, he says, experience has shewn will fall on occupiers in the crowded areas of great cities, and the same rule holds, according to him, in the United States in times of abounding prosperity, while in decaying towns and decaying parts of large cities, and generally in times of depression or stagnation (all too frequent everywhere), the burden falls upon the landlord. According to him, rates of precisely the same character, levied at one and the same time, in states like California and New York, may fall in one locality within the state ultimately upon the landlord, and in another, ultimately upon the occupier. Obviously, if the application of the canon adopted from Mill is to be regulated by determining in each case the fact of incidence, the courts have set before them in this region of municipal rates a task well-nigh impossible of performance.

This difficulty is recognized in the judgment in the *Montreal Case* (1). And in truth, in view of the difficulties

(1) [1923] A.C. 136.

1926

FAIRBANKS v. THE CITY OF HALIFAX.

Duff J.

and obscurities surrounding the subject, it seems reasonably safe to say that legislation imposing such taxes does not contemplate their ultimate incidence, but only the immediate application of them. It may properly be observed also that if Mill's view, baldly expressed in the third chapter, that a tax on house landlords is an indirect tax, be accepted as controlling the operation of s. 92 (2), it would probably have the effect of eviscerating any system of municipal taxation now or hitherto in force in this country.

Effect, of course, must be given to provincial legislation, unless the courts can clearly see that it is *ultra vires*.

It seems, moreover, not unreasonable to hold that such subsidiary provisions as that in question in the *Montreal Case* (1) and that now in question are not really infringements against the principle of s. 92 (2). Both provisions aim at avoiding inequality. In each case there is an assessment in respect of the capital value or a proportion of the capital value of real property. In the legislation in question in the *Montreal Case* (1), the occupier of exempt property for industrial or commercial purposes was held as if proprietor. Under the legislation before us, the owner of property in occupation of an exempt occupier is held as if he were occupier.

Such ancillary provisions would appear to be not inadmissible as part of a scheme of local rates authorized by s. 92 (2).

The appeal should be dismissed.

Appeal allowed with costs.

Solicitor for the appellant, the estate of James P. Fairbanks: *C. J. Burchell.*

Solicitor for the appellant, the Attorney-General of Canada: *J. L. Ralston.*

Solicitor for the respondent: *F. H. Bell.*

(1) [1923] A.C. 136.

THE CITY OF ST. JOHN (DEFENDANT) ... APPELLANT; 1925

*Oct. 14, 15.

CHARLES DONALD (PLAINTIFF) ..... RESPONDENT. 1926

*Feb. 2.

Dist. Seaway Hotels v. Grass Can. Ltd. 1972 1 S.C.R. 1092

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

Negligence—Employer and contractor—Person damaged by contractor's negligence—Liability of employer—Work necessarily attended with danger—Duty of employer—Duty of owner of land to prevent use thereof causing a nuisance—Servant or independent contractor—Contract reserving powers of control to employer—"Casual or collateral" negligence.

The defendant city employed M. as a contractor to deepen a stream within the city. In the contract and specifications wide powers of interferference and control were reserved to the city, but there was no evidence of actual interference. The work involved rock excavation. Near the work M. built a shack on or partly on land included in a street limit but not used as part of the roadway, and in this shack he placed tools and appliances for the work, including a forge and also a box of dynamite. An explosion occurred, damaging plaintiff's house. At trial the jury found that the explosion was caused by the negligence of M. or his servants, the negligence consisting in the storing of the dynamite in a shed used as a storehouse for tools, instead of being locked up in a separate structure used for explosives only. No question was put to the jury involving the city's liability, which was dealt with by the trial judge on considerations of law upon the contract and as upon undisputed facts.

Held, affirming the judgment of the Supreme Court of New Brunswick, Appeal Division, and of Crockett J. at the trial, that the city was liable.

Per Anglin C.J.C. and Rinfret J.: The principle applicable was that where work is necessarily attended with risk, the person causing it to be done has the duty of seeing that effectual precautions are taken; and he cannot escape from the responsibility attaching on him of seeing that duty performed, by delegating it to a contractor. The city, in ordering work involving storage of dynamite near a highway and neighbouring houses was, at its peril, bound to see that the duty of taking preventive precautions against its manifest danger producing injurious consequences was performed; the most obvious of such precautions was to provide the safest storage possible; not only was there no proper stipulation or instructions as to storing of explosives, but the city's duty to see that proper storage was provided would not be satisfied by merely stipulating or giving instructions for it; failure to see that the duty was performed entailed liability on it as employer to those injured as a result of its non-performance. The improper storage of the dynamite could not be regarded as casual or collateral negligence on M's part; it was negligence in the performance of an essential part of the work; it was not such an act

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

1926

THE CITY OF ST. JOHN v. DONALD.

of negligence as could not have been anticipated and guarded against; and carelessness in the storage and handling of explosives is not something so unusual that no sane contractor might be expected to be guilty of it.

Dealing with other grounds argued, Anglin C.J.C. and Rinfret J. *held* that, although the evidence should warrant an inference that the shack was on premises owned or controlled by the city, it did not satisfactorily appear that the city had, or should be deemed to have had, such notice that dynamite was stored therein as might entail liability on the ground taken by Newcombe J.; also, that the relation between the city and M. was that of employer and independent contractor, not of master and servant; the mere existence of wide powers of interference and control reserved to the city (but which were not exercised), did not suffice to make the contractor and his workmen servants of the city.

Per Duff J.: The storing of the dynamite at or near the site of the operations in progress and in the vicinity of dwelling houses and public streets was an act incidental to the carrying out of these operations by the city in virtue of powers vested in it as the municipal authority, through the instrumentality of the contractor. The nature of the work itself obviously dictated the duty of taking suitable precautions. This duty rested upon the city primarily as the donee of the powers in pursuance of which the work was being executed, and this duty it could not discharge by delegating it to a contractor. *Hardaker* v *Idle* (1896), 1 Q.B., 335; *Vancouver* v. *Hounsome,* 49 Can. S.C.R., 430.

Per Mignault J.: The duty was imposed on the city to supervise the storage of explosives, which duty it could not discharge by delegating it to the contractor.

Per Newcombe J.: Where a person is in possession of fixed property, he must take care that it is so used that other persons are not injured. This duty exists, though the property is in use by a contractor permitted, for purposes of his contract, on the premises. Such injuries are in the nature of nuisances. The shack was on land which, although included in the street appropriation, could not in its existing condition be used for street purposes, and was vacant unimproved land, as to which the city was under the obligation of an individual proprietor to see that it was not used in a manner to cause a nuisance. It may be assumed that the shack was not built without the city's knowledge and approval and that it was a consequence not improbable of the location and building of the shack, which the city should have realized, that the explosives for the work would be kept there; and the city could not escape liability for the user which, for purposes of the work, the contractor made of the shack, amounting to a public nuisance upon the city's property.

APPEAL from the decision of the Supreme Court of New Brunswick, Appeal Division, affirming the judgment of Crockett J. (who tried the case with a jury) in favour of the plaintiff, in an action for damages to plaintiff's property caused by an explosion of dynamite.

The defendant city employed the defendant Moses as a contractor to deepen a stream called Newman's Brook which crosses Adelaide street in that city. Under the contract the city had certain wide rights of inspection and direction by its engineer, of approval or rejection of materials, etc. The clauses in this regard are set out in the judgment of Anglin C.J.C. There was, however, no evidence of any actual interference. There was no express provision in the contract with regard to explosives. The work involved rock excavation. Moses brought his tools and appliances from the place where he had been working on another contract, about a mile distant, and built a shack in which they were placed. They included a forge and a box containing dynamite. The shack was built near the work, and on or partly on land which was included in the street limit of Adelaide street but was on a lower level than the travelled roadway which had been built up. The plaintiff's house was on Adelaide street, near the shack, but on the opposite side of the street. An explosion occurred, damaging plaintiff's house. The facts are more particularly set out in the judgments of Anglin C.J.C. and Newcombe J.

At the trial the jury found that the explosion was caused by the negligence of the defendant Moses or his servants, that the negligence consisted "in the storage of dynamite or other explosive in a shed used also as a storehouse for tools, instead of keeping it locked up in a separate structure used for explosives only," and found the damages to be $900, for which judgment was given. No question was put to the jury involving the liability of the city, nor was the court requested by either side to submit any such question. The question of its liability would appear to have been dealt with by the trial judge upon considerations of law, having regard to undisputed facts.

Both defendants, the city and Moses, were held liable by the judgment at trial. Moses did not appeal. The city appealed to the Supreme Court of New Brunswick, Appeal Division, which affirmed the judgment at trial. The city (by special leave granted by the Supreme Court of New Brunswick, Appeal Division) appealed to the Supreme Court of Canada.

1926

THE CITY OF ST. JOHN v. DONALD.

Hon. J. B. M. Baxter K.C. for appellant: The damage was not caused by any act done in the performance of the work, or on the site of the work or on any land occupied by Moses with the consent or knowledge of the city. If caused by negligence at all it was the casual or collateral negligence of the servants of Moses. The contract did not necessarily contemplate the use of a high or dangerous explosive in such a place as to be dangerous to plaintiff's property. The city was not under any duty towards plaintiff with regard to storage of dynamite or other explosive. There was no evidence of negligence.

The storage of materials cannot be treated as an act done in the performance of the work. The dynamite was not stored upon the actual site of the work. The city did not have notice of the building or of the storage. To carry the judgment at trial to its logical conclusion the result must have been the same if Moses had rented or occupied private land for the storage at any distance from the work. And until the dynamite was actually taken upon the site of the work what could prevent Moses appropriating it to other work?

The duty was not that of *Dalton* v. *Angus* (1), which was purely a case of lateral support; nor that of *Hughes* v. *Percival* (2), a case of interference with a party wall; and that the precaution required was in the *execution* of the works, see that case at pp. 725, 726; and see reference thereto in *Hardaker* v. *Idle District Council* (3), ("work ordered by him").

The above cases, and also *Penny* v. *Wimbledon Urban District Council* (4); *Holliday* v. *National Telephone Co.* (5); *Kitchener* v. *Robe and Clothing Co.* (6); are, in view of their circumstances, distinguishable. And see the *Hardaker Case* (3) at p. 344 where Rigby L. J. points out the distinction between cases of master and servant and of employer and independent contractor, and defines "collaterel negligence" as " negligence *other than the imperfect or improper performance of the work which the contractor is employed to do.*"

(1) 50 L.J.Q.B. 689.
(2) 52 L.J.Q.B. 719.
(3) [1896] 1 Q.B. 335 at p. 348.
(4) [1899] 2 Q.B. 72.
(5) [1899] 2 Q.B. 392.
(6) [1925] S.C.R. 106.

Reference to the rule stated in *Pickard* v. *Smith* (1), to the test laid down in *Greenwell* v. *Low Beechburn Coal Co.* (2), ("what act has been done which it is the duty of the defendants to take due care to prevent"); to Beven on Negligence, 3rd Ed. (1908), vol. 1 pp. 597, 607; 20 Hals., 264 para. 619; 16 Hals., 136 para. 238.

The provisions of the contract are only such as are required to secure to the city a proper workmanlike execution of the contract, as was said by Greenshields J. in *Smith* v. *City of Montreal* (3), or give the city control over the way in which the work shall be done and the kind of material to be used, as pointed out by Beck J. in *Smith* v. *Ulen* (4). The retention of a power of control is not sufficient to displace the relation of employer and contractor and substitute that of master and servant. In the *Hardaker Case* (5), while Rigby L. J. seems to have taken that view, the decision is the other way. See at p. 343, per Lindley L. J. and at p. 344 per A. L. Smith L. J. Reference also to *Murphy* v. *Ottawa* (6); *Reedie* v. *London & North Western Ry. Co.* (7); *Dooley* v. *City of St. John* (8); Smith's Master and Servant, 7th Ed. (1922) p. 238. It is a question of fact in each case whether the defendant was acting as master towards a servant or not: *Brady* v. *Giles* (9). See also *Bennett* v. *Castle & Sons* (10).

G. H. V. Belyea K.C. for respondent:—The city having undertaken a work necessarily attended with danger to the public and to the respondent, was under a duty to see that all necessary precautions were taken and could not rid itself of liability by entering into a contract for its performance by another. *City of Kitchener* v. *Robe & Clothing Co. Ltd.* (11); *Dalton* v. *Angus* (12); per Lord Watson and Lord Blackburn; *Quarman* v. *Burnett* (13); *Halliday* v. *National Telephone Co.* (14); *Hardaker* v. *Idle District Council* (5); *Penny* v. *Wimbledon Urban District Council* (15); *Black* v. *Christ Church Finance Co.* (16);

(1) 10 C.B.N.S. 470, at p. 480.
(2) [1897] 2 Q.B. 165 at p. 177.
(3) [1917] Q.B. 52 S.C. 284.
(4) 6 W.W.R. 678.
(5) [1896] 1 Q.B. 335.
(6) 13 Ont. L.R. 334.
(7) 4 Ex. 244.
(8) 38 N.B.R. 455.
(9) 1 M. & Rob. 494.
(10) 14 T.L.R. 288.
(11) [1925] S.C.R. 106.
(12) 6 App. Cas. 740.
(13) 6 M. & W. 499.
(14) [1899] 2 Q.B. 392.
(15) [1899] 2 Q.B. 72.
(16) [1894] A.C. 48.

1926

THE CITY OF ST. JOHN v. DONALD.

Longmore v. *McArthur* (1); *Waller* v. *Corporation of Sarnia* (2); *Pinn* v. *Drew* (3); *Bower* v. *Peat* (4); *Robinson* v. *Beaconsfield Rural District Council* (5); *Kirk* v. *City of Toronto* (6); *Ballentine* v. *Ontario Pipe Line Co.* (7); *Odell* v. *Cleveland House Ltd.* (8); *Pickard* v. *Smith* (9); *Hughes v. Percival* (10); *Tarry* v. *Ashton* (11); Moses' negligence in storing the dynamite as he did was not collateral or casual. Crockett J. in his judgment defined collateral or casual negligence as "some act or omission on the part of the contractor or his servants which could not reasonably have been anticipated or guarded against," referring to *Penny* v. *Wimbledon Urban District Council* (16); *Robinson* v. *Beaconsfield Rural District Council* (5). As to appellant's contention that it is only liable for Moses' negligence "in the execution of the work," this is dealt with in the appeal judgment as follows "If the explosion had occurred during the time that the dynamite was being transported to the shack and damage had been caused x x x it would at most have been caused by casual or collateral negligence and the city should not have been held liable therefor; but the situation is entirely changed when once the dynamite is placed in the shack in close proximity to the work for the sole and exclusive purpose of being used in connection with the work x x". Reference to terms of the contract. The case is a stronger one than the *Robinson Case* (12). The decision of Buckley L. J. in that case was adopted by Anglin C. J. C. in *City of Kitchener* v. *Robe & Clothing Co. Ltd.* (13). See also judgment of Idington J. As to holdings against finding collateral negligence, see also *Penny* v. *Wimbledon Rurban District Council* (14); *Holliday* v. *National Telephone Co.* (15), and *Hardaker* v. *Idle District Council* (16). As to negligence " in the performance of the contract" see *Black* v. *Christ Church Finance Co.* (17). Even if the contract prohibited storage of dynamite on the public highway and Moses was instructed

(1) 43 Can. S.C.R. 640.
(2) 8 D.L.R. 629.
(3) 32 T.L.R. 451.
(4) 1 Q.B.D. 321.
(5) [1911] 2 Ch. 188 at p. 191.
(6) 8 Ont. L.R. 730.
(7) 16 Ont. L.R. 654.
(8) 102 L.T.R. 602.
(9) 10 C.B. N.S. 470.
(10) 52 L.J.Q.B. 719.
(11) 1 Q.B.D. 314.
(12) [1911] 2 Ch. 188 at p. 181.
(13) [1925] S.C.R. 106.
(14) [1899] 2 Q.B. 72.
(15) [1899] 2 Q.B. 392.
(16) [1896] 1 Q.B. 335.
(17) [1894] A.C. 48.

to remove it, the appellant would nevertheless be liable under the authorities. He supplied it to the city in pursuance of his contract for the exclusive purpose of being used for the removal of the solid rock, and placed it where he did with appellant's consent or knowledge.

The city, having caused to be brought and used dangerous materials upon city property forming and being used as part of the scene of operations under the contract, is vicariously liable to respondent for damage caused by their escape, under the rule in *Rylands* v. *Fletcher* (1). The city was liable as an owner or occupier for damage to respondent by a nuisance existing on or originating from its land. *Attorney General* v. *Tod Heatley* (2); *Barker* v. *Herbert* (3); *Job Edwards Co. Ltd.* v. *Birmingham Navigations* (4); *Jones* v. *Festiniog Ry. Co.* (5); *Dominion Gas Co.* v. *Collins* (6).

Reference also to Smith's Leading Cases, vol. I p. 410; Clerk & Lindsell on Torts, 7th Ed. pp. 110-111; *Black* v. *Christ Church Finance Co.* (7); *Waller* v. *Corporation of Sarnia* (8); *Miles* v. *Forest Granite Co.* (9); *Grant* v. *Canadian Pacific Railway Co.* (10); *Canadian Southern Ry.* v. *Phelps* (11); *Rainham* v. *Belvedere* (12); *Midwood* v. *Mayor of Manchester* (13); *Charing Cross Electric Co.* v. *Hydraulic Co.* (14).

The city is liable for Moses' negligence, since the relation of master and servant was created under the contract terms and the circumstances surrounding the performance of the work (presence of appellant's officials to give orders). Reference to Salmond's Law of torts, 5th Ed. p. 96; *Performing Right Society* v. *Mitchell & Booker* (15); *Pollock* on Torts, 12th Ed. pp. 79, 80; *Yewens* v. *Noakes* (16); *Regina* v. *Negus* (17); *Warburton* v. *Great Western Ry. Co.* (18); *Hastings* v. *LeRoi Ltd.* (19); *Dallontonia* v. *McCormick* (20).

(1) L.R. 3 H.L. 330.
(2) [1897] 1 Ch. 56.
(3) [1911] 2 K.B. 633.
(4) [1924] 1 K.B. 341.
(5) L.R. 3 Q.B. 733.
(6) [1909] A.C. 640, at p. 646.
(7) [1894] A.C. 48.
(8) 8 D.L.R. 629 at p. 631.
(9) 34 T.L.R. 500.
(10) 36 N.B.R. 528 at p. 542.
(11) 14 Can. S.C.R. 132.
(12) [1921] 2 A.C. at pp. 480-481.
(13) [1905] 2 K.B. 597.
(14) [1914] 3 K.B. 772.
(15) [1924] 1 K.B. 762 at pp. 765, 767.
(16) 6 Q.B.D. 530, at p. 532.
(17) L.R. 2 C.C. 31, at pp. 34, 37.
(18) L.R. 2 Ex. 30.
(19) 34 Can. S.C.R. 177, at p. 187.
(20) 14 D.L.R. 613, at p. 621.

1926

THE CITY OF ST. JOHN v. DONALD.

Anglin C.J.C.

ANGLIN C. J. C.—The plaintiff sues to recover damages for injury to his house caused by an explosion of dynamite stored by the defendant Moses in a shack nearby. Moses was employed by his codefendant, the city of St. John, as a contractor to deepen Newman's Brook, which crosses Adelaide St. in that city. The authority of the city to undertake this work is not questioned; neither is any doubt cast upon its right to employ a contractor to perform it.

The use of dynamite or some other powerful explosive for blasting was necessary for the economical carrying out of the work, which involved rock excavation. A short time before the explosion occurred, Moses had caused a quantity of 40 per cent dynamite—estimated at about 50 pounds—to be placed in a shack which he had erected on, or immediately adjoining Adelaide St. and adjacent to the work. This shack was built for use as a toolhouse. It also contained a forge for blacksmithing purposes in connection with the work.

The jury found that the storing of the dynamite in a shed used also as a storehouse for tools instead of keeping it locked up in a separate structure used for explosives only was negligence which caused the explosion. While the immediate cause of the explosion is not known, this finding of the jury has not been impugned.

Both defendants were held liable by the judgment of the trial court which was affirmed on appeal. The recovery being for $900 only, a further appeal to this court did not lie without special leave under s. 41 of the Supreme Court Act. That leave was granted to the city of St. John by the Appellate Division of the Supreme Court of New Brunswick. The defendant Moses submitted to the judgment against him.

The plaintiff rests his claim against the city on three distinct bases:

(*a*) that the dynamite required for carrying out the contract having been stored by Moses either on property of the city, or on property of which it had a right of occupation by license, its explosion, due to negligence in storing, entailed liability on the city whatever may have been its relationship with Moses;

(*b*) that in carrying out the work undertaken Moses, if not the servant of the city, was at least by the terms of his contract so much under the control of its engineer that it

cannot escape liability on the ground that he was an "independent contractor";

(c) that, if Moses should be regarded as an "independent contractor," the city is nevertheless liable because the work contracted for was of such a character that in the natural course of things injurious consequences to neighbouring property (including that of the plaintiff) must be expected to arise from its performance unless precautions were taken to prevent such consequences, and the defendant city, therefore, owed a duty to the plaintiff to see that such precautions were taken, responsibility for the discharge of which it could not escape by delegating that duty to a contractor.

(a) Although the evidence should warrant an inference that the shack in which the dynamite was stored was on premises owned or controlled by the municipality, I am not satisfied that its engineer had, or should be deemed to have had, such notice that dynamite was stored in the shack as might entail responsibility apart from the other grounds on which the plaintiff rests his claim. It is unfortunate that these aspects of the case were not more fully investigated at the trial and that we are without the advantage of findings upon them by the jury. If I thought a finding of tacit sanction by the city of the storage of dynamite in the shack justifiable, I should probably be disposed to support the judgment against it on the ground which I understand commends itself to my brother Newcombe.

(b) On this branch of the case the learned trial judge expressed these views:

As to whether, by the terms of the written contract, Moses was in fact an independent contractor, or whether the city corporation retained such control of the work as to create the relationship of master and servant, I have not deemed it necessary to decide, inasmuch as in the circumstances indicated the defence as to the damage complained of being caused by the act of an independent contractor is, in my opinion, of no avail. I feel, however, constrained to say that had it been necessary for me to decide this question, the provisions in the contract and specifications as to the work being carried on *under the direction* of the city's engineer, and requiring the contractor and his foreman and servants to obey at all times the orders of the engineer, as well as the fact of the city's fixing the scale of wages to be paid by the contractor to his employees, and the provisions requiring him to save the corporation harmless from all suits and actions brought against it by reason of the carrying out of the work, are considerations which, in the absence of the clearest possible authorities to the contrary, I should have found it most

1926

THE CITY OF ST. JOHN v. DONALD.

Anglin C.J.C.

difficult to reconcile with the idea of Moses being an independent contractor in the sense contended for.

In deliverying the judgment of the Court of Appeal, Hazen C. J., said:

I do not base my judgment on the ground that the relationship of master and servant existed between Moses and the city, but I certainly, like Mr. Justice Crockett, would have great difficulty in coming to the conclusion, in view of the clauses contained in the contract specification and conditions thereunder, that Moses was an independent contractor. He was to be subject to the control and direction of his employer in respect to the manner in which the work was to be done, and that I think would constitute him a servant of the city, which would therefore be liable for his negligence.

There is no suggestion in the evidence that there had in fact been interference by any civic official in the performance of his contract by Moses. No directions had been given him as to the bringing of dynamite to the work, or as to its storage. Indeed failure to give such instructions is one of the grounds on which the plaintiff imputes responsibility to the appellant. There is no proof that the presence of dynamite in the shack, or in the neighbourhood of the work, was known to any employee of the city.

The clauses of the contract and specifications relied upon to establish such control by the city as would preclude its plea that Moses was an independent contractor read as follows:

All labour and materials of every description requisite for performing the work to be provided by the contractor but be subject at all times to the approval or rejection of the city engineer. * * * And the contractor further agrees with the city that he will carefully and skilfully carry on and perform the work to be done under this contract and that he will employ proper and skilled men to do the work, and to supply and use, in doing the work, good, proper, and requisite materials to the satisfaction of the engineer. * * * The contractor is to furnish at his own cost all of the labour and all of the material required. * * * the engineer and the clerk of works are to have full power and liberty to inspect the various parts of the work at all times during their progress, and in case of the contractor refusing to allow such inspection the work is to be deemed insufficient and not in accordance with the terms of the specifications.

The contractor is not to use the land forming the site of or connected with the works for any other purpose whatsoever than the proper carrying on of the works. * * * No person is to be employed or allowed to remain on the work or any part thereof who shall be objectionable to the engineer.

The contractor shall attend to, and execute, without delay all orders and directions which may from time to time be given by the engineer in connection with the contract, and in case of his refusing to comply with such orders and directions, or of his not proceeding with all due diligence and expedition within twenty-four hours after a written notice

requiring the same has been delivered to him, or his foreman, as hereinafter provided, the commissioner shall be at liberty to use free of cost and charge for wear and tear all, or any, of the contractor's tools, implements and materials to perform such work as he requires and direct agreeably with the specifications, and the contractor shall repay to the city all the cost and charges and expenses to be thereby incurred or the same may be deducted from any amount that may be due to the contractor and retained by the city in reimbursement of all such costs, charges and expenses.

Wide as are the powers of interference and control thus reserved to the city, their mere existence does not *in se* suffice to make the contractor and his workmen in carrying out the work contracted for the servants of the city. It may, as Sir Frederick Pollock says (Law of Torts, 12th Ed., p. 80-81), sometimes

be a nice question whether a man has let out the whole of a given work to an "independent contractor" or reserved so much power or control as to leave him answerable for what is done.

But in the absence of actual interference by the employer or his representative in exercise of the power thus reserved resulting in the injury for which damages are claimed—here there was none—the authorities seem to be reasonably clear that the mere reservation, to quote Smith's Law of Master and Servant, (7th Ed., p. 238).

by contract (of) general rights of watching the progress of works which the contractor has agreed to carry out for him, of deciding as to the quality of the materials and workmanship, of stopping the works or any part thereof at any stage, and of dismissing disobedient or incompetent workmen employed by the contractor will not of necessity render (the employer) liable to third persons for the negligence of the contractor in carrying out the works.

This passage is cited with approval by McCardie J., in *Performing Right Society* v. *Mitchell & Booker* (1). That learned judge says that

the question whether a man is a servant or an independent contractor is often a mixed question of fact and law. If, however, the relationship rests upon a written document only, the question is primarily one of law. The contract is to be construed in the light of the relevant circumstances.

He proceeds to discuss the criteria indicated by the authorities for determining whether the relationship of the employed to the employer is that of independent contractor or of servant, and then says that

The final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of the detailed control over the person alleged to be the servant. This circumstance is, of course, only one of several, but it is usualy of vital importance.

(1) [1924] 1 K.B. 762, at p. 767.

1926

THE CITY OF ST. JOHN v. DONALD.

Anglin C.J.C.

He cites as authority the leading case of *Hardaker* v. *Idle District Council* (1), which has often been followed and, so far as I am aware, has never been seriously questioned. The powers of supervision and control of the city engineer in the present case are not wider than those that were reserved to the district council's inspector in the *Hardaker Case* (1). While the defendants were there held liable on the ground that they could not delegate their duty to provide against injury to the gas mains (escaping gas from which caused damage to the plaintiff) so as to avoid liability for a breach thereof, a majority of the Lords Justices (Lindley and A. L. Smith, L.JJ.) concurred in holding that

> large as the inspector's power was, Thornton (the contractor) was not * * * the servant of the defendants (p. 343): the true relation was that of principal and contractor (p. 344).

So far as the decision of the majority in the Appellate Division of the Supreme Court of Ontario in *Dallantonia* v. *McCormick* (2), where a contractor's workman was injured by the fall of loose overhanging rock, may be inconsisitent with the opinion on the question now under consideration expressed by Lindley and A. L. Smith, L.JJ., in the *Hardaker Case* (1), I am not prepared to accept it. *Dallantonia's Case* (2) is, however, distinguishable from the case now before us in several features, notably in that there the engineer of the defendant company had knowledge of the danger to which the contractor's workmen were exposed while at work and directed its removal but failed to see that his instructions were effectively carried out. These facts may have entailed liability of the company.

I am, with respect, not disposed to regard the relation between the defendants in the present instance as that of master and servant or as other than that of employer and independent contractor

(*c*) The doctrine enunciated by Cockburn L. C. J., in *Bower* v. *Peate* (3), which is made the basis of the plaintiff's claim in the third branch of the case, was doubted by Lord Blackburn in *Hughes* v. *Percival* (4), as possibly too broadly stated; but the learned Lord did not indicate "how far this general language should be qualified". (See observation of A. L. Smith L.J. in *Hardaker* v. *Idle District Coun-*

(1) [1896] 1 Q.B. 335.
(2) [1913] 29 Ont. L.R. 319.
(3) [1876] 1 Q.B.D. 321, at p. 326.
(4) [1883] 8 App. Cas. 443.

cil (1). Lords Watson and Fitzgerald (p. 451 cited *Bower* v. *Peate* (2), without any suggestion of qualification. Mr. Salmond in his valuable work on Torts (6th ed.), at p. 124, treats Lord Blackburn's expression of doubt as a statement that Sir Alexander Cockburn's general proposition should not be supported. He concludes (p. 125) that

> the vicarious responsibility of the employers of independent contractors is not the outcome of any far-reaching general principle, but represents merely a number of more or less arbitrary exceptions based on considerations of public policy.

While it is

> a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract (*Ellis* v. *Sheffield Gas Consumers' Company*) (3).

it is, no doubt, the general rule that the person who employs an independent contractor to do work in itself lawful and not of a nature likely to involve injurious consequences to others is not responsible for the results of negligence of the contractor or his servants in performing it. The employer is never responsible for what is termed casual or collateral negligence of such a contractor or his workmen in the carrying out of the contract; and it is not universally true that he is responsible for injury occasioned by improper or careless performance of the very work contracted for; he is not so where the work is not intrinsically dangerous and, if executed with due care, would cause no injury, and the carrying out of it in that manner would be deemed to have been the thing contracted for. His vicarious responsibility arises, however, where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable. That duty imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it. That, I take it, is a principle applicable in such a situation whatever be the nature otherwise or the locus of the work out of which it arises.

Injuries due to improper acts authorized by the employer, to his negligence in the selection of the contractor,

(1) [1896] 1 Q.B. 335, at p. 347.
(2) [1876] 1 Q.B.D. 321, at p. 326.
(3) [1853] 2 E. & B. 767, 769.
(4) 6 M. & W. 499.

1926

THE CITY OF ST. JOHN v. DONALD.

Anglin C.J.C.

to his failure to impart proper instructions, to his neglect to prevent the creation on his own property by the contractor of a nuisance, or its continuance, or to his giving employment to do acts which, though lawful, can be done only at the peril of him who does them, are really not within the purview of the doctrine imputing vicarious responsibility. In these cases the responsibility is rather direct and rests on personal acts or omissions.

Contracts for works involving interference with rights of support (*Dalton* v. *Angus* (1); *Hughes* v. *Percival*) (2); and for works entailing the creation of dangers on highways (*Penny* v. *Wimbledon Urban District Council* (3); *Holliday* v. *National Telephone Co.*) (4) it is well established, subject the employer to vicarious responsibility for negligence on the part of his contractor which is not casual or collateral. The duty to take precautions for protection of the property endangered in the one case, and of the public in the other, cannot be delegated by the employer so as to avoid responsibility. These are admitted exceptions to the general rule giving the employer immunity from responsibility for the acts or omissions of the independent contractor. But the extension of this class of exception to contracts for works of other kinds the carrying out of which, unless precautions be taken to obviate the danger, involves equally manifest risk to those of the public who happen to come, or to possess property, within the region affected by it, is contested.

As early as 1861, however, in *Pickard* v. *Smith* (5), Williams J., delivering the judgment of the Court of Common Pleas, could find no sound distinction between the case of a public highway and of a road which may be, and to the knowledge of the wrongdoer will in fact be, used by persons lawfully entitled to do so. In *Black* v. *Christ Curch Finance Co.* (6), vicarious responsibility of the employer for negligence in the setting out of fire on open bush land, "an operation necessarily attended with great danger," was upheld by the Privy Council. The employer could not delegate his duty to take all reasonable precautions to prevent the fire spreading so as to escape responsibility for

(1) [1881] 6 App. Cas. 740.
(2) 8 App. Cas. 443.
(3) [1899] 2 Q.B. 72.
(4) [1899] 2 Q.B. 392.
(5) 10 C.B.N.S. 470, at p. 479.
(6) [1894] A.C. 48, at p. 54.

their being neglected. In *Odell* v. *Cleveland House, Limited* (1), the same doctrine was applied to a case of employment of a contractor to demolish the upper portion of a building, and the statement of law by Cockburn, L. C. J., in *Bower* v. *Peate* (2), was made the basis of the judgment. In *Hardaker* v. *Idle District Council* (3), while the contract was for work on a highway, the injury was to persons and property in an adjacent house. In this latter case the liability of the employer was rested upon the principle stated by Lord Blackburn in *Dalton* v. *Angus,* (4), that

> a person causing something to be done the doing of which casts upon him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with a contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby release himself from liability to those injured by the failure to perform it;

Lord Watson, at p. 831, said

> In cases where the work is necessarily attended with risk he (the employer) cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done.

It is true that these noble Lords were immediately dealing with a case of interference with a right to support; but they are, in these passages, as I read them, stating a principle of general application; and that principle, I think, governs the determination of the present case.

The work here contracted for was rock excavation necessarily requiring, for economic reasons, the use of a high explosive. Convenience, amounting to practical necessity, demanded that a reasonable quantity of the explosive should be readily accessible. That in turn involved its being stored upon, or adjacent to, the site of the work, and in dangerous proximity to neighbouring buildings, one of which was that owned by the plaintiff. The dynamite was accordingly brought by Moses to, and stored in, the toolhouse. It was there solely for the purpose of his contract with the city. In so storing it he was acting under that contract, though improperly. *Black* v. *Christchurch*

(1) [1910] 102 L.T. 602.
(2) [1876] 1 Q.B.D. 321.
(3) [1896] 1 Q.B. 335.
(4) 6 App. Cas. 740, at p. 829.

1926

THE CITY OF ST. JOHN v. DONALD.

Anglin C.J.C.

Finance Co. (1). Had the city carried on the work by day labour its legal duty to see that its servants safely stored the dynamite required and its liability for injurious consequences resulting from improper and dangerous storage of it would admit of no doubt. The danger to persons using the highway and to adjacent properties from improper storage of such an explosive must have been obvious to any thinking person. The employer ordering work involving storage of dynamite near a highway and neighbouring houses, was, at his peril, bound to see that the duty of taking preventive precautions against its manifest danger producing injurious consequences was performed. The most obvious of such precautions was to provide for the dynamite the safest storage possible. Compare *Wetherbee* v. *Partridge* (2).

If an obligation was imposed on the city, as employer, to exact a proper contractual stipulation or to give proper instructions as to the storing of the explosive, that duty was entirely neglected. (*Robinson* v. *Beaconsfield Rural District Council* (3)). But the city's duty to see that proper storage for the dynamite was provided would not be satisfied by merely stipulating or giving instructions for it. Failure to see that the duty was performed entailed liability on it as employer to those injured as a result of its non-performance. As put by Lord Lindley in *Hardaker* v. *Idle District Council* (4), the case is not one in which the contractor performed the city's duty for them, but did so carelessly; the case is one in which, so far as the providing of a proper place for storing the dynamite was concerned, no effort was made to discharge the duty of the city.

Nor can the improper storage of the dynamite be regarded as casual or collateral negligence on the part of Moses. It was negligence in the performance of an essential part of the work which he was employed to do—in the discharge of the very duty (amongst others) which the law would have thrown upon the city had it been acting by the hands of its servants. *Hardaker* v. *Idle District Coun-*

(1) [1894] A.C. 48, at pp. 55-57.
(2) [1900] 175 Mass. 185.
(3) [1911] 2 Ch. 188.
(4) [1896] 1 Q.B. 335, at p. 342.

cil, per Rigby L.J. (1); *Robinson* v. *Beaconsfield Rural District Council* (2). Moses expressly agreed to provide, and by implication to care for, all necessary material. The dynamite required for the work was part of such material, and its storage at a point reasonably accessible for the men engaged in the work was one of the obligations which Moses impliedly undertook. Improper storage was not such an act of negligence as could not have been anticipated and guarded against; *Penny* v. *Wimbledon Urban District Council* (3); *Pearson* v. *Cox* (4); and carelessness in the storage and handling of explosives is not something so unusual that no sane contractor might be expected to be guilty of it. *Hughes* v. *Percival* (5).

Storing the dynamite was an integral part of the work contracted for which was necessarily attended with danger, unless the precaution of providing a suitable place to keep it in was observed. The palpable recklessness of Moses in putting it in a building used as a tool-house and occupied as a forge involved the city in responsibility.

DUFF J.—When the facts are understood, the question of law presents no difficulty.

We are not informed of the particular sources of the statutory power under which the work of excavating the bed of Newman's Brook was undertaken by the city, but it has been assumed throughout the case that the work was carried out in execution of some general or special statutory authority vested in the municipality. In his judgment, Mr. Justice Crockett says,

> It was by virtue of the city corporation's authority, and its authority only, that the contractor could have exposed people improperly to such a danger.

The storing of the dynamite in the immediate vicinity of the work on which it was being used was an incident of the work which the corporation, as the proper public authority, was executing through the instrumentality of its contractor.

As the work was being carried on in the vicinity of dwelling houses and public streets, the duty of taking steps to

(1) [1896] 1 Q.B. 335, at p. 352.
(2) [1911] 2 Ch. 188, at pp. 191, 196, 197.
(3) [1899] 2 Q.B. 72, at p. 78.
(4) [1877] 2 C.P.D. 369.
(5) [1883] 8 App. Cas. 443, 450.

1926

THE CITY OF ST. JOHN v. DONALD.

Duff J.

protect the public against the risk of explosions was obviously dictated by the very character of the work itself. The failure to discharge this duty was no casual or collateral negligence: it was the breach of a duty resting upon the municipality, which, in exercise of its statutory powers, was causing the work to be done; a duty which it could not discharge by delegating it to the contractor, *Hardaker* v. *Idle District Council* (1); *Vancouver* v. *Hounsome* (2).

It is on this ground that I should dismiss the appeal.

MIGNAULT J.—In view of the circumstances of this case and of the close proximity of the work to dwelling houses and to the travelled portion of the highway, I think a duty was imposed on the city to supervise the storage of explosives to be used in the blasting operations, which duty it could not discharge by delegating it to the contractor.

I would dismiss the appeal with costs.

NEWCOMBE J.—The city contracted with its co-defendant, George Moses, for the excavation of the channel of Newman's Brook by contract in writing of 24th March, 1921, and the contractor thereby engaged to provide all labour and materials of every description requisite for performing the work, subject at all times to the approval or rejection of the city engineer, also

to supply and use in doing the work good, proper and requisite materials to the satisfaction of the engineer.

By the second of the specifications attached to the contract it was provided that the contractor was to furnish at his own cost all of the labour and material required; to erect the necessary fencing to protect the public; to erect a sufficient number of red lights warning the public of danger, and to conform with all of the city's by-laws in this respect. By clause 41 of the by-laws, relating to the fire department of the city, the storage of gun powder or other explosive substance in any building or place whatsoever within the limits of the city, in any quantity exceeding 25 pounds of gun powder or 10 pounds of any other explosive substance, at any one time, is forbidden under penalty of forfeiture and $40 for each offence. The contract provided prices for both rock, solid and loose, and earth excavation. It is

(1) [1896] 1 Q.B. 335, at p. 340. (2) 49 Can. S.C.R. 430.

common ground in the case that the excavation which the contractor undertook consisted largely of solid rock. Nothing is said expressly either in the contract or in the specification about explosives, but it must be taken that the city, according to the common understanding and having regard to the attendant conditions, impliedly authorized the use of explosives, and that these were included in the materials, if indeed they were not the only material, which the contractor would supply. The channel which was to be excavated extended for a distance of about 950 feet, including the stream below or to the westward of Adelaide street bridge as far as the pond. The contractor had been executing a contract for the city on Douglas avenue, which is distant a mile or thereabouts from the work now in question, and when he completed this work, perhaps on or about Saturday, 16th April, he removed his plant, tools and materials to Newman's Brook; the evidence as to the precise date is not satisfactory, but it certainly was not later than Monday morning, 18th April. Adelaide street approaching Newman's Brook is not built to the full width of its lay-out. It would appear that the ground included within the street limits at this point naturally slopes or falls away to the westward, and that it is only the eastern part of the roadway which had been built up or was used for purposes of travel. The road is said to be laid out to a width of 66 feet, but the travelled roadway consists only of the easterly portion, having a width of 45 feet 6 inches, upon which an embankment was formed supported on the westerly side by a retaining wall, several feet in height, which is nearly perpendicular, and protected by an iron rail. It was on the lower level or westerly side of the road allowance, within a short distance of the brook, that the contractor's teamster deposited the tools and materials which he brought from Douglas avenue, including lumber for the building of a shed, and a box containing a considerable quantity of dynamite, 50 pounds or less. Here on Monday the contractor built a temporary shed or lean-to, 20 feet by 10 feet, having a roof of one slope covered with tar paper, and in this shed were deposited the contractor's tools and appliances for use in the work, including a forge and also a box of dynamite. A stove pipe projected from one end of the shed from which smoke was seen to issue on several occasions, and the forge

1926

THE CITY OF ST. JOHN v. DONALD.

Newcombe J

was set up in the shed and put into operation. On Tuesday the men began the work of excavating the channel, working with picks and shovels. The work had been laid out by or under the direction of the city engineer before the excavating began. The distance of the shed from the channel is variously estimated at from 60 feet to 75 feet. On Wednesday morning the men returned to their work, ditching. There was a fire lighted in the shed that morning, presumably for purposes of the forge, and at 11 o'clock an explosion occurred which blew the shed to pieces, killed one of the contractor's men, who was the only occupant at the time, and caused considerable damage to the houses in the neighbourhood, including the plaintiff's house.

The following questions were put to the jury at the trial and their answers:

1. To what extent was the plaintiff's house damaged by the explosion of April 20, 1921, apart from the destruction of the window glass and other damage which was made good immediately after the explosion?

Ans.: Nine hundred dollars ($900).

2. Was the explosion caused by the negligence of the defendant Moses, or his servants?

Ans.: Yes.

3. If so, in what did such negligence consist?

Ans.: In the storage of dynamite or other explosive in a shed used also as a storehouse for tools, instead of keeping it locked up in a separate structure used for explosives only.

No question was put involving the liability of the city, nor was the court requested by counsel on either side to submit any such question. It would appear to have been assumed that there was no dispute of fact affecting the city and that its obligation depended entirely upon considerations of law, having regard to admitted or undisputed facts.

I should have liked to know from the jury whether in view of the facts and circumstances of the case the city authorized or approved the building and location of the shed, and whether it knew or had reason to know or to apprehend that dynamite was being stored there, but in view of the course of the trial, the submissions at the argument, and the considerations which I shall mention, I do not think it necessary to send the case back for any finding. By the New Brunswick Judicature Rules, Order 39, Rule 6; Order 40, Rule 10, and Order 58, Rule 4, which correspond to the English rules, the court has power to draw inferences of fact and to give any judgment and make

any order which ought to have been made, and a new trial is not to be granted because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial.

It is stated in the appellant's factum that the contractor built the shed

> either wholly within the bounds of Adelaide street or partly within the street and partly upon the adjacent property of a private owner,

and counsel for the city stated at the hearing that the shed might, for the purposes of the case, be treated as wholly upon the highway. People living in the neighbourhood saw the construction of the shed going on and saw the shed in place a day or two before the accident. It was plainly visible from the street and from the brook where the work was going on. No witnesses were called on behalf of the city. The city engineer had been upon the work and laid it out, but there is no direct evidence to show whether or not he was there at any time during either of the two days previous to the explosion, or when he was there.

It being conceded that the contractor, immediately before beginning to execute his contract, erected his shed upon land belonging to the city, in a public place, in close proximity to one of the city streets and to the site which had been laid out, or was then being laid out, by the city engineer for the excavating which was to be done under the contract; that the shed was provided for the purposes of the work; that the contractor had already, probably on a previous day, deposited at the site of the shed his tools and materials, and that the shed was used by the contractor from the time of its construction until destroyed by the explosion for no purpose save that of the contract, I think we may assume, neither the city nor the contractor producing any evidence to the contrary, that these things were not done without the license or consent of the city authorities, and that the city permitted the contractor to occupy the land in the way he did occupy it; and if the natural consequence of the user for which the contractor was authorized or licensed was to cause a nuisance, the city cannot escape liability for this.

1926

THE CITY OF ST. JOHN v. DONALD.

Newcombe J.

I think it was the duty of the city both to the public using the highway and to the people living in the neighbourhood to see that the explosives, which were practically required for the doing of the work, if kept on the work, or on the property belonging to or under the control of the city, did not cause a nuisance. The execution of this duty was unprovided for by the contract and in fact the duty was unfulfilled, and it was, as against the city, in consequence of the neglect of this duty that the accident took place.

In the well known case of *Laugher* v. *Pointer* (1), which had reference to a very different cause of complaint, Littledale J. at p. 560, says, referring to *Bush* v. *Steinman* (2), and *Sly* v. *Edgley* (3), that:

> These cases appear to establish that in these particular instances the owner of the property was held liable, though the injury were occasioned by the negligence of contractors or their servants, and not by the immediate servants of the owner. But supposing these cases to be rightly decided, there is this material distinction, that there the injury was done upon or near and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others.

In this case there was in the result an equal division of judicial opinion in the King's Bench, but in *Quarman* v. *Burnett* (4), it became necessary to decide the question, which had been left in difference, and Parke B., pronouncing the judgment of the Exchequer Chamber, held that the weight of authority and legal principle was in favour of the view taken by Lord Tenterdon and Littledale J. In consequence it was held that where the owners of a carriage were in the habit of hiring horses to draw it for a day or for a drive, and the owners of the horses provided a driver through whose negligence an injury was done to a third party, the owners of the carriage were not liable to be sued for the injury. And, as to the passage which I have quoted, Parke B. observed:

(1) 5 B. & C. 547.
(2) 1 B. & P. 404.
(3) 6 Esp. 6.
(4) 6 M. & W. 499.

It is true that there are cases—for instance, that of *Bush* v. *Steinman* (1); *Sly* v. *Edgley* (2), and others, and perhaps amongst them may be classed the recent case of *Randleson* v. *Murray*—in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But these cases are well distinguished by my Brother Littledale, in his very able judgment in *Laugher* v. *Pointer* (3). The rule of law may be, that where a man is in possession of fixed property, he must take care that his property is so used or managed, that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances.

In *Reedie* v. *London and North Western Railway Co.* and *Hobbit* v. *London and North Western Railway Co.* (4), the defendant company had contracted with certain persons for the construction of a portion of its railway, including a bridge over a public highway, and the contractor's workmen in constructing the bridge negligently allowed a stone to fall upon a person passing underneath along the highway. It was held that the company was not liable and Rolfe B., pronouncing the judgment, having referred to *Quarman* v. *Burnett* (5) and the cases following that decision, said:

By these authorities we must consider the law to have been settled; and the only question is, whether the law, so settled, is applicable to the facts of this case. To show it was not, it was argued by the counsel for the plaintiff, that there is a recognized distinction on this subject, between injuries arising from the careless or unskilful management of an animal, or other personal chattel, and an injury resulting from the negligent management of fixed real property. In the latter case, it was contended the owner is responsible for all injuries to passers by or others, howsoever they may have been occasioned; and here it was said the defendants were, at the time of the accident, the owners of the railway, and so are the parties responsible. This distinction as to fixed real property is adverted to by Mr. Justice Littledale, in his very able judgment in *Laugher* v. *Pointer* (6); and it is also noticed in the judgment of this court, in *Quarman* v. *Burnett* (5). But in neither of these cases was it necessary to decide whether such a distinction did or did not exist. The case of *Bush* v. *Steinman* (7), where the owner of a house was held liable for the act of a servant of a sub-contractor, acting under a builder employed by the owner, was a case of fixed real property. That case was strongly pressed in argument, in support of the liability of the defendants, both in *Laugher* v. *Pointer* (6) and in *Quarman* v. *Burnett* (5), and as the circumstances of those two cases were such as not to make it necessary to overrule *Bush* v. *Steinman* (1), if any distinction in point of law did exist, in cases like the present, between fixed property and ordinary

(1) 1 B. & P. 404.
(2) 6 Esp. 6.
(3) 5 B. & C. 547.
(4) 4 Exch. 244.
(5) 6 M. & W. 499.
(6) 5 B. & C. 547, at pp. 550, 560.

1926

THE CITY OF ST. JOHN v. DONALD.

Newcombe J.

movable chattels, it was right to notice the point. But, on full consideration, we have come to the conclusion, that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and in fact, that, according to the modern decisions, *Bush* v. *Steinman* (1) must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded. It is not necessary to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be, that in some cases he is so responsible. But then, his liability must be founded on the principle, that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law: *Sic utere tuo ut alienum non laedas*. This is referred to by Mr. Justice Cresswell, in delivering the judgment of the Court of Common Bench, in *Rich* v. *Basterfield* (2), as the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which the property is enjoyed. And, possibly, on some such principle as this, the case of *Bush* v. *Steinman* (1) may be supported.

In *White* v. *Jameson* (3), which was followed by Kekewich J. in *Winter* v. *Baker* (4), and in *Jenkins* v. *Jackson* (5), the plaintiff was the owner of cottages, and, on the opposite side of the street, was a shipyard owned and occupied by the defendant Jameson, where a brick kiln was erected and lighted within 45 feet of the cottages. The action was brought against Jameson and Proffitt to restrain the burning of the bricks in a manner to cause a nuisance to the occupiers of the cottages. Jameson had contracted with Proffitt for the excavation of clay in the shipyard, and for the making of bricks. The case was heard before Jessel M.R., who held the defendant Jameson liable, and he said:

> The land on which they (the acts complained of) were committed was his (Jameson's); and, independently of his having an interest in the profits, the defendant Proffitt did these acts by his license. The law on this subject is laid down in *Laugher* v. *Pointer* (6), a case which itself related to a very different matter. Mr. Justice Littledale there says: "The rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land and buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned

(1) 1 B. & P. 404.
(2) 4 C.B. Rep. 783, at p. 802.
(3) L.R. 18 Eq. 303.
(4) 3 T.L.R. 564.
(5) 40 Ch. D. 71.
(6) 5 B. & C. 547, at p. 560.

by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others." These observations are exactly in point, and have been cited with approbation in *Quarman* v. *Burnett* (1), and *Rich* v. *Basterfield* (2). Now here Jameson was in possession of the property, for he did not demise it to Proffitt, he merely granted to him a revocable license to burn bricks on it. Consequently he has brought Proffitt on his land and allowed him to commit a nuisance, and for this I hold he is liable to be sued in equity as well as at law.

In *Attorney General* v. *Tod-Heatley* (3), it was held by the Court of Appeal (Lindley L.J., A. L. Smith L.J., and Rigby L.J.) that it is the common law duty of the owner of vacant land to prevent it from being a public nuisance. That case had to do with the obligation of the owner of the land to prevent it from continuing to be a public nuisance by reason of the depositing thereon of offensive material to the annoyance of the inhabitants of the neighbourhood.

It is true that in *Hardaker* v. *Idle District Council* (4), where it was sought to charge the local authority with liability for damages caused by the negligence of its contractor in building a sewer upon a street under its statutory authority, A. L. Smith L.J., said, as to the principle which had been referred to or considered in the cases above quoted and in *Rapson* v. *Cubitt* (5):

> It was not contended at the bar that such a liability had any application to the present case, and indeed, if it had, it would impose a very onerous obligation upon local authorities, which, so far as I know, it has never before been attempted to impose upon them when executing works by their contractor in a public street.

I do not think however that this observation was intended to apply, either to an occupation of the street permitted by the municipal corporation for unauthorized purposes, or to vacant lands in the possession and under the administration of a local authority, which, although laid out and appropriated for a street, have not been formed into a street or utilized by the local authority for any purpose, or, as in this case, cannot in their existing condition be used for street purposes. The site of the nuisance here was vacant, unimproved land of the city, as to which, although its ultimate destination may have been a street, the city would, without hardship, incur the obligation of

(1) 6 M. & W. 499.
(2) 4 C.B. 783.
(3) 46 L.J. Ch. 275.
(4) [1896] 1 Q.B. 335.
(5) 9 M. & W. 710, at p. 714.

1926

THE CITY OF ST. JOHN v. DONALD.

Newcombe J.

an individual proprietor to see that the land was not in the meantime used in a manner to cause a nuisance.

In *Harris* v. *James* (1), the action was against the owner and tenant of a field by the occupier of adjoining land for injury caused to his land by the smoke from certain lime-kilns and by stones thrown upon it in the process of blasting the limestone in the field, which the owner had leased to the tenant for the purpose of its being worked as a lime quarry. The ordinary way of getting the limestone was by means of blasting, and the owner had authorized the quarrying of the stone and the erection of lime-kilns in the field. It was held by Blackburn J., upon demurrer, that the landlord was liable, although the nuisance was actually created by the act of his tenant, because the terms of the demise constituted an authority from him to the tenant to create the nuisance, which was therefore the necessary consequence of the mode of occupation contemplated in the demise.

In the present case, in like manner, the city, by its contract with Moses, authorized his occupation and use of the area laid out for excavation upon Newman's Brook, and the blasting and the bringing of the usual and necessary explosives upon the premises. The city was the owner or in occupation or had the control of that part of the road allowance set off and appropriated to Adelaide street, which was vacant and not built up for use and was not used or, in its unimproved state, capable of use as a highway. It was necessary that a reasonably safe and convenient place should be provided for the storing of the dynamite which was requisite for the blasting of the channel. No place of any sort had been provided by the city, and, when the work of excavation was about to commence, the contractor brought thither his tools and materials, including some dynamite, and deposited them upon this vacant land of the city, and constructed there a shed to receive them, in which he stored the tools and the dynamite. It is difficult to perceive how the contractor could reasonably have proceeded with his work without a magazine of some description located conveniently to the work. The contract contemplated that the contractor might be in possession of land

(1) 45 L.J. Q.B. 545.

1926

THE CITY OF ST. JOHN v. DONALD.

Newcombe J.

other than that actually belonging to the site of the excavation. He contracted

not to use the land forming the site of or connected with the works for any other purpose whatsoever than the proper carrying on of the works; * * * from time to time to remove all surplus and objectionable materials, waste or rubbish from the works, and from any land or premises where any portion of the work may be carried on.

The city retained large powers of supervision and direction under the contract.

I think it may be assumed that the shed was not built without the knowledge and approval of the city, and that it was a consequence, not improbable, of the location and building of the shed, which the city should have realized, that the explosives for the work would be kept there. It follows upon the authorities that the city cannot escape responsibility for the use which, for the purposes of the work, the contractor made of the shed, amounting to a public nuisance upon the property of the city. I come to this conclusion not because the contractor was the agent or servant of the city, nor because he was an independent contractor who had contracted with the city to execute for its benefit a dangerous work, but because the damage complained of ensued from a nuisance permitted or tolerated, if not authorized, upon its property which the city was by the common law bound to prevent.

RINFRET J.—I concur with the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellant: *John B. M. Baxter.*

Solicitor for the respondent: *George H. V. Belyea.*

ADVANCE RUMELY THRESHER CO., INC. (PLAINTIFF) ..... APPELLANT;

AND

PETREA YORGA (DEFENDANT) ..... RESPONDENT.

1926

*Feb. 8, 9.
*May 4

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Sale of goods—Steam engine—Purchaser unable to read English—Farm Implement Act, Sask., R.S.S. 1920, c. 128—Requirements of s. 18—Effect of non-compliance with s. 18—Effect of taking, retention, and use, of engine by purchaser.

Section 18 of *The Farm Implement Act*, Sask. (R.S.S. 1920, c. 128), implies a prohibition against taking a contract for the purchase of a "large implement" from any person who cannot read in English,

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

1926

ADVANCE RUMELY THRESHER CO. v. YORGA.

without first having such contract read over and explained to him in a language which he understands. A contract of purchase taken by the vendor without compliance with the section is not enforceable. On the sale of an engine the purchaser, a Roumanian, could not read English. The contract was read to him in English and some explanation given to him in Roumanian of certain clauses which he said he was unable to understand when read to him in English.

Held (Duff and Newcombe JJ. dissenting) that, upon the evidence in the case, English was not a language which the purchaser "understood" within the meaning of s. 18; that the vendor's action on the contract could not be maintained; and that, in the circumstances, the vendor could not succeed on an implied contract to take and pay for the engine on a *quantum meruit* basis. The court did not interfere with the order below enjoining the purchaser, as incident to his obligation, to return the engine and to account for such benefits as had accrued to him from its possession.

Semble, as the purchaser could not understand portions of the contract when read to him in English, the vendor was bound to have the entire contract read and explained to him in some other language (not necessarily his native tongue) which he understood sufficiently to enable him to appreciate the purport and effect of the contract to the extent to which an English-speaking person in his walk of life would be likely to appreciate them upon the contract being read over and explained to him in English.

Per Duff and Newcombe JJ. (dissenting): On the evidence and findings at trial it must be taken that the contract, previous to its being signed, was read over and explained to the purchaser in a language which he understood sufficiently to become aware thereby of the meaning of the contract, which is all the statute requires.

Per Newcombe J. (dissenting): If there were any defect in the explanation which the statute contemplates, the contract became thereby no worse than voidable at the purchaser's option, and, by his length of possession and extent of use of the engine, the purchaser had lost the right of avoidance.

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) which reversed the judgment of Embury J. in favour of the appellant in an action to recover the first instalment of the purchase price of a steam engine sold by the appellant to the respondent under an agreement in writing in the form prescribed by s. 12 of *The Farm Implement Act* of Saskatchewan (R.S.S. 1920, c. 128). The main questions for the consideration of the court on this appeal were whether, on the facts, there had been compliance with the provisions of s. 18 of *The Farm Implement Act* (which section provides for what must be

(1) 20 Sask. L.R. 127.

done in the event of the purchaser not being able to read in the English language, and is set out in full in the judgments) and what are the consequences of non-compliance with such provisions.

Bastedo for the appellant.

Gregory K.C. for the respondent.

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

ANGLIN C.J.C.—The plaintiff company carrying on business at Regina by an agreement in writing in the form prescribed by s. 12 of *The Farm Implement Act* (R.S.S., 1920, c. 128) purported to sell a Rumeley steam engine to the defendant for the sum of $3,000, payable in three instalments of $1,000 each with interest on the first of October, 1923, the first of October, 1924, and the first of October, 1925, the payments to be secured by lien notes. This action is brought to recover the first of such instalments and interest amounting to $1,028.25. Various defences were pleaded. At the trial, by amendment, the defendant was allowed to set up non-compliance with s. 18 of *The Farm Implement Act* as a further answer to the plaintiff's claim.

The learned trial judge found that the requirements of s. 18 had been sufficiently observed and gave judgment for the sum of $1,000 and costs. The Court of Appeal, holding the contrary, dismised the action with costs and ordered repayment of $66 advanced by the defendant for sales tax and delivery up to him of the lien notes, but directed that the defendant should account to the plaintiff for any benefit he may have received from the use of the engine, the amount thereof to be ascertained by the trial judge if the parties should be unable to agree. Special leave to appeal to this court was subsequently granted by the Court of Appeal.

The questions for determination here are the construction of s. 18; whether there has been compliance with its requirements; if not, the effect of non-compliance on the plaintiff's rights; and, if the contract should be held unenforceable, what rights the plaintiff has arising out of the taking, retention and use of the engine by the defendant.

1926

ADVANCE RUMELY THRESHER CO. v. YORGA.

Anglin C.J.C.

Section 18 reads as follows:

18. (1) In the event of the purchaser not being able to read in the English language the contract shall, before it is signed by him, be read over and explained to him in a language which he understands, and in such case the burden of proving that the said contract was so read over and explained to him, shall be on the vendor.

(2) An affidavit to the effect that the deponent has, within eight days preceding the taking of the affidavit, read over and explained the contract to the purchaser prior to his signature thereto, in a language which the purchaser understood, shall, upon proof of the signature of the officer before whom such affidavit purports to be sworn and that he was an officer authorized to take such affidavit, be received in evidence in all courts as conclusive proof of all facts sworn to therein.

It is noteworthy that while the consequences of non-compliance with the directions of s. 18 are not stated, such provisions are found in ss. 12 and 28, the former of which declares invalid and ineffective any contract which is not in the form by it prescribed, while the latter declares void at the option of the purchaser any contract, order or security containing certain stipulations which it prohibits.

Nevertheless, when the object of s. 18 is considered and due attention is paid to its provision that the burden of proving compliance with it shall be upon the vendor, the implication of a prohibition against taking a contract for the purchase of " a large implement " from any person who cannot read in English, without first having such contract read over and explained to him in a language which he understands is, we think, indubitable. In the case of such a statutory enactment we doubt whether there is any sound distinction to be drawn between the implied negative requirement that there shall not be a contravention of a positive direction and a direct prohibition. *Bensley* v. *Bignold* (1). The affirmative direction of the enactment now in question is so clearly mandatory and the attainment of its object—the protection of buyers unable to read English —makes the implication of negative words of prohibition so manifestly necessary that

> the duty of the courts to try and get at the real intent of the legislature

requires that implication to be made. *Liverpool Borough Bank* v. *Turner* (2); *Stevens* v. *Gourley* (3). Assuming

(1) [1822] 5 B. & Ald., 335, at p. 341.

(2) [1860] 29 L.J.N.S. Ch. 827; 30 L.J.N.S. Ch. 379, 380-1.

(3) [1859] 29 L.J.C., p. 1.

for the moment that the contract sued upon was not read over and explained to the defendant (who admittedly could not read English) as the statute prescribed, we have here a contract to the enforcement of which by the vendor no court of justice should lend its aid. *Cope* v. *Rowlands* (1); *Forster* v. *Taylor* (2); *Melliss* v. *Shirley Local Board* (3). In his esteemed work on the Principles of Contract, Sir Frederick Pollock says, 9th edition, at p. 361:

> When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession—
>
> (*e*) are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed.

Moreover, although the contract should not be avoided, it would almost seem to be an inevitable implication of the provision that

> the burden of proving that the said contract was so read over and explained to him shall be on the vendor,

that in the event of his failing to discharge such burden any curial proceeding on his part based upon the contract must fail.

But was there non-compliance with s. 18? The contract was read to the defendant only in English. There is no suggestion that it was read in any other language. Some explanation was given to him in Roumanian (his native tongue) of certain clauses which he said he was unable to understand when read to him in English. The learned trial judge found that the defendant "understood English to a considerable extent"; that he "could understand it to some extent"; and again that of English "he had some knowledge". In the Court of Appeal Mr. Justice Lamont's view was that the defendant "understood (English) only to a slight extent". Our appreciation of the evidence on this point accords with that of Lamont, J. A. We think that English was not a language which the defendant understood within the meaning of s. 18. Furthermore, we incline to the view that the defendant being unable to understand portions of the contract when read to him in

(1) [1836] 2 M. & W. 149, 157.
(2) [1834] 5 B. & Ad. 887, at pp. 896-7, 900.
(3) [1885] 16 Q.B.D., 446.

1926

ADVANCE RUMELY THRESHER CO. v. YORGA.

Anglin C.J.C.

English, the vendor was bound to have the entire contract read to him and explained to him in some other language (not necessarily, however, his native tongue) which he understood at least sufficiently to enable him to appreciate the purport and effect of the contract to the extent to which an English-speaking person in his walk of life would be likely to appreciate them upon the contract being read over and explained to him in English. We find ourselves in accord with the views expressed by Mr. Justice Lamont on this aspect of the case, and we are of the opinion that the plaintiff's action on the contract cannot be maintained.

Under the circumstances of this case we think that the plaintiff cannot succeed on an implied contract to take and pay for the engine on a *quantum meruit* basis. The taking, retention of possession and use of the engine were attributable to the unenforceable contract sued upon. The defendant would appear not to have had any idea of his right to set up the invalidity of that contract for non-compliance with s. 18 of *The Farm Implement Act* until at or about the time of the trial of this action. *Britain* v. *Rossiter* (1). We are not disposed to interfere with the order enjoining the defendant, as incident to his obligation to return the engine, to account for such benefits as may have accrued to him from its possession. On this aspect of the case we accept the judgment of Mr. Justice Martin.

The appeal fails and should be dismissed with costs.

DUFF J, (dissenting).—I concur with the view of my brother Newcombe that the contract was adequately explained to the respondent and understood by him, and that there was substantial compliance with the requirements of the statute. As to the effect of non-compliance, I prefer to express no decided opinion.

NEWCOMBE J. (dissenting).—The appellant (plaintiff) sues to recover the amount of a lien note, $1,000, and $28.85 for interest, made by the respondent (defendant) to secure an installment of the price payable by him upon the purchase of a Rumely steam engine, evidenced by statutory agreement in writing, dated 21st July, 1923. The statement of claim was delivered on 30th November, 1923, and the action came to trial on 6th December, 1924.

(1) [1879] 11 Q.B.D. 123, at pp. 127, 133.

The question in controversy depends upon the facts and the effect of s. 18 of the *Farm Implement Act,* 1917, of Saskatchewan, consolidated as c. 128 of the Revised Statutes, 1920. This Act, as its title denotes, regulates the sale of farm implements in the province; the engine which was the subject of the sale is a machine of the class which is described as "large implements". The Act requires that all vendors selling, or offering for sale, large implements in Saskatchewan shall file with the Minister of Agriculture in each year a description of the implements offered for sale, with the statutory particulars, including prices; also a list of all repairs required for the implements sold by them, stating the prices and places in Saskatchewan where they may be purchased, and a penalty is provided for neglect to file the list; also, by s. 11, it is enacted that no repairs shall be sold at a higher price for cash than the price stated in the list, and that any person charging a higher price shall be guilty of an offence, and liable upon summary conviction to a fine of $25.

Section 12 provides that no contract for the sale of any large implement shall be valid, and no action shall be taken in any court for the recovery of the whole or part of the purchase price of any such implement, unless the contract be in writing in form A in the schedule, and signed by the parties thereto. The contract was in the statutory form. There is another form, C, in the schedule which applies to the sale of second-hand implements; by s. 16, it is provided that the latter form shall not be used for the sale of new implements, and that,

> in case such form is so used, the contract shall be void at the option of the purchaser.

In form A, the vendor warrants that the machinery is well made and of good materials; that it will work well; be durable; that all necessary repairs will be available for ten years, etc. In form C, no warranties are set out, and it is expressly stipulated that the vendor gives no warranties other than those, if any, which are specially agreed for. By s. 17, it is provided that form A, shall not be used for second-hand or rebuilt implements,

> but, in case such form is so used, then the same shall be conclusive evidence that the implement so sold is, or is warranted to be, a new one.

Section 18 follows, and it is embraced in two subsections, the one for the benefit of the purchaser, and the other for

1926

ADVANCE RUMELY THRESHER CO. v. YORGA.

NewcombeJ.

the benefit of the seller. The section may conveniently be reproduced:

18. (1) In the event of the purchaser not being able to read in the English language the contract shall, before it is signed by him, be read over and explained to him in a language which he understands, and in such case the burden of proving that the said contract was so read over and explained to him shall be upon the vendor.

(2) An affidavit to the effect that the deponent has, within eight days preceding the taking of the affidavit, read over and explained the contract to the purchaser prior to his signature thereto, in a language which the purchaser understood, shall, upon proof of the signature of the officer before whom such affidavit purports to be sworn and that he was an officer authorized to take such affidavit, be received in evidence in all courts as conclusive proof of all the facts sworn to therein.

Section 19 provides that

the signing of such contract by the purchaser shall not bind him to purchase the implement * * *

until the contract shall have been signed by the vendor or his agent

and a copy thereof is delivered to or deposited in a post office addressed to the purchaser, postage prepaid and registered.

This evidently refers to the contract mentioned in subs. 1 of s. 18 which the purchaser cannot read in English, and it will be observed that it applies to all such contracts; there is no express exception of those which have not been read over and explained.

Section 28 is not without some relevancy; it provides that no contract made in connection with the sale of agricultural implements shall contain any statement to the effect that the vendor is not responsible for the representations of his agents, or any other language in anywise limiting or modifying the legal liability of the vendor as provided in the Act or the forms, and it is said that

the insertion of any such statement, or the use of any such language, shall be of no effect.

Then follows subs. 2, whereby it is provided that

any breach of the provisions of this section shall render the contract, order or security, void at the option of the purchaser.

The respondent by his defence denied the making of the agreement and the delivery of the engine, and he alleged that the engine delivered was not a new machine, and that, immediately upon discovering this, he advised the appellant, and asked for a return of the notes which he had given to accompany the contract. He alleged further that the respondent, at the time of making the contract,

falsely and fraudulently represented to him that the engine was a new engine of the latest model, and that he executed the contract so believing, whereas the engine was not new, nor of the latest model; and he submitted to return the engine, and claimed the return of his notes. These issues were rightly determined against the respondent at the trial, and are not controverted at bar upon this appeal. The learned trial judge found that there were no misrepresentations; that the engine, although six years in stock had not been used; was not second-hand; that it was a good engine, and that

> the results of its work showed that it performed the work it was called upon to do in a satisfactory manner, such as would be expected of a new engine.

The only other question is one raised by amendment at the trial, on 6th December, 1924, that the defendant,

> not being able to read in the English language, the contract was not read over to him as required by s. 18 of the *Farm Implement Act.*

It becomes necessary to decide whether, having regard to the true interpretation of this section and the evidence and findings, the right of recovery is defeated by reason of the facts with relation to the reading and explanation of the contract before its signature.

As to this defence, the learned trial judge found that:

> The evidence established that he (the respondent) carried on the ordinary small transactions in which he might be engaged, without the aid of an interpreter. He told the interpreter, who was present to explain the contract before it was signed, "he could understand but he could not talk back." As a fact in this case the defendant appears to have understood the meaning of the contract. True, he cannot read English, but he can understand it to some extent, and he received in another language of which he had a more complete understanding all the explanation that was necessary to give him a knowledge of the contents of the document; and he could have had an explanation in this last-mentioned language of every phrase in the contract, but as he said to the interpreter, he "understood but could not talk back." In all the circumstances, the defendant apparently having in fact understood, and not having been deceived, and having received all the explanations he was desirous of having, and in the additional circumstances of his having had a considerable knowledge of the English language, it seems to me that there was a sufficient compliance with the provisions of section 18, subsection 1, of the *Farm Implements Act* above referred to—certainly there was compliance with the spirit of the law.
>
> Learned counsel for the defence urged with some force that section 18, subsection 1, was enacted for the protection of men such as the defendant, and that it was designed to compel the interpreting and reading of this document to such persons in their own foreign native tongue; but in this case the document was read in English, of which he had some knowledge, and those parts of it which he understood after

1926

ADVANCE RUMELY THRESHER CO. v. YORGA.

Newcombe J.

hearing them in English were not interpreted, but the other parts which he did not understand were explained to him in his own language, which in my opinion constitutes sufficient interpretation.

The Court of Appeal was however of the opinion that, the respondent being unable to read English, there had been in fact no compliance with the legislative requirement that the contract should be read over and explained in a language which the purchaser understood before it was signed by him, and that this

> prevented any contract from coming into existence or any property passing under the agreement signed.

Now while the question of statutory intention is not free from difficulty, it appears to me that s. 18 of the *Farm Implement Act* is not designed to make utterly void a contract executed in the manner in which this one was executed. There is no penalty imposed for neglect to comply, neither is there any enactment as to what shall be the consequence of non-compliance. In order to ascertain the meaning, the other provisions of the Act may be considered, and, in ascertaining what is left to implications, s. 18 must be interpreted in the light of the inferences which may be legitimately drawn. We have seen that in other sections there are express declarations as to what the effect of non-compliance shall be. There is a pecuniary penalty, recoverable upon summary conviction, for neglect to file a list of implements, and another for overcharging for repairs. It is declared that no contract for the sale of a large implement shall be valid or enforcible unless the contract be in writing in the prescribed form and signed by the parties; that a contract for the sale of a new implement in the form prescribed for the sale of second-hand implements shall be void at the option of the purchaser; that if the form for sale of large implements be used for second-hand or rebuilt implements it shall be conclusive evidence that the implement so sold is, or is warranted to be, new; that, if any contract contain a statement to the effect that the vendor is not responsible for the representations of his agents, that shall have no effect, or render the contract void, at the option of the purchaser, and moreover, by s. 30, it is provided that certain explanatory words in the forms are merely directory.

Thus we have, in this short statute of thirty-one sections, a number of provisions, mandatory in form,

affecting the substance or contents of the contract, and visited by a variety of consequences, expressly declared, which include a pecuniary penalty; some that may be fatal to the validity of the contract; others which may be insisted upon only at the purchaser's election, and others which do not affect the operation of the instrument; but, as to the particular enactment in question, which prescribes a requirement to be observed in the making of the contract in special cases, while there is no express penalty for neglect, it is declared that the burden to prove compliance is placed upon the vendor, and that the purchaser is not to be bound until the contract shall have been signed by the vendor, and a copy delivered or posted to the purchaser. The consequence of non-compliance should, in the absence of expression, be ascertained reasonably, having regard to the apparent object of the clause in this particular statute. Section 18, subs. 1, is obviously intended to furnish a direction as to the manner of making the contract when the purchaser is unable to read English, and the effect of it, so far as declared, is, in such a case, if the issue be raised, to impose a burden of proof upon the vendor to show that the contract was read over and explained to the purchaser in a language which he understood, and, together with s. 19, to postpone the obligation of the purchaser until the signing of the contract and delivery or posting of a copy by the vendor. The transaction itself is perfectly legal. It is not like a case of a contract declared to be illegal, as under the *Gaming Acts* or the *Marine Insurance Act,* where the court is bound to take notice and pronounce the illegality. The plaintiff may fail in his action if he do not, when the reading and explanation is denied, satisfy the burden of proof with which he is charged by the statute, but not because of any vice of the contract itself. *Wetherell* v. *Jones* (1). Indeed, so far from evincing an intention that the contract shall be void for lack of reading and explanation, it is expressly provided, by subs. 2, that an affidavit to the effect that the deponent, within eight days previously, read over and explained the contract to the purchaser, prior to his signature, in a language which the latter understood, shall, upon

(1) 3 B. & Ad., 221, at p. 226.

1926

ADVANCE RUMELY THRESHER CO. v. YORGA.

Newcombe J.

proof of the signature and authority of the attesting officer, be received in evidence as conclusive proof of all the facts sworn to therein. The provisions of this section, taken as a whole, are thus in effect apt to operate for the benefit of the vendor at least as much as for that of the purchaser, since they include a very convenient and effectual means whereby the vendor may conclusively silence any controversy as to the reading of the instrument and the understanding of the purchaser of the language in which it was read and explained. The provision of subs. 2 seems inapt to accompany a clause making void for motives of public policy a contract which a purchaser is willing to accept.

Moreover the provision which requires reading and explanation must be applied having regard to the facts of the particular case; the extent or character of the explanation must necessarily be affected by the needs or circumstances of the case. No public duty or claim of society is prejudiced by withholding explanation of what is already understood, and if, as is found, the purchaser, appearing to understand, received all the explanation which he desired, and which was necessary to enable him to understand the contract, it would seem to be unjust that he should, after taking the benefit of the contract, be permitted to avoid it for lack of explanation, and this I think is true apart from the application of the rule which is sanctioned by the maxim *cuilibet licet renuntiare juri pro se introducto.*

Now, although no affidavit was introduced, facts are proved and found by the trial judge which satisfy the burden of proof as to the reading and explanation. I accept the findings upon the evidence; they are reasonably supported by the proof, and therefore ought not to be disturbed. I cannot agree that it is necessary, in order to satisfy the statute, that the contract should be read in the purchaser's native tongue, or in a language other than English, provided he have an adequate understanding of the latter. The purchasers who share in the benefit of the section are not of a class from which the legislature would expect anything better than an imperfect, though practical, knowledge of language; it applies as well to the illiterate Canadian or Englishman as to the foreigner, and

it is utterly indifferent in what language the contract is read and explained if that language be sufficiently familiar in its reading to give the purchaser an understanding of the stipulations. The reading undoubtedly took place. There was no attempt to defraud or to over-reach. The respondent, although he could not read English, was in the habit of transacting his business orally in that language, and it was the speech of the community in which he had lived for fifteen years. He had been for one year a pound-keeper. He had a large family of children, including some boys who had been at school and could read and speak English. One of these was a grown up son, who, I suppose, might conveniently have accompanied his father, when he went to buy a steam engine, if the latter had considered himself in any difficulty about the language. At his examination for discovery, his son was his interpreter. At the trial the respondent pretended that he did not understand the meaning of simple questions in English, but the judge evidently considered that this was pretence; and, at the conclusion of the trial, he said he thought the respondent spoke English about as well as Bodgan, the Roumanian who was called in to interpret at the making of the contract, which, as he observed, was not very well. Bodgan was a young Roumanian who had been brought up in Canada and lived here for twenty years. He was called in on the occasion of the making of the contract to assist in the negotiations. He was not a skilled interpreter, his knowledge of English was indeed somewhat meagre, but he appears to have had a practical working knowledge of both languages, and, when the contract was read, he did explain, or interpret some of the passages, and would have given further explanations, but that the respondent appeared to understand and gave his assurance that he did so.

It is a fact moreover, not immaterial to the respondent's understanding of the contract, that he had previously signed similar contracts under the *Farm Implement Act*. He was a Roumanian immigrant who came to the country in 1908. He had previously purchased farm machinery, an American-Abell engine in 1912, a separator in 1916, and a gas tractor in 1920, and he was not unaccustomed to contracts and lien notes. Although he received copy of the contract for the engine in question early in August, 1923, and it has ever since been in his possession, he testified that he had

1926

ADVANCE RUMELY THRESHER CO. v. YORGA.

NewcombeJ.

never discussed the terms of it with anybody. Maloney, the appellant's agent, who negotiated the sale to the respondent, had conversed with the latter in English as long ago as 1913, and the preliminary conversation was, on the occasion of the present sale, carried on between the respondent and Maloney in English. It must be remembered also that the respondent's defence is not that he did not understand the contract, or the reading of it in English, but that the contract was not read to him in any language; there is however the evidence of three witnesses for the appellant that the contract was read; the trial judge finds that it was read; and he expressly rejects the testimony of the respondent as to the condition of the engine, where it is contradicted by the witnesses for the appellant. There was considerable evidence adduced for the appellant, uncontradicted by the respondent, of the latter's understanding of English in reference to various transactions in which he had been concerned, and the learned judge, whose findings upon this branch of the case are I think of special weight, refers to his statement to Bogdan, which is not explicitly denied, that "he could understand but could not talk back".

Therefore I think it must be taken that, previously to the signing of the contract, it was read over and explained to the respondent in a language which he understood sufficiently to become aware thereby of the meaning of the contract; and that I think is the object of the legislature, and all that the statute requires.

It was on 21st July that the contract was signed. It calls for delivery of one 16 H.P. D. C. Rumely steam engine, rear mounted, with standard equipment, and the purchase of an engine of that description is admitted by the respondent. There is no dispute about the terms of the contract, no charge that the respondent did not perfectly understand the transaction. His complaint is that the engine which was delivered was one which had been previously in use or second-hand, an objection which has nothing to do with the terms of the contract, and that objection was communicated by the respondent to the appellant by telegram of 12th October, 1923, when the respondent, after having used the engine for his own harvest and for that of some of his neighbours, the season's work being then nearly com-

pleted, sent to the appellant company the following message:

> Engine sold this fall as new one send a man at once to settle up matter for this engine having been sold as new one and we found that she had been in use already look over before threshing done we can prove that it is a second-hand one.

The engine had been shipped in due course from Regina to the respondent at Limerick, where it arrived about 5th August. The respondent examined it for two hours on the flat car before unloading it. Then he paid the freight, took it home and began his threshing on 6th September. The appellant company had sent him, by registered post on 8th August, a copy of the contract as required by s. 19 of the *Farm Implement Act*. Thus, not only is it found that the respondent understood, but he took possession of the machine, and, although he was furnished with copy of the contract as the statute requires, and is presumed to know the law, he used the engine for the season, threshing 24,500 bushels of grain, and gave no notice of intention to assert the alleged statutory invalidity of the contract until the trial of the action.

I think there was a contract, and that the appellant satisfied the burden of proof. Moreover I think that, if there were any defect in the explanation which the statute contemplates, the contract became thereby no worse than voidable at the purchaser's option, and that, after having possession of the engine for a year and more, and having used it to the extent to which he did use it, it is too late for the purchaser to exercise the right of avoidance.

Appeal dismissed with costs.

Solicitors for the appellant: *Mackenzie, Thom, Bastedo and Jackson.*

Solicitor for the respondent: *C. E. Gregory.*

1926

*Mar. 8, 9.
*May 4.

IN THE MATTER OF THE NORTHWESTERN TRUST COMPANY (IN LIQUIDATION)

AND

IN RE

NEIL McASKILL (DEFENDANT) .....APPELLANT;

AND

THE NORTHWESTERN TRUST COMPANY (IN LIQUIDATION) (PLAINTIFF).. } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Company—Sale of Shares Act, Man.—Non-compliance therewith—Effect —Sale of shares void—Repudiation by purchaser after winding-up order—Company incorporated by special Act—Application of Sale of Shares Act.

If a company, to which the Manitoba *Sale of Shares Act* (R.S.M., 1913, c. 175, and amendments) applies, sells its shares without having complied with that Act, the sale, and all steps taken to carry it out, such as an allotment of shares, are void, and not merely voidable; and where the purchaser of the shares has not dealt with them or done anything from which an independent agreement to keep and pay for them can be implied, although his name has been placed on the register of shareholders, he can, even after a winding-up order has been made against the company, repudiate the purchase and successfully resist being placed on the list of contributories, where it appears that he only became aware, after the winding-up order was made, that the *Sale of Shares Act* was not complied with. *Oakes* v. *Turquand,* L.R. 2 H.L. 325. *In re Railway Time-Tables Publishing Co.; Ex parte Sandys,* 42 Ch. D. 98, and *In re Peruvian Railways Co.; Crawley's Case,* L.R. 4 Ch. App. 322, distinguished. *Welton & Saffery* [1897] A.C. 299, at 321-322, explained.

The company in question was incorporated by special Act which contained no reference to *The Sale of Shares Act.* It contained many provisions, one of which, s. 26, provided that "every person who makes application in writing for an allotment of shares, to whom any share or shares is or are allotted in pursuance of such application, shall be deemed conclusively to have agreed to become a shareholder of the company in respect of the shares so allotted."

Held, that the *Sale of Shares Act* applied as to the matters in question, and s. 26 did not affect its operation or prevent the purchaser from disputing his liability as a shareholder.

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

1926

MCASKILL v. THE NORTH-WESTERN TRUST CO.

Judgment of the Court of Appeal reversed, and its judgment in *In re Northwestern Trust Co.; in re Moreau et al* (34 Man. R. 449; [1924] 3 W.W.R. 625) (which reversed the judgment of Dysart J. (34 Man. R. 342; [1924] 2 W.W.R. 1145)) overruled. Idington J. dissenting.

APPEAL from a judgment of the Court of Appeal for Manitoba affirming an order of Dysart J. placing the appellant upon the list of contributories of The Northwestern Trust Company, which is being wound-up under the *Winding-up Act* R.S.C. 1906, c. 144, and amendments. The decision of the courts below was governed by a previous decision of the Court of Appeal for Manitoba, in the matter of three shareholders of the same company. See *In re Northwestern Trust Company; In re Moreau et al* (1) reversing (Prendergast and Trueman J.J.A. dissenting) the judgment of Dysart J. who had refused to place the parties on the list of contributories (2). An appeal in that case was taken to the Supreme Court of Canada but was quashed for want of jurisdiction. In the present case, as Dysart J. was bound by the decision in *In re Moreau et al* (1), he placed the appellant on the list of contributories, and an appeal to the Court of Appeal from his order was dismissed. The appellant obtained leave to appeal to this court, the amount involved being sufficient under the *Winding-up Act*. The reasons for judgment to be considered on this appeal were those delivered in *In re Moreau et al* (1) to which the learned judges of the Court of Appeal referred as the grounds of their decision in this case. The proceedings were brought upon a stated case agreed to by the parties. In substance this stated case set out as follows: The Northwestern Trust Company was incorporated by c. 170 of the Statutes of 1920, Manitoba, and had its head office in Winnipeg. By order dated 17th March, 1924, the company was directed to be wound up, and the liquidator applied to have appellant placed on the list of contributories for the sums of $5,400 and $1,000 in respect of two subscriptions for stock for 50 and 10 shares respectively, of the par value of $100 each, at the price of $125 per share. On its incorporation the company had only a part of its capital stock subscribed, and it authorized two

(1) 34 Man. R. 449; [1924] 3 W.W.R. 625.

(2) 34 Man. R. 342; [1924] 2 W.W.R. 1145.

1926

MCASKILL v. THE NORTH-WESTERN TRUST CO.

of its officers, McCabe and Maber, to procure subscribers for and sell, offer and attempt to sell all of the shares in the capital not then subscribed for. McCabe and Maber engaged one Shallott and one Brand to offer for sale, attempt to sell and sell the stock. Brand offered for sale and attempted to sell shares to various persons and on 21st September, 1922, offered 50 shares to appellant at Winnipeg and by his efforts induced him to sign an application for these shares and appellant paid therewith $550. On 20th November, 1922, Shallott offered 10 shares to appellant at Winnipeg and by his efforts induced him to sign an application for these shares and appellant paid therewith $250. These applications and payments were transmitted to the company, the stock allotted to appellant, and notice thereof given to him. The company made an application to the Public Utility Commissioners for Manitoba under *The Sales of Shares Act,* R.S.M., 1913, c. 175, and amending Acts, for permission and authority to offer and attempt to sell, and sell its shares, but the application was not granted and the company did not comply with the provisions of the said statute and never filed the papers required by the Act and never obtained a certificate under the Act nor a license for its agents. Neither McCabe, Maber, Shallott nor Brand had a license under *The Sale of Shares Act* as agents for the company. The appellant was not aware until after the winding-up order had issued that the company had not secured a certificate and its agents had not a license as aforesaid or that the provisions of the said *Sale of Shares Act* had not been complied with. The question submitted was "Is the said Neil McAskill [appellant] liable in the absence of other defence for any sum under the alleged subscriptions * * * and to be settled on the list of contributories herein therefor"? Further material facts, and a detailed reference to the provisions of the special Act incorporating the company will be found in the judgment of Mignault J. S. 26 of said special Act which, among other things, was relied upon by the liquidator, is set out in the headnote, which also indicates the other questions considered by the court.

H. M. Hannesson and *J. F. McCallum* for the appellant.

E. Lafleur K.C. and *P. C. Locke* for the respondent.

ANGLIN C. J. C.—I concur with Mr. Justice Mignault.

IDINGTON J. (dissenting).—This is an appeal from the Court of Appeal for the province of Manitoba in a matter wherein a question was raised by the appellant as to his liability as a shareholder in said trust company to pay the balance due by him upon certain shares he had acquired as the result of two distinctly separate applications in writing to the board of directors of said trust company for stock in same, and in response to each of which he had been by said board duly allotted the shares so applied for.

The liquidator appointed under said *Winding-up Act* when seeking to enforce the rights of the creditors of said company took steps therefor against the appellant and many others to recover the respective balances due by each of such like subscribers as the appellant.

They each set up a rather remarkable defence under the provisions of the Manitoba *Sale of Shares Act*, and were successful before the judge hearing the applications and, in each of four such cases, an appeal was taken to the Court of Appeal for Manitoba.

That court by a majority allowed the liquidator's appeal with costs.

From said judgment as against appellant he now appeals herein.

I so fully agree with the said view taken by said majority that, for the reasons respectively assigned by the Honourable Chief Justice Perdue, and the Honourable Justices Fullerton and Dennistoun, I am of the opinion that said appeal should be dismissed with costs against said appellant.

I, therefore, do not see much to be gained by repeating herein their several reasons or extending the course of reason by making new points, or trying to do so.

I only desire to point out that the said *Sale of Shares Act* was enacted some ten years or more before the special Act in question herein and had been radically amended several times, but had got into a settled form such as it had been for some years before the Manitoba legislature created said trust company by a special Act of said legislature, being chapter 170 of Manitoba Statutes, for 1920, at great length assigning the powers it desired to confer upon the said trust company.

1926

MCASKILL v. THE NORTH-WESTERN TRUST CO.

Idington J.

In course thereof there are so many provisions in conflict with those of the *Sale of Shares Act* and inconsistent therewith, when one looks at their respective purview and realizes such inconsistency and conflict that, as a matter of elementary law, full effect must be given to the later legislation whenever there is any such conflict or inconsistency.

Section 26 of said special Act has been much relied upon as binding appellant.

The said *Sale of Shares Act* has given certain stringent powers to the commissioner appointed thereunder and requires returns to him, but in the 22nd section of said special Act returns are to be annually made to the department of the Provincial Secretary. I cannot imagine such a duplication being deemed necessary by any legislature. It is one of several analogous provisions which I find in said special Act as quite unlikely to be enacted therein if the legislature ever thought the *Sale of Shares Act* was to apply in the way appellant contends.

Let anyone read the whole Act section by section and try to grasp the purview of the whole, and that of the *Sale of Shares Act,* and apply the law as set forth in the numerous decisions cited in Craie's 1901 Edition of Hardcastle's Statute Law, on pages 228, 344, 501 and 502, when dealing therein with the repugnancy between later and earlier statutes and, I submit, he will find it difficult to maintain appellant's pretensions herein.

It would be interesting to know something more anent the alleged application of the company in question, referred to in the eleventh paragraph of the stated case herein, than appears.

The bald facts in said eleventh paragraph without any date of the alleged application are not very satisfying and indeed such that I can attach no importance thereto, save that therein is the clear implication that nobody was ever given a licence under the *Sale of Shares Act* to sell shares in said company.

Its bald presentation and circuitous expression suggest a suspicion that possibly the directors started out with the impression that possibly they should get for their agents such like licences as in question, and were told, either by the commissioner, or some other good authority, that said

company specially created as a trust company by the legislature, and the many sections in the Act doing so, which would conflict with such an obligation as the *Sale of Shares Act* had imposed upon other companies had rendered it absurd to appoint licensees to sell shares in its stock.

This suggestion of mine is not of the slightest consequence; save in looking at the said *Sale of Shares Act* and if at all applicable, when considering the consequences of its non-observance, and the bearing thereof herein upon the liability of such subscribers as in question upon their respective contracts and validity or invalidity of such shares as allotted them in said trust company's stock.

It is to be noted in this connection that there is nothing in said Act expressly rendering the stock void, and the inferences of law applicable might be very different when dealing with an obviously honest error and a brazen defiance of the law.

DUFF J.—Speaking with the greatest respect, I cannot concur with the view expressed by the learned Chief Justice of Manitoba, that s. 26 of the special statute of the Northwest Trust Company affects the operation, as concerns that company, of the *Sale of Shares Act*. The *Sale of Shares Act* is an enactment of general application, intended obviously to extend to all companies, whether incorporated under some statute providing generally for the incorporation of Companies, or brought into existence by a special Act. There is nothing in the Northwest Trust Company's Act to indicate that, speaking broadly, the *Sale of Shares Act* is not to be observed, and the special statute must be read as containing an implied provision that the company is empowered to do the things authorized, on compliance with the requirements of the earlier legislation. The books are not wanting in precedents for this manner of reading a special Act. The decision of this court in *Canadian Niagara Power Co.* v. *Stamford* (1) is one. In this case I thought the view of the majority was wrong, but that view was sustained by the Judicial Committee. Manifestly, s. 26 is not intended to validate an *ultra vires* agreement. Probably the true reading of it is that, in the circumstances mentioned, the applicant is

(1) 50 Can. S.C.R. 168.

1926

MCASKILL v. THE NORTH-WESTERN TRUST CO.

Duff J.

deemed conclusively to have agreed in point of fact to take the shares allotted to him.

I have no manner of doubt that the doctrine of *ultra vires* (if not the doctrine laid down by the House of Lords in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), at least the doctrine expounded by Lord Blackburn, then Blackburn J., in the Exchequer Chamber (2) in that case) governs the acts of the company. My reasons for that view are fully given in *The Canadian Bank of Commerce* v. *The Cudworth Rural Telephone Company* (3), inclusive, and I will not repeat them here. It is sufficient to say that, if the legislature, in the *Sale of Shares Act,* has manifested an intention that such a company as this shall not, in the given circumstances, enter into a contract such as the appellant's contract to take shares, then that contract, although concluded in fact, was an illegal contract, and wholly void, and the act of the company in placing the appellant's name on the register of shares was unauthorized, and, as concerns the appellant, vis-à-vis the company, in its legal effect inoperative.

The real question to be determined is that to which the majority of the learned judges of the court below addressed themselves, namely, Is the appellant, as a consequence of the winding-up proceedings intervening before any repudiation by him of his status as a shareholder, precluded from denying that status, as against the liquidator in the capacity in which he represents the creditors?

In point of law, the appellant never assented to having his name put on the register. There was not merely an assent voidable at the election of the appellant; there was no assent which in law would bind or affect either the company or the appellant. The responsibility of the appellant as contributory arises out of s. 51 of the *Winding-up* Act, which imposes the liability to contribute upon shareholders or members of a company being wound up. If, in contemplation of law, the appellant was not a shareholder or a member of the company, I do not understand on what principle he is brought within the sweep of that section.

(1) L.R. 7 H.L. 653.
(2) L.R. 9 Ex. 224 at pp, 254 et seq.
(3) [1923] S.C.R., 618, at pp. 627-631.

The case would, of course, be very different if the appellant were the holder of shares allotted to him pursuant to a contract capable of being rescinded on some proper legal ground, such as fraud, but valid and binding until so rescinded. Such a right may be lost by reason of some change in the circumstances making it unjust to permit the exercise of that right, and accordingly it has been held, and has long been settled law, that a registered shareholder, having a right to rescind his contract to take shares on the ground of misrepresentations contained in the company's prospectus, will lose that right if he fails to exercise it before the commencement of winding-up proceedings. The basis of this is that the winding-up order creates an entirely new situation, by altering the relations, not only between the creditors and the shareholders, but also among the shareholders *inter se*. This was the principle of the decision in *Oakes* v. *Turquand* (1), a decision which has been applied many times since. But the rule in *Oakes* v. *Turquand* (1) has no application where there has never been a concluded agreement to take shares, or where the agreement, though concluded in fact, is, in point of law, a nullity. The principle, in this aspect of it, is lucidly stated in a passage I shall quote from Buckley on Companies, on p. 103 of the tenth edition, a passage reproduced *ipsissimis verbis*, from the ninth edition, which we have the authority of Lord Wrenbury himself for saying was entirely the work of his own hands:—

> If the transaction in which a name has been entered on the register is not voidable but *void*, the decision in Oakes *v.* Turquand has no application. If the transaction be void, there can be no contract; under such circumstances the fact that a winding up has commenced is no ground for retaining the name on the list of contributories. For the liquidator for enforcing a contract stands only in the place of the company, and cannot enlarge the engagement of the alleged shareholder beyond that which he has entered into. If, therefore, it is shown that the alleged member has never agreed to become a shareholder, if, that is, there is no contract at all, it is immaterial that the name is found on the register at the commencement of the winding-up.

The principle has been applied in numerous cases, many of which are discussed in detail in the second volume of Lindley on Companies. It has been applied in cases in which the shares that the company has professed to allot

(1) L.R. 2 E. & I., 325.

1926

MCASKILL v. THE NORTH-WESTERN TRUST CO.

Duff J.

have been such as the company had no power to issue—such, in other words, as could not in point of law be considered to have a legal existence. *In re London and Northern Insurance Corporation; Stace and Worth's Case* (1). It has been applied where there was no concluded contract, by reason of the failure to notify the applicant of the allotment, by reason of the non-performance of a condition precedent—*In re Universal Banking Company; Rogers' Case* (2), or because a condition of the application was not assented to, or was such that the company was incapable of assenting to it—*In re Richmond Hill Hotel Company; Pellatt's Case* (3).

In particular, where the shareholder has agreed to take paid-up shares, and only paid-up shares, and the company in the circumstances has no power to allot such shares, the applicant will not be treated as a member in respect of the shares allotted to him unless, expressly or by his conduct, he has accepted them. *In re Barangah Oil Refining Co; Arnot's Case* (4); *in re Scottish Petroleum Co.* (5); *in re Railway Time Tables Publishing Co.; Exparte Sandy* (6). There are no facts in the stated case to support a conclusion that there was a valid contract by conduct between the company and the appellant not falling within the prohibition of the *Sale of Shares Act.*

The view taken in the court below by Mr. Justice Denistoun, which seems also to have been the view of the Apellate Division of Alberta, as expressed in the judgment of Harvey C. J., in *in re Great North Insurance Co.* (7), was that the failure on part of the appellant to have his name removed from the share register prior to the winding up has the effect of precluding him from disputing his status as a shareholder and contributory in the winding up proceedings. This view is founded chiefly on the passage in the judgment of Lord Macnaghten in *Welton* v. *Saffery* (8), and in argument on behalf of the liquidator, it was this passage which was pressed upon us most vigorously in sup-

(1) L.R. 4 Ch. App. 682.
(2) L.R. 3 Ch. App. 633.
(3) L.R. 2 Ch. App. 527.
(4) 36 Ch. D. 702.
(5) 23 Ch. D., 413 at pp. 436-7.
(6) 42 Ch. D., 98 at pp. 116-7-8.
(7) [1925] 1 W.W.R., 1149, at p. 1154.
(8) [1897] A.C., 299 at p. 321.

port of the judgment of the court below. The passage is in these words:

> Why then, I ask, is the appellant to be relieved from the obligation of contributing his proportionate share of the losses of the undertaking? It was said that there was a "social contract," to which effect ought to be given now that the rights of creditors are out of the way. There, as it seems to me, lies the fallacy. How was the supposed contract made? Who gave the requisite authority for making it? Not the company, nor yet the shareholders. It is beyond the powers of a limited company to limit the liability of shareholders in a manner inconsistent with the conditions of the memorandum of association. The directors, therefore, had no authority from the company to issue shares at a discount, or on any terms relieving the shareholder from liability to pay in full. The shareholders had no power to authorize the directors to do on behalf of the company that which the company itself could not authorize them to do. The articles of association no doubt empower the directors to issue shares on such terms as they think fit; but that must mean, of course, on such terms as they think fit consistently with the provisions of the Companies Acts. The articles in express terms purport to authorize the directors to issue shares at a discount. That provision, however, is in contravention of the statute of 1862, and simply void; neither the company nor the shareholders, even if they had been unanimous, could have empowered the directors to do anything of the kind. If the directors acted without authority, how can their action bind those who are supposed to have given them authority, but who, in fact, gave them none? The truth is, as it seems to me, that there never was a contract between the company or the shareholders, on the one hand, and the persons to whom these discount shares were offered, on the other. There was an offer by the directors purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed the names of the discount shareholders on the register; they allowed their names to remain there until their remedy against the company was gone; and now they cannot be heard to say that they were not shareholders.

Here it is made quite clear, not only that it was Lord Macnaghten's own opinion, but that there was so much unanimity on the subject as to make discussion upon it superflous, that the original allotment, and the contract upon which the allotment was based, were both null; and that this was the view of the other Law Lords is sufficiently clear from the speeches of Lord Watson at pp. 310-11, and of Lord Davey, at pp. 331-2. If that had been the only contract expressed or implied, then, if I am right in what I have already said, Welton was not liable as a contributory, and we should certainly not have had the elaborate arguments and judgments delivered in that case, assuming as an indisputable and undisputed proposition that for the

1926

McASKILL v. THE NORTH-WESTERN TRUST CO.

Duff J.

purpose of satisfying the demands of creditors and the costs of winding up, Welton was liable as a contributory. I can find nothing in any of the reports of the case indicating the facts upon which this accepted view rested. I am quite unable to entertain a doubt, however, that the shares had been dealt with, or that the shareholders had acted with respect to the shares in such a way as to create an agreement by conduct to accept them, an agreement not affected by the condition that the shares should be treated as fully paid up. Many considerations can be presented in support of this opinion—considerations which appear to me to be quite conclusive. It is incredible, for one thing, to my mind, that, in the absence of such facts, Welton's liability, which in such circumstances would appear to have been conclusively negatived by the decision in *in re Barangah Oil Refining Co.; Arnot's Case* (1), would have been admitted by everybody, as it was. Then, Lord Macnaghten's judgment is not mentioned in Buckley on Companies, as containing anything inconsistent with the passage quoted above, or in the elaborate discussion of the whole subject in Lindley on Companies, as having any relevancy at all to the point now under discussion; or in the edition of 1901 of Rawlins & Macnaghten on Companies, at pp. 331 and 332, where the cases in which a shareholder is entitled to have his name removed from the register after the commencement of the winding up are carefully classified: or, again, in the discussion of the subject in Palmer on Companies. There appears to be abundant justification for thinking that Lord Macnaghten's judgment has not been considered to bear the interpretation ascribed to it in the argument of the appellant.

The appeal should be allowed and the question submitted answered in the negative.

MIGNAULT J.—This is an appeal by leave of a judge of this court from a judgment of the Court of Appeal of Manitoba, affirming an order of Mr. Justice Dysart placing the appellant upon the list of contributories of The Northwestern Trust Co., which is being wound-up under the provisions of the Dominion *Winding-up Act*.

(1) 36 Ch. D. 702.

The decision of the courts below, in this case, was governed by a previous decision of the Court of Appeal of Manitoba, in the matter of three shareholders of the same company, to wit, Alfred M. Moreau, Reginald Drayson and Lucy E. Vicary (1). In those cases, Mr. Justice Dysart had refused to place the parties on the list of contributories, but his judgment was reversed by the Court of Appeal (Prendergast and Trueman JJ.A. dissenting). An appeal was then taken to this court, but was quashed for want of jurisdiction, no leave to appeal having been obtained and the amount in each case being under $2,000. In the matter of McAskill, however, a subscription for sixty shares was involved, amounting in nominal value to $6,000., and these shares had been sold to him at a premium, to wit, $125 per share of a nominal value of $100. As Mr. Justice Dysart was bound by the decision in *In* re *Moreau et al.*, he placed McAskill on the list of contributors, and an appeal to the Court of Appeal from his order was dismissed. Thereupon McAskill obtained leave to appeal to this court, the amount involved being sufficient under the Winding-up Act. The reasons for judgment to be considered on this appeal are those delivered in the cases of Moreau, Drayson and Vicary, to which the learned judges refer as the grounds of their decision in this case.

The proceedings were brought upon a stated case agreed to by the parties. In substance, this stated case sets out that The Northwestern Trust Company was incorporated by a Manitoba statute, being chapter 170 of the Statutes of 1920, and had its head office in Winnipeg; that by order, dated the 17th of March, 1924, the company was directed to be wound-up and the liquidator applied to have McAskill placed on the list of contributories in respect of two subscriptions for stock, for 50 and 10 shares respectively, at the price of $125 per share, the balance unpaid thereon being $6,400; that on its incorporation the company had only a part of its capital stock subscribed, and it authorized two of its officers, McCabe and Maber, to procure subscribers for its capital stock not then subscribed for; that

(1) 34 Man. R. 449; [1924] 3 W.W.R. 625.

1926

MCASKILL v. THE NORTH-WESTERN TRUST CO.

Mignault J.

McCabe and Maber engaged one Shallott and one Brand to offer for sale and attempt to sell the stock; that Brand offered 50 shares of stock to McAskill at Winnipeg on the 21st of September, 1922, and by his efforts induced him to sign an application for these shares on which McAskill paid $550; that Shallott offered 10 shares of stock to McAskill at Winnipeg on the 20th of November, 1922, and by his efforts induced him to sign an application for these shares on which McAskill paid $250; that these applications were transmitted to the company, the stock allotted to McAskill, and notice thereof given to him; that the company made an application to the Public Utility Commissioners for Manitoba under *The Sale of Shares Act*, chapter 175 of the Revised Statutes of Manitoba, and amending Acts, for permission and authority to sell its shares, but the application was not granted, and the company did not comply with the provisions of the said statute and never filed the papers required by the Act and never obtained a certificate under the Act nor a license for its agents; that McCabe, Maber, Shallott and Brand did not at any time have a license under the Act when they offered the shares for sale to McAskill; that McAskill

> was not aware until after the winding-up order herein had issued that said company had not secured a certificate and its agents had not a license as aforesaid, or that the provisions of the said *Sale of Shares Act* had not been complied with.

The following question is submitted by the stated case:

> Is the said Neil McAskill liable in the absence of other defence for any sum under the alleged subscription for stock marked exhibits 2 and 3, and to be settled on the list of contributories herein therefor?

Before making special reference to the charter of the Northwestern Trust Company, it will be convenient to set out as briefly as possible the material provisions of the *Sale of Shares Act*. This statute was first enacted by the Manitoba legislature in 1912, 2 Geo. V, c. 75, and is chapter 175 of the Revised Statutes of Manitoba of 1913. As it stood at the time of the revision of 1913, it applied only to foreign companies, but in 1914, by chapter 105 of the statutes of that year, an important amendment was adopted, striking out the word "foreign" wherever it appeared in the statute, and defining the term "company" as including

> every company, corporation, syndicate of persons, incorporated or unincorporated.

The language of section 4 hereinafter quoted was also changed.

As a good deal in this case turns on the language of sections 4 and 6, I will quote them in extenso.

Section 4, as enacted by chapter 105 of the statutes of 1914:—

It shall hereafter be unlawful for any person or persons, corporation or company, or any agent acting on his, their or its behalf, to sell or offer to sell, or to directly or indirectly attempt to sell, in the province of Manitoba, any shares, stocks, bonds or other securities of any corporation or company, syndicate or association of persons, incorporated or unincorporated, other than the securities hereinafter excepted, without first obtaining from the Public Utility Commissioner, hereinafter styled "the commissioner," a certificate to the effect hereinafter set forth and a license to such agent in the manner hereinafter provided for.

The words "other than the securities hereinafter excepted" are a reference to section 5 of the amending statute, the purport of which is stated below.

Section 6:—

It shall not be lawful for any person or any such company, either as principal or agent, to transact any business, in the form or character similar to that set forth in section 4, until such person or such company shall have filed the papers and documents hereinafter provided for. No amendment of the charter, articles of incorporation, constitution and by-laws of any such company shall become operative until a copy of the same has been filed with the commissioner as provided in regard to the original filing of charters, articles of incorporation, constitution and by-laws, nor shall it be lawful for any such company to transact business on any other plan than that set forth in the statement required to be filed by section 7, or to make any contracts other than those shown in the copy of the proposed contracts required to be filed by section 7, until a written statement, showing in full detail the proposed new plan of transacting business, and a copy of the proposed new contract shall have been filed with the commissioner, in like manner as provided in regard to the original plan of business and proposed contract, and the consent of the commissioner obtained as to making such proposed new plan of transacting business and proposed new contract.

The prohibition at first extended to all sales or attempted sales of stock however made. But while the scope of the statute was extended in 1914 as above mentioned, the prohibition was restricted by section 5 of the amending statute of that year to sales or attempts to sell made "in the course of continued and successive acts." What the words just quoted mean is shewn by the rest of section 5 which states:

The printing, publication or advertisement in any newspaper, magazine or other periodical, or by any other means of display whatsoever, or the issue, putting forth or distribution of any advertisement, circular

1926

McASKILL v. THE NORTH-WESTERN TRUST CO.

Mignault J.

letter or other paper containing any offer to sell or solicitation to purchase or intimation of the fact of the issue of any of such shares, bonds, stocks or other securities, or solicitation by agents or employees, shall be evidence of an attempt to sell in the course of continued and successive acts in violation of this Act.

The other provisions of the Act, so far as they are pertinent, may be briefly summarized. A company or person desiring to sell any shares must file in the office of the Commissioner (i.e. the Public Utility Commissioner) a statement of the plan on which the company proposes to transact business, a copy of all contracts, bonds or instruments which it proposes to make with or sell to its contributors, an itemized account of its actual financial condition shewing its property and liabilities, and such other information touching its affairs as the commissioner may require (s. 7). These documents are examined by the commissioner who may make or have made a detailed investigation of the company's affairs; and if he finds that the company is solvent, that its articles of incorporation, its constitution and by-laws, its proposed plan of business and contracts provide a fair plan for the transaction of business and promise a fair return, he issues a certificate reciting that the company has complied with the Act and is permitted to do business in the province. If the Commissioner finds that the articles of incorporation, charter, constitution and by-laws, the plan of business or proposed contracts contain provisions that are unfair, unjust, inequitable or oppressive, or if he decides that the company is not solvent and does not intend to do a fair and honest business, or does not promise a fair return, he notifies it, or the person offering its shares for sale, of his findings, and it shall then be unlawful for the company or any agent on its behalf to sell or offer for sale its shares, bonds or other securities until the company shall change its constitution and by-laws, articles of incorporation, its plan of business and proposed contracts and its general financial condition in such a manner as to satisfy the Commissioner on all these points (s. 10).

When the company has obtained the Commissioner's certificate, it may appoint one or more agents, but no such agent shall do any business for the company until he has registered with the Commissioner and received a licence from him, which licence shall be produced to every person

with whom he proposes to transact business (s. 11). The company shall file with the Commissioner every twelve months, or oftener if required, a statement under oath of its financial condition and of its assets and liabilities. The Commissioner may revoke his certificate if he finds that the assets of the company are impaired and do not equal its liabilities, or that it is conducting business in an unsafe manner, or if the company refuses without satisfactory reasons to file any papers, statements or documents required by the Act or by any order of the Commissioner (s. 12).

The Commissioner is granted other powers of investigation of the company's affairs, and when his finding is adverse to the company on the points mentioned above, he reports the facts to the Attorney General, who may apply to the Court of King's Bench or to a judge thereof for the appointment of a receiver to take charge of and wind-up the affairs of the company (ss. 13 and 14).

The Act provides for a penalty of not less than fifty dollars nor more than five hundred dollars to be recovered from any person who shall do anything forbidden by the Act or declared unlawful by it (s. 15).

We now come to the incorporation of the Northwestern Trust Company by a special Act of the Manitoba legislature, chapter 170 of the statutes of 1920.

It will not be necessary to do more than refer briefly to some of the salient provisions of this charter which is very long and detailed. The capital stock is $1,000,000 in shares of $100 each, with power to increase it to an amount not exceeding $5,000,000. Stock to the amount of $100,000 must be subscribed and $35,000 paid thereon before the company goes into operation (s. 3). The objects of the company are stated in great detail in section 5 and following and are those generally of a trust company. It is also authorized to act as an executor, administrator, etc., without security when approved by the Lieutenant Governor in Council. Its liability in fulfilling these offices is the same as that of a private person acting in a like capacity, and the whole of its capital stock together with its property and effects are security for the faithful performance of its duties, but no shareholder is liable for more than the amount unpaid on the stock held by him (s. 11).

1926

MCASKILL v. THE NORTH-WESTERN TRUST CO.

Mignault J.

The powers of the directors are also stated in detail, and, *inter alia*, are to issue stock, make calls thereon and prescribe the terms of payment (s. 19). The persons mentioned in the preamble are named provisional directors and are empowered to open in the city of Winnipeg and elsewhere stock books in which are recorded the subscriptions of those who desire to become shareholders (s. 20). The company is directed to prepare and annually transmit to the Provincial Secretary a statement in duplicate under oath setting forth the capital stock of the company, the portion paid up, the assets and liabilities of the company, and such other information as the department may require (s. 22).

> Every person who makes application in writing for an allotment of shares, to whom any share or shares is or are allotted in pursuance of such application, shall be deemed conclusively to have agreed to become a shareholder of the company in respect of the shares so allotted (s. 26).

The register of the shareholders is *prima facie* evidence of any matters by the Act directed or authorized to be inserted therein (s. 27).

Sections 29 and 30 of the charter are taken verbatim from sections 48 and 49 of the Manitoba Companies Act (R.S.M. c. 35), and render each shareholder, until his stock has been fully paid up, liable to the creditors of the company for the unpaid portion thereof, but relieve him otherwise from liability for the acts, defaults or liabilities of the company. The company is directed to keep a register of the shareholders containing their names, the number of shares held by them and the amount paid thereon (s. 33). The company is declared subject to the general laws of the province relating to loan and trust companies (s. 50). The powers granted by the Act cease and determine unless the company begins business and goes into operation within two years (s. 51). Finally sections 31, 34, 47 and 59 to 65 inclusive of the Manitoba Companies Act are made applicable to the company (s. 52).

The first question we have to decide is whether the *Sale of Shares Act* applies to this company, a point on which there was a difference of opinion in the court below. The charter of the company contains no reference to this Act. The majority of the judges in the Court of Appeal considered that s. 26, which I have quoted verbatim, pre-

vented the appellant from disputing his liability as a shareholder.

It may well be that certain provisions of the company's charter override some of the enactments of the *Sale of Shares Act*. For instance, in so far as the charter expressly sets out the objects and defines the powers of the company, the Public Utility Commissioner, acting under the *Sale of Shares Act*, could not call on this company to change the plan of business mentioned in its Act of incorporation or to modify its charter powers. But because the charter authorizes the directors to issue stock and make calls thereon—powers belonging to directors in joint stock companies generally under the Manitoba Companies Act —it by no means follows that measures of supervision and control with respect to the sale of shares, such as those prescribed by the *Sale of Shares Act*, are inconsistent with or repugnant to this company's charter. In the absence of anything in the charter excluding these measures, which are undoubtedly of great public importance and designed to be of universal application, they should not be excluded by inference on account of the general power given to the directors to issue stock. Sect. 26 of the charter, which was specially relied on in the court below, can be given full scope without affecting any of the prohibitions of the *Sale of Shares Act*. It concerns a mere matter of evidence, authorizing the inference, from the fact of an allotment of shares pursuant to an application in writing therefor, that the applicant has agreed to become a shareholder in respect of the shares so allotted. Here there is no question that the appellant did consent to become a shareholder, but the point is whether such consent is binding on him in view of the prohibitions of the *Sale of Shares Act*. Section 26 presupposes a valid and binding application for the shares alloted. Nothing in that or any other section of the company's special Act excludes the applicability of the safeguarding provisions of the *Sale of Shares Act* to the appellant's purchase of shares in the Northwestern Trust Company.

It is common ground that this company did not obtain from the Public Utility Commissioner a certificate as required by the Act before selling shares to the appellant. It had applied for this certificate, which was not granted,

1926

McASKILL v. THE NORTH-WESTERN TRUST CO.

Mignault J.

and it had never filed the papers and documents required by sections 6 and 7 of the Act. It is also admitted that McCabe, Maber, Shallott and Brand, its agents, who offered the shares for sale, did not have or produce any license when offering them. The stated case further alleges that the appellant was not aware, until after the issue of the winding-up order, that the company had not secured a certificate, that its agents had no licenses, and that the provisions of the Act had not been complied with. Under these circumstances, is the appellant liable to be placed on the list of contributories of this company for the shares purchased by him?

The applications for stock and the allotments took place in the fall of 1922, and the winding-up order is dated the 17th of March, 1924. The stated case sets out no dealings by the appellant with the stock, no assisting at meetings or receipt of dividends by him. We have only the facts that the stock was subscribed for and allotted and that notice of the allotment was sent to the appellant. The appellant's repudiation of his purchase took place after the winding-up order issued, for at that time only did he become aware that the requirements of the *Sale of Shares Act* had not been complied with.

On behalf of the appellant it is contended that in view of the prohibitions of the *Sale of Shares Act,* his contract to purchase shares was void *ab initio,* and not merely voidable, and that he could, under the circumstances, successfully resist an application to place his name on the list of contributories.

The liquidator's submission is that, if the statute applies, the contract is not void but only voidable at the election of the shareholder, and that the latter's repudiation made after the beginning of the winding-up is too late. The liquidator also contends that the appellant having accepted the stock allotted to him and his name having been placed on the register of shareholders, he is now estopped from setting up against the creditors of the company, who are represented by the liquidator, that his purchase of shares is void and that he is not a contributory.

Taking into consideration the character of the statute, its language and also the purpose for which it was enacted —which was to protect the general public against schemes

or campaigns to sell shares or securities of doubtful value to unwary investors through agents, and with the aid of advertisements, circulars or other methods of publicity—the conclusion seems inevitable that the *Sales of Shares Act* deals with a matter of public policy and that anything done in contravention of its prohibitions is void and not merely voidable. It is true that *per se* every sale of its shares by a company is not made unlawful (s. 5 of c. 105 of 1914). It is the sale effected "in the course of continued and successive acts," as defined, which falls under the prohibitions of the statute. A sale so made, and all steps taken to carry it out, such as an allotment of shares, are void.

This case must be decided on the basis of the facts alleged in the stated case, and by them it is established that the requirements of the *Sale of Shares Act* were not complied with. The application for shares by the appellant and the allotment of these shares to him are consequently void, and there is no contract between him and the company. No dealings of the appellant with the stock are alleged, and there is nothing from which an independent agreement to keep the stock and pay for it can be implied.

The present case is therefore distinguishable from the cases on which the liquidator relies. The contract to take stock being void, such decisions as *Oakes* v. *Turquand,* (1) —where the contract induced by fraud was merely voidable —can have no application here. Nor can an independent contract to keep the shares and pay for them be implied as in *In re Railway Time Tables Publishing Co.; ex parte Sandys* (2), where the original contract to purchase shares at a discount was void, but the purchaser had dealt with the stock, had sold or attempted to sell a part of it, and had signed proxies as a shareholder for voting purposes. Neither is there such a circumstance as signing a blank form of transfer which, in *In re Peruvian Railways Co.; Crawley's Case* (3), was considered sufficient to imply acceptance of stock for the allotment of which a notice had not been sent to the shareholder.

The liquidator strongly relies however on the case of *Welton* v. *Saffery* (4). But the only point determined

(1) L.R. 2 H.L. 325.
(2) 42 Ch. D. 98.
(3) L.R. 4 Ch. App. 322.
(4) [1897] A.C. 299.

1926

MCASKILL v. THE NORTH-WESTERN TRUST CO.

Mignault J.

there was that a purchaser under a void offer, at a discount, of stock purporting to have been issued as fully paid up, who had already admitted his liability to contribute to the payment of the company's creditors and the cost of the litigation (which was unquestionable in view of the previous decision of the House of Lords in *Ooregum Gold Mining Co. of India* v. *Roper* (1), was also liable to contribution in order to adjust the rights of the shareholders *inter se*. The liquidator invokes the following dictum of Lord Macnaghten, at pp. 321-322:—

> The truth is, as it seems to me, that there never was a contract between the company or the shareholders, on the one hand, and the persons to whom these discount shares were offered, on the other. There was an offer by the directors purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed the names of the discount shareholders on the register; they allowed their names to remain there until their remedy against the company was gone; and now they cannot be heard to say that they were not shareholders.

This raises the question whether the appellant is estopped from denying that he is a shareholder of the company, as two of the learned judges (Perdue C.J.M., and Dennistoun, J.A.; Fullerton, J.A. *contra* on this point) thought in the court below.

This question must also be decided on the basis of the facts alleged in the stated case. It is not even set out there that the appellant's name was placed on the list of shareholders, but we may perhaps assume that it was. No dealing by the appellant with the stock is alleged as a basis of estoppel; the most that could possibly be said is that he allowed his name to go on the register, but for that the only authority given by him was his subscription for the stock. How then can it be asserted that he is estopped from setting up that his purchase of shares is void and his name wrongly on the register, when it is admitted that he was not aware until after the winding-up order issued that the requirements of the Sale of Shares Act had not been complied with, and then promptly repudiated? The liquidator cannot admit this lack of knowledge, and assert

(1) [1892] A.C. 125.

in the same breath that the appellant should have repudiated his purchase before the winding-up. In a much stronger case for estoppel than that with which we are concerned, the Court of Appeal for Ontario refused to hold an applicant for shares estopped from denying that he was a shareholder, and upheld a judgment striking his name from the list of contributories. *Re Pakenham Pork Packing Co., Higginbotham's Case,* (1). There the applicant for shares had attended meetings of the company and had moved resolutions, but it was admitted that he had had no notice until after the liquidation of irregularities in the creation of the preference stock for which he had subscribed. This Ontario decision was followed by the Court of Appeal of British Columbia in *Re Bankers' Trust and Barnsley* (2). See also Bower on Estoppel, s. 146, p. 129.

No difficulty arises from the fact that the name of the appellant was on the register of shareholders. It was illegally there, and the register is not conclusive either before or after the liquidation, but is only *prima facie* evidence (s. 27 of the company's charter), and names illegally thereon can be removed.

The appeal should therefore be allowed with costs throughout and the question submitted in the stated case answered in the negative, with the result that the name of the appellant should be struck from the list of contributories of the company. The costs of all parties should be paid out of the estate.

NEWCOMBE J.—I concur with Mr. Justice Duff.

Appeal allowed with costs.

Solicitors for the appellant: *McCallum, Wilson and Co.*
Solicitor for the respondent: *Philip C. Locke.*

(1) 12 Ont. L.R. 100, at p. 112. (2) 21 D.L.R. 623.

1926
*Mar. 4.
*May 4.

WILLIAM A. WRIGHT, CHALON E. CORSON, CANADIAN RAYBESTOS COMPANY, LIMITED (PLAINTIFFS) ... } APPELLANTS;

AND

BRAKE SERVICE LIMITED (DEFENDANT) ..... } RESPONDENT

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Infringement—Validity of patent—User in foreign country before invention—The Patent Act, R.S.C. 1906, c. 69, s. 7—Patent dated after assent to, but before the coming into force of The Patent Act, 1923, c. 23.

Held, in s. 7 of The Patent Act, R.S.C. 1906, c. 69, the words "which was not known or used by any other person before his invention thereof" meant just what they expressed, and the words "not known or used by any other person" were not to be qualified by the words "in Canada." The fact of user by another person, though in a foreign country, previous to the invention made by the applicant for patent, disentitles the latter to maintain an action for infringement of the patent granted to him under the said Act. *Smith* v. *Goldie* (9 Can. S.C.R. 46) disc.

The patent in question was dated 26th June, 1923. The Patent Act, 1923, c. 23, was assented to 13th June, 1923, but came into force, by proclamation, on 1st September, 1923.

Held, the rights of the patentee were governed by the former Act, and there was nothing in the new Act which had the effect of sustaining his patent against the objection raised against it, viz., user in the United States by another person before the patentee's invention.

APPEAL from a judgment of the Exchequer Court of Canada. The action was brought for alleged infringement by the defendant of letters patent belonging to the plaintiffs. The defendant pleaded non-infringement and also that the plaintiffs' patent was void. The action was first tried in December, 1924, judgment being reserved. Subsequently the defendant applied for leave to amend its particulars of objections, to the effect that the plaintiffs' patent, an improved brake band lining device, had been anticipated by one Cady of Canastota in the State of New York. Upon the issues tried in December, 1924, judgment was rendered on 24th February, 1925, sustaining the validity of the plaintiffs' patent and their action

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

1926

WRIGHT & CORSON v. BRAKE SERVICE LTD.

Idington J.

for infringement against the defendant (1). Leave having been granted to the defendant to amend its particulars for the purpose above stated, the judgment was set aside and a new trial ordered, limited to the specific issue raised in the defendant's amended particulars. At the further trial upon the amended particulars the defendant established to the satisfaction of the court that the said Cady late in the year 1918 constructed a brake band lining machine and had since used the same, with some slight modifications, in his garage at Canastota, and that this machine was the mechanical equivalent of the machine patented. The patent under which the plaintiffs claim was issued from the patent office of the Dominion of Canada and was dated 26th June, 1923. It was held that the plaintiffs' patent registered in Canada was anticipated by Cady, and it was therefore void and the plaintiffs' action for infringement failed. The plaintiffs appealed, limiting their appeal to the question of whether, upon the facts found by the trial judge, his decision was correct in law.

R. S. Smart and *J. L. McDougall* for the appellants.

W. L. Scott K.C. for the respondent.

IDINGTON J:—This is an appeal from the judgment of Mr. Justice Maclean, the President of the Exchequer Court, wherein the validity of a patent of invention granted under the Patent Act, R.S.C. 1906, c. 69, was in question, and said learned trial judge upon the facts found by him, and his interpretation and construction of section 7 of said Act, as applied to said facts, adjudged said patent as void, and dismissed said appellants' action with costs of the second trial and subsequent to the filing of respondent's amended particulars.

I do not think there is any doubt of the facts being correctly found by said learned judge, or indeed any serious contention herein to the contrary.

The only question is one of law and it turns upon the interpretation and construction of said section 7, which reads as follows:—

7. Any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improve-

(1) [1925] Ex. C.R. 127.

1926

WRIGHT & CORSON v. BRAKE SERVICE LTD.

Idington J.

ment in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention.

2. No patent shall issue for an invention which has an illicit object in view, or for any mere scientific principle or abstract theorem.

I must say it seems to be very clear English and easily well understood if we read it as such. The counsel for the appellants, however, argued that we must read into it something analogous to what once was in the *Patent Act* of Canada, restricting and confining the words used therein, beginning at the fourth line thereof, as follows—

which was not known or used by any other person before his invention thereof

to mean only any other person in Canada.

The learned judge held, as I think quite rightly, that the words "any other person" means there just what they literally express; and apply to any person in the United States as well as in Canada, who may have previously known or used the alleged invention.

In doing so he follows the holding of the late Sir Walter Cassels in the case of *The Barnett-McQueen Company, Limited* v. *The Canadian Stewart Company, Limited* (1) which is the last case in point, and by a judge well versed in the Canadian patent law.

I entertain a decided opinion that he was quite right and the learned trial judge on the facts herein also so in following that precedent.

The counsel for appellants seems to think the late Mr. Justice Burbridge had expressed in an earlier case a different opinion, and cites many patent enactments in Canada.

I doubt if that case is in fact in point, but even if so, I prefer the later decision upon which the learned judge below proceeded.

The more I study that story and the changes in the law, the more I feel convinced that our legislators found it necessary to depart from the original conception of what was needed, and eliminated the narrow and dangerous char-

(1) 13 Ex. C.R. 186.

acter of the law, along such a length of adjoining territory much given to invention, if the word "persons" was to be confined to Canada alone.

The person here in question was a Mr. Cady, in New York State, who, I strongly suspect, was the real inventor, though the learned trial judge does not expressly so find because it was not necessary. And I refer to it as a possible danger ahead if we reversed the judgment appealed from.

I am of the opinion that his appeal should be dismissed with costs.

DUFF J.:—Mr. McDougall's ingenious argument has not convinced me that the rights of the parties to this appeal are governed by the statute of 1923. S. 7, R.S.C., c. 69, which is the relevant enactment, is in these words:

> Any person who has invented any new and useful art, machine, manufacture or composition of matter or any new and useful improvement in any art machine manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention;

and the question is whether the words "not known or used" in the clause,

> which was not known or used by any other person before his invention thereof,

are subject to the qualification expressed in the words "in Canada." It seems difficult, without torturing the section, to read the words so.

The natural construction is to read them as governing the scope of the phrase "his application for patent therefor," which immediately precedes them. A difficulty, no doubt, arises from *Smith* v. *Goldie* (1), a decision, the scope and effect of which it is necessary to examine. The decision is very elaborately discussed in the judgment of Cassels J. in *Barnett-McQueen Co.* v. *Canadian Stewart Co.* (2) at pp. 226 et seq. The facts, in outline, were these: Smith, the appellant, had a Canadian patent,

(1) 9 Can. S.C.R. 46. (2) 13 Ex. C.R. 186.

1926
WRIGHT & CORSON v. BRAKE SERVICE LTD.
Duff J.

applied for in January, 1873, and granted in the following April. Sherman and Lacroix each had also a Canadian patent, dated in 1872, under whom Goldie, the respondent, claimed. Smith's machine, invented by him, was in complete working order in the United States in April, 1871. His application for a patent there was in July of the same year. Mr. Justice Henry, in the course of an elaborate judgment in this court, with which Taschereau J. and Fournier J. concurred, states explicitly that Smith was the first and only inventor of the combination in question, and that the two contestants, under whom the respondent claimed, had become acquainted with the value of the combination by obtaining knowledge of Smith's discovery. The court held, Strong J. dissenting, that Smith's invention was a patentable one. There seems to be little doubt that Mr. Justice Cassels is right in the opinion expressed by him in the judgment already mentioned (*Barnett-McQueen Co.* v. *Canadian Stewart Co.* (1)) at p. 227 of the report, that the point mentioned as being decided in the headnote of *Smith* v. *Goldie* (2) was actually so decided, although not mentioned in the judgments, namely, that the words " in Canada," in the sixth section of the Act of 1872, should be read as qualifying the words " in public use or on sale," and not as qualifying the immediately preceding word, " application." As Smith's machine had been in public use and on sale in the United States for more than a year prior to his application in Canada (see per Patterson J.A.) (3), Smith's title to a patent in this country would have been lost if, on the true construction of that section, " in public use or on sale " meant in public use or on sale anywhere, and not in Canada merely. This point, then, may be taken as decided.

It is not necessary to decide, and I desire to express no opinion upon it, whether such a change has taken place in the Act as entitles us to say that the decision in *Smith* v. *Goldie* (2) on this point no longer applies. That was the view of Cassels J., expressed in the case above mentioned. But beyond stating that his reasoning does not convince me, I leave the point without observation. Assuming that

(1) 13 Ex. C.R. 186. (2) 9 Can. S.C.R. 46.
(3) 7 Ont. A.R. 628, at p. 642.

Smith v. *Goldie* (1) upon this point is applicable, it is, of course, binding upon us, but although there is necessarily involved in it the proposition that the words " in Canada " do not limit the word " application," it does not necessarily follow that they do qualify the earlier words—the words in the preceding clause—" not known or used by others "; and, in point of fact, as will presently appear more particularly, Patterson J.'s view, as expressed in his judgment in the Court of Appeal, was that they do not.

The view expressed by Cassels J. is, that this court actually decided the point in *Smith* v. *Goldie* (1), in the sense of Patterson J.'s opinion, as it is reported to have done, in the headnote. Burbridge J. observes, however, in *The Queen* v. *LaForce* (2), that three of the learned judges at least, who were concerned in the decision of *Smith* v. *Goldie* (1), found the facts in such a way as necessarily to defeat the defence advanced by the respondents, neither of whom was (in his opinion), according to these findings, entitled to a patent as an inventor. They had neither invented nor discovered anything; they had merely pirated Smith's invention; and it may, in view of this difference of opinion, be doubted whether, on the question of law now before us, *Smith* v. *Goldie* (1) is decisive. But an examination of the statute of 1869, when its provisions are contrasted with those of the legislation of 1872, 1886 and 1906, convinces me that Patterson J. is right in his opinion that a change in policy is manifested by the statute of 1872. The point is stated in his judgment at pp. 640 and 641, and I quote his words:

> Mr. Cassels for the defendants, when discussing the question of want of novelty, called particular attention to the language of the sixth section of the Act of 1872, 35 Vict., c. 26, which is now in force, and the corresponding section of the Act of 1869, 32-33 Vict., c. 11, s. 6, which differs from that of the Act which had been in force in the province of Canada, Cons. S.C., c. 34, s. 3.
>
> The last-named Act authorized the granting of a patent to the inventor of a new and useful art, &c.: " The same not being known or used *in this province* by others before his discovery or invention thereof." While that Act was in force, no one was entitled to a patent under it except a subject of Her Majesty.
>
> The Act of 1869 extended the privilege to any person who had been a resident of Canada for one year before his application, and that of 1872 removed the restriction as to residence, thus in all respects placing

(1) 9 Can. S.C.R. 46. (2) 4 Ex. C.R. 14, at p. 59.

1926

WRIGHT & CORSON v. BRAKE SERVICE LTD.

Duff J.

foreigners on the same footing with subjects; but at the same time, and as a complement of this extension of the privilege, requiring absolute novelty, and not merely novelty within the Dominion, in the invention. The language is, therefore, more general, as used in the two later statutes, "the same not being known or used by others before his invention thereof"

It only remains to note that neither in the revision of 1886 nor in that of 1906 was any change pertinent to this point effected in the words of s. 6 of the Act of 1872, which Patterson J. was here considering, and it may not unreasonably be assumed that this weighty expression of opinion was before the legislature when these revisions took place.

The appeal should be dismissed with costs.

MIGNAULT J.—I concur with Mr. Justice Rinfret.

NEWCOMBE J.—I concur with Mr. Justice Duff.

RINFRET J.—The appellants, Wright and Corson, are both residents of Bridgeport, in the State of Connecticut, United States of America. The appellant company is their assignee. Brake Service Limited, the respondent, is a body politic and corporate of the city of Toronto, in the province of Ontario and Dominion of Canada.

By letters patent numbered 232159, dated 26th June, 1923, under the seal of the Patent Office of the Dominion of Canada, there was duly granted to the appellants for a period of eighteen years the exclusive right, privilege and liberty of making, constructing, using and vending to others to be used in the Dominion of Canada, an invention consisting of improvements in methods and mechanism for drilling and applying brake band linings. The appellants are the owners of this patent; and they claim that, for some time past, without their license, permission or assent, the respondent has infringed and is still infringing these letters patent. They pray for a declaration that the letters patent are valid, for an injunction restraining the wrongful acts of infringement and for accessory remedies, such as payment of damages, account of profits, inquiries and costs.

The defence was that the patent sued upon is and always has been void for several reasons contained in the particulars of objections of which the following alone need be retained and are stated thus:—

A machine anticipating in every particular the machine described in the plaintiff's patent sued on herein was in public use in the city of

Canastota, in the State of New York, one of the United States of America, in the public garage of one George B. Cady, for more than one year prior to the 25th day of August, A.D. 1922, the date upon which the plaintiffs filed their application for a patent in the Canadian Patent Office, to wit, continuously from the month of October in the year 1918 until the 25th day of August, A.D. 1922, and thereafter continuously until the present time, and the method of attaching brake linings to brake bands, described in the plaintiff's said patent, has been in constant use in connection with the said machine of the said George B. Cady from the said month of October, A.D. 1918, until the present time.

Upon that issue, the President of the Exchequer Court in his judgment delivered on the 18th day of April, 1925, expressed himself in the following way:—

I am entirely satisfied that Cady produced the machine referred to in the defendant's amended particulars, in the manner and at the time related by him. His evidence has been confirmed in too many particulars by other evidence, oral and documentary, to cause me to doubt his veracity. In regard to the other witnesses who gave evidence at the trial on behalf of the defendant, my conclusion is that they were reliable, and their evidence is to be believed. On the whole, I have no doubt whatever that Cady produced the brake-band lining machine in question late in 1918, and that he has since used the same with some slight modifications, in his garage at Canastota.

There can be no doubt that Wright and Corson is the mechanical equivalent of Cady. One need only to see the two machines to be entirely satisfied of this, and I think no useful purpose is to be served by any lengthy consideration of this point.

These findings of fact were not disputed before this court; and the sole question in this appeal therefore is whether knowledge or user in another country, previous to the invention of the applicant in Canada, renders void a patent granted by the Patent Office of Canada.

The learned President of the Court held that it did. Referring to *Barnett-McQueen Co.* v. *Canadian Stewart Co.* (1), and to *Smith* v. *Goldie* (2), he decided that the Canadian Patent Act clearly implied

that the inventor must be the inventor as to all the world, in order to be entitled to a patent.

The question at issue is as to whether the learned judge was right in so holding.

The patent having issued on the 26th June, 1923, this question must be decided according to the law in force at that date. This was the Patent Act, c. 69, R.S.C. 1906.

A new act came into force in 1923 (c. 23 of 13-14 Geo. V). On account of the peculiar wording of its 68th and 66th sections, it was contended, on behalf of the appellants,

(1) 13 Ex. C.R. 186. (2) 9 Can. S.C.R. 46.

1926

WRIGHT & CORSON v. BRAKE SERVICE LTD.

Rinfret J.

that the new act applied to this litigation. It was pointed out that, by s. 68, patents issued prior to the coming into force of this Act cease to be subject to the provisions of the Patent Act, c. 69 of R.S.C. 1906, and

become subject to the provisions of this Act, but except as hereinbefore expressly provided, nothing in this Act contained shall be construed * * * to avoid any patent that was valid at such time.

The exception referred to and "expressly provided," so the appellants say, is s. 66, whereby c. 69 of R.S.C. 1906, is repealed (barring section 5A thereof),

Provided, however, that any patent issued prior to the passing of this Act which could successfully have been impeached for violation of or non-compliance with any provision of the Acts heretofore in force may with like effect be so impeached after the passing of this Act, and in any action for the infringement of any such patent any such violation or non-compliance which could have been set up as a defence may with like effect be so set up after the passing of this Act.

The new Patent Act was assented to on the 13th June, 1923; but it came into force (s. 70) only upon a day to be fixed by proclamation of the Governor in Council. This was published on the 7th July and made the Act effective on the 1st September, 1923. The appellants' patent issued on the 26th June, 1923, or on a date between the assent and the day on which the Act came into operation.

It was submitted that the Act "passed" when it received the Royal assent; and, for that reason, the appellants argued that the patent could be successfully impeached only for violation of or non-compliance with a provision of the new Act.

We do not think that such is the purport of s. 66 of the Act of 1923. By force of its wording, the repeal of c. 69 R.S.C. 1906 became effective only upon the day when the Act of 1923 came into operation. There was no intervening Act between the "passing" of the new Act and the date of its commencement. The appellants' patent therefor could only be issued under and subject to the provisions of the only Act then in force and that was c. 69 of R.S.C. 1906. The object of the proviso in s. 66 was to preserve, after the repeal of the old law took effect, any defence which could have been set up under that law, in an action for infringement of a patent issued under it. S. 68 adds that

nothing in the new Act contained shall be construed to revive or restore any patent that was void when it came into force nor to avoid any patent that was valid at such time.

The question before us is precisely whether the appellants' patent was valid (under the law in force when it was issued) at the time when the new Patent Act came into operation on the 1st September, 1923.

The relevant section in c. 69 of R.S.C. 1906 reads as follows:—

Section 7.—Any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such a person an exclusive property in such invention.

2. No patent shall issue for an invention which has an illicit object in view, or for any mere scientific principle or abstract theorem.

This section enacts that the art, machine, manufacture or composition of matter or the improvement thereof must be "new and useful." The first requirement is novelty. If there is no novelty, there is no invention. The wording contains no limitation as to locality. It is plain and unrestricted. Before a patent can be obtained, every inventor must present a petition to the Commissioner stating his invention to be of something new and he must make oath that this statement is "true and correct" (s. 10). The Commissioner may object to grant the patent

when it appears to him that there is no novelty in the invention (s. 17c);

and, even if granted, the patent is void

if any material allegation in the petition or declaration of the applicant * * * in respect of such patent is untrue (s. 29).

It must be an art, machine, manufacture or composition of matter or a useful improvement thereof

which was not known or used by any other person before his invention.

These words and those immediately following them in section 7 are not cumulative. They contain two totally different requirements altogether. The first one relates to the date of the invention; the second, only to the date of the application. There must have been no knowledge or use by another person prior to the invention; there must not have been public use or sale with the consent or allowance of the inventor for more than one year previously to the application for the patent in Canada. Those are two distinct conditions, both of which are essentially required.

1926

WRIGHT & CORSON v. BRAKE SERVICE LTD.

Rinfret J.

The words

not known or used by any other person before his invention thereof

are to be read alone, as they are, without any qualification attached to them. To construe them as excluding knowledge or user in another country, it would be necessary to import in the wording the qualification "in Canada," which is not there and which appears elsewhere in the section in a totally different connection. According to the grammatical construction of the section, therefore, the person entitled to a patent is one who has invented something (art, machine, manufacture, composition of matter or improvement thereof)

1. new and useful;
2. which was not known or used by any other person before his invention;
3. which has not been in public use or on sale with his consent or allowance for more than one year previously to his application for patent therefor in Canada.

This agrees with the historical construction of the anterior statutes.

In an *Act respecting patents for inventions*, being chapter 34 of Consolidated Statutes of Canada, 22 Vict. 1859, the protection of the law was restricted to "a subject of Her Majesty and resident in this province." The condition was that the art etc. invented should be new and useful,

the same not being known or used *in this province* by others before his discovery or invention thereof, and not being at the time of the application for a patent in public use or on sale *in this province* with his consent or allowance as the inventor or discoverer thereof (s. 3).

Section 25 of this Act read as follows:

Section 25.—Whenever it satisfactorily appears that the Patentee at the time of making his application for the Patent, believed himself to be the first inventor or discoverer of the thing patented, the Patent shall not be held to be void on account of the invention or discovery or part thereof, having been before known or used in a foreign country, if it does not appear that the same or any material or substantial part thereof, had before been patented or described in any printed publication.

These were substantially the reproduction of similar enactments in the earlier statutes (1848-49—Statutes of Canada, 12 Vict., c. 24; 1829, 9 Geo. IV, c. 47).

In 1869, however, when the Patent Office was constituted and the office of Commissioner of Patents was created

by the statute of Canada 32 & 33 Vict. c. 11, the words in s. 25 of 22 Vict. c. 34:

> the Patent shall not be held to be void on account of the invention or discovery or part thereof having been before known or used in a foreign country

disappeared and they have never since reappeared in the subsequent statutory enactments.

As for the material words in s. 3 of the statute of 1859, they have undergone the following modifications:

1859-22 V.-c. 34-s.3.-:

> the same not being known or used *in this province* by others before his discovery or invention thereof, and not being at the time of the application for a patent in public use or on sale *in this province* with his consent or allowance as the inventor or discoverer thereof.

1869-32 & 33 V. c. 11, s. 6:

> not known or used by others before his invention or discovery thereof, or not being at the time of his application for a patent in public use or on sale in any of the provinces of the Dominion with the consent or allowance of the inventor or discoverer thereof.

1872-35 V.-C. 26-s. 6:

> not known or used by others before his invention thereof, and not being in public use or on sale for more than one year previous to his application, in Canada with the consent or allowance of the inventor thereof.

1886-R.S.C.-c. 61-s. 71:

> which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada.

As will be perceived, there was no change in the wording of 1886 when section 7 of R.S.C. 1906, c. 69 (already quoted) was enacted. But the disappearance, in 1869, of the words " in this province," after the words " not being known or used," (particularly when it is remembered that section 25 of the Act of 1859, excluding as it did knowledge or user in a foreign country, was completely struck out) tends to show in Parliament a change of policy and of sentiment and adds a great deal of force to the conclusion already derived from the grammatical construction of the statute of 1906.

We should now examine how far this conclusion is supported by the judgment of this court in *Smith* v. *Goldie* (1).

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

1926

WRIGHT & CORSON v. BRAKE SERVICE LTD.

Rinfret J.

This decision was given in 1883. In the report, one of the head notes reads:

To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit.

The appellants submitted that an examination of the reasons for judgment of the judges who composed the Supreme Court shows that the question was not so decided. Cassels J. in *The Barnett-McQueen Co.* v. *The Canadian Stewart Co.* (1) affirms that the point " was in fact decided in the manner stated."

No doubt, a perusal of the written opinions would fail to disclose the fact that this important proposition of law had been passed upon by the court. The Court of Appeal of Ontario had dismissed Smith's appeal on the ground that his invention was not patentable. The judges of this court, in reversing this decision, naturally directed their reasons towards establishing that the invention was a proper subject of patent, it being the essential point upon which they differed from the court below. But Patterson J.A., delivering the judgment of the Court of Appeal, had pointed out that the Acts of 1869 and of 1872, when removing the restriction as to residence and extending the privilege of the patent to foreigners,

at the same time, and as a complement of this extension of the privilege, required absolute novelty, and not merely novelty within the Dominion, of the invention (2).

No exception to this language was taken in the judgment of this court. On the contrary, it would appear that such was truly the effect of the decision and that otherwise it could not have been what it was, as a consideration of the relevant dates will show. Smith's machine was in complete working order in the United States in April, 1871. He applied for a patent in the United States in July of that year, and the patent was issued to him in December, 1872. His application for a Canadian patent was made on the 11th January 1873. It was granted and the patent was issued on the 18th April 1873. Sherman

(1) 13 Ex. C.R. 186, at p. 227. (2) 7 Ont. A.R. 628, at p. 641.

and Lacroix, the rival inventors, obtained their Canadian patents in 1872, and their United States patent prior to Smith's United States patents, although subsequently to his application therefor. The dates of the alleged invention by Sherman and Lacroix are not given in the report; but the judgment of the Appeal Court "substantially admitted," says Henry J. (1),

and I think properly, that Smith was the real inventor of the art or process.

It will be seen therefore that Sherman and Lacroix' patents were earlier than Smith both in the United States and in Canada, and apparently he could not succeed unless upon the ground that his invention in United States was prior to Sherman and Lacroix' invention and that the fact of the art or process having been known or used by Smith in United States before Sherman and Lacroix' invention rendered void the Canadian patents issued to the latter.

The logical conclusion would be that *Smith* v. *Goldie* (2) distinctly laid down the law that

the patentee must be the first inventor in Canada or elsewhere.

This was the interpretation unequivocably given to it in *The Barnett-McQueen Company, Limited* v. *The Canadian Stewart Company, Limited* (3) by Mr. Justice Cassels, who was counsel in the case and very familiar with the facts.

It would also be our own view of the judgment, were it not for the fact that, at page 60, Mr. Justice Henry (with whom Fournier and Taschereau JJ. concurred) says:

The evidence leaves no doubt on my mind that Smith was the first and only inventor of the combination he claims in his specification; and I feel as little doubt that the other parties who obtained the two other contesting patents became acquainted with the value of the combination by obtaining the knowledge of his discovery. * * * Setting out, then, with the affirmative proposition that Smith was the *bona fide* inventor of the combination in question, the only important remaining question is, was the discovery and invention in question the proper subject for protection by letters patent.

This, however, does not appear to have been the view of the facts taken by the learned Chancellor who tried the case, nor by the Court of Appeal or the other judges of the Supreme Court who completed the majority and delivered separate notes.

(1) 9 Can. S.C.R. 46, at 56-57.
(2) 9 Can. S.C.R. 46.
(3) 13 Ex. C.R. 186, at pp. 226, 227 and 228.

1926

WRIGHT & CORSON v. BRAKE SERVICE LTD.

Rinfret J.

As to whether, in the opinion of Mr. Justice Cassels, the holding expressed in the above head note of the report in *Smith* v. *Goldie* (1) was a correct statement of the law, his judgment in *Barnett-McQueen Co.* v. *Canadian Stewart Co.* (2) leaves no room for doubt. After having gone into the history of the legislation most exhaustively and having made a careful study of the several statutory enactments, Mr. Justice Cassels, construing section 7, c. 61, R.S.C. 1886, quite independently of the decision in *Smith* v. *Goldie* (1), reached the conclusion that, under that Act, no person could obtain a valid patent granting to him an exclusive property in an invention unless he was the first inventor in Canada or elsewhere.

There was no change in the law on that point between the Act of 1872, which this court had to apply in *Smith* v. *Goldie* (1), and chapter 69 of the Revised Statutes of Canada 1906, governing the present case. Or, at least, any change that has taken place in another part of the section would, *prima facie,* make the respondent's position more favourable. But it is unnecessary, for the purposes of this case, to consider the alleged difference between the provisions of the Revised Statutes of 1886 or of 1906 and the statute of 1872. The ground upon which this case was decided below, is not that the invention had

> been in public use or on sale with the consent or allowance of the inventor for more than one year previously to the (appellants') application for patent therefor in Canada,

but merely that it was known and used by one Cady, in Canastota, in the State of New York, before the invention by the appellants.

In our view, that was a reason sufficient in law to warrant the conclusion of the learned President of the Exchequer Court.

We thought it well to clear up the question, lest the above quoted passage in the notes of Mr. Justice Henry might be interpreted as an indication that *Smith* v. *Goldie* (1) was not a case between two independent inventors, but that Smith succeeded because he was the first and only discoverer of an invention which Sherman and Lacroix had surreptitiously obtained.

(1) 9 Can. S.C.R. 46. (2) 13 Ex. C.R. 186.

Reference ought to be made, before concluding, to *Queen* v. *La Force* (1), put forward on behalf of the appellants in support of their case. In so far as it may be contended that the decision therein was in conflict with that of the Exchequer Court in the present case, it need only be said that, in such a case, we could not agree with it. But we do not so understand Mr. Justice Burbidge's judgment. The principal consideration, the underlying idea upon which his judgment was based, is well expressed in the head note:—

Held, that the fact that prior to the invention of anything by an independent Canadian inventor to whom a patent therefor is subsequently granted in Canada a foreign inventor had conceived the same thing but had not used it or in any way disclosed it to the public is not sufficient under the patent laws of Canada to defeat the Canadian patent.

The judgment begins by stating:—

The main question to be determined in this case is whether, under the patent law of Canada, a prior foreign invention of which the public had no means of knowledge is sufficient to defeat a patent issued to an independent Canadian inventor (p. 33).

Resuming the facts, the learned judge writes (p. 38):—

The improvement had not been used in public—had not in fact been used at all, and any knowledge there was of it was not in any way open or accessible to the public.

The trend of his reasoning (see pp. 38, 39, 42, 44, 52, 61) is the development of the principle that practical employment of the art or skill, not theoretical conception or abstract ideas, may within the meaning of the law constitute an invention and form the subject of a patent. He finds that Jeffery, the alleged inventor in the case, never reduced the invention to practical form, so that the public had no knowledge or means of knowledge of it. This, according to his view, was not invention, but mere conception, and

not sufficient to defeat a patent issued to an independent Canadian inventor (p. 61).

However, in the course of his very elaborate and considered judgment, Mr. Justice Burbidge does say (p. 44):—

One can understand how the Parliament of Canada, going farther, it is true, in that direction than the Parliament of the United Kingdom, or the Congress of the United States has as yet gone, has, in what it deemed to be the interests of the general public of the Dominion, made prior public knowledge or use of an invention anywhere, a bar to a Canadian patent therefor. But one fails, I think, to apprehend why it

(1) 4 Ex. C.R. 14.

1926

WRIGHT & CORSON v. BRAKE SERVICE LTD.

Rinfret J.

should in favour of a foreigner, on the ground only of his earlier conception of the invention, make void a patent issued for good cause and consideration to an independent Canadian inventor, for an invention that prior thereto had not been used in public anywhere, and of which the public in no part of the world had any means of knowledge. If that be the law it ought not to concern the judge whose duty it is to declare, obey and enforce it, that in its enforcement great wrongs will be done.

This means that, had the facts in *Queen* v. *La Force* (1) been similar to those found, and indeed accepted, in the present case, the decision there would have been the same as that now confirmed by us.

The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Russel S. Smart.*

Solicitors for the respondent: *Ewart, Scott, Kelley and Kelley.*

1925

*Nov. 18, 19.

1926

*Feb. 2.

THE CITY OF WINDSOR.....APPELLANT;

AND

JAMES BARBER McLEOD.....RESPONDENT.

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

Constitutional law—Taxation—Ontario Assessment Act, R.S.O. 1914, c. 195, s. 13 (3), as enacted by 1922, c. 78, s. 12—Assessment of trustee in respect of income not wholly distributed annually—Indirect tax—Ultra vires—B.N.A. Act, s. 92 (2).

A municipal tax sought to be imposed on a trustee on assessment under the *Ontario Assessment Act*, R.S.O., c. 195, s. 13 (3), as enacted by 1922, c. 78, s. 12, in respect of income "not wholly distributed annually," is an indirect tax and *ultra vires* of the province.

Section 13 (3) does not restrict the liability of the trustee to property of the estate in his hands so as to make the tax direct within s. 92 (2) of the B.N.A. Act. The liability of the trustee assessed is personal, as for a debt due to the municipality, and therefore unrestricted, and his right of re-imbursement out of the trust property or by the beneficiaries make the tax indirect.

Judgment of the Appellate Division of the Supreme Court of Ontario (57 Ont. L.R. 15) aff.

(1) 4 Ex. C.R. 14.

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

APPEAL by the city of Windsor and by the Attorney-General for Ontario (intervenant) from the decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment of the County Court of the County of Essex, Coughlin J., which affirmed the decision of the Court of Revision of the city of Windsor, which had confirmed an assessment by the Assessment Commissioner of the city assessing the respondent in respect of certain income of the estate of John Curry, deceased.

The appeal to the Appellate Division was upon a case stated by the County Court judge. John Curry died on 11th May, 1912, domiciled at and a resident of the city of Windsor, Ontario. Under the provisions of his will, all the income derivable from his estate, after payment of his debts, etc., and certain legacies and annuities, was to be accumulated by his trustees for a period of twenty-one years from the date of his death, and on the expiration of that period, which will not be until 10th May, 1933, the whole residuary trust fund, including the accumulations of income, is to be divided one-third share to each of his three children (named) and in case any of his children shall have died before the expiration of the said twenty-one years, the one-third share of each or any of his children so dying shall vest in the trustees to divide the same amongst his grandchildren, if any, as the trustees may think best. One of the deceased's children died in 1920, leaving no children. Another, living in Windsor, Ontario, is married and has three children, and the other is unmarried and is living in the State of New York. The assessment in question was made in 1923 in respect of the net income of the estate for the year 1922, after deducting disbursements made in the ordinary course of administration, and was made under the provisions of the *Assessment Act,* R.S.O. 1914, c. 195, as amended. S. 5 provides that (subject to certain exemptions) all real property in Ontario and all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation. S. 13 (3), enacted in 1922, c. 78, s. 12, provides that "* * * every agent, administrator, trustee, executor or person who collects or receives or is in any way in possession or control

(1) 57 Ont. L.R. 15.

1926

CITY OF WINDSOR v. MCLEOD.

of income for or on behalf of an estate and which income is not wholly distributed annually shall be assessed in respect of the income not so distributed, on behalf of the estate in the municipality wherein the testator was domiciled at the time of his death." S. 13 (4) (also enacted in 1922) provides that "income which has been assessed against any agent, administrator, trustee, executor or other person on behalf of an estate under the foregoing subsection 3 shall not be again assessed, when received by the beneficiary or person entitled thereto". The main question for consideration by this court on this appeal was whether or not the tax sought to be imposed on the respondent was an indirect tax and, therefore, *ultra vires*.

F. D. Davis for the appellant, the city of Windsor.

Nesbitt K.C. and *O. W. Rogers* for the appellant, the Attorney-General for Ontario.

A. C. MacMaster K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The question presented for determination in this appeal is whether the municipal tax to be levied upon the respondent trustee in respect of "income not wholly distributed annually," as a basis for which assessment in respect of such income is provided for by subs. 3 of s. 13 of the Ontario *Assessment Act*, R.S.O., 1914, c. 195, as enacted in 1922 (c. 78, s. 12), is direct or indirect—is valid or *ultra vires* under s. 92 (2) of the *British North America Act*. The answer to this question would seem to depend on whether the liability of the person to be assessed under subs. 3 is unqualified, or is imposed only "to such extent as he has property" of the estate on behalf of which he is assessed "available for payment of such taxes," the restriction expressly enacted in regard to lands held by trustees, agents, executors, or administrators by s. 37 (12) of the Ontario *Assessment Act*. If the liability is personal and unrestricted, the right of the respondent to re-imbursement out of the trust property or by the beneficiaries renders the tax distinctly indirect.

The material facts in regard to the character of the income in respect of which the question arises are fully stated

in the judgment appealed from (1), and in the report of the former appeal to this court in *McLeod* v. *City of Windsor* (2). That case had to do with an assessment for the year 1920 and involved consideration of the *Assessment Act* as it stood prior to the insertion of subs. 3 of s. 13 made in 1922. The applicability of that amendment to the present case, which involves a similar assessment for 1923, may be assumed.

This court held in the former appeal that the *Assessment Act*, as it then stood, did not provide for assessment of income which was to be accumulated for a period of years by the trustee whom it was sought to assess in respect of it and was to be distributed ultimately amongst a class unascertained and then unascertainable. But the judgment proceeded on the footing that every person assessable in respect of income, upon assessment therefor, incurred personal liability for the tax to be imposed. In the case of a trustee for a non-resident beneficiary (s. 13 (1)) that liability was not restricted to trust funds available to pay such tax.

The majority of the court thought it unnecessary in that case to pass upon the question of the validity of such taxation. But Mr. Justice Duff, after indicating the definition of a direct tax within the legislative jurisdiction conferred by s. 92 (2) of the *British North America Act*, as authoritatively stated in *Cotton* v. *The King* (3), and discussing the provisions of s. 11 (2) of the *Assessment Act* as it then stood, expressed his views upon the validity of s. 13 (1), which reads as follows:

> Every agent, trustee or person who collects or receives or is in any way in possession or control of income for or on behalf of a person who is resident out of Ontario shall be assessed in respect of such income.

He said, at p. 706:

> The effect of this section, then, is that a trustee in receipt of an income for a non-resident beneficiary may be liable to pay income tax in respect of an income of an estimated amount which he may only in part have received or not received at all. It is past question not intended that he shall ultimately bear the tax. Normally he will indemnify himself, no doubt from moneys in his hands, but his liability is in no way conditioned upon the existence in his hands of a fund out of which the tax can be paid. The tax is not a lien upon the trust property, and the municipality has no recourse against such property. If he resorts

(1) 57 Ont. L.R. 15. (2) [1923] S.C.R. 696.
(3) [1914] A.C. 176, at p. 193.

1926

CITY OF WINDSOR v. McLEOD.

Anglin C.J.C.

to funds in his hands for payment, it is not pursuant to any duty laid upon him by the taxing authority so to apply the funds, but as a means of indemnifying himself against the personal liability which the statute imposes upon him directly.

Where personal liability is imposed upon a trustee or agent in respect of income received by him as such and the tax is not charged upon the income and there is no recourse against it by the taxing authority and the trustee is under no duty to the taxing authority to retain the income in his hands and apply it in payment of the tax, we should appear to have a case in which the trustee is the very person from whom the taxing authority demands the tax it being left to him to secure his indemnity from those who are ultimately intended to sustain the burden.

The case, of course, is quite different where no personal liability is imposed, where, for example, the liability of the trustee or agent is limited to the amount in his hands for his beneficiary, as in the case of *Burland* v. *The King* (1).

Where, too, trust property is charged with the payment of the tax, it is conceivable that the proper inference as to the legislative intent would be that the primary source of payment should be the trust fund, and the personal liability designed only as security for the proper application of the fund, but this is not a point of view with which we are concerned on this appeal.

The reasoning above was foreshadowed in the judgment of Lord Selborne in *Attorney General* v. *Reed* (2), and is that upon which the judgment of Lord Moulton proceeds in *Cotton's Case* (3), and was expressly approved.

Does the amendment of 1922—subs. 3 of s. 13—so restrict the liability of the trustee to property of the estate in his hands that it may be upheld as providing for direct taxation? That subsection is in these terms:

(3) Notwithstanding anything contained in this section or any other section of this Act, every agent, administrator, trustee, executor or person who collects or receives or is in any way in possession or control of income for or on behalf of an estate and which income is not wholly distributed annually shall be assessed, in respect of the income not so distributed, on behalf of the estate in the municipality wherein the testator was domiciled at the time of his death.

Subsection 4, likewise added in 1922, is as follows:

(4) Income which has been assessed against any agent, administrator, trustee, executor or other person on behalf of an estate under the foregoing sub-section 3 shall not be again assessed, when received by the beneficiary or person entitled thereto.

Although incorporated in s. 13, subs. 3 deals with a distinct subject-matter. Subsection 1 applies only to income received for a beneficiary who is a non-resident. Subsection 3 deals with all income which is not wholly distributed

(1) [1922] 1 A.C. 215. (2) 10 App. Cas. 141, at p. 143.
(3) [1914] A.C. 176.

annually, regardless of the residence of the beneficiary. It may, therefore, be argued with some force that the construction of subs. 3 is not affected by the view taken as to the effect of subs. 1. Nevertheless it is significant that in both subsections alike the qualification of the person made liable to be assessed is the same—"the agent, trustee, etc.," save that the additional words "administrator" and "executor" are inserted in subs. 3, probably unnecessarily as the comprehensive phrase

> every person who collects or receives or is in any way in possession or control of income for or on behalf of an estate

would include these personal representatives.

The manifest purpose of introducing this amendment was to cover the case of "income not wholly distributed annually," which it was contended in the earlier *McLeod Case* (1) was a *casus omissus*: and that view ultimately prevailed.

The difficulty of ascertaining the amount for which the appellant should be assessed proved to be formidable in *McLeod* v. *Windsor* (1). Having regard to the provisions of subs. 20 of s. 5 as to the partial exemption of income derived from investments, etc., this feature of the assessment now in question might require further consideration before its validity could be upheld. But it was not adverted to in the discussion at bar which was confined to the constitutional question. We, therefore, deal only with this latter aspect of the case.

Section 11 (1) declares every person not subject to business tax to be assessable in respect of income. Subsection 3 of s. 13 designates the "agent, administrator, trustee, etc.," as the person to be assessed in respect of the income here in question. Section 95 makes the tax to be imposed recoverable as a debt. The intent to impose personal liability on the respondent would, therefore, seem to be clear. Indeed, subject to the question as to its extent, the respondent's personal liability was not seriously contested. In the court below, Mr. Justice Ferguson says,

> The Deputy Attorney General * * * argued that * * * the tax was to be demanded from the trustee and ultimately paid and borne by him.

It is equally clear that no attempt has been made to fasten the tax as a lien or charge on the income. The section does

(1) [1923] S.C.R. 696, at p. 710.

1926

CITY OF WINDSOR v. MCLEOD.

Anglin C.J.C.

not enjoin retention of it, or of any part of it, to meet the tax. This omission is most significant in the case of an agent, one of whose primary duties is the prompt remittance of moneys collected to his principal: yet the mere agent is made liable for the tax equally with the trustee, etc. The municipality is not given the right to attach or impound or otherwise reach the income directly. Its only recourse is personal against the trustee. Nor is there any clear expression of the restriction of the liability of the trustee to funds of the estate in his hands, such as is found in s. 37 (12) already adverted to.

But it is contended that this restriction is implied in the direction of subs. 3 of s. 13 that the assessment of the agent, administrator, trustee, etc. shall be *"on behalf of the estate"*. We are, however, unable to find in this equivocal phrase evidence of an intent on the part of the legislature to depart in this instance from the general scheme of the *Assessment Act,* so clearly manifested in the sections above alluded to, that the liability of the person assessed shall be as for a debt due to the municipality and, therefore, unrestricted. The office of the words directing that the assessment shall be *"on behalf of the estate"* would rather seem to be to make clear—perhaps quite unnecessarily—the right of the person so assessed to recoupment out of the funds of the estate (R.S.O., 1914, c. 121, s. 35), or as put by Mr. Justice Ferguson, " to pass the tax on to the beneficiary."

An example of language apt to convey the intention to relieve the person to be assessed from personal liability beyond the estate property in his hands is found in a provision of the Quebec *Succession Duty Act* (4 Geo., V, c. 10) dealt with in *Alleyn-Sharples* v. *Barthe* (1):

> No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails so to do may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only.

The suggestion that all this was present to the minds of the Ontario legislators and was meant to be covered and intended to be enacted by the phrase "assessed * * * on behalf of the estate," imposes too great a strain on curial

(1) [1922] 1 A.C. 215, at p. 228.

credulity. Although always anxious to uphold impugned legislation by giving to it any construction of which it reasonably admits that will make for its validity, we feel that the implication contended for in order to support the taxation here in question would not be justified.

1926

CITY OF WINDSOR v. MCLEOD.

Anglin C.J.C.

With the Appellate Divisional Court, we are of the opinion that the whole structure of the scheme for the imposition of taxes on income or in respect of income in the hands of persons in possession or control for the benefit of others depends on a system designed to make the trustee pay taxes which he is not intended to bear, but to obtain from other persons, and that consequently the tax sought to be imposed upon or collected from McLeod is an indirect tax, *ultra vires* of the province, and illegal. *Re Grain Futures Taxation Act, Manitoba* (1).

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Davis, Healy* and *Plant.*
Solicitor for the Attorney-General for Ontario: *E. Bayly.*
Solicitors for the respondent: *McLeod* and *Bell.*

RE THE INCOME WAR TAX ACT, 1917,

AND

IN THE MATTER OF JAMES B. McLEOD, SURVIVING EXECUTOR, ON BEHALF OF THE ESTATE OF JOHN CURRY, DECEASED,..... } APPELLANT;

AND

THE MINISTER OF CUSTOMS AND EXCISE ..... } RESPONDENT.

1926

*Mar. 2, 3.
*May 4.

AN APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Dominion Income War Tax Act, 1917, and amendments—S. 3 (6) as enacted 1920, c. 49, s. 4—Income accumulating in trust for the benefit of "unascertained persons or persons with contingent interests"—Construction of will—Vested or contingent interests—Right to deduct income from Dominion tax-free bonds from income accumulating in trust.

C, who died in 1912, domiciled in Ontario, by his will directed that his estate be converted into money and invested and, after payment of debts, etc., and certain legacies and annuities, the surplus income be

(1) [1924] S.C.R. 317; [1925] A.C. 561, 566.

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

1926

IN RE McLEOD v. THE MINISTER OF CUSTOMS AND EXCISE.

invested and accumulated during 21 years from his death and at the expiration of that period the whole residuary trust fund be divided into three parts and conveyed to his three children and that "in case any of my children shall have died in the meantime, that the one-third share of each or any of my children that shall die before the expiration of said 21 years, shall vest in my trustees to divide the same amongst my grandchildren, if any, as they may think best." One of the testator's children died in 1920, leaving no children, another is married and has three children, and the other is unmarried and lives in New York State. A dispute arose between the Dominion taxing authorities and the sole surviving trustee (the appellant) as to the return of income for 1921 under The Income War Tax Act, 1917, and amendments, the former contending (as was sustained by the Exchequer Court) that the income accumulating in trust for the benefit of those who will be entitled to receive it at the expiration of the 21 years is taxable in the hands of the trustee as "income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests" within the second part of subs. 6 of s. 3 (as enacted 1920, c. 49, s. 4) of the said Act, and the trustee contending that such income, if taxable at all, is taxable only under the first part of the subsection as income accruing to the credit of the different beneficiaries though not received by the beneficiary during the taxation period. It was agreed that any income to which the child living in the State of New York was entitled or which was vested in her was not taxable.

Per Anglin C.J.C., Idington and Mignault JJ.—On the construction of the will, the vesting of the shares in the testator's children took place at the testator's death; and on the death of any of them before the expiration of the 21 years his share was divested and became vested in the trustees for distribution among the grandchildren at the time of the division of the estate as the trustees might think best. The words "contingent interests" in the Act should be given their legal meaning and do not include the case of a share vested subject to be divested. The share of each of the living children in the accumulating fund was not taxable against the trustee as "income accumulating in trust for the benefit of unascertained persons or persons with contingent interests," but (in the case of the child living in Canada) was taxable against the child herself. But the grandchildren were "unascertained persons" and the share of the fund which would have gone to the deceased child had he lived was taxable against the appellant as trustee.

Per, Duff, Newcombe and Rinfret JJ. (sustaining in the result, on equal division of the court, the judgment of the Exchequer Court).—Whether or not there are interests vested subject to be divested, the persons who are to enjoy the income are nevertheless, throughout the period of 21 years, uncertain and unknown, and therefore "unascertained" within the meaning of the Act. The Act, having regard to the time when the right to possession or enjoyment shall arrive, intends that the trustees shall pay the tax so long as it is uncertain who the persons may be who will then be entitled to receive the accumulated fund.

The trustee in his return claimed as a deduction a sum included in the net revenue, being the interest on Dominion of Canada tax-free

bonds, and also claimed as a deduction from income subject to the normal tax a sum received as dividends from Canadian companies liable to income tax. The question arose whether (as between the trustee and the Crown) the income accumulating in trust should be deemed to contain the whole of the tax-free bond income or only a proportionate part thereof, a proportionate part being passed on for each of the annuitants in respect of the annuities paid from the income of the estate. It was agreed that what was decided as to the income received from the tax-free bonds applied to the dividends received from Canadian companies liable to income tax.

Held that the trustee was entitled to deduct the income derived from the tax-free bonds from the net amount of income in respect of which he was taxable.

APPEAL by the appellant executor and trustee on behalf of the estate of John Curry, late of Windsor, Ontario, deceased, from the judgment of the Exchequer Court of Canada, Maclean J. (1), in so far as it held that the fund accumulating in the hands of the trustee under the deceased's will was income accumulating in trust for the benefit of unascertained persons or persons with contingent interests within the meaning of s. 3, subs. 6, of The *Income War Tax Act*, 1917, as enacted 1920, c. 49, s. 4, and as such liable to taxation; and a cross-appeal by the Minister of Customs and Excise from the said judgment in so far as it held that the appellant is entitled to retain for the benefit of the trust fund the full amount of income received from tax-free Dominion Government bonds. As to the right to retain for the advantage of the trust fund dividends from companies which had paid the tax on earnings, the parties agreed that the same principles apply as in respect of tax-free Dominion Government bonds. The material provisions of the deceased's will are set out or described, and the material facts given, in the judgments of Mignault and Newcombe JJ., and the questions dealt with by the court are indicated in the headnote.

A. C. McMaster K.C. for the appellant.

C. F. Elliott for the respondent.

ANGLIN C. J. C.—I concur with Mr. Justice Mignault.

IDINGTON J.—I concur with Mr. Justice Mignault.

(1) [1925] Ex. C.R. 105.

1926

IN RE McLEOD v. THE MINISTER OF CUSTOMS AND EXCISE.

DUFF J.—I have had an opportunity of reading the judgment of my brother Newcombe, and I concur in his reasons, as well as in his conclusion. I desire merely to emphasize the fact that no opinion is expressed upon the question whether or not the children took a vested interest in the fund at the death of the testator. Upon that question it is quite unnecessary to pass. The fund was to accumulate for the benefit of the persons among whom it was to be distributed when the time of distribution arrived. It is impossible to affirm that these must include any of the children, nor is it possible to say with regard to the fund or with regard to any ascertained or ascertainable part of the fund, that the persons who were ultimately to share in it—the ultimate beneficiaries, in a word—are now ascertained or ascertainable. The fund, in other words, is to accumulate for the benefit of persons who, for the relevant period, are not ascertained, and such a fund is, within the ordinary meaning of the words, it seems abundantly clear to me, a fund held for the benefit of "unascertained persons".

MIGNAULT J.—John Curry, in his lifetime of the city of Windsor, province of Ontario, banker, died on the 11th of May, 1912, leaving a large estate comprising, *inter alia,* land in and about Windsor and in and about the city of Detroit, U.S. His wife, Frances Arabella Curry, and his three children, one son, Charles Francis Curry, and two daughters, Verene May McLeod, the wife of the appellant, and Gladys Alma Curry, survived him.

By his last will, after payment of his debts and testamentary and funeral expenses, he devised and bequeathed all his real and personal property wherever situate to his wife, Frances Arabella Curry, his son, Charles F. Curry, and his son-in-law, James Barber McLeod, whom he appointed executors and trustees of his will, their heirs, executors and administrators, in trust for sale and to convert into money. The time at which the properties would be sold and the conditions of the sale, either for cash or on credit, were left to the discretion of the trustees, who were empowered to lease the real estate for a term not exceeding ten years, with right to renew the leases for a like term. And out of the fund so formed, he directed his trustees to pay, free from legacy or succession duties, certain legacies and annuities, *inter alia,* during twenty-one years, $2,000,

per year to Verene May McLeod, $1,000 per year to Gladys Alma Curry, with power to increase the annuity to $2,000 in the event of her marriage, and $2,000 to Charles Francis Curry. The will also left an annuity and certain bequests to the testator's widow, with the free use of his house during her lifetime.

By the terms of the will, any surplus revenue not required for the payment of the legacies, annuities and expenses was to be invested and accumulated during twenty-one years from the testator's death, and as to the disposal of the accumulated fund at the end of that period, the testator ordered as follows:

> At the expiration of the said period of twenty-one years from my death, I direct my Trustees after setting apart an amount sufficient to produce at three and one-half per cent per annum the annual payments hereinbefore directed to my beloved wife and the rates and charges on said house, to divide the balance of my estate in three parts and I direct that each of the said shares shall be conveyed or transferred to my children, Charles Francis Curry, Verene May Curry McLeod and Gladys Alma Curry. I further direct that as and when the capital which shall have been set apart at three and one-half per cent to produce the yearly sum to be paid to my beloved wife shall fall in and not be further required by reason of the death of my said wife, it shall be included in the division of the fund into three shares, or if it fall in after such division, it shall be divided in the same manner and amongst the same persons.
>
> At the expiration of twenty-one years after my death and at the time of the division of my estate, I direct that in case any of my children shall have died in the meantime, that the one-third share of each or any of my children that shall die before the expiration of said twenty-one years, shall vest in my Trustees to divide the same amongst my grandchildren, if any, as they may think best.

The testator's wife survived him only a few months and died on the 31st of October, 1912. Charles Francis Curry, his son, also died on the 24th of March, 1920, and left no children. Verene May McLeod has three children, John C. McLeod, Frances V. McLeod and Gladys E. McLeod, all minors. Gladys Alma Curry is, since 1915, a resident of the city of New York, U.S. She is unmarried. Both daughters of the testator now receive as annuities under the will $8,000 per year, to which sum the annuities were increased by order of the Supreme Court of Ontario.

The litigation has arisen over the return of income for 1921 made by the sole surviving trustee, James B. McLeod, the appellant, under the provisions of *The Income War Tax Act*, 1917, and amendments. This return shewed a gross income of $161,478.02, from which Mr. McLeod

1926

IN RE McLEOD v. THE MINISTER OF CUSTOMS AND EXCISE.

Mignault J.

deducted $84,298.85 for interest on borrowed money, real estate expenses, payment of annuities and other costs, leaving as net income $77,179.17. The appellant also caused a return to be made for Verene May McLeod of one-third of the net revenue, and for each of her three children of one-ninth of the net revenue (being a third of the third share bequeathed to Charles Francis Curry). The trustee in his own return claimed as a deduction $1,650 included in the net revenue, being the interest on Dominion of Canada Bonds (referred to hereafter as tax-free bonds) issued exempt from income tax, and also claimed as a deduction from income subject to the normal tax $68,531.25 received as dividends from Canadian companies liable to income tax.

The trustee paid income tax on the basis of his returns, but in May, 1924, the Commissioner of Taxation claimed from him $16,285.15, after crediting the payments made. The trustee having appealed from this assessment, it was affirmed by the Minister of Finance, and the appellant then served a notice of dissatisfaction under section 15 of the Act, thus bringing the matter of the assessment before the Exchequer Court.

In the latter court, three questions were submitted as stated by the formal judgment:—

1. Whether the fund accumulating in the hands of the trustee under the will is "income accumulating in trust for the benefit of unascertained persons or persons with contingent interests" within the meaning of section 3, subsection 6, of *The Income War Tax Act*, 1917, as enacted by 10-11 Geo. V, c. 49, s. 4 (1920), and as such liable to taxation?

2. Whether the estate as such was carrying on a business within the meaning of the Act, resulting in taxable profit?

3. Whether the income accumulating in trust should be deemed to contain the whole of the tax-free bond income or only a portion thereof, the balance being passed on as tax-free income to the annuitants?

The learned President of the Exchequer Court, Mr. Justice MacLean, answered the first question in the affirmative and the second in the negative. The answer to the third question was that the appellant was entitled to retain for the benefit of the trust fund the full amount of the income received from the tax-free bonds. And in the event of the parties being unable to agree upon the remaining points raised in the appeal, right was reserved to apply for further directions in regard thereto.

The decision of the Exchequer Court on the second question is not impugned by either party on this appeal. The appellant appeals against the answer of the Exchequer Court to the first question, and by a cross-appeal the respondent asks that the judgment be set aside with respect to the determination it gave to the third question. Both parties take the position that what is decided as to the income derived from the tax-free bonds applies to the dividends received from Canadian companies liable to income tax. It will therefore not be necessary to deal separately with these dividends, the exemption as to which is only in respect of the normal tax. The parties also agree that any income to which Miss Gladys A. Curry is entitled or which is vested in her is not taxable under the Act, inasmuch as she does not reside in Canada.

Taking up first the main appeal, which involves the answer given in the court below to the first question, although the question as framed would not appear to involve more than measuring the facts of this case by the rule contained in the second part of subsection 6, the learned President, in his reasons for judgment, considered himself free to refer to any other provision of the Act which could help in solving the problem submitted to him. In the argument before us, the parties also discussed other sections of the Act, and it may be well to do likewise in so far as these other provisions can be of any assistance.

It is obvious however that the whole of subsection 6 must be considered, and not merely its second part. This subsection, as first enacted by chapter 55 of the statutes of 1919, stated that the

> income of a beneficiary of an estate shall be deemed to include the amount accruing during each taxation year to which he, his heirs or assigns are entitled from the income of an estate whether distributed or not.

The 1920 amendment changed this language, and added the provision concerning income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests. As the subsection now stands, it reads as follows:

> 6. The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period. Income accumulating in trust for the bene-

1926

IN RE McLEOD v. THE MINISTER OF CUSTOMS AND EXCISE.

Mignault J.

fit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person.

Taken as a whole, subsection 6 seems designed to cover every case of income derived from an estate or trust. The first sentence provides for the taxation of the beneficiary on

> all income accruing to the credit of the tax-payer (in the French version, "l'intégralité du revenu accumulé au credit du contribuable") whether received by him or not during such taxation period.

This of course supposes that there is an ascertained beneficiary presently or ultimately entitled to the income, even though this income may be accumulated and not paid over to him during the taxation period. The second sentence of subsection 6 deals with another situation, namely where it cannot be said that the income is presently appropriated to any certain beneficiary, for this income is

> accumulated in trust for the benefit of unascertained persons, or of persons with contingent interests ("in the French text, "s'accumulant au bénéfice de personnes inconnues ou de personnes ayant des intérêts éventuels"),

and then the income is taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person.

All this is in accord with the general policy of the Act which imposes the income tax on the person and not on the property. In other words, it is the person who is assessed in respect of his income. We were referred to the definition of "income" in subsection I of section 3. In so far as this definition can be of any help, it considers as income annual gains or profits "whether such gains or profits are divided or distributed or not"; but here we are dealing with something which, as received and accumulated by the trustee, is undoubtedly income. Our attention was also called to the definition of "person" in section 2. And as "person" means any "trust", it was argued that any "trust" receiving income was taxable as a person. Still the Act having specifically provided by subsection 6 of section 3 for the case where income is derived from any estate or trust, we must, in the last analysis, come back to that subsection to determine the liability of the appellant under the Act. We were also referred to subsection 11 of section 7, which requires any trustee receiving income on

behalf of a person who is resident outside of Canada to make a return of such income. But this subsection evidently contemplates the case where a non-resident is liable for income tax, and Miss Gladys A. Curry, the parties agree, does not come within the class of non-residents so liable (subsection 1 of section 4), and consequently subsection 11 of section 7 is of no assistance. Subsection 6 of section 3 therefore governs the matter under controversy.

Mr. McMaster contended on behalf of the appellant that the beneficiaries under the Curry will are not unascertained persons or persons with contingent interests, that their interests in the legacy are vested subject to being divested in a certain contingency, and that consequently the accumulating revenue is not taxable against the trustee, but can only be taxed against the beneficiary if the latter is subject to taxation under the Act.

This of course involves consideration of the terms of the will, and in this connection we were referred to a large number of decided cases, some of them dealing with devises of real estate or of money charged on real estate, others with legacies of personal property, but obviously each decision depended on the language of the devise or legacy under consideration.

The Curry will ordered the formation of a fund by the sale of the testator's property real and personal and its conversion into money, and after payment out of the income of the fund of the special legacies, annuities and expenses, the surplus revenue was to be accumulated in the hands of the trustees, and at the expiration of twenty-one years from the testator's death the trustees were directed to divide the estate into three parts and to convey and transfer each of such shares to the testator's children, Charles Francis Curry, Verene May Curry McLeod and Gladys Alma Curry. So far, there would appear to be nothing of a contingent character, and it certainly cannot be claimed that these children are unascertained persons. It sufficiently appears from the provisions of the will, and especially from articles 3, 4 and 5—which give the trustees a discretion as to the time when they shall sell the properties of the estate, and authorize them to sell for cash or on credit and to make leases of the real estate—that the

1926

IN RE McLEOD v. THE MINISTER OF CUSTOMS AND EXCISE.

Mignault J.

setting apart as well as the payment and distribution of the shares of the fund belonging to the children was postponed for the convenience of the fund, and for no reason personal to the legatees. Under these circumstances, and although the gift here is contained in the direction to pay or distribute the shares at a future time, I think that the vesting of the shares in the children is not deferred to the time of payment or distribution of the shares, but took place at the death of the testator (Jarman on Wills, 6th ed., vol. 2, p. 1404. See also Theobald on Wills, 7th ed. p. 585). The time when the legacy must be paid is certain, and the rule *dies incertus conditionem in testamento facit* is thus excluded.

This is also indicated by the direction in the will that at the expiration of the twenty-one years, and at the time of the division of the estate, in case any of the children shall have died in the meantime, the one-third share of each or any of the children that shall die before the expiration of the twenty-one years shall vest in the trustees to divide the same amongst the grandchildren, if any, as they may think best. This language shews that the children were vested with their shares in the fund to be formed after the death of the testator, and on the death of one of them before the expiration of the twenty-one years his share was divested and became vested in the trustees for distribution among the grandchildren at the time of the division of the estate, as they may think best.

In construing subsection 6, the terms "contingent interests" should be given their legal meaning. It is argued that a construction should be placed on this expression that can be applied in all the provinces, including the civil law province of Quebec, and for this reason it is urged that the popular rather than the technical meaning should be given to the terms. In the province of Quebec, there can be no doubt as to the interpretation of the words " contingent interests" or their equivalent in the French version of the Act "intérêts éventuels." They mean there what I find they mean in the language of the common law. Were this not so, in construing these terms, effect should be given to the rule of construction laid down in *Commissioners for*

Income Tax v. *Pensel* (1). See also *Chesterman* v. *Federal Commissioners of Taxation* (2).

The appellant's contention that the second part of subsection 6 only applies when the income is accumulated wholly for persons with contingent interests or wholly for unascertained beneficiaries cannot be supported. It may be accumulated partly for one class and partly for the other, and the trustee may administer a fund as to a portion of which ascertained beneficiaries have vested interests, while another portion of the fund may be left to persons with contingent interests, or to persons who are as yet unascertained. The subsection as a whole covers all these cases, and its first part may be well applied to one class and the second part to another under the same will.

My opinion therefore is that each of the testator's children had a vested interest in the gift of a third share of the fund. There is however more difficulty as to the vesting of the gift over in favour of the grandchildren. Charles Francis Curry died in 1920 and by his death was divested of the share that had vested in him. The title of the grandchildren to any portion of the fund was contingent on the death of one or more of the children before the expiration of the twenty-one years. By virtue of the will, on the death of Charles Francis Curry, his share became vested in the trustees to divide it among the grandchildren as they may think best. This division is to take place at the expiration of the twenty-one years, that is to say in 1933. There are now three grandchildren and there may be others, or none at all, at the latter date. Moreover, the share which any surviving grandchild may receive, should there be more than one, rests wholly in the discretion of the trustees. It seems at least doubtful, under all the circumstances, whether the grandchildren were vested in 1921 with any interest in Charles Francis Curry's share of the fund, but it is not necessary to decide the point because the grandchildren, during the period of assessment in question, were unascertained persons within the meaning of subsection 6. It is said that the class was ascertained, but the statute refers to the persons and not to the class, and no persons of the class were ascertained as beneficiaries when the assessment was made.

(1) [1891] A.C. 531, at p. 580. (2) [1926] A.C. 128, at p. 131.

1926

IN RE McLEOD v. THE MINISTER OF CUSTOMS AND EXCISE.

Mignault J.

On the main appeal therefore the judgment should be varied so as to declare that the share in the accumulating fund of Mrs. McLeod and Miss Curry is not taxable against the appellant. Mrs. McLeod's share is taxable against herself. The share of the fund, however, which would have gone to Charles Francis Curry, had he lived, should be declared taxable, for the 1921 period of taxation, against the appellant as trustee. As the appellant's appeal is successful in respect of a material part of the assessment, he should have his costs here and in the court below.

With respect to the cross-appeal of the respondent, there appears to be no reason for disturbing the judgment. The income derived from the tax-free bonds was part of the income received by the appellant as trustee, and he is entitled to deduct it from the net amount of income in respect of which he is taxable. The reasons given by the learned President for so deciding are satisfactory. The cross-appeal should be dismissed with costs.

The case should be remitted to the Exchequer Court as some questions, which may be involved in the appeal from the assessment, and as to which the parties were to be at liberty to apply for further directions, were not determined.

NEWCOMBE J.—The question in controversy depends upon the interpretation, in its application to the facts of the case, of s. 3, subs. 6, of the *Income War Tax Act*, 1917, as amended. This subsection provides that:

> (6) The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person.

The testator died on 11th May, 1912, leaving his wife and three children surviving, one son and two daughters. By his will, he left his property to his wife, his son, and his son-in-law, James B. McLeod, the appellant

> in trust for sale and to convert into money and to hold, invest, accumulate and dispose of the same, trust and subject to the provisions hereinafter set out.

He directed that the proceeds should be invested by his trustees in securities of the various descriptions which he mentioned; that the income of the fund should be added to

the principal and follow its destination, and that the accumulations should be made for and during the period of twenty-one years from his death. He directed that out of the income of the fund certain annuities and legacies should be paid, including a specified annuity to each of his children, to be paid quarterly during the period; also an annuity to his wife of $3,000, to be paid quarterly during her natural life, and that she should have the free use of his house. Then followed two clauses providing that:

> At the expiration of the said period of twenty-one years from my death, I direct my trustees after setting apart an amount sufficient to produce at three and one-half per cent per annum the annual payments hereinbefore directed to my beloved wife and the rates and charges on said house, to divide the balance of my estate in three parts and I direct that each of the said shares shall be conveyed or transferred to my children, Charles Francis Curry, Verene May Curry McLeod and Gladys Alma Curry. I further direct that as and when the capital which shall have been set apart at three and one-half per cent to produce the yearly sum to be paid to my beloved wife shall fall in and not be further required by reason of the death of my said wife, it shall be included in the division of the fund into three shares, or if it fall in after such division, it shall be divided in the same manner and amongst the same persons. At the expiration of twenty-one years after my death and at the time of the division of my estate, I direct that in case any of my children shall have died in the meantime that the one-third share of each or any of my children that shall die before the expiration of said twenty-one years, shall vest in my trustees to divide the same amongst my grandchildren, if any, as they may think best.

The testator's widow died on 31st October, 1912, and his son died on 24th March, 1920. The latter left no children. One of the testator's daughters is married to the appellant, and has three children; the other is unmarried.

It is held that the income accumulating in trust for the benefit of those who will be entitled to receive it at the expiration of the period of twenty-one years is taxable in the hands of the trustees. The appellant questions this decision, and principally upon the ground that, according to his contention, the respective interests of the testator's children and grandchildren, as defined by the will, are vested in them and not contingent.

I shall not enter upon the enquiry as to whether the interests of the children and grandchildren, or any of them, are vested or not. In my view of the case, in either event, the beneficiaries are equally ascertained or unascertained. The testator gave practically his whole estate to his trustees to convert into money and to invest, the proceeds to be ac-

1926

IN RE McLEOD v. THE MINISTER OF CUSTOMS AND EXCISE.

Newcombe J.

cumulated at interest for twenty-one years, subject to the payment of the legacies and annuities. There has been no severance or separation into parts. At the expiry of the twenty-one years, the dispositions were made subject to contingent events; the trustees were to set apart an amount sufficient to produce the annual payments provided for the testator's widow, and to divide the balance of his estate into three parts; one of these shares to be conveyed or transferred to each of his children who survived; and he directed that if, as the event happened, his widow should die during the period, the fund set apart to produce her annuity should fall into and become part of the residue, and be divided accordingly. Now I think it could have added nothing to the solution of the question in hand if the will had expressly declared, what is said to be its effect, that the testator's children shall each take a vested interest in the accumulated fund in the interval, subject to be divested as to any of them who shall die during the period; the persons who are to enjoy the income would nevertheless, at every moment of the period, be uncertain and unknown, and therefore unascertained in the only sense in which it is reasonable to suppose that the word is used in the statute.

If the income be accruing to the credit of an ascertained person who is the beneficiary of an estate or trust, the taxation of it is provided for by the first sentence of the section; but, whatever may be the meaning of "taxpayer" in the context, income which by the terms of the trust he may never receive cannot be said to be accruing to his credit, and therefore such income is not that of the testator's children or grandchildren within the intent of that clause. Presumably the concluding sentence of subs. 6 was intended to reach income accumulating in trust which is not accruing to the credit of a beneficiary because he is unascertained—unknown, uncertain; or because his interest is contingent. It is uncertain at present who is to have or enjoy the income, and it is for that very state of uncertainty that I think the clause, in its application to this case, is intended and apt to provide. There is income accumulating in trust for the benefit of some person. Let it be assumed that the interests of the children are vested; nevertheless there are or may be other persons interested who

may be solely entitled at the expiry of the period, and who do not derive their interests from the children; and the persons for whose benefit the income is accumulating, that is, those who will ultimately receive it, are therefore unascertained.

The express mention of "persons with contingent interests" serves to indicate that "unascertained persons" do not include or are not limited to these, and therefore, if or in so far as an interest in personality must be either vested or contingent, persons with vested interests may, within the intent of the subsection, be unascertained. The truth is that the enquiry as to the character of an interest—whether vested or contingent—is not conclusive for the determination of a question as to whether the persons possessing the interest are ascertained or not. In a sense of course all beneficiaries of a trust are ascertained when the trust is created, because it is essential that they shall be capable of ascertainment from the provisions of the trust; but, where the income is to accumulate and become payable in the future, and the ascertainment of the beneficiaries is subject to events which may happen in the interval, the beneficiaries are, nevertheless for the purposes of the statute, unascertained. In my view, the statute, having regard to the time when the right to possession or enjoyment shall arrive, intends that the trustees shall pay the tax so long as it is uncertain who the persons are, or may be, who will then be entitled to receive the accumulated income.

I should imagine that if the trustees were asked at the present time to say who are the persons for whom they are, in the administration of the trust, accumulating the income, they could, if disposed to answer, only truthfully say that it is for the two daughters of the testator, if they survive the period; and, as to the one-third which each of the testator's children who has died or may die during the period would otherwise receive, for division among the testator's grandchildren, if any, as the trustees in charge of the trust at the time of distribution may think best; and, if there be no grandchildren at the end of the period, then for those who may be entitled by law according to the happening of the uncertain events. This answer would, I should think, be truly descriptive of persons who are

1926

IN RE McLEOD v. THE MINISTER OF CUSTOMS AND EXCISE.

Newcombe J

unascertained, or who have contingent interests, within the meaning of the statute.

But it is said that at least, the testator's grandchildren now living are ascertained, that they have a vested interest under the will in that part of the fund which would have gone to the testator's son had he survived, and that they must receive that share at the expiry of the period; that therefore there are ascertained persons for whom the income is accumulating in trust, and consequently that the persons for whom the income is so accumulating are not unascertained. I am not however willing to accept either the premises or conclusion of this argument. If I be right in the view which I have expressed that the testamentary disposition of the income accumulating in trust as an undivided whole is for the benefit of persons who at present are not, and cannot be, ascertained, that condition would not I think be affected by the fact, if it be a fact, that there are some individuals ascertained who, if they survive the period, will be entitled to an uncertain share in one-third of the entire fund.

RINFRET J.—I concur with Mr. Justice Newcombe.

Appeal dismissed without costs.

Cross appeal dismissed with costs.

Solicitor for the appellant: *A. C. Bell.*

Solicitor for the respondent, *C. F. Elliott.*

JOHN MACDONALD & COMPANY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE PRINCESS MANUFACTURING COMPANY, LIMITED (DEFENDANT) } RESPONDENT.

1925

*Nov. 20.

1926

*Feb. 2.

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

Sale of goods—Sale by description and sample—Implied warranty that goods are merchantable.

Held, at common law, on a sale by description and by sample of goods (such as "black Italian cloth"), the ordinary use of which goods is well established, and the description being the usual commercial

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

description well known in the trade, although the purpose for which they are bought is not communicated to the vendor, and although the vendor is not the manufacturer of the goods, and does not know of any defect, there is an implied warranty that the goods will answer such description and be merchantable under that description for the ordinary and usual purpose for which they are used. Neither inspection of the sample nor of the bulk, so far as concerns defects not discoverable on reasonable inspection, excludes such implied warranty.

The court, applying above principle, reversed the judgment of the Appellate Division of the Supreme Court of Ontario (56 Ont. L.R. 418) and restored the judgment of Middleton J.,

Held that the appellant, purchaser of goods from the respondent, was entitled to damages for defect in the goods.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of Middleton J. in favour of the appellant in an action for damages claimed on the ground that certain cloth sold and delivered by the respondent (which was not itself the manufacturer thereof) to the appellant and paid for, was so defective that it was not of merchantable quality. The transaction took place before the *Sale of Goods Act* of Ontario came into operation.

G. W. Mason K.C. and *R. L. Kellock* for the appellant.

G. L. Smith for the respondent.

The judgment of the court was delivered by

RINFRET J.—John Macdonald and Company Limited, wholesale dry goods merchants, purchased on or about the 29th April 1920, from The Princess Manufacturing Company Limited, manufacturer of ladies garments, sixty-six webs of black Italian cloth.

The Princess company were not themselves the manufacturers of these goods. They had bought them for use in their business, but finding that they had a surplus of them, they were willing to dispose of it.

Nothing was said as to the purpose for which the Macdonald Company purchased the cloth. However it is used chiefly as a "coat lining—either men's or women's wear"; and Mr. Carson, factory manager of the Princess Company, stated in his evidence that it

is a well-known description of goods on the market * * * in trade it means black cotton lining suitable for garments.

(1) 56 Ont. L.R. 418.

1926

JOHN MACDONALD & CO., LTD., v. THE PRINCESS MNF. CO., LTD.

Rinfret J.

There was contradictory evidence as to how the sale was made. Brown for the appellant deposed that he concluded the purchase with Mr. Gibson, president of the Princess Company, after having examined a whole piece (or web) brought in by Mr. Gibson. The latter wanted $1.10 per yard, Brown offered $1; they compromised at $1.05. Gibson left the web with Brown after he bought the goods. The other 65 webs were delivered later.

Gibson at first testified that he was in Macdonald's warehouse and was asked if they could dispose of any black Italian. He telephoned to Mr. Carson and asked him. Carson answered he would look into the matter and get in touch with Mr. Brown. He added: "I did not make any bargain for the goods at all". Carson "transacted the rest of the transaction". But when re-examined, Mr. Gibson is put the following question:

And Mr. Brown says the bargain was made with you for the goods—would you agree with him, on that interview a bargain was made?

He replies: "Yes".

The importance of this answer is that it comes from the president of the Princess company, and admittedly the interview referred to is the only one where the price was discussed and agreed upon. According to Mr. Gibson, this interview took place before the piece of cloth was sent over to the Macdonald Company, and his story is inconsistent with his having himself taken the web to the latter's warehouse and shown it to Brown.

In this he is corroborated by Mr. Carson, who says that, after having received the telephone from Mr. Gibson, he requested the shipper of the Princess company to take down a sample piece and leave it for Mr. Brown. The next day, Carson "went down to see Mr. Brown". He goes on to say:

I asked Mr. Brown if he had looked at the material sent in and he said he had. I asked him if he cared to have it, and he asked me if they were in good condition. I said they were new goods in from Pullan's of Bradford, and that we could send them down to him to see. He told me to send them in, and we sent them in that same day, that is the remaining 64 pieces.

Q. And you have a receipt for them?—A. We have a receipt for them.

Q. Did you see Mr. Brown again about the matter?—A. No, I did not see Mr. Brown again.

Q. What happened after that?—A. The goods were accepted and paid for in due course.

Q. When were they—have you a memorandum when they were paid for?—A. I have.

Q. And the price Mr. Brown has told us was $1.05?—A. They were paid by John Macdonald cheque on May 4th, 1920.

The shipper, F. W. Green, gave evidence that he delivered the sample piece of cloth to Mr. Brown on April 28, 1920, and he produced a book showing the receipt for it. This accords with the invoice sent on the 29th April by the Princess Company to the Macdonald Company.

On this evidence, the trial judge found that "the sale was both by description and by sample".

As the transaction took place before the Sale of Goods Act of Ontario came into operation, our decision must rest upon the common law.

However, before we come to the consideration of the state of the common law as applied to the particular circumstances of this litigation, a further set of facts, as to which there is no dispute, must be adverted to.

Brown says he made the ordinary inspection of the sample by feeling the cloth and examining it ocularly, to estimate from the appearance the quality of the goods in respect of weight, fineness of texture and colour. He did not "unroll the piece so as to try it for tenderness" nor "pull it apart for strength". He apparently made the test customary in ordinary commercial practice. (See Lord Macnaghten at p. 297 in *Drummond* v. *Van Ingen* (1). He was not expected to send the piece to a tester and have it shrunk "unless he had doubt of the goods," and he had none; he found them " perfect goods".

When the sixty-five remaining webs were delivered, Brown merely opened one piece, "to see if it compared with the sample piece," and was satisfied that it did. He "did not test it for strength". He did not unroll the goods. His reason was that

it is rather a difficult matter to open up a roll of Italian cloth,

and

you would never get them back into the same condition again.

He admits "it could be done"; but (to use the words of Mr. Almas, manager of a department in the Macdonald Company)

it is not customary for wholesalers to examine linings when they receive them from the mill

(1) 12 App. Cas. 284.

1926

JOHN MACDONALD & CO., LTD. v. THE PRINCESS MNF. CO., LTD.

Rinfret J.

because you cannot

put them in the same shape as before they were opened and the customers think the bundles were tampered with.

The Macdonald Company began to resell the cloth. They got complaints from their customers that the goods were so inferior as not to be merchantable. Upon investigation, they came to the conclusion that this was the fact and that the cloth lacked in tensile strength, because, as they assumed,

the fabric was rotted by the dyes used in the course of the manufacture.

At the trial, the experts first heard disagreed; but the parties afterwards collaborated on certain tests, as a result of which the goods were found utterly inadequate in strength, the defect being "attributed to the unduly short fibre". The presiding judge accordingly held it to be established "that the goods were not in fact merchantable" and that their defect would not be "discernible on ordinary examination" or "apparent upon reasonable examination of the samples * * * or of the goods".

Mr. Justice Smith delivered the judgment of the Appellate Division. Commenting upon this feature of the case, he said:

> There was some discussion on the argument as to whether the very superficial examination that Mr. Brown says he gave the sample was sufficient. It was urged that, if he had availed himself of the opportunity of a fuller examination which he had, the lack of strength would have been disclosed. Mr. Carson, the appellant's manager, testified that when the goods arrived from England he opened and unrolled two webs, and examined them by all ordinary means, including testing for strength by pulling with his fingers and found no defect, and accepted the goods. In face of this evidence the appellant cannot complain that respondents did not discover the defect because of lack of proper inspection, and the learned judge's finding on that point is quite warranted.

The action is for damage due to the fact that the material sold, delivered and paid for, was so defective that it was not of merchantable quality.

The trial judge stated that

throughout both parties acted in perfect good faith, and the question is where the loss is to be borne, neither of the parties litigant being in any way at fault from the moral standpoint.

He was of opinion that the case was governed by the decision in *Mody* v. *Gregson* (1), and awarded judgment for the recovery of the amount claimed. The Court of Appeal reversed this judgment, but, in reaching this result, appears

(1) L.R. 4 Ex. 49.

to have been to no slight extent influenced by the impression, no doubt unwittingly left upon their minds, that, after the long adjournment to have an examination made of the goods by another expert, judgment had been given on the report of the latter without any further hearing. Due to "lack of any argument," the court thought that, on the question as to how the sale was made, counsel before the trial judge had no opportunity of pointing to Brown's "lapse of memory" and "the evidence the other way". Mr. Justice Smith, in fact, expressly states:

> It is because I think that matter was not before his mind and was not considered that I venture to think, on the evidence, that there was a sale of specific goods after inspection by Brown. * * * If the learned trial judge had reached his conclusions on a consideration of the evidence on that point, and the conduct of the witnesses, I would accept his finding without question.

While the trial centred on the question whether the goods were merchantable and was adjourned to permit of the supplementary examination already mentioned, the case was fully argued by counsel for both parties before the learned trial judge after completion of the further tests; and, under the circumstances, we see no reason, and none was pointed out to us at bar, why his findings that the sale was by description and by sample should not be accepted. The question is therefore: Upon that finding in an ordinary commercial transaction, how would the common law deal with the case?

As early as *Gardiner* v. *Gray* (1), where twelve bags of waste silk had been sold, after inspection of samples, but were later discovered to be unmerchantable under the description of waste silk and could not be used for any of the usual purposes for which waste silk was used, Lord Ellenborough (p. 145) laid down the rule of law as follows:

> I am of opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality of fineness, but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is whether the commodity purchased by the plaintiff be of such a quality as can be reason-

(1) 4 Camp. 144.

1926

JOHN MACDONALD & CO., LTD. v. THE PRINCESS MNF. CO., LTD.

Rinfret J.

ably brought into the market to be sold as *waste silk*? The witnesses describe it as unfit for the purposes of waste silk and of such a quality that it cannot be sold under that denomination.

In a later case, on a sale of oxalic acid, where the defendant was not the manufacturer, but had purchased it from the manufacturers, and, after delivery, the acid was found to contain sulphate of magnesia which was not discoverable even by experienced persons, except by analysis, the court (Willes J. delivering the judgment) held that:

> Where goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk, and without warranty. (*Josling* v. *Kingsford*) (1).

It was after having referred to the above rule laid down by Lord Ellenborough in *Gardiner* v. *Gray* (2), and having mentioned incidentally that it was "elaborately commented upon in the judgment of the Court of Queen's Bench, delivered by Mellor J. in *Jones* v. *Just*" (3), that Willes J., in *Mody* v. *Gregson* (4), expressed himself in the following way:

> This rule of law entitling the purchaser in an ordinary commercial bargain for the supply of goods, not specified or agreed upon at the time but described generally as of a designated sort, to receive merchantable goods of that sort, is founded upon an obvious inference from the character of the transaction, that the parties are dealing not for the mere semblance or shadow of the thing designated, but for the thing itself as commonly understood in commerce, with the essential qualities which make it worth buying to a person who wants an article of that designation; in other words, that the buyer and seller, in the absence of anything to show an intention to the contrary, must be taken as intending to buy and sell respectively a merchantable article of the designated kind.

Willes J. afterwards refers to the fact that Gregson and others were manufacturers of the goods, but only as one of the "special reasons for applying" what he expressly calls "the general rule in favour of the buyers".

He then proceeds to examine whether the fact of the sale being by sample negatives the implied term that the goods should be merchantable and points out (p. 53) that there are cases where the sample is given

(1) 32 L.J.C.P. 94.
(2) 4 Camp. 144.
(3) L.R. 3 Q.B. 197.
(4) L.R. 4 Ex. 49, at p. 52.

under circumstances which make it the only description of the thing to be supplied, and so to constitute the only touchstone of the contract,

and there are other cases where goods are

bought under a specified commercial description, either by sample or even after inspection of the bulk.

He goes on to say that, in the latter class of cases,

it is an implied term, notwithstanding the sample or inspection, that the goods shall reasonably answer the specified description in its commercial sense. The sample in such cases is looked upon as a mere expression of the quality of the article, not of its essential character, and notwithstanding the bulk be fairly shown, or agree with the sample, yet if from adulteration or other causes not appearing by the inspection or sample, though not known to the seller, the bulk does not reasonably answer the description in a commercial sense, the seller is liable.

And he cites *Josling* v. *Kingsford* (1) where, he says, "for like reasons," the seller, although he knew nothing of the adulteration, was held liable by the Court of Common Pleas.

Mody v. *Gregson* (2) was approved by the House of Lords in *Drummond* v. *Van Ingen* (3). Lord Herschell, in his speech, refers to it thus:

In the case of *Mody* v. *Gregson*, (2) in the Exchequer Chamber, the decision in *Jones* v. *Just* (4) was approved of and acted upon, and it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that the goods were sold by sample, and that the bulk precisely corresponded with it, but was only excluded as regards those matters which the purchaser might, by due diligence in the use of all ordinary and usual means, have ascertained from an examination of the sample. I think that the law enunciated in these cases is sound and not open to doubt.

The summary of the common law then resolves itself into this that

if the subject-matter (of the sale) be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description, that is to say shall be that article or commodity saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose.

(1) 32 L.J. C.P. 94.
(2) L.R. 4 Ex. 49.
(3) L.R. 12 App. Cas. p. 284.
(4) Q.R. 3 Q.B. 197.

1926

JOHN MACDONALD & CO., LTD., v. THE PRINCESS MNF. CO., LTD.

Rinfret J.

(Brett J. A. in *Randall* v. *Newson* (1), approving Best C. J. in *Jones* v. *Bright* (2). It is put thus in Benjamin on Sale, 6th ed., at p. 715:

> If the buyer's purpose be communicated to the seller, the seller's obligation is to supply goods fit for that purpose; if the goods are bought under a commercial description, his duty is to supply merchantable goods.

Under a contract of sale of an article, such as black Italian cloth, the ordinary use of which is well established and which is a "well-known description in the trade," although there is no evidence that the purpose for which it was being bought was communicated to the vendors, there was an implied warranty that the cloth would be merchantable "black cotton lining suitable for garment," this being the ordinary and usual purpose for which it was used. Neither inspection of the sample nor of the bulk, so far as concerned defects not discoverable on reasonable inspection, excluded the implied warranty that the cloth must answer its usual commercial description and be merchantable and saleable under that description. Here it was not.

We think therefore the trial judge was right and his judgment must be restored. The appeal is allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Donald, Mason, White and Foulds.*

Solicitors for the respondent: *Smith, Rae and Grier.*

(1) L.R. 2 Q.B.D. 102, at p. 109. (2) 5 Bing. 533, at p. 540.

HIS MAJESTY THE KING.....APPELLANT; 1925

AND *April 14.

E. W. BOAK.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Appeal—Conviction for manslaughter quashed by court of appeal—Leave to appeal to Supreme Court of Canada—Sections 1013, 1021, 1011, 1024A Cr. Code—Appeal to court of appeal on objection as to qualification of juror not raised at trial—Right of appeal to court of appeal without leave—Court of appeal judgment conflicting with judgment of another court of appeal in like case.

The Court of Appeal for British Columbia quashed a conviction for manslaughter on the ground of disqualification of a juror by deafness, which disqualification that court found to be established by evidence taken subsequent to the trial. The defendant had not before the verdict raised objection as to the juror's qualification. The Court of Appeal held that the question as to the deafness of the juror and its effect in respect to the trial and conviction was a question of law only, and under s. 1013 (1) (a) of the Criminal Code an appeal to it lay without leave, and it therefore refused leave to appeal as being unnecessary. The Attorney-General for British Columbia moved for leave to appeal to the Supreme Court of Canada.

Held, that, having regard to clauses (*b*) and (*c*) of s. 1013 (1), and to s. 1011, of the Criminal Code, the motion should be favourably considered if the pre-requisite of jurisdiction to entertain the projected appeal, viz., conflict between the judgment from which it was sought to appeal and that of any other court of appeal in a like case (Criminal Code, s. 1024A) existed; that decisions prior to the enactment of s. 1013 in 1923 on some of the matters covered by that section might properly be regarded as having been rendered in like cases; that such conflict as aforesaid existed by reason of the cases of *Reg.* v. *Earl* (10 Man. R. 303), and *Rex* v. *Battista* (21 Can. Cr. Cases 1); and the motion should be granted.

MOTION under s. 1024A. of the Criminal Code by counsel representing the Attorney-General of British Columbia for leave to appeal from the judgment of the Court of Appeal for British Columbia (1) setting aside the conviction of the defendant for manslaughter. Leave to appeal was granted by the judgment now reported. The subsequent judgment of this court on the merits has been already reported (2).

*PRESENT:—Anglin C.J.C. in Chambers.

(1) 35 B.C. Rep., 256. (2) [1925] S.C.R. 525.

1925

THE KING. v. BOAK.

J. A. Ritchie K.C. for the motion.

Geo. F. Henderson K.C. contra.

ANGLIN C.J.C.—Counsel representing the Attorney General of British Columbia moves under s. 1024A of the Criminal Code (10-11 Geo. V., c. 43, s. 16) for leave to appeal from the judgment of the Court of Appeal for British Columbia setting aside the conviction of the defendant for manslaughter. The defendant appealed upon one notice of appeal to the Court of Appeal under s. 1013 of the Criminal Code (13-14 Geo. V, c. 41, s. 9) on grounds of misdirection, non-direction and irregularities in the course of the trial. He also appealed by a second notice on the ground that two of the petit jurors—George Keown and Thomas Worledge—who sat on the trial, were incapacitated by deafness from serving on the jury. Moreover, he at the same time moved the Court of Appeal, on a third and distinct notice of appeal, to quash the indictment on which he had been tried and convicted on the ground that five of the jurors who sat on the alleged grand jury by which it was found had not been "summoned" as grand jurors (Criminal Code, s. 921).

Notice of motion for leave to appeal was given in connection with the matters covered by the notice of motion first mentioned but not in connection with the alleged defects in the constitution of the grand and petit juries. An application for leave to appeal would appear to have been made, however, on the hearing of the appeal in connection with the alleged disqualification of the petit jurors.

The court directed that separate judgments should be pronounced by its several members. (Criminal Code, s. 1013 (5)).

No allusion is made to the subject matters of the notice of motion, first above referred to, in any of the judgments of the appellate judges beyond the statement that error in the judge's charge formed one of the grounds of appeal.

The Court of Appeal consisted of five members. Two of the learned judges (Martin and M. A. Macdonald J.J.A.) would have acceded to the motion to quash the indictment; two (Macdonald, C.J.A. and Galliher, J.A.)

would have refused it; McPhillips, J.A., while alluding to it as a ground of appeal, expresses no opinion upon the alleged defect in the constitution of the grand jury.

The alleged disqualification of the juror Worledge was either not pressed or was not regarded as of sufficient importance to be noticed in the judgments delivered.

Three of the learned appellate judges (Martin, Galliher and McPhillips) held that the question as to the deafness of the juror Keown and its effect in respect to the trial and conviction of the defendant was a question of law and not a question of fact or a question of mixed fact and law and on that ground refused leave to appeal as unnecessary. They found that the disqualification of Keown was established by evidence taken subsequent to the trial—no doubt under s. 1021 of the Criminal Code (13-14 Geo. V, c. 41, s. 9) (and vide *Rex* v. *Syme* (1))—and on that ground quashed the conviction and directed a new trial. Mr. Justice M. A. Macdonald expressed no opinion on this aspect of the case. The learned Chief Justice dissented holding the question raised as to the disqualification of Keown to be essentially a question of fact or of mixed fact and law, on which an appeal does not lie without leave and that, under the circumstances, which he details, leave to appeal should be refused.

The learned Chief Justice appears to assume the competency of an appeal by leave on this ground; but does not advert to the question, now raised by the Attorney General, whether such an appeal, by the present defendant, is not precluded by the fact that he first raised the objection to the disqualification of the jurors after the verdict.

The decision of the majority of the court clearly involves an adjudication that such an appeal lies; that failure to object to the jurors' disqualification before the verdict does not debar the defendant from making it; and that the Court of Appeal may determine the fact on which alleged disqualification of a juror is based on evidence taken under s. 1021 of the Criminal Code. That the appeal involved merely a question of law and therefore fell within clause (a) of s. 1013 (1) and lay without leave is distinctly affirmed by the formal order of the court. Upon both

(1) [1914] 10 Cr. A.R., 284.

1925

THE KING v. BOAK.

Anglin C.J.C.

points—the competency of the appeal on an objection to the qualification of the jurors not raised at the trial and the right to have brought the appeal without leave—the judgment from which leave to appeal is now sought is asserted by counsel for the Attorney General to conflict with judgments of other courts of appeal. (Criminal Code, s. 2 (7)).

Proceedings in error in criminal cases and the procedure and practice in provincial courts of criminal appeal in respect of motions for or the granting of new trials of persons convicted on indictment have been entirely superseded (Criminal Code, s. 1013(3)). The Court of Appeal must, therefore, have dealt with the defendant's application in the exercise of the appellate jurisdiction conferred on it by s. 1013(1). Indeed the Chief Justice said that redress in all cases like the present one must be sought by an appeal only.

Having regard to the provisions of clauses (b) and (c) of s. 1013(1) in respect to the need of leave to appeal and to the provisions of s. 1011 that no omission to observe the directions of any Act as to *(inter alia)* the qualification of a juror shall be ground for impeaching any verdict or shall be allowed for error on any appeal, I think the application of the Attorney General for leave to appeal to this court should be favourably considered if the pre-requisite of jurisdiction to entertain the projected appeal, viz., conflict between the judgment from which it is sought to appeal and that of any other court of appeal in a like case (s. 1024A), exists.

Section 1013 having been enacted only in 1923, a conflicting judgment under it is scarcely to be looked for. But earlier decisions on some of the matters covered by that section are in point and may properly be regarded as having been rendered in like cases.

I regard the decision, in 1894, of the Court of Queen's Bench in Manitoba—then the Court of Appeal for that province (55-56 Vic., (D.) c. 29, s. 3 (e))—in *Regina* v. *Earl* (1) as sufficiently *in consimili casu.* The court there rejected an appeal based on the ground, first raised after the trial, that one of the petit jurors was unable to understand the language in which the trial had been conducted. The observations of Killam, J., at pp. 312, 313,

(1) 10 Man. R. 303

1925

THE KING v. BOAK.

Anglin C.J.C.

of Taylor, C.J., at p. 308 and of Bain, J., at p. 317 are in point. I do not overlook the distinction between the two cases that deafness is a ground of disqualification under the British Columbia statute (R.S.B.C., 1924, c. 123, s. 6), whereas ignorance of English is not a disqualification under the law of Manitoba.

On the question whether alleged disqualification through deafness is a ground of appeal which falls within clause (a) or within clause (b) of s. 1013(1), the decision of the Court of King's Bench (Que.) in *Rex* v. *Battista* (1) is in conflict with the judgment now before us. The appeal there was based on the qualification of a petit juror which it was held " was a question of fact and not a question of law " and " should have been raised before verdict was rendered."

But it may well be that the questions of fact or of mixed fact and law covered by clause (b) are confined to questions in issue between the Crown and the defendant on the trial and that the ground of appeal in the present case arising out of the constitution of the petit jury falls rather under clause (c). (Archbold Cr. Pl. Ev. & Pr. (26th Ed.) 338).

For these reasons leave to appeal will be granted. I advisedly refrain from any observation affecting the merits of the case to come before the court. The case may be set down as the first case on the Western list for the session of this court commencing on the 5th of May next.

Motion granted.

1926

*May 5.
*May 31.

C. C. MOTOR SALES LTD. (DEFENDANT)..APPELLANT;

AND

SOLOMON CHAN (PLAINTIFF).. .. .. ..RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Conditional sale—Default in payment—Repossession and resale—Seller realizing an excess on resale—Buyer's right to excess—B.C. Conditional Sales Act, R.S.B.C., 1924, c. 44.

On the buyer's default under a conditional sale agreement the seller repossessed and resold the chattel, realizing a sum in excess of the unpaid instalments.

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

(1) [1912] 21 Can. Cr. C., at pp. 1-6.

1926

C. C. MOTOR SALES LTD. v. CHAN.

Held that, in view of the terms of the agreement and the wording of its clauses, the relationship of the parties did not differ essentially from that of mortgagor and mortgagee, with an obligation for payment by the former, and therefore the surplus proceeds of the resale belonged to the buyer; that there was nothing in the B.C. *Conditional Sales Act*, R.S.B.C., 1924, c. 44, which had the effect of depriving the buyer of his right thereto. *Sawyer* v. *Pringle* (18 Ont. A.R. 218) distinguished.

Judgment of the Court of Appeal for British Columbia ([1926] 1 W.W.R. 508) aff.

APPEAL, by special leave of the Court of Appeal, from the judgment of the Court of Appeal for British Columbia (1), affirming, by a majority, a judgment of the County Court of Vancouver, adjudging that the plaintiff do recover against the defendant the sum of $532.78 and costs.

The defendant sold an automobile to the plaintiff under a conditional sale agreement dated April 1, 1924, the material parts of which are set out or described in the judgment. The plaintiff made default in payment of some of the instalments of the purchase money and the defendant took possession of the automobile and resold it. The proceeds of the resale exceeded the balance unpaid by the plaintiff and the action was to recover the excess from the defendant

C. W. Craig K.C. for the appellant.

D. Donaghy for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff agreed for the purchase of an automobile from the defendant upon terms of cash and credit, as set out in a written agreement between the parties. He made default in payment of some of the instalments of the purchase money, and the defendant took possession of the vehicle and sold it under provisions of the agreement, realizing a sum in excess of the unpaid instalments. The plaintiff thereupon brought this action in the County Court to recover the excess. The County Court judge gave judgment for the plaintiff, and the defendant company appealed to the Court of Appeal, contending that the excess belonged to it, and not to the plaintiff. The amount, $532.78, is not in dispute. The appeal was dis-

(1) [1926] 1 W.W.R. 508.

missed, but Martin J. A. and M. A. MacDonald J. A. dissented. The case comes before this court by special leave of the Court of Appeal.

The question depends upon the interpretation and effect of the agreement of sale between the parties. It is dated 1st April, 1924. The vendor (the appellant) agrees to sell, and the purchaser (the respondent) agrees to purchase, the automobile upon the terms and conditions therein set forth, and the purchaser acknowledges receipt of the automobile in good order and condition. The price is $3,103.60, of which $950 was paid at the time of executing the agreement, and it was stipulated that the balance should be paid in twelve monthly instalments of varying amounts. The instalments were to bear interest at 8 per cent, and the purchaser gave to the vendor his promissory note for each of the instalments. Then "the terms and conditions of this contract of conditional sale" are enumerated and set out; there is a description of the automobile "together with the conditions surrounding the purchase of the same". By these it is provided that the vendor has and shall continue to have the absolute property "until after full and complete payment of the purchase price therefor"; that "on full payment of said promissory notes (or renewals), principal and interest, according to their terms, the titles of said property shall vest in said purchaser"; it is declared that the automobile is to be used as a taxicab, and that, while it is in possession of the purchaser, he shall have the right to use it for that purpose; that he shall take proper care of it, and that, if it be injured or require repairs, the purchaser shall immediately have it repaired at his own expense, and that the purchaser shall not sell or dispose of it, or remove it from British Columbia, except upon the written permission of the vendor. I quote in full the 9th, 10th, 11th and 12th enumerations:—

9. The purchaser covenants that the automobile covered by this agreement will not be used for the transportation of liquor or drugs or any unlawful purpose during the life of this agreement, and in case of any such contingency, the entire debt hereby secured shall, at the vendor's option, become immediately due and payable, and the vendor shall have the same right of seizure and sale as if default had been made in payment of principal or interest.

10. If by reason of failure of the purchaser to pay an instalment of principal or interest or any part of the same or to observe any of the covenants, provisos or conditions herein contained, the vendor shall deem

1926

C. C. MOTOR SALES LTD. v. CHAN.

Newcombe J.

it advisable to take any proceedings either judicial or extra judicial to protect itself or enforce the security, all costs and expenses incurred by the vendor of or incidental to such proceedings shall be payable by the purchaser and shall be deemed to be a payment of principal due and in arrears hereunder, and shall bear interest at the rate herein above set forth.

11. That time shall be material and of the essence hereof, and that if default be made in the payment of said principal sum or interest, or any part thereof, at the time the same shall become due, or if default be made by said purchaser in any other respect hereunder, or if said purchaser fails to make payment for any labour, repairs, improvement or equipment placed upon said automobile by authority of said purchaser (in which case said vendor may, at its option, make such payment), then the said principal sum and all accrued interest, including expenses (if any) and including such payment (if any) made by said vendor thereon, shall thereupon immediately become wholly due and payable at the option of said vendor (notice of said option being hereby waived), the said vendor may at once take possession of said automobile and said parts, devices, tools, and equipment wherever the same may be, and sell said automobile and said parts, devices, tools and equipment and the whole thereof, as provided by law.

12. The purchaser agrees to pay any deficiency that may remain after the application of the proceeds of any sale hereunder to the payment of said indebtedness or any judgment obtained thereon.

There remains a clause by which the purchaser agrees to keep the automobile insured for an amount equal to or exceeding the principal sum payable under the agreement,

loss, if any, payable to vendor or assigns as interest may appear, and deliver the policy therefor to said vendor,

or that the vendor may procure insurance,

and all sums expended in so doing, with interest thereon at the rate of 8% per annum, shall be added to the purchase price, and shall be secured hereby.

It will be observed that, by the express provisions of three of the clauses to which I have referred, it is a term or condition of or "surrounding the purchase of" the automobile that the agreement shall operate as a security to the vendor for the principal and interest of the debt, and that, if and when any of the payments provided for shall become overdue, the vendor may take possession of the automobile and sell it, applying the proceeds of the sale to the payment of the indebtedness, from which it would seem to follow that the agreement is intended to operate as a legal mortgage, incident to which, of course, is the purchaser's right to redeem.

While the transaction may constitute a conditional sale within the definition of the *Conditional Sales Act*, R.S.B.C.

1924, c. 44, I do not find any provision in that Act which denies the respondent's right to the surplus proceeds of the sale.

It is enacted by section 10 that when the seller retakes possession of the goods pursuant to a condition in the contract, he shall retain them for twenty days, and that the buyer may redeem them within that period by paying the balance of the contract price with the actual costs and expenses of taking and keeping possession; that, if the price of the goods exceed $30, and the seller intend to look to the buyer for any deficiency upon resale, the goods shall not be resold until after notice in writing of the intended sale shall have been given to the buyer, which notice is to contain a description of the goods; a statement of the balance due and the actual costs and expenses; a demand of payment on or before the day mentioned, and a statement that, unless the amount be paid within the time mentioned, the goods will be sold. It is further provided that, when the goods are not redeemed within the twenty days, and subject to the giving of the notice of sale prescribed, the seller may sell the goods, either by private sale or at public auction, at any time after the expiration of that period (1). There is nothing in these provisions however to suggest an intention to diminish or to prejudice the rights which the purchaser has under the terms of the instrument, or which are by law incidental to the transaction; they are intended rather for the protection of the purchaser; the disposition of the proceeds of the sale is not expressly regulated by the statute, and remains subject to the provisions expressly or impliedly contracted.

The dissenting judges in the Court of Appeal relied principally upon the case of *Sawyer* v. *Pringle* (2). But it is to be observed that the provisions of the agreement in that case differed from those now under consideration, and the question involved was also different. There was a contract which is described as

(1) *Reporter's Note:*—The chattel in question was not resold until after the expiration of the twenty days. The notice (referred to in the judgment) required by the Act to be given if the seller intends to look to the buyer for any deficiency on a resale was not given in this case.

(2) 18 Ont. A.R. 218.

1926

C. C. MOTOR SALES LTD. v. CHAN.

Newcombe J.

an executory agreement of future sale on performance of certain named conditions by the defendant.

There are two clauses from the agreement extracted in the report, and from one of these it appears that the property in the machine which was the subject of the agreement was not to pass to the proposed purchaser until full payment of the price and any obligations given therefor, although he was to have the possession and right of use in the interval; but, upon any default in payment, the whole price or obligation was to become due and payable, and it was provided that the vendor might then resume possession. There was no provision for resale; but, upon default, the vendor did resume possession and resell for less than the price stipulated by the agreement, and it was held that the balance was not recoverable from the purchaser, because the vendor, by reselling the machine to another, had disabled himself from completing the sale for which he had previously agreed, and that the consideration for the payment of the price therefore failed. Such a question could not arise in this case because by the twelfth clause of the contract the purchaser explicitly agrees to pay any amount by which the proceeds of sale are deficient to meet the indebtedness.

Burton J. A., who was one of the majority of the court, said:—

> If I could bring myself to the conclusion arrived at by one of my learned brothers (MacLennan J.A.) that the relationship of mortgagor and mortgagee existed between these parties, I should probably have no difficulty in arriving at the same result as he has, but that, as it appears to me, is what they have studiously avoided. They have on the contrary refrained from making any absolute contract of sale, reserving possession merely till payment, but have entered into a peculiar contract under which no sale is to be considered as made until full payment of the price.

Osler, J. A. considered that the case must be looked at as if the possession had always remained with the vendor, and he said it

> is one where there is an express contract which governs the right of the parties, and in which the plaintiffs have been careful to exclude the possibility of the goods being treated for any purpose as the goods of the defendant, until the price shall have been paid.

On the other hand, Maclennan J. A. found that the relationship of mortgagor and mortgagee existed between the parties, and that their legal and equitable rights must be determined by the principles applicable to that relation.

While in the present case the contract does not amount to a bargain and sale of the automobile, and is executory in the sense that the property is not to pass to the purchaser until payment of the price, it is nevertheless a concluded agreement for sale by which the possession passes to the purchaser, and the property is also to pass upon compliance with the stipulated conditions, the vendor in the meantime, by the express provisions, retaining the property as security. The debt is secured upon the property, the legal ownership remaining with the creditor, but the equitable ownership being that of the debtor, subject to the security afforded to the creditor for the debt; the vendor is given the right to take possession and sell, if the purchaser fail to make payment; the proceeds of the sale are to be applied to the payment of the indebtedness, and the purchaser is to pay any deficiency which may remain; therefore the relationship between the parties does not differ essentially from that of mortgagor and mortgagee with an obligation for payment by the former; and if, as I conclude, that be the meaning and effect of the instrument, there can be no doubt that the surplus proceeds of the sale belong to the purchaser. It is true that the property was not transferred to the purchaser and reconveyed to the vendor in order to effect the security for the indebtedness which, by the stipulations of the agreement, the latter was to have; but equity looks to the intent of the transaction rather than to the form, and the intent is made clear by the terms of the instrument.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McLellan & White.*

Solicitor for the respondent: *F. A. Jackson.*

1926

*June 24.

ALEX. DEBORTOLI .....APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Evidence—Homicide—Admission of dying declaration—Admissibility upheld by court of appeal—Motion for leave to appeal to Supreme Court of Canada under S. 1024A Cr. Code—Alleged conflict with decision in Allen v. The King, 44 Can. S.C.R., 331.

A person suffering from a wound from which she later died made a signed declaration that the wound was inflicted by a knife in the hand of the accused. At that time she had not that settled hopeless expectation of death requisite to the admissibility of a dying declaration. Shortly before her death her said statement was read to her (she being first told that the statement about to be read was the one she had made previously) and she assented to its correctness and signed it by her mark. This latter declaration and evidence thereof was admitted at the accused's trial, and its admissibility was upheld unanimously by the Court of Appeal for British Columbia. Application was made on behalf of accused for leave to appeal to the Supreme Court of Canada under s. 1024A of the Criminal Code, on the ground that the judgment of the Court of Appeal conflicted with the judgment of the Supreme Court of Canada in *Allen* v. *The King,* 44 Can. S.C.R., 331.

Held, that the judgment of the Court of Appeal did not conflict with the judgment in the *Allen Case,* and the application was dismissed.

MOTION for leave to appeal to the Supreme Court of Canada, under section 1024A of the Criminal Code, from the judgment of the Court of Appeal for British Columbia upholding the admissibility in evidence at the trial of the accused of a certain dying declaration. The material facts of the case are stated in the judgment now reported.

J. A. Ritchie K.C. for the motion.

D. Donaghy contra.

NEWCOMBE J.—In this case a dying declaration of the murdered woman was admitted at the trial. The accused was tried at Vancouver and found guilty. He appealed from his conviction to the Court of Appeal for British Columbia upon two grounds, which are stated in the notice of appeal as follows:—

(a) the said conviction cannot be supported having regard to the evidence.

*PRESENT:—Newcombe J. in chambers.

1926

DEBORTOLI v. THE KING.

Newcombe J.

(*b*) the learned judge of Assize wrongfully admitted an alleged dying declaration or ante-mortem statement of one Pearl Prosser (also known as Pearl Travesey), and evidence thereof.

The appeal was dismissed unanimously by the learned justices of appeal who heard the case. Application is now made on behalf of the prisoner for leave to appeal to this court under s. 1024A of the Criminal Code, on the ground that the judgment of the Court of Appeal, dismissing the prisoner's appeal to that court, conflicts with the judgment of the Supreme Court of Canada in *Allen* v. *The King* (1).

It appears that the woman was taken to the hospital in a taxi-cab on 27th November, 1925, suffering from a severe wound from which she died on 16th January, 1926. On 8th January she had made a declaration, which was taken down, and which she signed, and in which she declared that the wound was inflicted by a knife in the hand of the prisoner. But at that time she had not that settled hopeless expectation of death which is requisite to the admissibility of a dying declaration. Her condition became worse, and when, on 15th January, she was asked to make the statement which was used at the trial, and about the admissibility of which the question arises, what occurred is stated by Roderick McLeod, a detective of the Vancouver police force, who gave the following evidence before the jury:—

> The doctor reported to me her condition. I then turned to Earl Robinson (the magistrate who had taken down her statement on the 8th) who was at the table and addressed the woman. I said this was the man who had taken a statement from her on a previous occasion and I said: "This gentleman is going to read to you Pearl the statement that we got from you before, and I am going to ask you if it is correct. You will tell me if it is or not." So Earl Robinson proceeded to read the statement that he had in his book * * * The statement he read was the statement that she gave to us the week previously.

Then follows Mr. McLeod's account of the reading of the previous statement, question and answer, and of the woman's assent. When the writing was finished she tried to sign, but was too weak, and she made her mark.

It is urged that according to the principle of the decision of this court in *Allen* v. *The King* (1), the statement so obtained, which was admitted and read at the trial, and subsequently held admissible by the Court of Appeal, was inadmissible because of the evidence which identifies the woman's narrative of what took place when the fatal blow

(1) [1911] 44 Can S.C.R. 331.

1926

DEBORTOLI v. THE KING.

Newcombe J.

was struck with her account as given a week previously, when she still entertained hope of recovery.

In *Allen* v. *The King* (1) a witness had testified at the preliminary investigation who was not produced at the trial, and the requirements for the admission of his deposition under s. 999 of the Criminal Code were not established. When the prisoner came to give his evidence however he was cross-examined with regard to some of the statements which this witness had made and which were taken down at the preliminary inquiry, and it was held by a majority of this court that the result of this was that a material portion of the deposition taken before the police magistrate had been given to the jury without the conditions of the Act being complied with, and that the evidence was therefore inadmissible.

The Court of Appeal of British Columbia has determined that the declaration now in question was admissible, and of course it is not for me to review that decision. The question I think is whether that court should have held otherwise upon the proper interpretation and application of the decision in *Allen* v. *The King* (1).

The evidence produced before the jury shews that the declaration in proof was elicited by a communication to the deceased that the statement about to be read to her was that which she had signed on 8th January, followed by the reading to her of that statement, and that her declaration of 15th January was identical in its description of the facts of the tragedy with the one made by her on the previous occasion, when she did not realize that she was going to die. It may be that these facts affect only the weight or credibility, not the admissibility, of the declaration, that is not for me to decide, but if that were the view of the Court of Appeal, I find nothing to conflict with it in the judgment of this court in the *Allen Case* (1). Indeed, after the most careful consideration, I have reached the conclusion that ingenuity cannot suggest anything involved in the judgment in *Allen's Case* (1) with which the judgment of the Court of Appeal upholding the admission of the declaration of 15th January is necessarily in conflict.

I must therefore dismiss the application.

Motion dismissed.

(1) [1911] 44 Can. S.C.R., 331.

NANOOSE WELLINGTON COLLIERIES, LIMITED (DEFENDANT)..... APPELLANT;

AND

ADAM JACK (PLAINTIFF)..... RESPONDENT.

1926

*Feb. 2, 3.
*Feb. 8.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale—Fraud—Instrument containing release of existing liability—Signed with no intention to give release—Action for specific performance—Onus probandi.

Under an agreement between the respondent and the appellant company for the sale of the respondent's brick plant, the appellant undertook to incorporate a new company to take over the business and also agreed to assume and pay the amount due from the respondent to one B. on a chattel mortgage. Some months later, the respondent signed another instrument transferring the brick property to the new company which assumed liability for the payment of the mortgage, but the instrument expressly released the appellant company from its obligation to pay off the mortgage. In an action for specific performance of the first agreement,

Held, that the basic fact on which the respondent's case must rest is that he executed the instrument containing the release clause in ignorance of its presence and effect and the burden of proving such ignorance rested on him; and that his evidence, which alone was offered to substantiate it, did not discharge that onus.

Judgment of the Court of Appeal ([1925] 2 W.W.R. 267) reversed.

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

The respondent brought action for a declaration that he is entitled to be indemnified by the appellant company against his liability on a mortgage to one Braun, which appellant had agreed to assume and pay off, and for specific performance of such agreement. The respondent was a brickmaker and the appellant was a company carrying on coal mining operations near Nanaimo, on Vancouver Island. In the spring of 1921, the appellant entered into an agreement with the respondent by which he was to have the right to take certain shale which was found contiguous to the company's coal and use the same for

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

(1) [1925] 2 W.W.R. 267.

1926

NANOOSE WELLINGTON COLLIERIES, LIMITED, v. ADAM JACK.

Anglin C.J.C.

making brick, and on the same date, March 12th, a lease of a three-acre portion of the company's property was made to the respondent for the purpose of using the same as a brick yard. At this time J. M. Braun was a director of the appellant company and just about the time these agreements were entered into, was appointed one of a committee of two directors to attend at the mine and assist or supervise the management thereof and did so attend and reside at the mine. Braun and the respondent then entered into an arrangement under which the respondent, at the instance of Braun, went about and bought some second-hand brick machinery and had the same installed on the leased premises. The respondent put into the proposition about $900 of his own money, while Braun apparently furnished the balance, which amounted from $14,000 to $18,000. At the end of June, Braun took from the respondent a chattel mortgage to secure advances of $23,000 and future advances to be made by Braun to the respondent and covering the brick plant and equipment. At the annual general meeting of the company on August 11th, 1921, it was decided that the company should purchase from the respondent the brick plant and this was accordingly done by an agreement of the same date. This agreement provided for the incorporation of a company to take over and carry on the brickmaking business in which company the respondent was to have a 5% interest. The respondent was also to be paid the sum of $5,000 in cash which was actually paid to him. As one of the terms of taking over the brick plant the appellant company agreed to pay certain of the respondent's liabilities which were set out, among them the liability for any money due under the chattel mortgage. Pursuant to the agreement a new company was formed within the ninety days specified in the agreement and after its formation the respondent was given his 5% interest in shares. The brick plant and assets which the appellant company had received from the respondent were conveyed and transferred to the new company and upon receiving the assets the new company likewise assumed that liability which remained unpaid, the chattel mortgage. The deed of transfer signed by the respondent released the appellant company from its own obligation in the August agree-

ment. The transfer was carried out by two agreements of the 22nd December, 1921. These agreements were drawn by Mr. Speer, of the law firm of Davis & Co., on instructions from Mr. Coleman, managing director of the appellant. Two years later, the respondent commenced this action against the appellant company only and setting up in answer to the release pleaded by the company first a plea of "non est factum" which later was abandoned and replaced by a plea of fraud. The claim for damages was abandoned at the trial and the trial judge dismissed the action. An appeal was taken to the Court of Appeal which reversed the judgment of the trial judge and declared that the respondent was entitled to be indemnified by the appellant.

J. A. Ritchie K.C. and *E. F. Newcombe* for the appellant.

R. Cassidy K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—This record, in our opinion, does not disclose any such cogent facts or circumstances as would warrant a reversal of the finding of the learned trial judge that the plaintiff was "wholly unreliable" as a witness. That finding is abundantly warranted by the inconsistencies and contradictions of the plaintiff's own testimony and its conflict in material facts with that of such an admittedly upright and trustworthy witness as Mr. Speer, the solicitor who prepared and attended upon the execution of the documents in the obtaining of which the fraud alleged is said to have been committed.

In the case as made by the plaintiff in his evidence at the trial misconduct and misrepresentation on the part of Mr. Speer formed a notable feature. That the execution of the document containing the release was procured by a scheme carefully prepared by Coleman, the defendant company's manager, as a result of which the plaintiff was kept in ignorance of the presence in it of the release, being assured by Mr. Speer that it was "just a usual transfer,"—such was the case the defendant was called upon to meet. On appeal, and again in this court, every imputation against Mr. Speer was unqualifiedly withdrawn and the plaintiff's case was rested wholly on his failure to realize the presence of a release clause in one of two documents which he was induced to sign in Mr. Speer's office, or on his in-

1926

NANOOSE WELLINGTON COLLIERIES, LIMITED, v. ADAM JACK.

Anglin C.J.C.

ability to appreciate its significance—a situation, for which, it is charged, Coleman, deliberately prepared and on which he successfully relied. That case was not put forward at the trial and neither the defendant company nor the witness Coleman had any fair opportunity to meet it. With the utmost respect we are of the opinion that, under these circumstances, such a charge of fraudulent conduct by Coleman as that now insisted upon should not have been held by the Court of Appeal to have been established.

A basic fact on which the plaintiff's case must rest is that he executed the document containing the release clause in ignorance of its presence and effect. The burden of proving such ignorance rested on him. His evidence, which alone was offered to substantiate it, does not discharge that onus.

It is quite conceivable that the plaintiff, without any fraudulent intent or manoeuvre on the part of Coleman, such as is now suggested in support of his claim, may have executed the release with full realization of its import, because he was mistakenly optimistic as to the prospects of the brickmaking venture in which he had been engaged and of the company incorporated to carry it on. But however that may be, and without casting the slightest doubt on the right of the Court of Appeal in a proper case to find fraud established notwithstanding the contrary view taken by the trial judge (*Annable* v. *Coventry*) (1), we are all very clearly of the opinion that, under the circumstances of this case, the explicit findings of the trial judge, which obviously rested largely on his appreciation of the respective credibility of the three witnesses who testified before him—the plaintiff, Mr. Speer and Coleman—should not have been disturbed. *Nocton* v. *Lord Ashburton* (2).

The appeal will be allowed with costs here and in the Court of Appeal and the judgment of the trial judge will be restored.

Appeal allowed with costs.

Solicitors for the appellant: *Davis, Pugh, Davis, Hossir, Ralston and Lett.*

Solicitor for the respondent: *A. C. Brydone-Jack.*

(1) [1912] 46 Can. S.C.R. 573.

(2) [1914] A.C. 932, at pp. 945, 957-8.

LAMBERT RENERS.. .. ..APPELLANT; 1926

AND *May 14. *June 14.

HIS MAJESTY THE KING.. .. ..RESPONDENT.

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

Criminal law—Strike—Picketing—Besetting and watching "wrongfully and without lawful authority"—Section 501 (f) Cr. C.

By s. 501 (*f*) of the Criminal Code everyone is guilty of an offence who "wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain * * * besets or watches the house or other place where such other person resides or works or carries on business or happens to be."

The conviction of defendant thereunder for conduct in the "picketing" of coal mining premises in the course of a strike by certain mine workers, which conviction was affirmed by the Appellate Division of the Supreme Court of Alberta (Clarke J.A. dissenting), was affirmed by the Supreme Court of Canada, which held that there was evidence at the trial that the besetting and watching in which defendant was engaged was "wrongful and without lawful authority" within the meaning of the section.

Defendant's acts were wrongful and unlawful if the besetting and watching in which he, in common with his comrades or associates, was engaged, amounted to a nuisance or a trespass, or if the men who were besetting and watching constituted an unlawful assembly, and the conduct in question (discussed in the judgments) afforded evidence of each of these particulars.

While apparently the hill occupied by the party to which the defendant belonged was somewhat outside the mining property, the hills surrounding the mine in other directions belonged to the mine owners and the groups stationed there were trespassers, and since the picketing was carried on in pursuance of a common design or project to which all the strikers including defendant were parties, he must be held responsible for the trespasses equally with those who actually occupied the mine owners' property.

Per Idington J.: The section clearly forbids anyone from besetting another's house or place of business with a view to compel him to abstain from doing anything which he has a lawful right to do. Such an act, which at common law might be the basis of a civil action, was always at common law wrongful, and is in itself "wrongful and without lawful authority" within the meaning of the section unless some lawful authority (e.g., as often there might be with a sheriff, etc.) exists.

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

1926

RENERS
v.
THE KING.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming (Clarke J. A. dissenting) the conviction of defendant under s. 501 (*f*) of the Criminal Code on a charge of wrongfully and without lawful authority besetting and watching the mine of a certain coal mining company with a view to compel the company to abstain from engaging or employing or continuing in its employment miners and employees other than those belonging to a certain trade union to which the defendant belonged. The charge is set out in full in the judgment of Idington J.

C. C. Robinson, K.C. and *H. A. F. Boyde* for the appellant.

W. S. Gray and *J. J. Frawley* 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 appellant, with five others, was charged in two counts, under section 501 (*f*) of the Criminal Code, with the offence of wrongfully and without lawful authority besetting and watching the mine of the Alberta Block Coal Company, Limited, where the company carried on its business, with a view to compel the company to abstain from engaging or employing, or continuing in its employ, miners or employees other than those belonging to a trade union, known as the Red Deer Valley Miners' Union, to which the accused belonged. It will be convenient to set out the material part of the section, which is as follows:—

S. 501 (*f*): Every one is guilty of an offence punishable, at the option of the accused, on indictment or on summary conviction before two justices, and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,—

* * * *

(*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be.

(1) 22 Alta. L.R. 81; [1926] 1 W.W.R. 810.

The case has been tried twice. At the first trial there was a jury, and all the accused were convicted, but upon appeal the conviction was set aside upon purely legal grounds, as we are informed, and, at the new trial, the accused, other than the appellant, pleaded guilty, and the latter, electing to be tried without a jury, was tried before McCarthy J., and again convicted. From this conviction he appealed to the Appellate Division of the Supreme Court of Alberta, where the appeal was heard and the conviction upheld by the judgment of the court, pronounced by the Chief Justice. Clarke J. however dissented, the court considering it convenient that his judgment should be pronounced separately, and it is the question of law involved in his dissent that is now presented upon the appeal to this court.

The Alberta Block Coal Company of Drumheller, in the Province of Alberta, belonged to an association of coal operators which negotiated an agreement with the executive of the United Mine Workers of America regulating working conditions, including the rate of wages to be paid to the miners. This agreement went into operation, but was subsequently amended by the parties in a manner to effect a reduction of 15% in the rates stipulated. The reduced rates were not acceptable to the majority of the Company's employees, and became the cause or occasion for a strike. The striking miners belonged to the Union of the United Mine Workers of America; they were dissatisfied with the reduction of the rates to which the executive of their union had agreed, and in consequence they decided to withdraw from it, and to set up a new union, which is known in the case as the Red Deer Valley Miners Union. Some of the company's employees however did not join in the agitation, but continued to work for the company as formerly, and the strikers established what they call pickets at the mine with a view, as they say, peacefully to persuade the miners who adhered to the company's service to cease work.

The locality of the mine is not as clearly described by the transcript of the evidence produced as might be desired, but there is in proof a plan of a limited area, and some of the witnesses give descriptions from which it would appear that the mine is situated in a narrow valley or coulee bordered by hills of considerable height, about 100 ft. to

1926

RENERS
v.
THE KING.

Newcombe J.

150 ft. above the level. The shaft is sunk on the property of the company, and in the neighbourhood is a power house, machine shop, wash house, offices, some dwelling houses and outbuildings, and, a few hundred feet distant, a store house and powder house. These buildings are all upon the property of the company, which is approached from the north by a waggon road, and by a railway spur or siding from the line of the Canadian National Railways. The disturbances began on 23rd June, 1925, and the offence is charged to have been committed between the 22nd and 27th days of June. The evidence is however directed particularly to the occurrences on the night of the 25th and the early morning of the 26th. On the 23rd a large delegation of the strikers went to the mine and there was some discussion. McDonald, who was one of them, says that they found men there wearing their working clothes and carrying their lunch buckets and he talked with several of these men about quitting work, but that they were not prepared to quit and went down to the mine. The following information is elicited from him:

A. I spoke to about ten or eleven, they were in line. Thomson and Fernet, I think I remember them all right, I don't remember the others.

Q. These men apparently were not on the 23rd prepared to quit work and join your union, is that right?

A. On the 23rd, they went down to the mine on the 23rd.

Q. They listened to your representations and then they decided to work, is not that the situation, or rather continue work?

A. Oh yes, they did, because, naturally enough, their boss, Jesse Gouge, who was standing there over them, and he tried to drive me away and I insisted I wanted to speak to the men and talk to them.

Q. You had the opportunity to speak to them?

A. Yes, I spoke to them.

The pickets were divided into groups and took their positions at places convenient for their purpose about the mine, from whence they continued to watch and beset the premises for several days. At night they occupied the hills surrounding the mine and overlooking the avenues of approach. Here they lighted wood fires which were kept burning throughout the night, and about which the men gathered, and where they were relieved at intervals. Inspector Nicholson of the provincial police, who was stationed at Drumheller, says:

Q. You have told us that these men had a smudge or fire there?

A. Yes.

Q. And that there were other smudges or fires on neighbouring hills around?

A. Yes.

Q. Were these hills around the A.B.C. Mine?

A. They practically surrounded it, yes.

He says, moreover, that:

A. These men were on the different hills in bunches of individuals and each bunch or crowd on each hill had a fire, a little bonfire or smudge. One of these hills was immediately behind the buildings at the A.B.C. premises, that would be immediately north. On account of a complaint received earlier on the 25th and on account of noises which I had heard in the vicinity of a powder house belonging to the A.B.C. Mine on the night of the 25th, I decided to remove the men on this particular hill that I speak of.

Asked whether there was any means of communication between the various parties on the hills, the witness answers that

they continued to shout to one another from one hill to another. One party would shout to one hill and it would be answered, and the call would go practically round all of the crowd.

Inspector Nicholson sent three of his constables at about, or shortly after, midnight of the 25th, to occupy separate positions along the roadway at the foot of the hill immediately to the north. When these constables, or two of them, were perceived by the men on the top, they were greeted with insult, curses and threats. They made no response, but remained in their respective positions, and immediately afterwards five of those on the top were taken into custody by Inspector Nicholson and other constables who had approached under cover of the darkness from the rear. The appellant however ran down the hill where he stoned one of the constables stationed below, who pursued him calling upon him to stand, and was arrested after he had been wounded by a shot from the constable. During the night previous to the coming of the police, there had been ten or fifteen men upon this particular hill, but apparently the six men charged were the only ones there at the time of the arrest.

The trial judge, in convicting the appellant, delivered a somewhat lengthy judgment. He referred to the cases of *Reg.* v. *Hibbert* (1), and *Reg.* v. *Bauld* (2). He said that in his view the conduct of the accused and the men with

(1) 13 Cox's Cr. C. 82. (2) 13 Cox's Cr. C. 282.

1926

RENERS
v.
THE KING.

Newcombe J.

whom he was associated went far beyond the conduct of the men concerned in these cases, and that

I cannot look on his conduct as peaceful picketing, having regard to all the surrounding circumstances and certainly the conduct was such as to operate in the mind of the men who were going to work and to operate on the mind of the operators as to whether or not to carry on the work in the mine.

The learned Chief Justice, pronouncing the judgment of the Appellate Division, relied upon *J. Lyons & Sons* v. *Wilkins* (1), and the same case, as reported upon appeal after the trial (2), and he considered the case of *Ward, Lock & Co.* v. *The Operative Printers' Assistants' Society* (3), which, it had been argued, was not in complete accord with the *Lyons Case*. In conclusion, however, he said that

a picketing effected in the way this was—to constitute a menace and practical compulsion by moral force, even if no physical force were contemplated, as to which one might have doubts, would not be such a picketing as would be warranted and, therefore, would be wrongful.

He quoted the finding of the learned trial judge and he said

with this finding, which in my opinion, is quite justified, the case does not seem to fall within the qualifications suggested in the *Ward, Lock Case* (3).

Clarke J., the dissenting judge, agreed

that the defendant should be held responsible as one of the watching and besetting party, engaged in what is commonly called picketing, and that he, with the others charged, did, with a view to compel another person to abstain from doing something which he had a lawful right to do, or to do something from which he had a lawful right to abstain, beset or watch the place where such other person works or carries on business within the meaning of s. 501 (*f*).

But he found difficulty in saying that such picketing was wrongful or without lawful authority; or, as he puts it, "in other words that peaceful picketing is wrongful". He reviewed the evidence, as to which he appears to take a view more favourable to the appellant than that which seems to be held by the majority of the court. He said that the *Ward, Lock Case* (3) as applied in the later case of *Fowler* v. *Kibble* (4), seems to cast considerable doubt upon the correctness of the decision in the *Lyons Case* (2) and therefore he concluded, adopting what he takes to be the result of the *Ward, Lock Case* (3), that the element of wrongfulness is lacking in the present case, and he would therefore allow the appeal.

(1) [1896] 1 Ch. 811.
(2) [1899] 1 Ch. 255.
(3) [1906] 22 T.L.R. 327.
(4) [1922] 1 Ch. 487.

In view of the nature of the dissent and seeing that the jurisdiction of this court in criminal appeals is limited to questions of law, which are the subject of difference below, the point which this court has now to determine is in reality whether there was evidence at the trial that the watching and besetting in which the appellant was engaged was wrongful and without lawful authority. Upon this point I entertain no doubt.

In the *Lyons Case* (1) the Court of Appeal upon both occasions considered the interpretation of s. 7, subs. 4 of the Conspiracy and Protection of Property Act, c. 86 of 1875, which corresponds, with unimportant variations, with s. 501 (*f*) of the Criminal Code, upon which the present charge is laid. It is explained by the concluding clause of s. 7 of the *Conspiracy and Protection of Property Act* that

> attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

But this clause is not embodied in the Criminal Code, and for that reason, as well as because of the facts in proof, it has no application to the case now under review.

The Master of the Rolls (Lord Justice Lindley) considered that to watch and beset in order to compel caused a nuisance, and he found upon the evidence that there was a nuisance. But in the *Ward, Lock Case* (2) Moulton L.J. was of the opinion that there might be a sort of compulsion which would not be wrongful or illegal and therefore that the conclusion of the Master of the Rolls was too broad; he did not however deny its application to the particular case which the Master of the Rolls had in hand, and these great judges were in perfect agreement that it was necessary to establish, in one way or another, that the watching and besetting was done wrongfully and without legal authority.

In the *Ward Lock Case* (2) the defendant had stationed pickets to watch the plaintiffs' printing works for the purpose of inducing the workmen employed by the plaintiffs to join the union, and then to determine their employment by proper notices, the object being thereby to compel the plaintiffs to become employers of union men, and to ab-

(1) [1899] 1 Ch. 255. (2) 22 T.L.R. 327.

1926

RENERS
v.
THE KING.

Newcombe J.

stain from employing non-union men; the report states that this was carried out without causing, by violence, obstruction or otherwise, a common law nuisance. Moulton L.J. said, as reported:—

> In my view that which decides the question is that there is no evidence of any improper or illegal acts, or, indeed, of any acts whatever, by any of the pickets sent by the defendants * * *. I wish to add that, in my opinion, there is throughout a complete absence of evidence of anything in the nature of picketing or besetting which could constitute a nuisance. It appears that the discharged workmen loitered about for a day or two after leaving work, a thing which is not unlikely to happen, and that they were at times joined by others, but there is no suggestion even by the plaintiffs' witnesses that any annoyance or molestation took place, and the evidence to the contrary is overwhelming.

He referred to the fact that, at the request of the plaintiffs, the police had placed special patrols outside their premises during the period of the dispute, but that none of the police had been called as witnesses by the plaintiffs, and that the inspector and a sergeant, called by the defendants, had shown that there was nothing which could give any ground for complaint. This decision is referred to and followed as an important one in *Fowler* v. *Kibble* (1), but, for the purposes of the present case it decides no more than I think was decided by the Master of the Rolls in the *Lyons Case* (2). The judgments concur in the view that watching or besetting, if carried on in a manner to create a nuisance, is at common law wrongful and without legal authority. In the *Lyons Case* (2) the Court of Appeal found the essential facts to constitute a common law nuisance. In the *Ward Lock Case* (3) they found that the sort of picketing there in proof afforded no evidence of a nuisance, and these cases do not really assist in the determination of the present question, which depends upon its own facts, except in so far as they affirm, what is evident by the statute itself, that if picketing be carried on in a manner to create a nuisance, or otherwise unlawfully, it constitutes an offence within the meaning of the statute.

Coming now again to the facts in the present case, the acts with which the appellant is charged were wrongful and unlawful if the watching and besetting in which he, in common with his comrades or associates, was engaged amounted to a nuisance or to a trespass, or if the men who

(1) [1922] 1 Ch. 487. (2) [1899] 1 Ch. 255.
(3) 22 T.L.R. 327.

were watching and besetting constituted an unlawful assembly, and there is evidence as to each of these particulars which ought not to be overlooked.

There was a large number of men engaged; a crowd was assembled at the Atlas crossing to the north of the company's works; pickets in considerable numbers were stationed at every avenue of approach; they remained in position with reliefs uninterruptedly by night as well as by day; they lighted fires on hilltops surrounding the mine, shouting back and forth from one group to another. On one occasion at the very entrance to the mine one of these men, according to his own testimony, insisted upon his endeavour to persuade workmen, who were there in their working clothes and with their lunch baskets, from going into the mine, notwithstanding that their foreman was present and tried to drive him away.

To the southeast of the shaft and the power house at a distance of about 800 feet is the powder house, situated in a narrow spur or offshoot of the coulee to the southward of the railway. This building is at the base of one of the surrounding hills, and if, as Inspector Nicholson testifies, the hills on which the fires were lighted practically surrounded the mine, some of them must have been very near to the powder house. He tells us that crowds of men continued on these hills throughout the whole of the 25th from seven o'clock in the morning, and that it was because of a complaint and noises which he heard in the vicinity of the powder house that he decided to remove the men from the hilltops. He says he intended to remove "all these different crowds of men," but to begin at the particular hill where he found the appellant. It will, of course, be realized that, as these hills were at considerable distances, the shouting from one hill to another must have been vociferous, and moreover the danger of open wood fires in the neighbourhood of the powder house and other buildings of the company was in itself a cause for apprehension.

Now while apparently the hill which was occupied by the party to which the appellant belonged was somewhat to the northward of the northern limit of the company's property, the hills surrounding the mine in other directions belonged to the company and the groups stationed there were trespassers, and, since the picketing was so carried

1926

RENERS
v.
THE KING.

Newcombe J.

on in pursuance of a common design or project to which all the strikers including the appellant were parties, he must be held responsible for the trespasses equally with those who actually occupied the company's property.

Moreover, while it is explained, with remarkable agreement on the part of the striking miners, that the purpose of their assembly at and about the mine was peacefully to endeavour to persuade the miners who continued to work to quit the service of the company and to join the new union, in order, as it is said, to maintain the standard of living, the character and purpose of this assembly is, I think, better evidenced by its acts and course of conduct than by the statements of its members as to what their intention was; and the numbers of men who assembled, their distribution about the premises, including the company's property, their attendance there by day and by night, the fires, the shouting, their reception of the police, their threats and conduct when the police approached, afford cogent evidence, not only of a nuisance, but also of an unlawful assembly, Hawkins Pleas of the Crown, 8th ed., Bk. 1, c. 28, ss. 4, 5 and 9; *Reg.* v. *Vincent* (1); *Reg.* v. *Neale* (2).

It is not for this court to judge the evidence, except to determine whether there be any. The appellant's case fails if evidence be found which the trial judge was bound to consider tending to shew that the watching and besetting, which is conclusively found to have taken place, was wrongful and without lawful authority, and I think there is such evidence in each of the aspects to which I have referred.

It was suggested also that the pickets were endeavouring to induce the company's workmen to break their contracts of service, but the evidence does not, in my opinion, go far enough to justify a finding that there were such contracts.

I would dismiss the appeal.

IDINGTON J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta maintaining the conviction of the appellant who was tried before Mr. Justice McCarthy without a jury and found guilty of the following charges laid against him and five others, that is to say that they did at Newcastle in the Judicial District of Calgary

(1) 9 C. & P. 91, 109. (2) 9 C. & P. 431, 435.

between the 22nd and the 27th days of June, 1925, wrongfully and without lawful authority with a view to compelling another person, The Alberta Block Coal Company Limited, a body corporate, to abstain in the carrying on of its business from engaging or employing or continuing in its employment miners and employees other than those belonging to the Red Deer Valley Miners Union, or to such union as the defendants themselves belonged. The Alberta Block Coal Company Limited then having a lawful right to engage or employ or continue in its employment miners or employees without restriction as to their membership in the union or unions aforesaid, or to compel the said company to engage and employ and continue in its employment only such miners and employees as belonged to said union, which members the said company had a lawful right to abstain from employing, did beset and watch the place where the said company carries on business, to wit: the mining premises of the said company.

And further stand charged that they at the same time and place wrongfully and without lawful authority with a view to compel Tom Fernet, William Hopkins, Joseph Thompson, Robert Brownell, and others, to abstain from doing what they had a lawful right to do, to wit: to work for the Alberta Block Coal Company Limited, did beset and watch the place where the said Tom Fernet, William Hopkins, Joseph Thompson, Robert Brownell and others worked, to wit: the premises of the Alberta Block Coal Company Limited's mine.

The accused parties had been tried before Mr. Justice Boyle with a jury and found guilty but for some reason or other a new trial was directed.

The others then pleaded guilty but the present appellant elected to be tried before Mr. Justice McCarthy without a jury.

The said charges were laid under section 501, subs. (*f*) of the Criminal Code.

The said section 501 reads as follows:—

501. Every one is guilty of an offence punishable, at the option of the accused, on indictment or on summary conviction before two justices and liable on conviction to a fine not exceeding one hundred dollars, or to three months imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,

(*a*) uses violence to such other person, or his wife or children, or injures his property; or

(*b*) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property; or,

(*c*) persistently follows such other person about from place to place; or,

(*d*) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in, the use thereof; or,

(*e*) with one or more other persons, follows such other person, in a disorderly manner, in or through any street or road; or,

1926

RENERS
v.
THE KING.

Idington J.

(*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be. 55-56 V, c. 29, s. 523; 4-5 Ed. VII, c. 9, s. 3.

The essential parts thereof to be considered herein are the following lines:—

> who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain, * * *
>
> (*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be.

This seems to me a clear and explicit expression in plain English forbidding anyone from besetting another's house or place of business with a view to compel him to abstain from doing anything which he has a lawful right to do.

Each of the preceding subsections from (*a*) to (*e*) inclusive, implies violence or improper conduct towards another of some kind for which the party so doing might be punishable otherwise in law. But there is no such necessary implication in simply watching a house.

These men were, clearly as noon-day, doing what the subsection (*f*) forbids, unless in the case of one having lawful authority to beset or watch. For example, the sheriff or his officers often have lawful authority to go very far in discharging their duty—even to the extent of besetting or watching a house. No pretence of authority is shewn here. None existed. Indeed the accused were in fact trespassers, I imagine, on the property of the coal company. And surely the company in question carrying on business in and on the premises in question, had a perfect right to refuse to employ men belonging to the Red Deer Valley Miners' Union.

And can there be a shadow of doubt that the men taking part in the besetting and watching complained of were doing so with a view to compel said company to abstain from pursuing their business without the aid of workmen belonging to the said Red Deer Union.

Compel is a word of various shades of meaning, for example, the Century Dictionary gives some five different shades, but let us select no. 1, which reads as follows:—

> 1. To drive or urge with force or irresistibly; constrain; oblige; coerce, by either physical or moral force: as, circumstances *compel* us to practise economy.

Or, let us turn to Murray's New English Dictionary, and we find a different application of it and select no. 2 b, which reads as follows:—

> b. To constrain (an action); to bring about by force, constraint or moral necessity; to exact by rightful claim; to demand.

Surely either one or other of these expressions can be acted upon herein, and was intended to be acted upon and applied in cases such as herein presented if we leave aside all other features than the proof of besetting and watching.

It does not in either necessarily imply physical violence as the means of compulsion.

Ever since the effect of said section as it appeared in the R.S.C. 1886, was changed by dropping subs. 2 of s. 12 of c. 173, in which the words were as follows:—

> 2. Attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

the law has been simplified and I respectfully submit made clear.

On the other hand in the English Act from which in its original state our Act was first taken there was a provision very similar to the said section 2, almost identical, which continued part of the English Act and hence renders English cases turning thereon (save and except *Lyons* v. *Wilkins* (1), I am about to refer to) of very little service to any Canadian case since our Criminal Code of 1892 was framed and, as already stated, the above quoted section dropped out.

In 1906 the English *Trades Disputes Act* was passed and distinctly enacted as follows, in the second section thereof:—

> It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

Other provisions of the same Act tended still more to render it impossible to make any English case such as herein in question of any helpful service.

(1) [1899] 1 Ch. 255.

1926

RENERS
v.
THE KING.

Idington J.

I must also say that a criminal intent and object might well be suspected in much presented to us in the evidence but as I understand the ground of Mr. Justice Clarke's dissent, which is the ambit of our jurisdiction herein, it is quite unnecessary to enter into that feature of this case to which I have just referred.

In the judgment of Mr. Justice Clarke, so far as dissenting, he makes clear what he means as follows:—

> I think the real difficulty in this case consists in the interpretation of the words in s. 501 "wrongfully and without lawful authority."
>
> I agree that the defendant should be held responsible as one of the watching and besetting party engaged in what is commonly called picketing and that he with the others charged did with a view to compel another person to abstain from doing something which he had a lawful right to do or to do something from which he had a lawful right to abstain, beset or watch the place where such other person works or carries on business within the meaning of s. 501 (*f*) but my difficulty is in saying that such picketing is wrongful and without lawful authority, or in other words that peaceful picketing is wrongful.
>
> If it is not wrongful then, in my opinion, the conviction cannot be supported upon the evidence. There is no evidence that during the night when the conduct of the defendant is complained of there was any interference with either the mining company or its workmen, or any violence, intimidation or threats; Lewis McDonald was called as a Crown witness and the trial judge states the situation upon which he apparently bases his judgment as follows: "Lewis McDonald in his evidence tells us that the so-called Canadian Union proposed to picket the A.B.C. Mine to tell the miners it was their duty to try to persuade the mine workers not to go to work so as to not reduce the standard of living. He testifies that during the time the accused and others were picketing the A.B.C. Mine he was on the picket during the 23rd and on the morning of the 24th of June, 1925. The purpose of the picket was to interview the men employed in the A.B.C. Mine and persuade them not to go to work. He admitted interviewing some of them himself. Cecil Terris, in his evidence, says they were supposed to go down to the mine and if they met anybody going down to work to ask them to join the new union. * * * So that apparently the accused were there to persuade the miners not to go to work or to prevent the A.B.C. Company from employing men who did not belong to the new union and to prevent them from hiring men who belonged to the United Mine Workers of America."
>
> If the picketing itself, that is, the watching or besetting was not unlawful I cannot see that the fact of the picketers being distributed in different places and having bonfires on a dark night can make the watching wrongful.

In *Rex ex rel Barron* v. *Blachsawl; Rex ex rel Barron* v. *Hangsjaa* (1), where the conviction of the appellant on a similar charge was affirmed by this court, *Lyons & Sons* v. *Wilkins* (2), was strongly relied upon. I understand the court there held that watching and besetting, however peaceable, was a common law nuisance and, therefore, wrongful and that the qualifying words in s. 7 as to obtaining and communicating information alone rendered it rightful. If that decision stood unchallenged I would not hesitate to say it was conclusive of the present appeal in favour of the Crown not only by reason of the absence of the qualifying words in our section 501 but because if they were still in the Act they do not extend to persuading which was part of the plan here.

The later case of *Ward, Lock & Co.* v. *The Operative Printers' Assistants' Society,* February, 1906 (3), applied in *Fowler* v. *Kibble* (4), seems to me to cast considerable doubt on the correctness of the decision in *Lyons* v. *Wilkins* (2). It was not referred to in the *Blachsawl Case* (1), and it is said that it was not brought to the attention of the court which I think is correct. I gather from that case that peaceable picketing was not considered to be wrongful at common law and was not made illegal by section 7 of the Imperial Act and if that be correct it can scarcely be wrongful under our s. 501. But for the fact that owing to the general importance of the question the defendant is desirous of obtaining the opinion of the Supreme Court of Canada, I would say that the question is determined by our former decision but considering it a proper case for an appeal I have decided to dissent from the judgment of the majority and adopting what I take to be the result of the *Ward, Lock Case* (3) would hold that the element of wrongfulness is lacking in this case and would, therefore, allow the appeal and quash the conviction.

The foregoing quotation from his judgment shows that all involved in this appeal, by reason of the dissent of Mr. Justice Clarke, is the doubt he has as to the meaning of the words "wrongfully and without lawful authority" in the part of section 501 which I have quoted above.

He suggests, as had been suggested long ago by others, that "besetting and watching" a house or premises is not in law wrongful, and hence the basis of the said subsection (*f*) renders it absolutely inoperative.

The answer to such an objection is that we must, if possible, give it some efficacy, and to do that we must ask ourselves if it is correct that the act of so besetting and watching never was, in law, wrongful.

I answer that such a course of conduct always was at common law wrongful, and might be the basis of a civil action, and hence clearly wrongful.

(1) 21 Alta. L.R. 580.
(2) [1899] 1 Ch. 255.
(3) 22 T.L.R. 327.
(4) [1922] 1 Ch. 487.

1926

RENERS v. THE KING.

Idington J.

Such was the holding of the court in the case of *J. Lyons & Sons* v. *Wilkins* (1), and the judgment of Lord Justice Lindley, M.R., at pages 266 and 267, deals with exactly what has troubled Mr. Justice Clarke herein and, I submit, the passage therefrom on page 267, which reads as follows:—

> But it is not necessary to shew the illegality of the overt acts complained of by other evidence than that which proves the acts themselves, if no justification or excuse for them is reasonably consistent with the facts proved. This is the principle always applied in criminal prosecutions in which the words "feloniously," "wrongfully," or "maliciously" are introduced into the charge, and have to be proved before the person accused can be properly convicted: see Archbold's Criminal Pleadings and Evidence, 19th ed. pp. 64-7. That this is the correct method of construing and dealing with the words "wrongfully and without lawful authority" in s. 7 is, in my opinion, perfectly plain if attention is paid to sub-heads 1, 2, 3, and 5, to which those words are as applicable as they are to sub-head 4. If the overt acts mentioned in sub-head 1, for example, i.e., using violence or intimidation, are proved, and it is proved that they were done with a view to compel, etc., and there is no reasonable ground for justifying them, it is unnecessary to give further evidence to prove that they were committed "wrongfully and without legal authority"; see *Reg.* v. *McKenzie* (2). If this be true of all the sub-heads except 4 (watching and besetting), I can discover no justification for giving the words "wrongfully and without lawful authority" any different meaning or effect when applied to 4—namely, "watching or besetting."

Others in like manner in same case and in a further appeal refer to this and express analogous opinions, and such was taken to be the law until the case of *Ward, Lock & Co.* v. *The Operative Printers' Assistants' Society et al* (3), in 1906, 26th February. Even in that Stirling J. expresses himself as if the court were in accord with what Lord Justice Lindley had said in the *Lyons Case* (1). It was the provision of exception that created the difficulty.

By our Canadian courts, cases were decided in Manitoba and Alberta adopting the law as settled by *Lyons* v. *Wilkins* (1) and other cases.

This I accept as good law yet, and more especially so when the subsequent paragraph above referred to had been eliminated in framing our Criminal Code in 1892.

It became increasingly more difficult to do so in England by reason of the *Trades Disputes Act,* to which I refer above. Indeed that rendered it almost quite impos-

(1) [1899] 1 Ch. 255.

(2) [1892] 2 Q.B. 519, at pp. 521-3.

(3) 22 T.L.R. 327.

1926

RENERS v. THE KING.

Idington J.

sible for us to follow the later English decisions. I imagine said Act was a result of the *Ward, Lock Case* (1).

I need not elaborate further but submit the foregoing considerations remove all doubts such as in question, and therefore am of the opinion that this appeal should be dismissed.

I may add, however, that having read the entire case I find there is evidence of actual violence, trespass and abusive and vile language, even in the presence of policemen keeping guard, which removes all doubt in law and in fact of the guilt of the appellant, who ran away on hearing someone approach. Why, if innocent, do so?

I have out of respect to the learned judge below, dissenting, tried to confine the expression of my opinion above to the point in which he expresses doubt, but, if others think we should go beyond, I think it as well to state concisely my conclusions if needed.

Appeal dismissed.

Solicitors for the appellant: *McIntyre & Sandercock.*

Solicitor for the respondent: *James Short.*

MONTREAL LIGHT, HEAT & POWER CONSOLIDATED (DEFENDANT) ..... } APPELLANT;

AND

THE CITY OF WESTMOUNT (PLAINTIFF) RESPONDENT.

1926

*Mar. 5.
*June 14.

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

Municipal corporation—Assessment—Valuation roll—Pipes, poles, wires and transformers—Meters—Immovable or movable—"Immovable," "real estate," "real property"—Terms similar for purposes of taxation—Action for taxes—Defence—Property—Non-assessable—Cities and Towns Act, art. 5730, R.S.Q. 1909—Art. 2731, R.S.Q. 1909—Arts. 376, 380, 384 C.C.

The respondent brought an action to recover from the appellant company $8,626.86 for municipal taxes and $4,831.05 for school taxes as assignee of the Board of Schools Commissioners, for the years 1920-21, 1921-22 and 1922-23. The subjects of the taxation were gas mains or pipes located in the public streets, a system of electric poles and wires, almost entirely upon the public streets and meters placed in the

(1) 22 T.L.R. 327.

1926

MONTREAL L., H. & P. CONS. v. THE CITY OF WESTMOUNT

houses of the consumers in the municipality. In the valuation roll for the years 1920-21 and 1921-22 all the electric property of the appellant company, including the meters, which were of substantial value, was embraced in a single gross valuation and was the subject of but one assessment. In the exercise of their powers of taxation, instead of using the term "immovable" as found in art. 5730, R.S.Q. 1909, the municipal corporation substituted in its by-laws the term "taxable real estate" and the Board of School Commissioners in its resolutions the term "taxable real property."

Held that the pipes, poles, wires and transformers are immovables within the meaning of that term as used in art. 5730 of the Cities and Towns Act, R.S.Q., 1909, and are subject to taxation as such. *Bélair* v. *Ste. Rose* (63 Can. S.C.R. 526) foll.

Held, also, that the meters, being movables within art. 384 C.C., do not lose that character by reason of the mode or purpose of their being placed by the company upon immovables not belonging to it, to which they are, when in use, temporarily affixed; and they are not therefore taxable immovables. Idington J. dissenting.

Held, also, that the assessments of the electric system for the years 1920-21 and 1921-22 must be invalidated *in toto* as being, to an extent not apportionable, made upon movables, i.e., electric meters; and no part of the taxes sued in respect of them are recoverable. Idington J. dissenting.

Held, also, that, although the words "immovable" and "real estate" and "real property" are not in practice interchangeable, the terms "real estate" and "real property" should be taken, for the purposes of the taxation by-laws and resolutions, to include property which is held to be "immovable" by nature as the pipes, poles, wires and transformers.

Held, further, that a defence to a claim for taxes that the taxed property is non-assessable, if otherwise maintainable, is not precluded by the failure of the assessed party to invoke any special machinery afforded for appeals from assessments or any summary proceedings available to have valuation rolls annulled for irregularity. *Donohue* v. *St. Etienne de la Malbaie* ([1924] S.C.R. 511) foll. Idington J. dissenting.

Judgment of the Court of King's Bench (Q.R. 38, K.B. 406) rev. in part, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing in part the judgment of the Superior Court and maintaining in part the respondent's action for taxes.

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.

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

(1) Q.R. 38 K.B. 406.

Lafleur K.C. and *Montgomery K.C.* for the appellant.

Geoffrion K.C. and *Weldon 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.—This action is brought to recover municipal taxes amounting to $8,626.86 and school taxes amounting to $4,831.05 for the years 1920-21, 1921-22, 1922-23 claimed, with interest, by the city of Westmount from the appellant company. For the school taxes the city sues as assignee of the Board of School Commissioners. The subjects of the taxation, of which complaint is made, are gas mains, located in the public streets, a system of electric poles, wires and transformers, almost entirely upon the public streets, and meters placed in the houses of the consumers in the municipality. The appellant company owns neither land in the municipality nor other property than that so described and whatever interest it may have in the land occupied by its poles, pipes, wires and transformers by reason of the exercise of its statutory right to such occupation. (Compare *Gas Consumers Co.* v. *City of Toronto* (1), and *Ahearn & Soper* v. *New York Trust Co.* (2), per Duff J.

The preliminary question has arisen in the consideration of this appeal whether it sufficiently appears that the electric and gas meters of the appellant are included in the assessments in question. The total assessment in respect of the electric system is, for each of the three years, identical in amount, viz., $85,000. For the first two years electric meters are expressly included as subjects of assessment and for the third year, while these meters do not appear in the roll *nominatim,* the continuance of the same total in the valuation is said to indicate that it covers the same items as in the two previous years. In the case of the gas system the assessment for each of the three years is likewise the same, viz., $130,000, and the items are given as "gas mains and equipment," in the first two years and as "pipes, lines, etc.," for the third year. The parol evi-

(1) [1897] 27 Can. S.C.R. 453, at pp. 457, 459.

(2) [1909] 42 Can. S.C.R. 267, at p. 275.

1926

MONTREAL L., H. & P. CONS. v. THE CITY OF WESTMOUNT

Anglin C.J.C.

dence as to the inclusion of both gas and electric meters for each of the three years as items of the property assessed is not as full and definite as might have been expected had this matter been regarded as of serious moment at the trial. Such allusions as we find in the testimony rather point to these meters having been treated as part of the properties assessed. Their inclusion is specifically averred in the defendant's plea; but the plaintiff in its answer denies this with other allegations. The learned trial judge says nothing which would lead one to suppose that he intended to pass upon the question of the inclusion of the gas and electric meters in the property assessed in any of the three years. While he makes no specific allusion to meters he may have intended to deal with them in the comprehensive phrase: " autres appareils destinés à la distribution." In the Court of King's Bench, however, from the judgment of Mr. Justice Tellier, which was concurred in by Allard, Howard and Letourneau, JJ.A., it would seem probable that the meters, both gas and electric, were there regarded as items included in the several assessments. That learned judge said:—

> Les biens dont il s'agit * * * comprennent * * * les compteurs électriques qui tiennent aux fils et qui enrégistrent la somme de courant consommée * * * et les compteurs auxquelles les tuyaux de gaz aboutissent.

We are, however, of the opinion that in regard to the construction of such public documents as assessment and valuation rolls it is eminently fitting that the rule embodied in the maxim *ut res magis valeat quam pereat* should be applied. The assessments of the gas system are obviously open to the construction that the " equipment " included in each of the assessments for the first two years was equipment appertaining to the " gas mains," such as valves and connections, and that the " et cetera " of the assessment for the third year included only things *eiusdem generis* with or appurtenant to " pipes and lines." The assessment of the electric system for the third year is in terms restricted to " poles, transformers and wires" and this change may well have been made in order to exclude the meters which had been expressly included in the two earlier assessments. The mere similarity in the amount of each of the three assessments of the electric system is scarcely sufficient to justify the court in treating as still included in

the third year an item that had apparently been designedly dropped, especially if to do so would invalidate the entire assessment.

For these reasons we think the assessments for the three years of the gas system and the assessment for the third year of the electric system must be treated as not including meters in any of them. But the inclusion of electric meters in the assessments for the years 1920-21 and 1921-22 being explicit does not admit of any controversy.

The appellant maintains that the property in respect of which the right of taxation is asserted was non-assessable. This defence to the claim for taxes, if otherwise maintainable, is not precluded by the failure of the appellant to invoke the special machinery afforded for appeals from assessments or any summary proceedings available to have valuation rolls annulled for irregularity. *Donohue Bros.* v. *St. Etienne de la Malbaie* (1).

To the valid imposition of a municipal or school tax there are always two requisites—statutory power to impose the tax and the due exercise of such power by the municipality or school corporation, as the case may be. Both the existence of the power and its efficient exercise must be clearly established, the taxpayer being entitled to the construction most beneficial to him in the case of reasonable doubt. *Partington* v. *Attorney-General* (2). The appellant maintains that both requisites are lacking in regard to the taxes sued for.

Section 2 of the charter of the city of Westmount, 3 Edw. VII, c. 89, reads as follows:—

> The city of Westmount shall be subject to the provisions of the *Cities and Towns' Act*, 1903, except in so far as is inconsistent with the provisions of this Act.

The *Cities and Towns' Act* of 1903 (3 Edw. VII, c. 38) was embodied in the R.S.Q., 1909, as arts. 5256-5884 and was subsequently re-enacted as c. 65 of the statutes of 1922 (2nd session) 13 Geo. V. Section 474 of the Act of 1903 (art. 5730 of the R.S.Q., 1909; s. 510 of the Act of 1922) reads as follows:

> The council may impose and levy, annually, on every immovable in the municipality a tax not exceeding two per cent of the real value as shewn in the valuation roll.

(1) [1924] S.C.R. 511.

(2) [1869] 4 E. & I. App. 100, at p. 122.

1926

MONTREAL L., H. & P. CONS. v. THE CITY OF WESTMOUNT

Anglin C.J.C.

Nothing in the city charter excludes or qualifies the application of this provision.

By art. 2731 of the R.S.Q., 1909, Boards of School Commissioners are empowered to impose assessments "upon all taxable property in the municipality." Taxable property, is, by art. 2521 (16) declared to mean "the real estate liable for school taxes," and by art. 2521 (15), as amended by 4 Geo. V, c. 22, s. 1 (1914), real estate is defined as

> including everything that is immovable by virtue of the municipal laws governing the territory of school municipalities.

The sole question with regard to the statutory power to impose the taxes sued for—municipal and school alike—is whether the subjects of taxation in this instance are immovables within the meaning of that term as used in art. 5730 of the R.S.Q., 1909. That question formed the principal matter of discussion at bar; but, while not free from difficulty, it would seem to be concluded adversely to the appellant by the decision of this court in *Bélair* v. *Ste. Rose* (1), as to the gas mains and electric poles and wires, which, for the reasons there stated, must be regarded as "buildings (*bâtiments*)" within the meaning of art. 376 C.C. and, therefore, "immovable by their nature." In that case three things were distinctly held: (*a*) that the scope of the word "immovable" in art. 5730 (R.S.Q., 1909) is to be ascertained by reference to the provisions of the Civil Code, arts. 376 *et seq*: (*b*) that the word "buildings" (*bâtiments*) in art. 376 C.C. is used in the sense of "constructions"; (*c*) that it is immaterial to its taxability under art. 5730 that a construction is erected on land which does not belong to the person who owns the construction. There is no distinction in principle which would justify the taxation of the bridge in that case under art. 5730 as an immovable and warrant the exemption of the appellant's gas mains, and electric poles and wires in the present case as movables. The materials of which the structures—bridge and distribution systems alike—were comprised were all movables before being placed *in situ* and made part of such structures. Once incorporated in the structures, however, the materials lost

(1) [1922] 63 Can. S.C.R. 526.

that character; and the structures themselves took on the character of immovables.

Nor does it appear to matter for the present purpose whether the immobilization of the pipes, poles and wires be attributed to their physical connection with the land in or upon which they are placed, or with the buildings from which they radiate as parts of a distribution system. In either view they are immovables actually (in the sense of physically) situated in the municipality and thus "come within the letter of the law" which confers the power to tax. *Partington's Case* (1). The immobilization of the transformers may not be so clear. But they are usually attached to the company's poles and form an integral part of the system quite as much as the wires strung on the poles to carry the current.

For these reasons, as well as those stated by Mr. Justice De Lorimier and Mr. Justice Tellier, and upon the authorities cited by those learned judges, the pipes, poles, wires and transformers must be regarded as taxable immovables. Particular reference may be made to art. 445 of the charter of the city of Westmount, 8 Edw. VII, c. 89, s. 39.

To the electric meters, however, different considerations apply. *In se* these appliances or pieces of mechanism, are movables within art. 384, C.C., and they would not appear to lose that character by reason of the mode or purpose of their being placed by the company upon immovables not belonging to it, to which they are, when in use, temporarily affixed. Moreover, the wires to which the meters are attached belong not to the company but to the householders.

The meters are put in the premises of consumers for temporary purposes and are so fastened if at all, that they can be replaced without difficulty. They are frequently changed, either because they must be tested and re-certified from time to time, or because of breaks in the tenancy of the property in which they are used. They are not "attached for a permanency." Their removal involves no breakage, destruction or deterioration of the interior wires to which they are attached, or of the walls against which they are placed. (Art. 380 C.C.). They would,

(1) 4 E. & I. App. 100.

1926

MONTREAL L., H. & P. CONS. v. THE CITY OF WESTMOUNT

Anglin C.J.C.

therefore, seem to fall within the category of movables and not to be taxable as immovables within art. 5730 of the R.S.Q., 1909. *Liquidation de la Société Générale de Papeterie* c. *Delor* (1), cited by the appellants is closely in point; see vol. 4, Huc, p. 24.

Had the valuation of the poles, wires and transformers been made separately from that of the meters the assessments of the electric system for the years 1920-21 and 1921-22 could have been maintained as to all except the last mentioned. *Donohue* v. *St. Etienne de la Malbaie* (2). But, in each of these two years, all the electric property of the appellant is embraced in a single gross valuation and is the subject of but one assessment. That the electric meters are of substantial value and form a not unimportant item in each of the total assessments of $85,000 seems clear. It is not within the jurisdiction of the Superior Court to apportion the amount of these assessments between the taxable and non-taxable property included in them. Being, to an extent not indicated, made upon movables, the entire assessments of the electric system for the two earlier years are thereby invalidated and no part of the taxes sued for in respect of them is recoverable.

The exercise in the present case of the powers of taxation, conferred as above indicated, is evidenced by three municipal by-laws and three resolutions of the Board of School Commissioners. Each of the three by-laws provides for the imposition and levy of taxes "on the taxable real estate situate within the limits of the city;" each of the resolutions provides for imposing a tax on "all taxable real property liable therefor in the school municipality of the city of Westmount."

To employ the very term by which the property made taxable is designated in the Act which confers the power to tax was obviously the certain method of subjecting to the taxation everything which the municipal corporation and the Board of School Commissioners are given the right to tax. That certain and safe method has been departed from by both governing bodies. For "every immovable," the term found in art. 5730 (R.S.Q., 1909),

(1) S. 1888-2-205. (2) [1924] S.C.R. 511.

the municipal corporation has substituted "the taxable real estate," and the school commissioners "all taxable real property." We are thus confronted with two questions: Is everything comprised in the terms "real estate" and "real property" an "immovable" within the purview of art. 5730? And do these terms cover such immovables as the gas mains, poles, wires and transformers in question?

Neither in the *Cities and Towns' Act,* in the *General Interpretation Act* (R.S.Q., 1909, art. 36), nor in the Civil Code is there any definition either of "real estate" or of "real property." These terms must, therefore, be given their ordinary and natural meaning. While not technical terms known to the civil law, they are such in English law and their connotation is well established. The two terms are practically synonymous. (Stroud's Judicial Dict., 2nd ed., p. 1660). Without acceding to the view that the words "immovables," "real estate" and "real property" are in practice interchangeable, we are satisfied that the term "immovables" comprises everything which could be regarded as real estate for the purposes of the taxation by-laws and resolutions before us; and while it may not be so clear that such immovables as the pipes, poles, wires and transformers in question are real estate and real property, the weight of authority certainly favours that view.

The civil law divides all property into movable and immovable; English law divides all property into real and personal. While the real property of English law is not entirely co-extensive with the immovables of the civil law, speaking generally it may be so regarded for purposes such as those with which we are now concerned. Blackstone says:

> Things real are such as are permanent, fixed, and immovable, which cannot be carried out of their place, as lands and tenements; things personal are goods, money and all other movables which may attend the owner's person wherever he thinks proper to go. (2 Bl. Com., c. 2).

Real estate comprises all hereditaments. That the pipes, poles, wires and transformers here in question would be hereditaments in English law seems clear. *Metropolitan Ry.* v. *Fowler* (1). If used, as they probably are, in the

(1) [1893] A.C. 416, at p. 427.

1926

MONTREAL L., H. & P. CONS. v. THE CITY OF WESTMOUNT

Anglin C.J.C.

sense attributed to them by English law, the terms "real estate" and "real property" of the by-laws and resolutions now before us comprise such property as the gas mains, poles, wires and transformers. In the case of the school commissioners' resolutions this scarcely admits of doubt, since "taxable property" means "the real estate liable for school taxes" (Art. 2521 (16)) and "real estate," the synonym of "real property," is declared in the Public Instruction Law, to include everything that is immovable under the municipal law governing the territory. Art. 2521 (15) R.S.Q., 1909. But, without the aid of any such definition, "real estate," having regard to its complement in the classification of property and things, viz., "personal estate," must, in the absence of some clear indication of its being employed in a more restricted sense, be taken to include property whch is held to be immovable by nature, as are the pipes, poles, wires and transformers under consideration.

The appeal must therefore be allowed as to the taxes based on the assessments of the electric system for the years 1920-21 and 1921-22 and the appellant is entitled to its costs in this court and the Court of King's Bench. As to the taxes in respect of the assessments of the gas system for the three years and the assessment of the electric system for the year 1922-23, the judgment appealed from will be maintained; and the respondent will have the costs of the action.

IDINGTON J. (dissenting).—This is an appeal from the Court of King's Bench, in an action to recover the taxes imposed for three years upon appellant's property in respondent city.

I agree with the reasoning of Mr. Justice DeLorimier of the Superior Court who tried the case and gave judgment for the respondent, and that of Mr. Justice Tellier in the Court of King's Bench, with whom the other judges of that court agreed, with the exception of Mr. Justice Greenshields who dissented.

I do not feel, when I so fully agree with their said reasoning, that I should merely repeat it herein, and I therefore hold that this appeal should be dismissed with costs.

I may, however, refer to some features of the case (which is certainly a most remarkable one) to which no attention was paid or at least pressed on the attention of the said courts, or either of them.

The assessment was made upon the plant of the appellant in said city, found to be immovable by said courts, and hence a proper basis upon which to rest the several assessments and the imposition of proper taxes thereon.

The appellant's counsel started in this court by relying not only upon the grounds they had taken in the courts below, but also, for the first time, upon two further rather curious grounds; that parts of the erection of the appellant, which consisted of their electric plant, were "transformers" and described as such in the assessment in question; and "metres" for electric supplies and gas supplies respectively, also so described, and hence must be held movable, and therefore could not be assessed as immovables.

As to these transformers, they were firmly tied by wires and metal braces to the posts supporting the electric wires and were certainly part and parcel of the immovable part of the property, much more so than the posts were in the ground or the majority of frame houses resting on a wall are, and easily moved.

But occasions might arise, if they happened to be burnt out, for their being replaced.

So is any *house* so liable, and the *Cities and Towns Act*, which governs the whole question in this case involved, provides for the burning, in whole or in part, of buildings and relief being given, and, I submit, covers the cases of burning out.

Again it is said the transformers provided for changing the wire or pressure thereon and thus the increasing or the reduction of the power. I am surprised at such a contention in face of the facts that all our houses have windows so fitted as to move up or down to let in fresh air, or shut out cold air; and in this climate there are storm windows used in winter and moved in summer, and Venetian blinds used in summer and removed in winter; and all these things are of great value and form part of the

1926

MONTREAL L., H. & P. CONS. v. THE CITY OF WESTMOUNT

Idington J

value of the house so equipped and are assessed accordingly therewith, as part thereof, and still held to be immovable.

Can we hope to escape our taxes on any such pretext?

It seems to me a desperate suggestion that because of such like characteristics the whole assessment is to be declared null and void.

I will not argue such a question but merely state it and hold that such a feature herein is of no consequence.

To rely on the absolutely literal reading of art. 384 C.C., and declare such to be the law applicable herein and thus exempt movable houses from taxation, would be something I cannot assent to, especially when that is immediately preceded by the elaborate definition of "immovables."

I may add that there are manifold other illustrations conceivable as shewing the absurdity of such a pretension.

The metres are something a trifle more arguable for I can conceive of them being loosely hung on to any part of the main property, but that is evidently not the case with those in question or we would have heard of it. The pretext made as to them is that those used for the electric current have to be changed every six years. So have the shingles on our roofs, only not quite so frequently.

I am, with due respect, very sceptical as to the alleged facts and as to the alleged value or cost of such changes.

It is a resealing or stamp on the instrument imposed by some Federal legislation that has to be met. These are so trifling in that regard that, forming as they do part of the appellant's plant even though situate on other people's ground (as, in the case of electric metres, they may be) I cannot hold such large assessments as in question are to be held as rendered null and void by reason of their being mentioned.

The gas metres, if I understand the evidence, are not necessarily in the houses of other people but may be outside where the owner's pipe meets that of the appellant; probably on the line of the street allowance. Did anyone ever hear of those alleged movables, so situated, being carried away? The witness is, after telling how the gas pipes meet outside, talking of gas metres as though they had been named under equipment, of which there is no evidence.

But it is clear that they are not mentioned in the copies of the assessment rolls in evidence and as to the electric appliances also for the last year, yet they are all, even for that year, treated by the appellant as nullifying the whole assessment.

Then it was pointed out to counsel that in the recent case *Shannon Realties, Limited* v. *Ville de St. Michel* (1), the Privy Council held that if the party assessed failed to appeal from the assessment, then unless in the case of fraud, no relief could be given. I cannot agree with the contention that in principle this case does not apply. That contention is not what I take from reading the judgment of their Lordships in the court above.

It was much more *ultra vires* to assess the land in question therein at its full value when the line was so clearly drawn in law at a fractional part thereof, than in this case where incidental to description of an immovable he mentions parts of it just as if an assessor of a house had happened to name the windows.

If a clear cut case of *ultra vires* were presented, I think something might be said for the contention set up in the case of *The Toronto Railway Company* v. *Toronto* (2), where the whole amount called in question was personal property for which assessment had been imposed, and no possibility of confusion existed. Personal property was as a whole assessable under the Ontario law, and named distinctly as such. I infer that was how they were enabled to identify the item there in dispute, as the report shews in above respect. There was no report of that case as dealt with in the court below in the Ontario reports. I am driven therefore to infer something not made clear.

This is not that case nor is the law, that is to be considered herein, the same as in question therein.

And the Ontario law on which said Toronto case turns was amended to meet such emergency, as is shewn in R.S.O., 1914, c. 195.

Section 498 of the *Cities and Towns Act*, 13 Geo. V, c. 65, s. 487, now s. 498, R.S.Q., 1925, vol. II, are identical and read as follows:—

(1) [1924] A.C. 185.

(2) 6 Ont. L.R., 187; [1904] A.C. 809.

1926

MONTREAL L., H. & P. CONS. v. THE CITY OF WESTMOUNT

Idington J.

After all the complaints filed have been decided, the council shall declare the roll homologated; and the roll so homologated shall remain in force, until the coming into force of a new roll.

I think that covers the case of the last assessment for the year 1922-1923 in question herein for said Act of 13 Geo. V, c. 65, came into force on 1st July, 1923. But if I am in error then the previous statutes to same effect will apply to it as well as to the previous ones.

The following articles 5706, 5707, 5708 and 5709 of the R.S.Q., 1909, are respectively applicable to the prior assessments in the two earlier years in question herein.

5706. During such time, any person who, personally or as representing another person, deems himself aggrieved by the roll as drawn up, may appeal therefrom to the council, by giving for that purpose a written notice to the clerk stating the grounds for his complaint.

5707. The council, at its first general session after the expiration of the thirty days mentioned in article 5705, shall take into consideration and decide all the complaints made under article 5706.

After having heard the parties and their witnesses, under oath administered by its presiding officer, as also the assessors if they wish to be heard and the witnesses produced on behalf of the municipality, the council shall maintain or alter the roll, as it may think fit.

5708. In all cases, the council shall proceed, at such session or at any adjournment thereof, to revise and homologate the roll, whether it be complained of or not. It may also correct the form of the language used.

5709. At such session, or so soon thereafter as all the complaints filed have been decided, the council shall declare the roll homologated; and the roll so homologated shall remain in force, until the coming into force of a new roll.

and the articles 4507, 4508, and 4509, from the supplement to said revision, are as follows:—

4507. The council at its first general session, after the expiration of the thirty days mentioned in article 4505, takes into consideration and decides all the complaints made under the preceding article.

After having heard the parties and their witnesses, under oath, administered by its presiding officer, as also the valuators if they wish to be heard, the council maintains or alters the roll, as to it seems meet.

4508. In all cases, it is the duty of the council to proceed at such session, to the revision and homologation of the roll, whether it be complained of or not.

It may also make any correction in the style of the drawing up thereof.

4509. At such session, or so soon thereafter as all the complaints filed have been decided, the council declares the roll homologated; and the roll so homologated shall be in force, until the entry into force of a new roll.

The article 4546 of said 1909 revision deals with the collection of school rates.

And then practically the law remained the same until the statute of 13 Geo. V, quoted above.

There was an appeal given by art. 5715 of said Revised Statutes of 1909 to the Circuit Court, and so continued until said 13 Geo. V, when continued by section 493 thereof, as follows:—

493. An appeal shall lie to the Circuit Court of the county or of the district, or to the District Magistrates Court:

1. From any decision of the council under sections 485, 486, 488, 489 or 491, within thirty days from such decision, whether the council rendered same of its own accord or upon a complaint or petition filed in virtue of such sections;

2. Whenever the council has neglected or refused to take cognizance of any written complaint made in virtue of section 484, or of a petition presented in virtue of sections 489 or 491, within thirty days after the sitting at which it should have taken cognizance thereof.

Sections 499, 500, 501 and 502 thereof are as follows:—

499. The court, may, by its judgment, confirm the decision appealed from, annul or amend the same, or render such decision as the council ought to have rendered, or order it to exercise the functions respecting which recourse is had.

500. The decision may be set aside only when a substantial injustice has been committed, and never by reason of any trifling variance or informality.

501. The court, in adjudicating upon the appeal, may condemn either party to costs; and, if the decision appealed from be modified, it may order its judgment to be served upon the municipality, and such judgment shall be final and executory. After the judgment upon the appeal, all original documents transmitted by the municipality in consequence of the appeal shall be returned to the latter.

502. Every appellant who neglects to prosecute effectually the appeal, shall be deemed to have abandoned the same, and the court, on application by the respondent, may declare all the rights and claims founded on the said appeal forfeited, with costs in favour of the respondent, and order the transmission of the record to the municipality.

Such were the clear ways open to the appellant for relief against the said items of the transformers and metres in question, and it never appealed. Why? I cannot believe that it ever was thought by those acting for it that, if liable at all, they could hope for relief by anything rested solely on the said trifles.

I can conceive that they felt encouraged as their predecessors had been by the judgment of Mr. Justice Greenshields in the belief that none of the properties in question could be held liable and the whole assessment be held void as *ultra vires,* just as many others had been in Ontario or Quebec, before the law was made clear by legisla-

1926

MONTREAL L., H. & P. CONS. v. THE CITY OF WESTMOUNT

Idington J.

tion, when the assessments had possibly in some such apparent like cases been held void.

I can find no settled jurisprudence holding in such like cases as where only a fractional part or item of the subject matter assessed had been illegal on any ground, that therefore the whole assessment was void, and hence no need to resort to the mode of relief provided in such manifold ways as were open to appellant herein.

The case of *Donohue Brothers* v. *St. Etienne de la Malbaie* (1), decided by this court, is the first of the kind upheld. And that proceeded upon the assumption that the *Toronto Railway Case* (2) was of the same nature. I have shewn above that the ultimate decision therein was where one item of a very large assessment was singled out to test the matter, and that single item being wholly non-assessable, it was held appellant was not obliged to resort to applying for relief to courts of revision, etc.

Many like cases had preceded this one as will appear from a perusal of the case of *Nickle* v. *Douglas* (3), where the item in dispute was wholly for property held thereby, to be owned in Montreal and not in Kingston, where appellant was assessed, and hence beyond the jurisdiction of the Kingston authorities to deal with.

In that and such like cases where nothing else was involved than the one or more items non-assessable, hence clearly *ultra vires,* those concerned in escaping taxes in respect thereof had no need to pursue any of the means of appeal such as were open to the appellant herein.

That *Toronto Case* (2) was to my mind clearly not in point.

The *Donohue Brothers Case* (1) did not pursue the same course as this appellant, but resorted to an action under article 50 C.C.P., and for that reason alone is clearly distinguishable from that involved herein.

Moreover it was supported by a bare majority of this court and the respondent therein got leave from the Judicial Committee of the Privy Council to appeal there, and thus cast a doubt on the said decision, though that appeal

(1) [1924] S.C.R. 511. (2) [1904] A.C. 809.
(3) 37 U.C.R. 51.

was not argued but settled by the parties and, with their consent, dismissed.

For these and many other reasons I think it is clearly distinguishable and, therefore, not binding upon me. And I am not able to escape the onerous burden of labour cast upon me by reason of the facts which do not prove the case, and, in law, seem to have no substantial merits, if any at all.

I do not think it is necessary for me to trace out and demonstrate the correct interpretation of the legislation laying the foundation for the imposition of taxation in such like cases as this.

I am sorry that the framer of the Acts involved did not consistently adhere throughout to the absolutely right expressions so as to avoid needless argument, but the meaning is on the whole clear.

I may add that the school authorities no doubt had the right to the taxes it has assigned to respondent and sued for by it herein.

I think the sections of the Acts above quoted make clear the respondent's right to recover the several sums respectively claimed, with interest from and after the respective due dates of each homologation of the assessments, which by the council and by virtue of the several Acts respectively relevant to each assessment had the effect of declaring said respective assessments valid.

The appeal should be dismissed with costs.

Appeal allowed in part.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitor for the respondent: *J. W. Weldon.*

1926

*May 12.
*May 31.

ANTON J. KUPROSKI AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

ROYAL BANK OF CANADA (PLAINTIFF) ..... } RESPONDENT.

AND

WILLIAM YOUNG AND OTHERS (DEFENDANTS).

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

Bankruptcy—Guarantee—Creditor proving claim in bankruptcy and valuing security—Retention of security at assessed valuation—Subsequent recovery against guarantors.

Directors of a company guaranteed payment of its liabilities to a bank. The company went into bankruptcy and the bank, pursuant to the Bankruptcy Act, proved its claim and valued its security consisting of an hypothecation of collateral notes. The bank was allowed to retain its security at the valuation placed upon it. The bank subsequently sued the guarantors for the balance unpaid of the company's debt.

Held, that s. 46 (6) of the *Bankruptcy Act* did not have the effect of vesting in the bank the complete ownership of the collateral notes and of reducing the company's debt for all purposes by the amount at which the notes were valued; and the guarantors were not relieved from liability on their guarantee to the extent of such assessed value.

Canadian Bank of Commerce v. *Martin* ([1918] 1 W.W.R. 395), distinguished. *Bank of Hamilton* v. *Atkins* ([1924] 1 W.W.R. 92), overruled.

Judgment of the Appellate Division of the Supreme Court of Alberta (21 Alta. L.R. 553) aff.

APPEAL by certain of the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which (Beck and Hyndman JJ.A. dissenting) dismissed an appeal from the judgment of Ives J. (2) in favour of the plaintiff.

In consideration of the plaintiff agreeing or continuing to deal with Progressive Farmers' Co., Ltd., in the way of its

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

(1) 21 Alta. L.R. 553; [1925] 3 W.W.R. 417.

(2) [1925] 2 W.W.R. 586.

business as a bank, the defendants jointly and severally guaranteed (to a certain limit) payment to the plaintiff of the liabilities which the company had incurred or was under or might incur or be under to the plaintiff. The guarantee was dated September 9, 1920. The company made an assignment in bankruptcy in April, 1921, and on May 21, 1921, the plaintiff filed a claim showing an indebtedness by the company to the plaintiff of $3,857 as of the date of the assignment in bankruptcy. The plaintiff held as security an hypothecation, dated September 9, 1919, of collateral notes amounting, according to its proof of claim, to $4,408.55 and interest, and in its proof of claim it assessed the value of the notes at $2,290. It was allowed to retain its security at the said valuation. It subsequently sued the guarantors for the full unpaid amount of its claim, and recovered judgment therefor. The appeal was limited to the amount of $2,290, at which the plaintiff valued its security, the appellants contending that they were relieved from liability on their guarantee to the extent of such assessed value.

N. D. McLean K.C. for the appellants.

Hon. 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

RINFRET J.—In consideration of the Royal Bank of Canada agreeing or continuing to deal with Progressive Farmers' Co., Limited, "in the way of its business as a bank," the appellants jointly and severally guaranteed payment to the bank of the liabilities which the company had incurred or was under or may incur or be under to the bank. The guarantee was in writing and dated the 9th September, 1920.

The bank accordingly did business with the company and the latter became indebted to the bank in the sum of $3,866.10, for which a note was made by the company and remitted to the bank. The bank now seeks to recover from the guarantors the sum remaining overdue and unpaid in respect of such note. But, some time after having incurred this debt, the company went into bankruptcy. The bank,

1926

KUPROSKI v. ROYAL BANK OF CANADA.

Rinfret J.

as required by sections 45 and 46 of the *Bankruptcy Act*, filed with the trustees a statutory declaration verifying its debt, stating that it held, as security therefor, an hypothecation of collateral notes amounting to $4,408.55 and assessing the value of those notes at $2,290. At a subsequent meeting of the inspectors of the bankrupt estate, the bank was allowed to retain its security at the valuation thus placed upon it.

The guarantors now contend that, by force of subsection (6) of section 46, of the Act, this had the effect of vesting in the bank the complete ownership of the collateral notes, and of reducing the company's debt for all purposes by the amount at which these notes were valued, and that they are accordingly relieved from liability on their guarantee to the extent of such assessed value.

This, in effect, would mean that the notes are to be treated no longer as security, but as if they had been collected by and paid to the bank for the total amount of their valuation and quite irrespective of what they may eventually realize.

Such is not, in our view, the purport of section 46 of the *Bankruptcy Act*. The Act deals with the relations between the bankrupt and his creditors. The particular subsection declares what will happen, as between the secured creditor and the bankrupt or his trustee, if the creditor retains his security at "the value at which he assesses it." For purposes of dividend, the value so assessed must be deducted and "the amount of the debt shall be reduced" accordingly.

As was said by Lord Watson in *Deering* v. *Bank of Ireland* (1):—

> *So far as concerns the proceedings in bankruptcy,* the security is dealt with as having been realized and paid to the creditor, and his debt to the extent of its valuation or actual proceeds is extinguished, the balance unpaid being then treated as unsecured, and therefore admitted to proof.

But this is only "so far as concerns the proceedings in bankruptcy." These proceedings do not affect the agreement between the creditor and the sureties or guarantors. No mention, nor reference is made to the latter in section 46.

(1) [1886] 12 App. Cas. 20, at p. 27.

The bank merely fulfilled the requirements of the Act in filing and proving its claim, and in assessing the value of the security it held. No mistake or fraud in the valuation is even suggested. There is not the slightest evidence of improper appraisal. The assessment is not the voluntary act of the bank, but was done in compliance with the statute. This is not a case where the creditor becomes party to a composition or a deed whereby the principal debtor is discharged and the position of the surety is altered. Such was the situation in *Canadian Bank of Commerce* v. *Martin et al.* (1), where, upon the voluntary winding-up of a company under the *Companies' Act* of British Columbia (R.S.B.C. 1911, c. 39), a creditor, making his claim as such, valued his securities at a certain sum and accepted for that sum certain book debts of the company, the price thereof being deducted from the creditor's claim. This transaction was regarded as a purchase of the book debts and as being "in substance a contract between the assignee and the plaintiff." There was no provision in the *Companies' Act* of British Columbia for valuing securities. The composition with the principal debtor was therefore unaffected by statute and it was there held that the portion of the company's debt represented by the price of the book debts was satisfied and that the sureties thereon were released.

Under section 46 of the *Bankruptcy Act*, however, the debt is, for the purpose of the Act, restricted to the unsecured portion of the creditor's claim not by the voluntary deed or agreement of the creditor, but by operation of law. *In re Jacobs* (2); *In re London Chartered Bank of Australasia* (3); *Stacey* v. *Hill* (4); and, in the words of Bramwell L.J. in *Rainbow* v. *Juggins* (5).

> Where a man enters into a contract of suretyship, he, it is true, bargains that he shall not be prejudiced by any improper dealing with securities to the benefit of which he as surety is entitled; but he makes that bargain with reference to the law of the land, and if the law of the land says that under such and such circumstances certain things must take place in order to enable the creditor to do the best he can for his own protection, then the contract of suretyship must be taken to be made subject to the liability of those things taking place.

(1) [1918] 1 W.W.R. 395.
(2) 10 Ch. App. 211, at pp. 213-214.
(3) [1893] 3 Ch. 540, at p. 546.
(4) [1901] 1 K.B. 660.
(5) 5 Q.B.D. 422, at p. 423.

1926

KUPROSKI v. ROYAL BANK OF CANADA.

Rinfret J.

For that reason, the principle of the decision in *Canadian Bank of Commerce* v. *Martin* (1), should not be extended to the case where, as here, a company having gone into liquidation and made an authorized assignment under the *Bankruptcy Act*, a creditor, in putting in his claim, values his securities and the valuation is accepted, by operation of the Act.

With great respect, we cannot, in such a case, accept the view of the law laid down in *Bank of Hamilton* v. *Atkins et al.* (2), that the creditor has thereafter no claim *pro tanto* against the sureties who had guaranteed the debt. The *Bankruptcy Act*, as it stands, does not deal with the obligations of the guarantors. On the contrary, it may well be said that the possibility of a loss through the bankruptcy of the debtor and the operation of the *Bankruptcy Act* is precisely one of the contingencies against which the agreement of guarantee was meant to provide.

It is therefore to the agreement itself that we must turn to find out whether, in the event, the sureties have been relieved as they claim. It clearly appears by the terms of the document that not only is it not so, but that, quite independently of the *Bankruptcy Act*, the bank would have had ample authority to act as it did. The bank could refuse credit, grant extensions, take and give up securities, accept compositions, grant releases and discharges, and otherwise deal with the customer and with other parties and securities as the bank may see fit, and may apply all moneys received from the customer or others, or from any securities upon such part of the customer's indebtedness as it may think best, without prejudice to or in any way limiting or lessening the liability of the (sureties) under this guarantee.

And this guarantee shall not be considered as wholly or partially satisfied by the payment or liquidation at any time or times of any sum or sums of money for the time being due to the bank, and all dividends, compositions and payments received by the bank from the customer or any other person or estate shall be applied as payments in gross without any right on the part of the undersigned to claim the benefit of any such dividends, compositions or payments or any securities held by the bank until payment to the bank of the amount hereby guaranteed, and this guarantee shall apply to and secure any ultimate balance due to the bank, and the bank shall not be bound to exhaust its recourse against the customer or other parties or the securities it may hold before being entitled to payment from the undersigned of the amount hereby guaranteed.

Another clause says that the guarantors "specially waive and renounce any benefits of discussion and division."

(1) [1918] 1 W.W.R. 395. (2) [1924] 1 W.W.R. 92.

In the premises, we cannot see how the appellants can escape their liability and we think the judgment maintaining the action of the bank ought to be confirmed.

IDINGTON J.—This is an appeal from the Appellate Division of the Supreme Court of Alberta (1) dismissing an appeal from the judgment of the learned trial judge hereinafter referred to.

The four appellants being directors of a joint stock company doing business with the respondent, all, together with the three other parties referred to above, as defendants, gave a guarantee to the said respondent assuring it the payment of all the indebtedness due, or to become due, by said company, but limited to $4,000. Collateral securities had been given the respondent from time to time for said indebtedness, or parts thereof.

The said company having become bankrupt, prior to May, 1922, and passed under the operation of the Bankruptcy Act, the Canadian Credit Men's Trust Association, Limited, became the trustees of its estate under said Act.

The respondent proved its claim, as one of the creditors, against said company, and, in accordance with the requirements of said Act, valued the collateral securities it held in accordance with the provisions of said Act at $2,290.

Beyond that nothing more was done by respondent, in that connection, than comply with the requirements of section 45 in that regard.

The respondent having sued the appellants and others on their said guarantee, the said appellants set up a curious contention: that under section 46, subsection (6) of said Act, which reads as follows:—

> (6) Notwithstanding subsections four and five of this section the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the court may allow, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued.

(1) 21 Alta. L.R. 553; [1925] 3 W.W.R. 417.

1926

KUPROSKI v. ROYAL BANK OF CANADA.

Idington J.

the indebtedness due by said company under and by virtue of said guarantee to the respondent, could not be recovered from them as guarantors, save and except for the excess of the same beyond the value of the said collateral securities, declared in and by the proof of respondent, in making its claim filed with the trustee.

The learned trial judge, Mr. Justice Ives, dealt in his judgment with that pretension, as follows:—

> Under s. 46 the valuation made by the creditor when the claim is filed is not final. There may be a revaluation before or after the security is realized.
>
> Also the section provides that if certain formalities, which are conditions precedent are complied with by the creditor and the trustee the former may become the owner of his security at a valuation which thereupon is applied as payment of the debt to that extent. But this surely is not the effect of a bare compliance with that requirement of the Act which calls upon the creditor to file and prove his claim in the first instance. And that is all that this plaintiff did.

I accept his findings of fact for I cannot see them controverted and no proof of compliance with said conditions precedent has been pointed out.

I, therefore, cannot find any error of law in his judgment for recovery of the full indebtedness covered, as originally intended, by the guarantee sued upon, and would therefore dismiss this appeal with costs.

Of course the appellants or others of the guarantors paying the entire debt will be entitled to be subrogated to the respondent in respect of all said collateral securities or the proceeds thereof.

I pass no opinion upon the strict meaning of the phrase at the end of the said subsection (6), which I have quoted, for I see no necessity for doing so in this case.

Appeal dismissed with costs.

Solicitor for the appellants: *M. J. O'Brien.*

Solicitor for the respondent: *H. A. White.*

JOSEPH GOUIN.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1926

*May 31.
*June 14.

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

Criminal law—Evidence—Accomplice—Corroboration—Warning to jury—Duty of judge—Appeal—Jurisdiction—Dissenting opinion—Sections 1002, 1013 (5) and 1024 Cr.C.

An entry in the formal judgment of an appellate court, signed by its president, that two judges dissented from the judgment for the reasons in law stated in their respective notes, is sufficient to found jurisdiction for appeal to the Supreme Court of Canada upon these questions of law under sections 1013 (5) and 1024 Cr.C. Idington J. *dubitante.*

When the evidence against a prisoner is the uncorroborated evidence of an accomplice, it is wrong for the judge to tell the jury that, if they are quite certain that the accomplice is telling the truth, they have not only the right to convict the prisoner but that it is their duty to do so. *Rex* v. *Beebe* (41 T.L.R. 635; 19 Cr. App. Cas. 22) foll. Idington J. dissenting.

Per Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.—In such a case, the judge should follow the rule laid down in *Baskerville's Case* (12 Cr. App. Cas. 81): the judge should warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice and, in his discretion, may advise them not to convict upon such evidence; but he should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence.

APPEAL from the 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, which had found the appellant guilty of manslaughter upon the verdict of a jury.

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

Lucien Gendron for the appellant.

Ernest Bertrand K.C. for the respondent.

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

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

1926

GOUIN v. THE KING.

RINFRET J.—The appellant has, by the verdict of a jury, been found guilty of manslaughter upon an indictment for murder; i.e. for having, unlawfully and with intent to procure abortion, done on the person of a girl acts which have caused her death, and which he knew to be likely to have such result.

Against his conviction he appealed, on grounds which involved questions of law alone, to the Court of King's Bench of the province of Quebec, where his appeal was dismissed and the conviction entered against him was confirmed in all respects.

The law is that

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. (Criminal Code, s. 1013, subs. 5).

In *Davis* v. *The King* (1), it was held that an appeal lies to this court, under s. 1024 of the Criminal Code read with s. 1013, only where a dissenting opinion has been expressed upon a question which the court of appeal deems a question of law and pursuant to its direction.

This direction must be evidenced by the order of the court and should be plainly expressed. The formal judgment here contains the entry that

Mr. Justice Allard and Mr. Justice Létourneau entered a dissent from the present judgment for the reasons in law stated in their respective notes.

This entry, which is signed by the president of the court, is, in our opinion, consistent only with the view that the court considered it in the interests of justice that separate judgments should be pronounced by the dissenting members of the court, and therefore sufficient to found jurisdiction for appeal to the Supreme Court of Canada upon the questions of law which are in difference between the learned judges of the court of appeal.

By force of s. 1024 of the Criminal Code as enacted by s. 27 of c. 38 of 15 and 16 Geo. V, the right of appeal is limited to

any question of law on which there has been dissent in the court of appeal.

(1) [1924] S.C.R. 522, at p. 525.

In this case, the points of difference were four in number; but, in the view we take, it will only be necessary to consider the first of them, as to which both dissenting judges have expressed their disagreement from the majority of the court. It has reference to a certain passage of the learned trial judge's charge to the jury.

The learned judge, after having explained the law concerning parties to offences (the principals, the accomplices, the actual perpetrators of the crime and the accessories before or after the fact) discussed the weight which ought to be given to the evidence of an accomplice and the necessity for its corroboration. He described what amounts to corroboration in law; and then he advised the jury as follows:

La Cour d'Appel a décidé que le juge ne doit pas demander aux jurés de mettre de coté le témoignage d'un complice, mais il doit leur indiquer le danger qu'il peut y avoir à condamner une personne sur le seul témoignage d'un complice. Cependant, même si ce témoignage n'est pas appuyé de quelque corroboration, non-seulement vous avez le droit de le faire, mais c'est votre devoir de le faire, si vous croyez que le complice qui rend témoignage dit la vérité.

The learned judge was there advising the jury on a question of law and we must therefor, for the moment, quite independently of the facts of this case, consider whether in law his direction on that point was adequate and proper.

An accomplice is a competent witness. *Rex* v. *Baskerville* (1).

There are cases in which the evidence of one witness must be corroborated (Cr. C. s. 1002). Murder arising out of abortion is not one of them. But, in the *King* v. *Baskerville* (1), the Court of Criminal Appeal in England undertook to state "the law to be applied in future cases" and added:

We trust that it will be unnecessary again to refer to the earlier decisions of this court.

Lord Reading C.J., when delivering the judgment said (p. 663):—

It has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. *Reg.* v. *Stubbs* (2); *In re Meunier* (3). This rule of practice has become virtually equivalent to a rule of

(1) [1916] 2 K.B. 658, at p. 669. (2) 1 Dears. 555.
(3) [1894] 2 Q.B. 415.

1926

GOUIN
v.
THE KING.

Rinfret J.

law, and since the *Court of Criminal Appeal Act* came into operation this court has held that, in the absence of such a warning by the judge, the conviction must be quashed.

The judgment in the *Baskerville Case* (1) as laying down "the law that should be followed by this court" was expressly adopted by the Court of King's Bench (appeal side) of the province of Quebec in *The King* v. *Boycal and Ballan* (2).

Since then, the Court of Criminal Appeal has decided *The King* v. *Beebe* (3), which was a case of abortion. This decision was delivered only on the 6th July 1925 and therefore after the learned trial judge in the present case was called upon to give his direction to the jury, so that, in justice to him, it should be said that he lacked the advantage of having before him what may be called an authoritative interpretation of the Baskerville judgment.

In the *Beebe Case* (3), Lord Hewart C.J. refers to *King* v. *Baskerville* (1) and asks: "What does that judgment say?" His answer is:

> A clear distinction is drawn, although it is drawn in very few words and without elaboration or explanation, between three things: one, is to tell the jury that it is within their legal province to convict upon such unconfirmed evidence; the second is, and this is a rule of universal application in such cases, not a rule to be neglected in some cases and observed in others, but a rule of universal application, it is a duty to warn the jury of the danger of convicting a person on the uncorroborated testimony of an accomplice or accomplices; the third thing is, that the learned judge in the exercise of his discretion may advise them not to convict upon such evidence. One reads that passage side by side with the passages in the cases referred to, where it appears that so far as Baron Park was concerned he always advised a jury in such circumstances not to find a person guilty. But however that may be, there is a distinction drawn between the three different things the jury are to be told; that it is within their legal province to convict; they are to be warned in all such cases that it is dangerous to convict; and they may be advised not to convict.
>
> It is quite clear when one looks at that enumeration of the various courses, that nowhere is to be found directly or indirectly any reference to a case in which it may be the duty of the learned judge to advise the jury in such a case that they ought to convict.

The decision in the *Baskerville Case* (1) cannot be put in clearer and more powerful language, and it would be idle to add anything to it.

(1) [1916] 2 K.B. 658.

(2) [1920] Q.R. 31 K.B. 391, at p. 396.

(3) 19 Cr. App. Cas. 22; 41 T.L.R. 635.

Now let us see how far the direction here complained of compares with the warning in the *Beebe Case* (1).

Here, the learned judge said:

Cependant, même si ce témoignage (that of an accomplice) n'est pas appuyé de quelque corroboration, non-seulement vous avez le droit de le faire (i.e. to convict), mais c'est votre devoir de le faire, si vous croyez que le complice qui rend témoignage dit la vérité.

In the *Beebe Case* (1), the judge presiding the Assizes had said:

If you are quite certain that that girl (an accomplice) is telling the truth and nothing but the truth so that you are satisfied in your heart and conscience, although it is uncorroborated, you ought to act upon it. If you are not satisfied up to the very hilt then do not do it.

As will be seen, in both passages the language is almost identical; but, if anything, the direction in the *Beebe Case* (1) was less open to objection. Yet, it elicited the following criticism from the Lord Chief Justice of England:

Those words are not only not a warning of the danger of so acting, and not only are they not a refraining from advising the jury so to act, but they are quite clearly an affirmative and express direction to the jury that in that event they ought so to act. In the opinion of this court, that direction is not such a direction as should, according to the law laid down in *Baskerville Case* (2), be given.

And the conviction was quashed.

It is true that in the *Beebe Case* (1) there was no corroboration of the evidence of the accomplice. But the direction of the learned trial judge in this case, at the point complained of, proceeds on the same assumption ("même si ce témoignage n'est pas appuyé de quelque corroboration"). It may very well have led the jury to understand that he was in effect advising them that, under the particular circumstances of this case, it was not necessary for them to look for corroboration, but if they were satisfied that the accomplice told the truth, not only was it within their province to convict the accused on the sole evidence of such accomplice, but it was their duty to do so. Now, in such a case, while a jury may convict, the rule is not that it is their duty to convict.

In our opinion, this is conclusive of the appeal. When once a case of misdirection is made out, the burden is upon the Crown to show that, as a result, there has been no miscarriage of justice, (s. 1014 Cr. C). Here, the Crown has

(1) 41 T.L.R. 635; 19 Cr. App. Cas. 22.

(2) [1916] 2 K.B. 658.

1926

GOUIN
v.
THE KING.

Rinfret J.

failed to convince us that, but for the direction above referred to, the verdict would necessarily have been the same.

No doubt it is the settled rule in England that the appeal may be dismissed, although the point raised should be decided in favour of the appellant, if the court considers that no substantial wrong has occurred. The rule is embodied in s. 1014 subs. 2 of our Criminal Code; and only a short time ago this court made an application of it in *Baker* v. *The King* (1).

But, as was said by Sir Charles Fitzpatrick C.J. in *Allen* v. *The King* (2):

> I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitae*.

In the *Allen's Case* (2), all the judges below had found that there was ample evidence that the prisoner killed Captain Elliston and, as would appear from the report, all the judges of this court concurred in that opinion. Nevertheless, because some evidence had been improperly admitted or something not according to law had been done which might have operated prejudicially to the accused upon a material issue, although it had not been and could not be shown that it did, in fact, so operate, and although the evidence properly admitted warranted the conviction, a new trial was ordered.

In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the improper direction and therefore the conviction cannot stand.

Since the case must go before another jury, we purposely refrain from discussing the evidence tendered in corroboration of the testimony of the accomplice; and we should not in the slightest be understood to mean that there is not in the record ample corroboration to justify a conviction under proper direction. We think however, the jury may have been led to disregard this issue and to think that they might well reach their verdict without considering whether or not

(1) [1926] S.C.R. 92, at p. 100. (2) 44 Can. S.C.R. 331, at p. 339.

such corroboration was sufficient to warrant a conviction. Were this court now to decide that it was, it would transfer to itself the determination of a question which the accused has the right to have tried by a jury, *Makin* v. *Attorney-General for New South Wales* (1).

We are therefore of opinion that the appeal must be allowed, the conviction quashed and a new trial directed.

IDINGTON J. (dissenting).—Before receiving a copy of my brother Rinfret's opinion herein, I had read the entire appeal book in this case, as well as the factums, and considered same, and had arrived at the conclusion that this appeal should be dismissed. I may say that the *Beebe Case* (2), where there was no corroborating evidence, yet so much relied upon by counsel for appellant, does not seem to me to have much resemblance to this case.

Indeed the expression of the learned trial judge herein complained of, seemed to me as if he had simply, in a very long charge, made a slip in failing to add a word or two such as under the circumstances set forth in other evidence adduced in the case; and not likely to have influenced the jury unduly.

And I may say as to the decision in the Court of Criminal Appeal in England, constituted under the Act of 1907, we have not the same powers as that, and hence must be on our guard, in that respect, in the disposition we make of cases presented to us within our restricted jurisdiction over criminal cases.

As there is to be a new trial I must content myself with saying that for the reasons assigned by Mr. Justice Greenshields, concurred in by Mr. Justice Dorion, with which in the main I agree, I am of the opinion that this appeal should be dismissed.

Appeal allowed.

(1) [1894] A.C. 57, at p. 69.

(2) 41 T.L.R. 635; 19 Cr. App. Cas. 22.

1926

*May 25, 26.
*June 14.

A. R. BOSTWICK (DEFENDANT).. .. .. ..APPELLANT;

AND

PIERRE BEAUDOIN (PLAINTIFF) .. ..
AND
J. O. FERNET (MIS-EN-CAUSE).. .. ..
} RESPONDENTS.

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

Sale—Right of redemption—Notice to the buyer—Intention to redeem—Tender—Arts. 1546, 1548, 1549, 1550 C.C.

In order to exercise a stipulated right of redemption, it is not sufficient for the seller to give notice to the buyer within the stipulated term of his intention to exercise that right, but he must also offer at the same time the price of the thing sold.

Johnson v. *Laflamme* (54 Can. S.C.R. 495) explained.

Judgment of the Court of King's Bench (Q.R. 40 K.B. 113) aff.

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 Beaudoin's action.

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

J. C. Lamothe K.C. for the appellant.

G. Allard for the respondent Beaudoin.

C. Tessier for the respondent Fernet.

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

MIGNAULT J.—Il s'agit d'un jugement de la cour du Banc du Roi, confirmant le dispositif du jugement de la cour supérieure en tant qu'il maintenait l'action pétitoire de l'intimé Beaudoin contre l'appelant Bostwick, mais modifiant ce jugement sur l'appel de l'intimé Beaudoin, afin de le rendre pleinement exécutoire. Fernet qui a été mis en cause en cour supérieure à la requête de Bostwick, et qui a été appelé à défendre l'authenticité de l'acte de vente avec faculté de

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

(1) Q.R. 40 K.B. 113.

réméré que Bostwick lui avait consenti, est également intimé sur le présent appel.

Les faits qui ont donné lieu au procès peuvent se relater brièvement.

Le 15 janvier, 1921, par acte devant Aubin, notaire, Bostwick a vendu à Fernet, avec la garantie de droit, une terre située partie en la paroisse de Berthier et partie en la paroisse de Lanoraie avec toutes constructions y érigées pour le prix de $2,000, et à charge de payer à l'acquit du vendeur les sommes empruntées par ce dernier et dont le paiement était garanti par hypothèque sur la propriété vendue. Le vendeur s'est réservé jusqu'au 15 janvier, 1924, le droit de racheter la terre et dépendances en remboursant à l'acheteur la somme de $2,000, avec intérêt de 7% payable annuellement au 1er juillet, et toutes sommes que l'acheteur aurait pu payer sur les emprunts sus mentionnés, avec intérêt à 6%.

L'acte ajoutait qu'à défaut par le vendeur de rembourser à l'acheteur la somme de $2,000 dans le délai susdit, ou d'en payer l'intérêt aux époques fixées, comme à défaut par le vendeur de payer annuellement et régulièrement les taxes et autres impositions foncières auxquelles serait assujettie la dite terre, ou encore à défaut par le vendeur de maintenir les constructions et travaux érigés sur la terre, il serait forclos, dès tel défaut, d'exercer le droit de rachat, et l'acheteur ou représentants demeureraient propriétaires incommutables de la terre et dépendances.

Bostwick, du consentement de Fernet, est resté en possession de cette terre et la possédait encore lors de l'institution de cette action. Avant l'expiration du délai de réméré, il a payé à Fernet, quelquefois en retard, certains versements d'intérêts sur les $2,000. On ne se plaint pas qu'il n'ait pas payé les taxes.

Bostwick espérait toujours pouvoir racheter la propriété qu'il avait vendue à Fernet, mais il n'avait pas les fonds nécessaires. Il a eu, pendant le délai pour exercer le réméré, diverses conversations avec Fernet qui apparemment ne demandait pas mieux que de rentrer dans ses fonds. Pour effectuer le rachat, Bostwick comptait emprunter le montant requis de sa sœur qui demeure à Ottawa, et le jour même de l'expiration du délai du réméré, 15 janvier, 1924, il écrivait à Fernet que sa sœur avait été obligée par suite

1926

BOSTWICK v. BEAUDOIN.

Mignault J.

de maladie de retarder son voyage à Lanoraie pour quelques jours, et qu'il espérait que le délai ne serait pas long. Le terme pour le rachat étant expiré, Fernet vendit la terre à Beaudoin le 18 mars, 1924, sous la garantie de ses faits personnels seulement, pour la même somme de $2,000, et à la charge des hypothèques. C'est alors que Bostwick, qui prétend avoir vainement demandé à Beaudoin de ne pas acheter la propriété, mais de la lui laisser racheter de Fernet, adressa un protêt notarié, le 10 avril, 1924, à Beaudoin, lui offrant $2,108.93 pour capital et intérêts, prétendant par là exercer le réméré, et il le somma de signer un acte de rétrocession de la propriété, ce que Beaudoin refusa de faire. Bostwick n'ayant pas voulu livrer à Beaudoin la possession de la terre, celui-ci intenta contre lui l'action pétitoire qui a été maintenue par le jugement dont est appel.

La défense de l'appelant Bostwick consiste principalement en une attaque contre l'acte passé devant le notaire Aubin par lequel il avait vendu la terre à Fernet avec réserve du droit de réméré. Le notaire, dit-il, ne lui a pas lu un acte de vente, mais un contrat de prêt, et si l'acte comportait une vente, il l'a signé par erreur. Il aurait informé Fernet, dans l'automme de 1923, qu'il avait l'intention de rembourser le prêt. Le demandeur, en se portant acquéreur de la terre, ajoute-t-il, a agi de mauvaise foi en achetant un droit litigieux, et le défendeur lui a offert, le 10 avril, 1924, la somme de $2,108.93 pour capital et intérêts qu'il consigne. Ses conclusions sont que ses offres soient déclarées bonnes et suffisantes et que le demandeur soit condamné à lui signer un acte de rétrocession de la terre, le jugement, au cas de refus du demandeur de signer cet acte, devant en tenir lieu. Il demande aussi l'annulation de la vente de Fernet à Beaudoin.

L'appelant Bostwick fit suivre cette défense d'une inscription en faux à l'encontre de l'acte de vente à réméré du 15 janvier, 1921, prétendant que la déclaration du notaire Aubin qu'il avait lu cet acte était fausse. La cause a été instruite tant sur le mérite de l'action et de la défense, que sur l'inscription en faux, les deux instances ayant été réunies. L'inscription en faux fut rejetée par la cour supérieure. Sans nous occuper des motifs de ce rejet, qui n'ont pas été acceptés par la cour du Banc du Roi, il suffit de dire que cette dernière cour renvoya l'inscription en faux pour

la raison que la preuve offerte par Bostwick par sa propre déposition n'était pas suffisante pour établir que le notaire ne lui avait pas lu l'acte. Le notaire Aubin est mort avant l'enquête, et il n'y a au dossier que l'affirmation sous serment de Bostwick. Le juge Greenshields a fait une analyse complète du témoignage de ce dernier, et, avec le savant juge, nous croyons que les dires de Bostwick ne suffisent pas pour démontrer que l'acte ne lui a pas été lu. Il ne sera donc pas nécessaire de nous occuper davantage de l'inscription en faux qui a été renvoyée à bon droit. L'action pétitoire de Beaudoin a été maintenue par la cour supérieure, et la cour du Banc du Roi rejeta l'appel de Bostwick contre ce jugement.

A l'audition, l'avocat de l'appelant Bostwick a soutenu qu'il y avait dans sa défense et dans le protêt contenant ses offres réelles tout ce qu'il faut pour l'exercice du retrait de droit litigieux contre le demandeur. Nous sommes d'opinion que ce n'est pas ce retrait que l'appelant a exercé dans l'espèce, et nous n'avons pas à nous prononcer sur sa prétention que le droit acquis par Beaudoin était litigieux. Le plus qu'on puisse dire, en interprétant avec quelque bonne volonté la défense de l'appelant, c'est que ce dernier prétend qu'ayant, dans le délai voulu, exprimé l'intention d'exercer le réméré, malgré que ses offres réelles n'aient été faites qu'après l'expiration du terme et elles ont été faites à Beaudoin et non à Fernet—l'appelant peut maintenant repousser l'action de l'intimé Beaudoin.

Quant à l'exercice du droit de réméré, la prétention de l'appelant est qu'il suffit que le vendeur déclare à l'acheteur, dans le délai du réméré, son intention d'exercer ce réméré; qu'il n'est pas nécessaire d'accompagner cette déclaration de l'offre du prix de vente, mais qu'ayant exprimé cette intention à l'acheteur, il lui serait loisible, pendant trente ans, qui est le terme de la prescription de droit commun, de racheter la propriété vendue. Il appuie cette prétention sur la décision de cette cour dans *Johnson* v. *Laflamme* (1).

Dans cette cause le vendeur avait offert à l'acheteur, dans le délai convenu, la somme pour laquelle la propriété avait été vendue. Son action basé sur ces offres avait été intentée après l'expiration du terme, et cette cour décida qu'il n'était

(1) 54 Can. S.C.R. 495.

1926

BOSTWICK v. BEAUDOIN.

Mignault J.

pas nécessaire de prendre l'action dans le délai stipulé pour le réméré, et que les offres faites avant son expiration étaient valables. C'est toute la portée de ce jugement comme précédent judiciaire, et on ne peut s'en autoriser, malgré le sommaire rédigé par l'arrêtiste et qui va trop loin, pour prétendre qu'il suffit d'intimer à l'acheteur dans le délai l'intention d'exercer le réméré, sans accompagner cette déclaration de l'offre du prix. La prétention de l'appelant conduirait à l'étrange résultat qu'un délai qui est de rigueur (art. 1549 C.C.), et qui ne peut être stipulé pour un terme excédant dix ans (art. 1548 C.C.) durerait virtuellement trente ans après son expiration, et cela sans que le prix de vente ait jamais été offert à l'acheteur. Les autoritée françaises citées par l'appelant ne peuvent l'emporter sur le texte bien précis des articles du code. Voyez aussi l'article 1550 C.C. tel que modifié en 1919 par 9 Geo. V., c. 74.

D'ailleurs l'acte de vente signé par l'appelant le condamne. Le remboursement du prix de vente, aux termes de cet acte, devait être effectué dans le délai stipulé, et faute de ce remboursement, l'appelant était forclos, dès ce défaut, d'exercer le droit de rachat, et l'acheteur demeurait propriétaire incommutable de la terre vendue. Même si le code ne condamnait pas la prétention de l'appelant, cette prétention serait insoutenable en présence de la convention expresse des parties.

Nous sommes également d'avis que l'appelant est mal fondé à prétendre qu'il a signé cet acte par erreur. L'acte de vente lui a été lu par le notaire, la déclaration de ce dernier en fait pleine foi et ne saurait être contredite vu le rejet de l'inscription en faux, et l'appelant ne peut pas soutenir qu'il ne connaissait pas la nature de l'acte très clairement rédigé qu'il a signé "lecture faite".

Pour ces raisons, nous sommes d'avis que l'appel doit être rejeté avec dépens.

IDINGTON J.—At the argument of this appeal the only hope I had for appellant was that it might be found possible to impute to Fernet the intention of extending, as he had habitually done in regard to the interest, the time for payment of the principal; but I can find no solid basis to rest such a waiver upon. Hence, though seemingly a case of

hardship, I must agree with my brother Mignault for the reasons he assigns that this appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lamothe, Gadbois & Charbonneau.*

Solicitor for the respondent Beaudoin: *G. Allard.*

Solicitor for the respondent Fernet: *Camille Tessier.*

See Brown v Prairie Lumber Co 60 MR 253

1926
*Feb. 18.
*May 31.

THE W. T. RAWLEIGH CO. (PLAINTIFF) ..... APPELLANT;

AND

ALEX. DUMOULIN AND ANOTHER (DEFENDANTS) ..... RESPONDENTS.

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

Sale of goods—Agreement—Warranty—Third party guaranteeing debt of buyer—Signature given by error—Nullity—Fins de non-recevoir—Arts. 992, 993 C.C.

The appellant company, before selling its manufactured goods to pedlars, required a contract of guarantee to be signed by two persons who bound themselves to pay all moneys due or to become due by the pedlar. The respondents signed such a contract for the benefit of one C, who fraudulently represented to them that it was merely a letter of reference. Later on C. went into bankruptcy and the appellant sued the respondents for the amount then owing by C. At the trial the respondents testified that C. induced them to sign the documents on these representations and also that they had signed it in error as to the nature of the contract. It was proved that they signed the contract without reading it.

Held that, error as to the nature of a contract being a cause of nullity (art. 992 C.C.), although the fraud of C. was not a valid defence as to the appellant company which had not participated in it (art. 993 C.C.), the contract was nevertheless void by reason of this error, and in the circumstances of the case no *fin de non-recevoir* against the respondents resulted from the fact that they had signed the contract without reading it.

Fins de non-recevoir discussed.

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

1926

RAWLEIGH v. DUMOULIN.

Imperial Life Assurance Co. v. *Laliberté* (Q.R. 29 S.C. 183), *Gosselin* v. *The Independent Order of Foresters* (11 R. de J. 259); *Similingis* v. *Provincial Fire Insurance Co. of Canada* (23 R.L.N.S. 323), and *Tranquil* v. *Gagnon* (26 R.L.N.S. 56) overruled.

Judgment of the Court of King's Bench (Q.R. 39 K.B. 241) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court at Montreal and dismissing the appellant's action.

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

Lafleur K.C. and *Champoux K.C.* for the appellant.

Geoffrion K.C. for the respondents.

The judgment of the court was delivered by

MIGNAULT J.—En tant qu'il est nécessaire de les relater, les faits de cette cause sont les suivants:

Au mois de février, 1922, les intimés, Alexandre Dumoulin et J. E. Desrochers, à la demande d'un nommé S. Charland, signèrent un contrat de cautionnement par lequel ils garantissaient conjointement et solidairement, en faveur de la compagnie appelante,

unconditionally the payment in full of the balance due or owing said seller (la compagnie appelante) on account, as shown by its books at the date of the acceptance of this contract of guarantee by the seller, and the full and complete payment of all moneys due or owing, or that may become due or owing said seller, and all indebtedness incurred by the buyer (le nommé Charland) under the terms of the above and foregoing instrument by the buyer named as such therein.

Ce cautionnement faisait partie d'un contrat de vente intitulé "renewal contract," par lequel l'appelante consentait à vendre à Charland au prix du gros certains produits fabriqués par elle et que Charland revendait à son compte. Ces contrats se renouvelaient d'année en année et à chaque renouvellement l'acheteur était obligé de fournir un semblable cautionnement. Il fallait également un certificat par des hommes d'affaires que l'acheteur, à leur connaissance, était sobre et digne de confiance. Ce n'était pas le premier contrat de ce genre que Charland faisait avec l'appelante, et à la date de l'acceptation par cette

(1) Q.R. 39 K.B. 241.

dernière du contrat en question, le 9 février, 1922, il lui devait, d'après l'état au dossier, $3,169.23. Depuis cette date jusqu'à la fermeture du compte, en juillet, 1922, les crédits dépassèrent le montant des achats faits par Charland, de sorte que son débit final s'est trouvé réduit à $2,993.88, et c'est cette somme que l'appelante réclame des cautions de Charland, les intimés, en vertu de leur cautionnement.

Il faut ajouter qu'au verso de la feuille du contrat qui porte la signature des intimés, il y a, sous le titre de " Références," imprimé en lettres majuscules, une déclaration par un gérant de banque et par un charretier qu'ils connaissaient l'acheteur et qu'ils le recommandaient comme étant sobre et digne de confiance.

Peu de temps après qu'ils eussent signé le contrat de cautionnement, les intimés, prétendant n'avoir donné qu'une lettre testimoniale à Charland, et craignant qu'il n'en résultât pour eux quelque responsabilité pour les dettes de celui-ci, essayèrent d'en obtenir une décharge de l'appelante, mais cette dernière refusa d'y consentir.

Charland tomba bientôt en faillite, et les intimés furent poursuivis pour le débit restant à sa charge à la clôture du compte. Leur défense est: 1°. qu'ils ont signé le contrat par suite du dol de Charland qui leur a représenté que c'était une simple recommandation ou " lettre de référence." 2°. qu'ils l'ont signé par erreur quant à la nature de l'acte auquel ils apposèrent leurs signatures croyant que ce n'était qu'une " référence."

A ce sujet, Desrochers témoigne que Charland est venu le trouver afin de lui demander de signer pour lui (Charland) une " lettre de référence " adressée à l'appelante, afin qu'il pût renouveler son contrat avec celle-ci, lui disant que cela ne l'engageait à rien. Desrochers ajoute qu'il ne comprend et ne lit pas l'anglais, et qu'il n'a remarqué que le seul mot " Références " sur le contrat. Le témoignage de Dumoulin est à peu près au même effet. Il dit que Charland lui a représenté qu'il devait obtenir des " références " afin de renouveler son contrat, et qu'il lui a demandé de signer un écrit " comme quoi tu me connais pour un bon vendeur, un homme sobre." Dumoulin lui a répondu: " ton papier est en anglais, je ne le comprends pas." Il dit qu'alors Charland " me l'a traduit en références," et il

1926

RAWLEIGH v. DUMOULIN.

Mignault J.

a signé l'écrit. Il a produit un témoin, le nommé Martin, son employé, qui le corrobore. Plus tard, Dumoulin a eu des doutes quant à l'honorabilité de Charland, et il a fait écrire à l'appelante pour savoir s'il avait signé autre chose que des références.

Ajoutons que Charland ne fut pas interrogé par l'appelante en contre-preuve et nous n'avons que les témoignages non contredits des intimés et de Martin sur ce qui s'est passé lors de la signature du contrat.

Le moyen résultant du dol de Charland a été rejeté par les deux cours, et avec raison, car l'appelante n'a pas participé à ce dol. La cour supérieure (M. le juge Duclos) a aussi écarté la défense des intimés qu'ils avaient signé le contrat par erreur, et que partant ce contrat était nul. Ce dernier moyen fut cependant accueilli par la majorité de la cour d'appel (le juge-en-chef Lafontaine, et les juges Howard et Rivard), les juges Dorion et Hall étant dissidents. L'appelante, dont l'action a été renvoyée, nous demande d'infirmer le jugement de la cour du Banc du Roi et de rétablir celui de la cour supérieure.

Il ne s'agit donc maintenant que de cette question d'erreur, le dol de Charland étant écarté comme moyen de rescision du contrat.

Le premier juge a motivé le renvoi de la défense des intimés comme suit:

> The defendants cannot urge their own fault and negligence in avoidance of a contract *quoad* an innocent third party who has acted on the faith of the said contract.

Et le savant juge ajoute:

> It is urged that the defendants never consented to sign the bonds; but this is arguing in a vicious circle. They did sign the bonds under pretences which the slightest inquiry would have shewn them to be false.

Et il cite Lemerle, *Fins de non-recevoir,* p. 144, ainsi qu'un court passage de mon *Droit Civil Canadien,* tome 5, p. 218. Il me sera peut-être permis de dire que ce dernier passage, comme les signes typographiques l'indiquent, est réellement tiré de Mourlon, *Répétitions écrites sur le code civil,* t. 2, n° 1049*bis*. Il aurait fallu reproduire ce qui précède et suit l'extrait que l'honorable juge cite pour se rendre compte de toute la pensée de l'auteur.

L'espèce que nous avons à juger est la suivante. Par suite du dol de Charland, qui affirmait qu'il ne s'agissait que d'une "lettre de référence," les intimés ont signé un

contrat de cautionnement en faveur de l'appelante. Cette dernière n'a pas participé à ce dol qui partant ne peut lui être opposé comme moyen de rescision du contrat (art. 993 C.C.). Cependant les intimés ont prouvé par leur serment, Dumoulin étant corroboré par un de ses employés, qu'ils ont signé ce contrat par erreur quant à sa nature, croyant ne signer qu'une simple recommandation. Si dans ces circonstances l'erreur est prouvée, et la cour du Banc du Roi accepte la preuve qui en a été faite, peut-on écarter la défense des intimés en leur opposant une fin de non-recevoir résultant du fait admis par eux qu'ils ont signé ce contrat sans le lire? J'ajoute que le contrat en question est clairement rédigé, et que la bonne foi de l'appelante ne souffre aucun doute.

L'erreur quant à la nature même du contrat est une cause de nullité aux termes de l'article 992 C.C., car alors il n'y a pas eu de consentement, et l'erreur d'une seule des parties, ou l'erreur unilatérale, suffit (Aubry et Rau, 5e éd., tome 4, p. 496 et renvois).

Cela étant, la cause de l'erreur est indifférente. Le droit romain n'accordait pas la rescision dans le cas de l'erreur grossière, car on disait *nec stultis solere succurri, sed errantibus*. L'article 992 C.C. n'admet pas cette distinction; il envisage l'erreur subjectivement, et dès qu'elle existe, et sans égard à sa cause, il annule le contrat (Voir dans le même sens Laurent, tome 15, n° 509, et lire dans Mourlon, à l'endroit cité plus haut, ce qui précède et suit le passage reproduit dans le jugement de la cour supérieure).

Ce qu'on enseigne toutefois, c'est que lorsqu'une partie fait rescinder un contrat par suite d'une erreur qu'elle aurait pu éviter si elle avait été plus prudente, elle devra indemniser l'autre partie, qui était de bonne foi, du préjudice que celle-ci en éprouve. (Aubry et Rau, 5e éd.; tome 4, p. 497 et renvois). Dans le passage de Mourlon que reproduit le juge de première instance, cet auteur, comme le contexte le démontre, suppose que l'avantage que le demandeur retirerait de la rescision serait égal à l'indemnité qu'il aurait à payer. Je puis ajouter d'ailleurs que je n'ai trouvé dans la jurisprudence française aucun cas où on ait renvoyé l'action en rescision pour erreur à cause de l'imprudence ou de la négligence du demandeur.

1926

RAWLEIGH v. DUMOULIN.

Mignault J.

Ce que le jugement de la cour supérieure oppose aux défendeurs, c'est une fin de non-recevoir tirée du fait qu'ils ont signé le contrat sans le lire.

The defendants (dit le savant juge) cannot urge their own fault and negligence in avoidance of a contract *quoad* an innocent third party who has acted upon the said contract.

On trouve la même idée dans le jugement de l'honorable juge Dorion. Qu'il me soit permis de répondre, avec beaucoup de déférence, que l'appelante n'était réellement pas un tiers, mais une partie au contrat de cautionnement fait en sa faveur. Du reste, outre la citation de Lemerle, dont l'ouvrage publié en 1819 ne fait qu'énoncer un principe général, et le passage de Mourlon qui, je l'ai dit, s'explique par son contexte, je n'ai pu trouver, après des recherches minutieuses, aucune autorité qui admette une telle fin de non-recevoir à l'encontre d'une action ou défense basée sur l'erreur.

Il est indiscutable qu'il y a dans le droit civil des fins de non-recevoir (on appelle cela *estoppel* dans le droit anglais) qui s'opposent à l'admissibilité d'une action en justice ou d'une défense. Pothier (Obligations, n° 676), visant le cas des créances, définit les fins de non-recevoir, comme étant certaines causes qui empêchent le créancier d'être écouté en justice pour exiger sa créance.

Il signale la chose jugée, le serment décisoire (qui n'existe plus dans la province de Québec, 60 Vict., c. 50, s. 21), et la prescription. On peut dire en thèse générale qu'aucune fin de non-recevoir n'est accueillie en l'absence d'une règle de droit qui l'admette. Ainsi certaines actions en nullité de mariage ne pouvent plus être reçues après l'expiration d'un délai plus ou moins long qui fait présumer l'acquiescement au mariage (arts. 149, 151 C.C.). Après ce délai, une fin de non-recevoir fait écarter l'action. (Voy., dans la jurisprudence française, un arrêt intéressant de la cour de cassation du 4 juin 1845, Dalloz, 1845 1.307). La fin de non-recevoir dont il s'agit ici n'est pas reconnue, mais au contraire est implicitement exclue, par le code civil.

A titre de droit comparé, il serait intéressant de constater que sous l'empire du droit anglais il n'y aurait pas *estoppel* dans un cas comme celui qui nous occupe. Dans la cause de *Carlisle and Cumberland Banking Company* v. *Bragg* (1), la cour d'appel d'Angleterre a refusé d'admettre

(1) [1911] 1 K.B. 489.

l'estoppel dans une espèce où le défendeur avait signé sans le lire un contrat de garantie qu'on lui a représenté être un document se rapportant à une affaire d'assurance dans laquelle il avait des intérêts.

Je crois qu'on peut disposer de cette cause en disant que les intimés ayant signé, par erreur quant à la nature même du contrat, le contrat de cautionnement invoqué par l'appelante, celle-ci ne peut les faire condamner à payer la dette de Charland. Cette erreur pouvait se prouver par le témoignage des intimés. A l'époque où le code civil est entré en vigueur, la partie n'aurait pu offrir son serment pour prouver l'erreur, mais maintenant les parties sont admises à témoigner en leur faveur. Il peut sans doute y avoir danger qu'une personne peu scrupuleuse échappe à son obligation en prêtant un serment qu'il est souvent difficile de contredire. Mais c'est là une considération pour le législateur plutôt que pour le tribunal, et le juge du procès peut toujours apprécier la sincérité du témoignage rendu devant lui et l'écarter s'il lui paraît peu digne de foi. Du reste, si l'appelante souffre un préjudice par suite de la négligence des intimés, l'existence de ce préjudice ne serait pas une raison de maintenir une action basée uniquement sur un contrat frappé de nullité. L'appelante, je l'ai dit, n'est pas responsable du dol de Charland. Cependant ce dol a eu pour résultat l'erreur des intimés, et cette erreur suffit pour rendre le contrat non avenu. (Baudry-Lacantinerie et Barde, *Obligations,* tome 1er, n° 114). Il y a une décision en sens contraire de feu le juge C. A. Pelletier dans *Imperial Life Assurance Co.* v. *Laliberté* (1), mais je préfère l'opinion de Baudry-Lacantinerie et Barde à laquelle je viens de renvoyer. Cette opinion est d'ailleurs partagée par Planiol, 6e. éd., tome 2, n° 1064.

Il convient d'ajouter qu'il y a trois autres décisions des tribunaux de la province de Québec que je n'ai pu suivre, car elles me paraissent dépasser la portée de l'article 992 C.C. tel que je l'interprète: *Gosselin* v. *The Independent Order of Foresters,* cour de circuit, Charbonneau J. (2); *Similingis* v. *Provincial Fire Insurance Co. of Canada,* cour de revision (3); *Tranquil* v. *Gagnon,* cour de revision (4). Dans la première cause on a exprimé l'opinion

(1) Q.R. 29 S.C. 183.
(2) 11 R. de J. 259.
(3) 23 R.L.n.s. 323.
(4) 26 R.L.n.s. 56.

1926

RAWLEIGH v. DUMOULIN.

Mignault J.

que pour être une cause d'annulation d'un contrat, l'erreur doit être invincible, incontrôlable et involontaire. Dans la seconde, on a refusé de tenir compte d'une erreur qui, en la supposant prouvée, résultait de la négligence de la personne qui s'en plaignait. Enfin, dans la troisième, on a décidé que l'erreur doit être telle qu'une personne d'expérience aurait pu s'y tromper. Ces décisions ne sont appuyées sur aucune autorité dans la jurisprudence ou la doctrine, et, à mon avis, elles ajoutent réellement à la loi.

L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Charles Champoux.*

Solicitors for the respondent A. Dumoulin: *Lamarre & Bourdon.*

Solicitors for the respondent J. E. Desrochers: *Fontaine & Desjarlais.*

1926

*May 27.
*June 14.

AMEDEE LATREILLE (PLAINTIFF).....APPELLANT;

AND

GEDEON GOUIN (DEFENDANT).....RESPONDENT.

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

Exchange of properties—Simultaneous deeds of sale—Alleged misrepresentations by one owner—Action to set aside one deed—Resiliation of the whole agreement—Remedies—Art. 1598 C.C.

After an exchange of one property for another, one of the parties to the exchange cannot, upon the ground of false representations or fear of eviction, demand that the other party be compelled to take back his property and pay instead its alleged value in money.

The exchange may not thus be rescinded in part, but the whole exchange must be resiliated and the parties put back in the position in which they were before.

In either of these cases, the remedy is limited to the recovery of the property given in exchange. A condemnation for the payment of a value in money can only be obtained as a sanction, in case the property itself can no longer be returned.

---

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

Where a party is evicted from the thing he has received in exchange, he has the option of demanding damages (Art. 1598 C.C.).

Judgment of the Court of King's Bench (Q.R. 41 K.B. 375) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court and dismissing the appellant's action.

The appellant was the owner of a farm in the township of Sutton and was desirous of selling it for $12,500. He requested a real estate agent to find him a purchaser and was informed by the latter that the respondent might be interested in purchasing the farm if the appellant would be interested himself in acquiring ownership of a business and tenement block respondent had in the town of Thetford Mines and for which the latter wanted $20,000. The respondent's property consisted of a three-story building which was leased for stores and residential purposes. The respondent had also rented for a period of years an adjoining lot on which he erected a shed which was united to his building by stairs. The appellant went to Thetford Mines to examine the respondent's property and he finally agreed to purchase it for $18,000 provided the latter took his farm for $12,500. A writing was then drawn by the real estate agent containing the various conditions of the transaction and was signed by both appellant and respondent. On the 27th July, 1923, a notary prepared two separate deeds of sale, one for the town property from respondent to appellant at $18,000, and one for the farm property from appellant to respondent at $12,500. There was a mortgage of $4,900 on the farm property and respondent assumed it, leaving a balance of $7,600 to be paid by him to the appellant. Both deeds were signed at the same time and appellant acknowledged receipt from respondent of $7,600 and respondent acknowledged having been paid $7,600 on the purchase price of $18,000. One month later the appellant took the present action against the respondent in order to set aside the deed of sale by the respondent to him of the town property and also asked that the respondent be condemned to reimburse him the sum of $7,600 which was declared in the deed to have been paid

(1) Q.R. 41 K.B. 375.

1926

LATREILLE v. GOUIN.

in cash, on the ground that the respondent had falsely represented to him that the shed adjoining the main building was situated on the property sold. The respondent denied that any misrepresentations had been made by him; but added that, if the appellant had any complaint about the transaction which was really a contract of exchange, he ought to have asked that it be entirely set aside in order to place both parties in the same position as they were before the passing of the two deeds. The appellant's action was maintained by the trial judge; but on appeal this judgment was reversed.

Ls. St. Laurent K.C. for the appellant.

A. Perrault K.C. and *J. E. Perrault K.C.* for the respondent.

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

RINFRET J.—Pour assurer l'exécution des conventions, les tribunaux ont le pouvoir et le devoir de les interpréter et de déterminer leur véritable nature. La dénomination qui a été donnée à un contrat ne change rien à son caractère. Ce qu'il faut rechercher, avant tout, c'est l'intention des parties. (Baudry-Lacantinerie, 3e éd., vol. 12, n° 334; Planiol, 5e éd., vol. 2, n^{os} 973, 1182, 1200).

Ce sont là des principes que cette cour a eu l'occasion d'affirmer entre autres dans son arrêt *re Salvas* v. *Vassal* (1), où elle dut examiner la portée d'un acte de vente à réméré dans lequel la Cour du Banc de la Reine (2) n'avait voulu voir qu'un contrat de gage ou de nantissement et auquel, par défaut de tradition des biens, elle avait refusé de donner effet à l'encontre des tiers.

Sir Henry Strong, juge-en-chef, dit (p. 77):

It appears to me free from doubt that the parties intended just what they have said in the two notarial deeds and that these deeds were not intended to disguise any other or different contracts from those expressed in them. This being sufficient for the decision of the appeal, I need not say anything further.

Et le juge Girouard (p. 81):

Pour décider la question, même vis-à-vis des tiers, il s'agit de rechercher non pas les motifs, ou le but immédiat ou ultérieur, ou les

(1) 27 Can. S.C.R. 68. (2) Q.R. 5 Q.B. 349.

résultats possibles ou probables que les parties avaient en vue, mais la nature de la convention qu'elles avaient l'intention de faire, et qu'en réalité elles ont faite.

Or, dans cette cause de *Salvas* v. *Vassal* (1) la cour étant d'avis qu'il était prouvé et même admis que, dans le but de mieux assurer le remboursement des avances de l'appelant, les parties avaient réellement eu l'intention de consentir une vente avec faculté de réméré, donna effet à cette intention et, le délai de rachat étant expiré sans remboursement, déclara l'appelant propriétaire irrévocable de l'immeuble vendu, même vis-à-vis des tiers.

Ici, en recherchant, dans les actes consentis par eux, la véritable intention de Gouin et de Latreille, la cour d'appel n'a donc pas, suivant l'habile argumentation du savant procureur de l'appelant, refusé de suivre la doctrine énoncée par la Cour Suprême du Canada dans l'arrêt de *Salvas* v. *Vassal* (1). Nous croyons, au contraire, qu'elle en a fait une application juste et précise.

Non seulement toute la preuve, sans aucune contradiction, mais l'admission positive de l'appelant établissent que, en donnant à leur transaction la forme de deux actes de vente, les parties n'ont jamais eu en vue autre chose que l'échange de leurs propriétés. Ils ne voulaient pas qu'il y eût, de part et d'autre, le paiement d'un " prix en argent " (art. 1472 C.C.), et de fait il n'y en a pas eu; mais ils entendaient se donner respectivement une propriété pour une autre (art. 1596 C.C.). Et c'est là la distinction essentielle et caractéristique entre la vente et l'échange. (3 Pothier, ed. Bugnet, p. 9, art. 17 et p. 13, art. 30; 19 Baudry-Lacantinerie, De la vente et de l'échange, 3e éd., nos 127 et 128; 4 Aubry & Rau, Droit Civil, p. 336; Guillouard, De la vente et de l'échange, p. 100, n° 92). Et le fait qu'il existait une soulte ne modifie pas la situation (19 Baudry-Lacantinerie, 3e éd. n° 975; 2 Planiol, 6e édit. n° 1662).

Sans doute, chacun des deux actes mentionne un montant en argent; mais ce n'est là que l'énonciation des valeurs respectives des propriétés fixées par les parties pour servir de base à l'échange. Ni Gouin, ni Latreille n'avaient l'intention de donner ou de recevoir de l'argent (sauf la soulte). D'après ce qui est acquis au dossier, la convention n'aurait pas permis à l'un de poursuivre l'autre pour un prix en argent, pas plus qu'elle n'aurait autorisé l'exécution des contrats par la remise d'une somme d'argent. Chacun des

1926

LATREILLE v. GOUIN.

Rinfret J.

contractants ne pouvait satisfaire à son obligation que par la délivrance de sa propriété elle-même.

C'est donc, comme d'ailleurs l'a fait la majorité de la cour d'appel, et contrairement à la Cour Supérieure, du point de vue d'un échange qu'il faut envisager la transaction des parties en date du 27 juillet 1923; et c'est dans les règles du droit applicables à l'échange qu'il faut chercher la solution de cette cause.

Dans ces circonstances, Latreille, alléguant d'abord fausses représentations, et uniquement pour cette raison, a conclu à l'annulation de cette partie de la convention par laquelle il avait reçu la propriété de Gouin et a demandé que ce dernier fût contraint de reprendre sa propriété et de lui rembourser la somme de $7,000 (erreur pour $7,600) prétendue payée comptant lors de la signature du contrat. (On a vu qu'il n'en a pas été ainsi et que cette somme d'argent n'a pas été et ne devait pas être payée en vertu de la convention). En outre, il a déclaré se réserver tous recours en dommages.

Plus tard, par voie d'amendement mais sans modifier ses conclusions, Latreille a invoqué en plus que Gouin n'était pas propriétaire de la propriété qu'il lui avait livrée. (De fait, il semblerait être seulement l'emphytéote du terrain, bien que propriétaire des bâtiments).

Dès le début, Gouin a plaidé: Les deux actes que nous avons signés ne sont en réalité qu'un échange de propriété. Vous ne pouvez demander la résiliation d'une partie seulement de cet échange. Si vous voulez me contraindre à reprendre ma propriété, il faut, en même temps, que vous vous déclariez prêt à reprendre la vôtre. S'il doit y avoir rescision, il faut que ce soit de la convention toute entière.

En d'autres termes, un copermutant ne peut demander la résiliation de l'échange sans que les parties soient remises autant que possible dans la même position qu'elles étaient auparavant.

L'appelant prétend que, à raison de la forme des actes, il se trouvait, au moment de poursuivre, dans une situation embarrassante au sujet de l'interprétation qu'il devait attribuer à la transaction. Il lui faut bien admettre cependant que cette difficulté a cessé dès la production du plaidoyer. Là, le défendeur déclarait clairement (ce qui, d'ailleurs, était exact) qu'il considérait la convention comme un

échange. Il était dès lors facile pour l'appelant de prendre acte de cette déclaration et de se diriger en conséquence.

Mais l'appelant, dans sa réponse, part au contraire du point de vue que l'autre acte ne peut être rescindé; il n'offre pas de le résilier; et il a conservé cette attitude pendant tout le reste du procès.

Dans ces conditions, le rejet de l'action telle qu'intentée nous paraît inévitable.

L'appelant ne demande pas la résiliation de l'échange. Il demande que l'intimé soit tenu de reprendre sa propriété et de lui rembourser $7,000 qu'il allègue avoir payés. Or, il admet lui-même qu'il n'a rien payé. Si toutefois il avait droit à la restitution du prix en vertu de l'art. 1511 C.C., le prix, dans le cas actuel, ce n'est pas une somme d'argent (ou le montant de $7,000), mais c'est la propriété qu'il a donnée en échange. Or, il ne demande pas autre chose que $7,000; et il n'a aucun droit de se faire rembourser cette somme qu'il n'a jamais déboursée.

Gouin n'a pas consenti à acheter la ferme de Latreille, mais seulement à l'échanger contre sa propriété. Il ne peut être contraint maintenant à donner de l'argent à la place de sa propriété.

Nous ne pouvons pas, comme il est suggéré par deux des juges de la cour d'appel, lui accorder la somme demandée à titre de dommages-intérêts, car ce n'est pas à ce titre qu'il la réclame. En outre, il n'y a aucune preuve de dommages au dossier. Le défendeur n'a pas été appelé à faire face à une contestation de ce genre; et il ne serait pas juste, ni équitable, après coup, de transformer ce litige en une action en dommages. (*California Associated Raisin Co.* v. *Radovsky* (1). C'est d'ailleurs le demandeur lui-même qui s'est chargé, dans les conclusions de sa déclaration, d'affirmer au défendeur qu'il ne réclame pas de dommages, et qu'il se réserve tout recours à ce sujet, s'il y a lieu.

L'article 1598 C.C. donne à

> la partie qui est évincée de la chose qu'elle a reçu en échange * * * le choix de réclamer des dommages-intérêts ou répéter celle qu'elle a donnée.

Sans se demander si, au moment de l'institution de l'action, Latreille pouvait être envisagé comme " une partie qui est évincée ", il suffit de constater que cet article du code lui

(1) Q.R. 40 K.B. 97; [1926] S.C.R. 292.

1926

LATREILLE v. GOUIN.

Rinfret J.

laissait le choix entre: 1, une action pour faire résilier l'échange et " répéter la chose " qu'il avait donnée; ou 2, une action pour réclamer des dommages-intérêts.

Il a opté pour l'action en résiliation (bien qu'il l'ait fait imparfaitement), en indiquant de plus qu'il ne demandait pas alors des dommages, mais que, au contraire, il se réservait le droit de les réclamer plus tard, c'est-à-dire dans une autre action.

Il est impossible, dans ces conditions, de changer maintenant cette option et de traiter l'action comme si, dès l'origine, elle eut exercé un recours en dommages. Tout au plus peut-on faire comme le demandeur lui-même et lui donner acte de sa déclaration qu'il se réserve son " recours en dommages, s'il y a lieu ".

Nous rejetons donc l'appel uniquement parce qu'il y a eu, en l'espèce, un échange et que l'appelant ne demande pas, par son action, et ne veut pas demander la résolution de l'échange en entier, de façon à remettre les deux parties dans le même état qu'elles étaient avant la formation du contrat. Le jugement de la cour est limité à cette unique raison, afin qu'il n'y ait entre les parties chose jugée sur aucun autre point et que réserve soit accordée de tous les autres recours auxquels les parties peuvent encore avoir droit.

L'appelant devra payer les frais du présent appel.

IDINGTON J.—This appeal arises from a bargain, between appellant and respondent for an exchange of properties, which was reduced to writing and signed and that writing drawn up by a broker who had brought it about was taken to a notary public to have the bargain so arrived at duly carried out by the preparation of the necessary deed or deeds.

The respondent entered into the possession of the farm he thus became entitled to, and the appellant into the possession of the property in the town of Thetford Mines which he thus became entitled to.

About a month thereafter the appellant brought this action against the respondent alleging that he had not got the title to the said Thetford Mines property which he had expected as the result of said bargain.

Instead of making an attack thereby on the whole exchange and seeking to have that cancelled and the parties put back where they respectively were before the said bargain, he sought only to rescind the conveyance to him by the respondent, and to be repaid some $7,000 he alleged he had paid.

The learned trial judge granted him what he asked although both parties agreed in evidence that there had been an exchange and nothing else.

He refused to admit in evidence the writing above referred to containing the bargain and refused to look at anything else than the deed to the appellant and declared by his judgment that respondent had not the right to sell the land described in his deed to the appellant and set aside the sale as set forth in said deed, and condemned the respondent to repay to the appellant $7,000 with costs.

From that judgment respondent appealed to the Court of King's Bench, appeal side.

The court allowed his appeal with costs of the appeal and of the proceedings up to and of the trial, and dismissed the action.

I am, with great respect, surprised at the diversity of opinion expressed in the court below, for it seems to me that if we ever can do justice, we must get seized of the actual nature of the transaction between the parties which, I submit, certainly was a clear case of exchange.

There was no $7,000 paid and that can only be arrived at by a consideration of the terms of the exchange. And everyone possessed of knowledge of how men act in making an exchange and arriving at the basis of such a bargain, must know how dangerous it would be to assess damages on any such basis as the estimates of valuation expressed therein.

Moreover the action was not one for damages but for rescision and an attempt to get recision of only a part of the bargain and thereby if possible get an unduly advantageous sale for his farm.

I agree with the opinion of Justices Guerin and Tellier —and as expressing my own more clearly than that of Justice Flynn, though he certainly presents a strong argument, and sheds light on the case.

1926

LATREILLE v. GOUIN.

Idington J.

For the reasons so assigned in support of the judgment appealed from I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *L. U. Talbot.*

Solicitors for the respondent: *Perrault, Lavergne & Girouard.*

WILLIAM F. TOLLEY (PLAINTIFF).....APPELLANT.

AND

1926
*May 7, 10.
*Oct. 5.

JOSEPH H. GUERIN AND FARMERS' & MERCHANTS BANK OF SWEET GRASS, MONTANA (DEFENDANTS).. } RESPONDENTS.

AND

JOSEPH SCHWARTZ .....(DEFENDANT.)

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

Sale of land—Purchaser's lien—Priority to registered mortgage—Equitable considerations—Land Titles Act, Alta. (R.S.A., 1922, c. 133)—Sale of goods—Bulk Sales Act, Alta., 1913, c. 10, as amended 1919, c. 38 (present Act, in different form, R.S.A., 1922, c. 148).

T. bought from S. his store premises and stock-in-trade, transferring to S., as part consideration, T.'s ranch stock, which was to be applied, first on the purchase price of the land sold by S. to T., and then on the price of the merchandise. S. was to apply the proceeds of T.'s ranch stock transferred to S., in settlement of the debts of S. *pro rata*. G. was president of a bank to which S. was indebted. G. knew of the proposed transaction between S. and T. and desired it to go through. As found by this court, G. told T. that S. was not indebted to the bank, and concealed from T. certain securities taken to secure the bank, including a mortgage on the store premises which he registered; G. also procured the proceeds of T.'s ranch stock transferred to S. to be applied on the debt of S. to the bank. The wholesale creditors of S. seized the stock-in-trade under writs of execution, the seizure being based on an alleged violation of the Alberta *Bulk Sales Act* on the sale from S. to T. T. at first contested the seizure but abandoned the proceedings. T. recovered a judgment against S. for $5,500, and was declared to have a lien therefor on the store premises purchased from S., and that lien was given priority over G.'s mortgage. On this latter point a new trial was ordered by the Appellate

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

Division, and it was this question of the priority of T.'s lien over G.'s mortgage (and the facts as to G.'s conduct, which were in dispute) which ultimately came to be decided by the Supreme Court of Canada.

Held that, even assuming (as was held by certain judges of the Appellate Division, but not decided by the Supreme Court of Canada) that the transaction between S. and T. was not a sale "for cash or on credit" within s. 2 of *The Bulk Sales Act of Alberta*, 1913, c. 10, as amended 1919, c. 38 (as being the Act applicable and not the later Act of 1922) and therefore did not violate that Act, so that T. might successfully have contested the seizure by the creditors of S., yet T.'s abandonment of his contest of the seizure did not afford an answer to his equitable claim against G.; G. was estopped from invoking his mortgage to the prejudice of T.'s lien; and the Alberta *Land Titles Act* has not denuded the courts of their equitable jurisdiction to compel persons unconscientiously asserting legal rights to do equity.

Judgment of the Appellate Division of the Supreme Court of Alberta (21 Alta. L.R. 408) reversed, and judgment of Boyle J. ([1925] 2 D.L.R. 270), declaring the priority of T.'s lien, restored with a certain modification.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta (1) which by a majority reversed the judgment of the trial judge, Boyle J. (2), declaring that the plaintiff (appellant) was entitled, in respect to a charge for a judgment against the defendant Schwartz for the sum of $5,500, to priority over the mortgage of the defendant Guerin against certain land which had been sold by Schwartz to the plaintiff.

The plaintiff and the defendant Schwartz entered into an agreement by which Schwartz was to sell to the plaintiff certain land and buildings thereon in Milk River, Alberta, and a stock of merchandise belonging to the business which Schwartz had carried on on the said premises. As part of the consideration the plaintiff was to transfer to Schwartz certain land and certain live stock and other chattels on his ranch. The property conveyed and payments made by the plaintiff to Schwartz were to be applied, first on the purchase price of the real property to be conveyed by Schwartz to the plaintiff, and then on the price of the merchandise. Schwartz was to apply the proceeds of all chattels got by him from the plaintiff in settlement of his debts *pro rata*.

(1) 21 Alta. L.R. 408; [1925] 3 W.W.R. 1; [1925] 3 D.L.R. 693.

(2) [1925] 2 D.L.R. 270.

1926

TOLLEY v. GUERIN.

The defendant (respondent) Guerin was the president and cashier of the defendant (respondent) bank at Sweet Grass, Montana, near the international boundary, which did some business in Canada. According to the findings made or sustained by the judgment now reported the following facts (on which there was conflicting evidence and certain difference of opinion in the Appellate Division) appear. Schwartz was indebted to the said bank. Guerin knew of the proposed transaction between the plaintiff and Schwartz and (believing, as he said, that Schwartz could do better in live stock than in a mercantile business), desired it to go through. Guerin told the plaintiff that Schwartz owed the bank nothing. Guerin undertook to act as trustee for distribution *pro rata* amongst the wholesale creditors of Schwartz of all moneys to be received from the sale by Schwartz of the plaintiff's ranch stock transferred to him. Unknown to the plaintiff Guerin took from Schwartz a bill of sale of the said ranch stock. He applied the proceeds of sale thereof towards Schwartz' indebtedness to the bank. He also, as security to the bank, took and caused to be registered a mortgage from Schwartz (he had previously held as security an unregistered transfer in favour of Schwartz) on property which included the land and buildings that Schwartz was transferring to the plaintiff, and disclosed this mortgage to the plaintiff only after the plaintiff had taken possession of the Schwartz property and the plaintiff's ranch stock transferred to Schwartz had been sold by Schwartz and its proceeds were already with Guerin's bank.

The wholesale creditors of Schwartz caused a seizure under writs of execution to be made of the stock-in-trade which had been sold by Schwartz to the plaintiff, the seizure being based on an alleged violation of the *Bulk Sales Act*. The plaintiff at first contested the said seizure but subsequently discontinued the proceedings.

On the first trial of the action, before Walsh J., the plaintiff was given judgment for $5,500 against Schwartz and was declared to have a lien for it upon the land in Milk River which Schwartz had agreed to sell to him and in part payment for which the plaintiff had transferred his ranch stock to Schwartz; and that lien was given priority

over the mortgage held by Guerin. In so far as this judgment gave priority to the plaintiff's lien over Guerin's mortgage it was set aside by the Appellate Division (1) and a new trial ordered. The second trial was before Boyle J. (2) who upheld the priority of the plaintiff's lien over Guerin's mortgage. This judgment was set aside by the Appellate Division and the plaintiff's action dismissed, Stuart and Clarke J.J.A. dissenting (3). The plaintiff appealed to this court.

A. L. Smith K.C. and *E. V. Robertson* 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, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—The history of the transactions out of which this litigation arose and of the litigation itself is fully recorded in the judgments of the provincial courts. A careful study of the entire record discloses that the learned trial judge was abundantly justified in accepting the evidence of the plaintiff Tolley and his corroborating witnesses and in discrediting and rejecting entirely the conflicting testimony of the defendant Guerin. The findings of fact made by the learned judge (2) are fully sustained and warrant his conclusion that the plaintiff was the victim of a gross and palpable fraud in the perpetration of which the defendant Guerin not only actively participated but would appear to have been the instigating and controlling spirit.

Only one of the learned appellate judges has taken a contrary view of the evidence (4), and, with great respect, his reversal of the explicit findings of the trial judge as to the respective credibility of the witnesses who appeared before him cannot be supported. *Nocton* v. *Ashburton* (5).

(1) 21 Alta. L.R. 441; [1924] 4 D.L.R. 943; [1925] 3 W.W.R. 26.
(2) [1925] 2 D.L.R. 270.
(3) 21 Alta. L.R. 408 [1925] 3 W.W.R. 1; [1925] 3 D.L.R. 693.
(4) (1925) 21 Alta. L.R. 408, at p. 427.
(5) [1914] A.C. 932, at pp. 945, 957-9.

1926

TOLLEY v. GUERIN.

Anglin C.J.C.

To the findings of fact made by the learned trial judge the evidence appears to warrant the addition of further findings that the defendant Guerin not only undertook to act as trustee for distribution *pro rata* amongst the wholesale creditors of Schwartz of all moneys to be received from the sale by the latter of the Tolley stock transferred to him, but that he actually obtained $5,000 of such proceeds from the Canadian Bank of Commerce on a representation that he required this money to enable him to carry out the trust for such distribution, a bill of sale from Schwartz enabling him as holder of the legal title to the stock to compel the handing over of the proceeds of its sale to himself. Guerin's undertaking of the trust for distribution is sworn to by Tolley, corroborated by Schwartz, Berkinshaw and Moffat, and to a considerable extent by admissions forced from Guerin himself on cross-examination. He also admitted that he knew that the money in question formed "part of the realization of the first money from this deal with Tolley" and "was to be applied as payment on that real estate," i.e., the Milk River lots and buildings. Guerin, therefore, received these moneys earmarked to his knowledge with the trust impressed upon them by the agreement between Tolley and Schwartz of the 26th of August and, as to the $5,000, by asserting his purpose to carry out that trust. In direct violation of the confidence reposed in him he applied this $5,000 and other moneys received by him, which were likewise so earmarked to his knowledge, amounting in all to upwards of $6,000, to pay off in part the indebtedness of Schwartz to the Farmers' and Merchants' Bank of which he (Guerin) was the president and cashier—an indebtedness which he had not merely concealed from, but the existence of which he had more than once explicitly denied to Tolley in the course of the negotiations leading up to his agreement with Schwartz.

Concealing this indebtedness to the bank, Guerin, of course, also concealed from Tolley the existence of two securities which he held for it—one, the bill of sale of the Tolley stock already mentioned which he took from Schwartz on the day immediately following the completion of the agreement by which Schwartz acquired ownership

of it, and the other a mortgage from Schwartz for $8,500 on his property at Milk River, which included the lots and buildings that Schwartz was, to Guerin's knowledge, transferring to Tolley as free from all encumbrances. While Guerin had probably held an equitable charge on Schwartz's Mill River property for several weeks before Tolley entered into negotiations with Schwartz, his mortgage on it was perfected and registered only after Tolley had agreed to buy from Schwartz and with full knowledge by Guerin of the terms and conditions of their agreement. Guerin disclosed this mortgage to Tolley only after Tolley had taken possession of the Schwartz property and his (Tolley's) stock had been sold by Schwartz and its proceeds were already with Guerin's bank.

As a direct consequence of the fraud and breach of trust committed by Guerin in appropriating to his bank the proceeds of the Tolley stock, which the wholesale creditors of Schwartz should have received, the latter caused a seizure to be made of the stock-in-trade at Milk River, which had been sold by Schwartz to Tolley and they subsequently disposed of it. This seizure was based on an alleged violation of the *Bulk Sales Act* in the sale by Schwartz to Tolley and until the judgment rendered by the Court of Appeal on the second appeal everybody—courts, counsel and parties alike—had proceeded upon the assumption that the transaction between Schwartz and Tolley contravened the provisions of that statute and that the seizure and sale by Schwartz's creditors were unimpeachable. Tolley had at first contested the seizure but subsequently withdrew his application for interpleader, no doubt upon advice to that effect.

There have been two trials of this action. At the first trial before Mr. Justice Walsh Tolley's loss resulting from the fraud and breach of trust by Guerin was found to be $5,500; he was given judgment for this amount against Schwartz and was declared to have a lien for it upon the Milk River property of Schwartz in part payment for which he had transferred the ranch stock to Schwartz; and that lien was given priority over the $8,500 mortgage held by Guerin.

1926

TOLLEY v. GUERIN.

Anglin C.J.C.

In so far as that judgment established Tolley's claim against Schwartz and his lien for the amount thereof on the Milk River lots and buildings which Schwartz had agreed to sell to him, this judgment was not disturbed by the Appellate Division and is, therefore, *res judicata*. In so far as it gave priority to Tolley's lien over Guerin's mortgage, it was set aside, chiefly because Guerin had not given evidence at the trial before Walsh J., under a mistaken idea as to the question to be decided, and a new trial was directed solely to determine this issue (1). The formal judgment of the Appellate Division contains this paragraph:

> That there be a new trial before a judge without a jury to determine whether the respondent herein is entitled to priority over the mortgage of the appellant herein in respect of a charge for his judgment against the defendant Schwartz herein, for $5,500 against the following lands and premises registered in the name of the appellant, namely: All of Block 9 in the townsite of Milk River, according to a map or plan of record in the Land Titles Office for the South Alberta Land Registration District as Number 2227 Y, reserving unto the Crown all coal and unto the Alberta Irrigation Company all other minerals.

At the second trial (2), upon findings already sufficiently adverted to, Boyle J. upheld the priority of Tolley's lien over Guerin's mortgage but, no doubt inadvertently, included in it

> the costs of this trial to be taxed under column 5, rule 27 not to apply; and the costs of the appeal to the Appelate Division of this Honourable Court, together with the costs awarded by the Honourable Mr. Justice Walsh at the former trial, as varied by the Appellate Division on the appeal.

On the second appeal this judgment was set aside by the Appellate Division, and the plaintiff's action was dismissed with costs throughout, Mr. Justice Stuart and Mr. Justice Clarke dissenting (3). Harvey C.J.A., with whom Hyndman J.A. concurred, without at all suggesting that the findings of the learned judge were open to question, allowed Guerin's appeal solely on the ground that when the transaction between Schwartz and Tolley had taken place *The Bulk Sales Act* in force was the statute of 1913, c. 10, as amended by c. 38, s. 1, of the statutes of 1919, whereas it

(1) (1924) 21 Alta. L.R. 441, at p. 445.
(2) [1925] 2 D.L.R. 270.
(3) 21 Alta. L.R. 408; [1925] 3 W.W.R. 1; [1925] 3 D.L.R. 693.

had up to that time been erroneously assumed throughout that it was the statute of 1922 (R.S.A., 1922, c. 148) which governed. In the opinion of the learned Chief Justice the transaction between Schwartz and Tolley was not "a sale for cash or on credit" within the meaning of s. 2 of the statute of 1913, c. 10. He therefore concluded that the transaction involved no violation of that Act, that the seizure by Schwartz's creditors of the stock-in-trade which he had transferred to Tolley was indefensible and that Tolley's failure to prosecute his interpleader proceedings was the real cause of the loss suffered by him through being deprived of the Schwartz stock-in-trade. Beck J.A. wholly disagreed with the learned trial judge's findings of fact. The other members of the court, Stuart and Clarke JJ.A., as already stated, would have affirmed the judgment of Mr. Justice Boyle.

As the matter presents itself to us, it will not be necessary to express an opinion upon the application and effect of *The Bulk Sales Act* of 1913. Assuming, but without at all so deciding, that the view taken on these questions by the learned Chief Justice was correct, it is difficult to understand how Tolley's abandonment of his contest of the seizure by Schwartz's creditors affords any answer to his equitable claim against Guerin now under consideration. It may be that his failure to prosecute the contest of the seizure, if it were invalid, would have been so much the proximate cause of Tolley's loss that he would have had difficulty in maintaining an action for deceit. But different considerations govern the court when dealing as a court of equity with Tolley's equitable rights (*Nocton* v. *Ashburton* (1)), in regard to his purchaser's lien, (*Rose* v. *Watson* (2)), arising out of Guerin's fraud and breach of trust.

That Tolley had a purchaser's lien on the Milk River lots was established by the judgment at the first trial before Mr. Justice Walsh as against Guerin as well as against Schwartz. The only question left open on the new trial directed by the Appellate Division was Tolley's right to priority for that lien over Guerin's mortgage. It is unques-

(1) [1914] A.C. 932, at pp. 953, 963.

(2) (1864) 10 H.L.C. 672.

1926

TOLLEY v. GUERIN.

Anglin C.J.C.

tionable in our opinion that Tolley was induced to enter into the transaction with Schwartz largely on the strength of Guerin's false statements that Schwartz was not indebted to the Farmers' and Merchants' Bank and by his consequent concealment of the charge or mortgage which he held on Schwartz's Milk River property as security for the indebtedness to the bank which actually existed. Had Guerin's statements been true Tolley would have found himself, when deprived of the greater part of the consideration he was to receive for the transfer of his property to Schwartz as a result of the seizure by Schwartz's creditors of the stock-in-trade, with a lien for the amount of his loss on the Milk River lots and buildings unencumbered by any prior charge. In fact, when he comes to assert his lien he finds registered against the property a mortgage for $8,500 in favour of Guerin. That, under such circumstances, whatever may have been the rights of Schwartz's creditors under *The Bulk Sales Act,* a court of equity should hold Guerin estopped from invoking his mortgage to the prejudice of Tolley's lien in our opinion admits of no question. Nor does the *Land Titles Act* enable Guerin to reap the benefit of his fraud and breach of trust. That statute has not denuded the courts of their equitable jurisdiction to compel persons unconscientiously asserting legal rights to do equity.

On this short ground we are of the opinion that the judgment of the trial judge declaring the priority of Tolley's lien must be restored. In view however of the terms of the judgment directing the new trial, the addition to the $5,500, for which the lien had been established by the judgment of Mr. Justice Walsh, of the costs of the proceedings would appear to have been a mistake, which must now be rectified. With this modification the judgment of the learned trial judge (Boyle J.) will be restored.

The plaintiff should have his costs in this court and of the second appeal to the Appellate Division as well as the costs ordered by Mr. Justice Boyle to be paid by the defendants.

IDINGTON J.—This appeal arises out of a cause of action finally established by a judgment in the Appellate Division

1926

TOLLEY v. GUERIN.

Idington J.

of the Supreme Court of Alberta and out of a direction of that court, when so determining, to have an issue tried as therein directed, to determine the extent of relief to be granted as result thereof.

I have considered the judgment of the Chief Justice herein and in the main agree therewith, and absolutely as to the conclusions he has reached.

Appeal allowed with costs.

Solicitor for the appellant: *E. V. Robertson.*

Solicitors for the respondents: *Bennett, Hannah & Sanford.*

1926

*May 20.
*June 14.

GUSTAVE ARMAND (DEFENDANT) .....APPELLANT;

AND

FRED CARR AND KITTY CARR (PLAINTIFFS) .....
AND
ERNEST WILCOX (DEFENDANT).....
} RESPONDENTS.

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

Negligence—Automobile collision—Injury to gratuitous passengers—Responsibility of driver—Care "reasonable under all the circumstances"—Appeal to Supreme Court of Canada—Jurisdiction—Value of matter in controversy—Alleged cause of action of a plaintiff (respondent) distinct from that of co-plaintiff—Requirement for right of appeal de plano.

Plaintiffs were gratuitous passengers in an automobile owned and driven by A. It collided with a taxicab driven by W. Plaintiffs sued A. and W. At trial Meredith C.J.C.P., on the evidence held W. alone to blame. The Appellate Divisional Court, Ont., apparently without intending to disturb his findings of fact, took the view that on those findings, as they understood them, A. had also been guilty of negligence which contributed to the collision and should be held jointly liable with W. On appeal by A. to the Supreme Court of Canada:

Held, the Appellate Divisional Court appeared to have misapprehended the findings at the trial in certain important particulars; the evidence supported the trial judge's findings, and did not disclose negligence in A.'s conduct. It might be that in an emergency he did not exercise the best possible judgment, but even that was doubtful; if there

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

1926

ARMAND v. CARR.

was any error on his part, it amounted, at the most, to an excusable mistake in judgment and did not involve any breach of duty owing to his passengers such as would predicate a failure to take that care which would have been "reasonable under all the circumstances," which is the test of the responsibility of one who undertakes the carriage of another gratuitously (*Karavias* v. *Callinicos* [1917] W.N. 323; *Harris* v. *Perry & Co.* [1903] 2 K.B. 219; the contention for some lower standard, argued as being implied in *Nightingale* v. *Union Colliery Co.*, 35 Can. S.C.R. 65, rejected); and A.'s appeal should be allowed. Idington J. dissented, holding that the evidence established such negligence in A.'s conduct as made him jointly liable with W. for the damages suffered by plaintiffs.

On the question of this court's jurisdiction to entertain the appeal as against one of the plaintiffs (respondents), it was held that, if he had a cause of action it would be complete in itself and entirely distinct from that of his co-plaintiff; and in such a case the value of the matter in controversy on the appeal to this court, with regard to each individual respondent, must exceed the sum of $2,000 in order to give a right of appeal against him *de plano*. ("*L'Autorité*" *Limitée* v. *Ibbotson*, 57 Can. S.C.R. 340).

APPEAL by the defendant Armand from the judgment of the Second Appellate Division of the Supreme Court of Ontario (1) which, reversing the judgment of the trial judge, Meredith C.J., C.P., held said defendant jointly liable with the defendant Wilcox for damages suffered by the plaintiffs through an automobile collision. The facts of the case are sufficiently stated in the judgments now reported.

A. C. Heighington for the appellant.

D. O. Cameron for the respondents Carr.

C. R. Widdifield for the respondent Wilcox.

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 plaintiffs were gratuitous passengers in an automobile owned and driven by the defendant Armand. While travelling easterly on the Toronto-Hamilton highway this automobile collided with a taxicab being driven westerly by the defendant Wilcox. The collision occurred at about 7.50 o'clock on the evening of the 29th of October, 1924, at a point approximately three miles east of the town of Oakville.

(1) (1925) 28 Ont. W.N. 310. See also (1925) 29 Ont. W.N. 302.

The plaintiffs, who were seriously injured, sued both Armand and Wilcox. The learned trial judge (Meredith C.J., C.P.) held that Wilcox was alone to blame for the collision and he assessed the damages of the plaintiff Fred Carr at $1,500 and those of the plaintiff Kitty Carr at $3,000. The Second Appellate Divisional Court (apparently without intending to disturb the findings of the trial judge) took the view that on those findings, as they understood them, the defendant Armand had also been guilty of negligence which contributed to the collision and therefore should be held jointly liable with Wilcox (1). From this judgment Armand appeals. There is no appeal by Wilcox.

The view of the trial judge may be best appreciated by reading the following extract from his judgment:

> I have now to determine whether either of these drivers was guilty of that negligence which gives a right of action. I am quite unable to see how Armand was guilty of negligence of that character. He was driving his car in a careful manner, not at an excessive rate of speed. Why should he be doing otherwise? He was in no great haste. He had a load that he would not desire to hurt, or run any risk of hurting. He is said to have been a careful driver, and he looks like a very intelligent, careful man.
>
> The story is: That he was driving carefully along the road until the lights on Wilcox's car disturbed him. Those who drive cars know that such things do happen, and are very likely to happen. Then he did that which it seems to me a careful driver would do; he kept well on his own side of the road, so much so that he ran off the pavement on that side in doing so. That caused some bumping and occasioned an outcry of one of the occupants of the car, and then he did that which was quite proper in all the circumstances of the case; he came back upon the paved portion of the highway gradually. He seems to have come back in a careful way; he did not make a sudden turn so as to bring him on the road abruptly, but he came carefully along. It is evident if he had turned on the road abruptly and run across his half of it he might put those who might be coming along the other side of the road in danger. On coming back wholly upon the pavement he seems to have gone as far as the middle of the road; he probably crossed the middle line of the pavement a foot or so. That was what would ordinarily happen with a man proceeding as carefully as he was. When that was accomplished he proceeded towards his right and he was then driven that way more so by Wilcox's approach. He and the man with him—Carr—saw Wilcox's car bearing down upon him; and he was well over off Wilcox's side of the road when Wilcox's car ran into his. That is what happened. How can Armand be blamed for anything in that? That story is what one would naturally expect; there is nothing unusual about it; and that story is in exact accord with the testimony of the gentleman who saw the cars immediately after the accident, a man who is connected with

(1) (1925) 28 Ont. W.N. 310.

1926

ARMAND v. CARR.

Anglin C.J.C.

some Collegiate Institute in Toronto, a very competent and trustworthy witness, whose testimony is altogether in favour of Armand, and against Wilcox.

What is there on the other side? Several witnesses who swear that from their first view of Armand's car Armand was driving in what I may describe as a wild manner, going from one side of the road to the other. Is that believable? If it is, let those believe it who may; I cannot. Unless the man had lost his memory and mind some time before this accident, it could not have happened; and if he had he would not be to blame for it. But it did not happen, and the only wobbling, the only turn, was that to which I referred, and which in no way interfered with Wilcox's rights on the road.

What about Wilcox? It is manifest he was proceeding at an excessive rate of speed. It does not seem to be unusual with some taxi drivers, especially at that time of night, anxious to get back home. He passed the schoolmaster's car, and got out of sight of it in a very short time—the schoolmaster's car going at about twenty-one miles an hour. That was negligent, but would not give a right of action unless it caused an injury. It casts more doubt upon the testimony of the witnesses for Wilcox and Wilcox (*sic*), and it tends to make it plain to my mind that the accident happened as described by Armand and his witnesses. Armand gave some testimony upon his examination for discovery and that all seemed to me to be quite in accord with the view of the case which I have taken. At one time it seemed as if there might be a conflict of testimony between the two women who gave testimony on behalf of Armand; though one indeed was formally making a claim against him; but it may all be quite consistent. The young woman, Mrs. Grinham, does not remember having shouted, "Where are you going?" but no doubt she said that when Armand was partly off the pavement on his own side. I see nothing inconsistent in the testimony of these two women. And Carr, although suing Armand as well as Wilcox, gave his testimony in a fair way, and was in a position to see, and did know, just what did happen. What did happen was this: Wilcox bore down on Armand at a great rate of speed and was over the centre line of the road. He had abundance of room to pass upon his own side at any rate of speed. A great weight of the credible evidence proves that as also does the position of the cars after the accident.

I was unfavourably impressed, as to credibility, by Wilcox and his witnesses. His own story, indeed, seemed to be so improbable as to reach the impossible; his speed was about five miles an hour, and he could have stopped in a distance of three or four feet. Armand's car did not run into his, but slued—on a dry pavement and struck broadside, and yet his car was so smashed as to need about $1,000 worth of repairs, including a new chassis-frame and a new axle; and Armand's car was almost destroyed—four persons almost killed—two crippled badly for life.

I am therefore obliged to find that Wilcox is answerable for all damages that were sustained.

The opinion of the Appellate Divisional Court was delivered by Mr. Justice Fisher. The grounds on which the reversal of the judgment in favour of Armand was based cannot be better stated than by quoting them from his opinion:

* * * The learned Chief Justice found Wilcox who was driving the car guilty of negligence and added that "I was unfavourably impressed as to credibility by Wilcox and his witnesses."

Upon a careful perusal of the evidence I am of the opinion these findings were fully warranted and should not be disturbed. The learned trial judge found Armand was driving carefully, not at an excessive rate of speed, but because the lights of Wilcox's car disturbed or confused him, he first ran part of his car off the pavement to the south and then returned to the pavement and proceeded as far as a foot beyond the middle of the pavement, and that whilst he was attempting to turn again to the south, Wilcox ran into him on that side of the highway and did the damage complained of. The result of all the evidence as I view it, is: had Armand kept his car in the position he had it off the pavement and not attempted to turn against and on to the pavement which was about four inches high, and that if Wilcox had been travelling at a moderate rate of speed instead of at an excessive rate of speed, as found by the learned trial judge, the accident would not have happened. If it was the speed and lights of Wilcox's car that caused Armand to turn off the pavement, then the question to be asked is, why did he return again to and beyond the middle of the pavement before Wilcox had passed? Had he remained off the pavement the accident would not have happened. He turned off the pavement so as to avoid what appeared to him danger and then almost immediately again turned into the path of that danger. These acts of Armand, in my opinion, constituted negligence on his part and that negligence entered into and co-operated with the negligence of Wilcox.

With the greatest respect to the learned Chief Justice that (*sic*), these acts of Armand, which he seemed to think were proper, were in my opinion clearly improper and negligent acts, and but for their commission the accident would not have happened. Both Wilcox and Armand were therefore guilty of negligence.

In my opinion, a driver of an automobile, going at the rate of eighteen to twenty miles per hour, with the wheels on one side off the pavement and sunken four inches below it, with confusing headlights from an approaching automobile, turns his car out of the sunken running rut at that rate of speed on the pavement and in the direction and path of an oncoming car, is guilty of a degree of negligence which disentitles him, if an accident occurs and action follows, to the recovery of damages. The driver in such circumstances should either have continued with his right wheels off the pavement (in this case he could have without danger or difficulty) or, if that appeared to him dangerous or impracticable, his plain duty was then to have stopped.

The learned appellate judge would appear to have misapprehended the findings at the trial in three important particulars. He says that "he (Armand) turned off the pavement so as to avoid what appeared to him to be danger" (i.e., presumably purposely). A few sentences earlier, more in accord with the view taken by the trial judge, he had said: "Because the lights of Wilcox's car disturbed or confused him, he first ran part of his car off the pavement to the south" (i.e., probably unintention-

1926

ARMAND v. CARR.

Anglin C.J.C.

ally). The learned Chief Justice had found that "the lights on Wilcox's car disturbed him (Armand) * * * he kept well on his own side of the road, so much so that he ran off the pavement on that side in doing so" (i.e., accidentally).

Again the learned appellate judge says that Armand's car was struck "whilst he was attempting to turn again to the south," i.e., before he had regained his own side of the pavement. The learned trial judge found expressly that Armand "was well over off Wilcox's side of the road when Wilcox's car ran into his. That is what happened."

Mr. Justice Fisher also expressed the view that Armand in turning back on to the pavement passed "into the direction and path of an oncoming car" (Wilcox's). The learned trial judge found that "the only turn" made by Armand "in no way interfered with Wilcox's rights on the road."

While the stories told by the passengers in Wilcox's car as to Armand's course and Wilcox's position on the road no doubt point to a different conclusion, the testimony of the two plaintiffs and the corroboration of it afforded by the actual *situs* and relative position of the two cars as they were found by the two witnesses Reid and Charington, who were wholly disinterested, fully supports the findings made by the learned trial judge in all particulars. Indeed, as already stated, we do not understand that Mr. Justice Fisher meant to differ from Mr. Chief Justice Meredith upon any question of fact.

When confronted with the glare of the headlights of the Wilcox car, Armand, although he was then on his own side of the road, did a prudent thing in turning still farther to the right. That in doing so he accidentally allowed his right wheels to slip over the edge of the pavement is not at all surprising when the blinding and confusing effect of the approaching glaring headlights is taken into account. It certainly does not bespeak negligence. Armand then found himself in a very difficult position. His right wheels were on the gravelled sideway about four inches below the level of the road and so rough that one of the two women passengers cried out in alarm. To his right, and quite close, was a ditch guarded by a fence. Having regard to what subsequently occurred Armand would no doubt have

been well advised had he tried to stop his car even at the risk of crashing into the fence and possibly of landing it in the ditch. What he did, as found by the learned trial judge, was to slow down somewhat and come

back on the paved portion of the highway gradually. He seems to have come back in a careful way. He did not make a sudden turn so as to bring him on to the road abruptly, but he came carefully along.

Whether in executing this manoeuvre any part of Armand's car ever crossed the centre line of the road is extremely doubtful. The learned trial judge says it "probably did a foot or so." The plaintiff Fred Carr, who deposes to this fact, says "he (Armand) came to about the centre of the road—it might have been a foot over, never more than a foot" and "he swerved back again to his own side," so much so that Fred Carr feared he would certainly collide head on with the fence which ran along the right hand side of the road at this point.

With the utmost respect we do not discern any negligence or fault in what Armand did. It may be that in an emergency he did not exercise the best possible judgment in returning to the pavement; but even that is at least doubtful. If there was any error on his part, it certainly amounted, at the most, to nothing more than an excusable mistake in judgment and did not involve any breach of duty owing to his passengers such as would predicate a failure to take that care which would have been "reasonable under all the circumstances." We regard this as the test of the responsibility of one who undertakes the carriage of another gratuitously—*Karavias* v. *Callinicos* (1); *Harris* v. *Perry & Co.* (2)—rather than some lower standard, which counsel for the appellant argued is implied in the decision of this court in *Nightingale* v. *Union Colliery Co.* (3).

For these reasons we think the judgment of the trial judge should not have been disturbed. The appeal as against Kitty Carr will accordingly be allowed with costs.

The defendant Wilcox, although but slightly interested, was made a respondent to this appeal. He did not file a factum but appeared by counsel and supported the judgment against Armand. The costs of Armand, however,

(1) [1917] W.N. 323. (2) [1903] 2 K.B. 219.
(3) (1904) 35 Can. S.C.R. 65.

1926

ARMAND v. CARR.

Anglin C.J.C.

were not thereby increased and the costs awarded him should be payable only by any respondent whose judgment against him is set aside.

The question of the jurisdiction of this court to entertain the appeal so far as concerns the claim of Fred Carr, who was awarded $1,500 damages, was brought to the attention of counsel at the conclusion of the argument and they were heard upon it. It is perfectly clear that if Fred Carr has a cause of action it is complete in itself and entirely distinct from that of his co-plaintiff Kitty Carr, and it is equally clear that in such a case the value of the matter in controversy on the appeal with regard to each individual respondent must exceed the sum of $2,000 in order to give a right of appeal against him *de plano*. *"L'Autorité" Limitée* v. *Ibbotson* (1).

On Friday last, the 11th of June, however, the Appellate Divisional Court on the application of Armand made an order extending the time for an appeal by him as against Fred Carr and granting special leave for that appeal. The order of the court has been duly filed and we may treat this appeal as properly before us.

No distinction can be made between the cases of Kitty Carr and Fred Carr and the appeal from the judgment in favour of Fred Carr will therefore also be allowed.

IDINGTON J. (dissenting).—This is one of three actions arising out of a collision between two automobiles on the highway from Toronto to Hamilton, running through Oakville.

This action was brought by the plaintiffs, now respondents, Fred Carr and Kitty Carr, against the respective drivers of each automobile.

The learned trial judge directed them to be tried together before him without a jury. The counsel for respondents—the Carrs—who were plaintiffs in this case, wished the jury to be retained, but some other counsel in the other cases preferred dispensing with the jury. They were by no means unanimously in favour of trying them together.

I respectfully submit the doing so has been, I imagine, the source of much confusion and omissions as will appear later to clear up several points.

(1) (1918) 57 Can. S.C.R. 340.

The other actions are, so far as appears, disposed of either by the learned trial judge or the Second Divisional Court for Ontario.

The appellant Armand owned a Dodge sedan and offered the Carrs (now respondents herein) and other friends a free ride from Oakville to Toronto on the night of the 29th of October, 1924.

The respondent Wilcox was a taxi driver, living in Galt, who owned a Studebaker Special, and drove it from Galt to Toronto by way of other highways connecting with above-mentioned highway at Bronte, and thence to Toronto, having, on the occasion in question, a number of ladies resident in Galt, as paying passengers, and, on said night they were returning home with him in said car.

The plaintiffs, the said Fred and Kitty Carr, now respondents, are husband and wife but had seperate claims for their personal damages which each had respectively suffered in said collision.

The appellant Armand started with his passengers from Oakville between seven and eight o'clock on said evening, to attend a concert to take place in Toronto at nine o'clock on said evening. And when, according to some witnesses, three or four miles from Oakville, they saw the other respondent's car with his passengers, coming westerly and carrying a bright light as usual when darkness had come on. All seem agreed it was a dark night. Some one of the passengers in Armand's car cried out: "See that car coming," or words to that effect, referring to Wilcox's car. Armand was driving his own car and simply said thereupon "That damned light," evidently disturbed by its brilliance. He immediately turned, from being near the centre of the concrete paved part of the highway, to the right hand and got his car over, not only the said concrete-paved part but also a strip three feet wide which runs alongside of the concrete pavement and is made of macadam or gravel, and is solid and travellable so far as so constructed, till it meets the grass or ordinary soil, and his two right hand side wheels sank some four inches into the said soil. And then, apparently because one of his lady passengers called out "Gus, where are you going," he turned back again across the said strip and the concrete-paved part of the highway till he had got a foot beyond

1926

ARMAND v. CARR.

Idington J.

the centre line of the concrete pavement, and then turned back to the right, and the respondent Wilcox, driving his car, struck it against the rear part of Armand's car. I shall presently deal more at length with the actual situation thus created. Meantime I wish to say that the result was a considerable damage to each car and very serious damage to Armand and to all the passengers in his car, to which I am about to refer more in detail.

Amongst those so injured are the respondents Fred and Kitty Carr, who have sued herein the appellant, and respondent Wilcox. The appellant Armand was thrown from his seat on to the highway and was so injured as to become unconscious and to remain so for a week. His memory has so failed him that he cannot remember anything that so transpired and can give no explanation of his pursuing such an erratic course of conduct in driving his car, when facing a very obvious danger.

The appellant, Fred Carr, who was sitting in the front seat with Armand and was, I assume (using common knowledge as well as having regard to what he says) on the right hand side of the car, testifies that he was reading the speedometer and it shewed they were running at a twenty-one mile rate of speed until after the slumping over the solid strip which I have referred to, with the two right side wheels sinking four inches, and then, on turning back across the pavement, Armand lowered his rate of speed to eighteen miles an hour, until the collision took place, or a possible stoppage I am about to refer to.

The other car driven by Wilcox, when first seen was a distance of some two hundred yards ahead according to some witnesses, and according to others, about one hundred yards. And, it is practically admitted, it had been, when first seen, travelling at, probably, a twenty-five mile rate of speed, if not more.

The question raised herein is whether appellant in pursuing such a course of conduct as I have outlined was so negligent as to be held jointly liable with Wilcox for the damages suffered by the plaintiffs, the Carrs, now two of the respondents, by reason of the collision, or for part thereof.

The evidence of Fred Carr, to which I wish to call special attention, is as follows:

Q. You are one of the plaintiffs?—A. Yes.

Q. You were in the car the night of the accident?—A. Yes.

Q. You remember the accident?—A. Yes.

Q. Tell us what happened just before the accident?—A. Well, we saw some bright lights approaching over the brow of the hill about two hundred yards ahead. Mr. Armand said, "Damn those lights, they are bright," and pulled over to the side of the road and he dropped off the pavement.

Q. How much of his car was off the pavement?—A. Both wheels were off.

Q. Both right hand wheels?—A. Both outside wheels.

Q. Prior to getting off the pavement at what rate was he driving?—A. Twenty-one miles.

Q. How do you know?—A. I was watching the speedometer.

Q. You were sitting with him, and that is the rate he was driving?—A. Yes.

Q. When he went off the pavement?—A. 21 miles.

Q. When he went off the pavement what happened?—A. We ran along for a few yards off the pavement.

Q. Was it rough there?—A. Fairly rough.

Q. What speed was he going at while running with the two right hand wheels off the pavement?—A. 21, but he slowed down to 18 as we came on again.

Q. Did it have any effect on the car?—A. Yes, caused us to bump up and down some.

Q. Did he get on to the pavement again?—A. Yes, he came right over on the pavement.

Q. How far did he get over?—A. A little over the centre.

Q. What happened then?—A. He swerved back again to his own side.

Q. What happened next?—A. Well, I saw another car approaching, the same car that had bright lights, it seemed to come on us, and I spoke to Mr. Armand and he turned out. I was afraid we were going to have a collision with the fence, and put up my feet to avoid it.

Q. A white fence?—A. Yes.

Q. What did Armand do?—A. He shut off his engine and put on his brakes at the same time.

A. At the moment of the collision in what position was Armand's car?—A. Heading a little towards our own side.

Q. What angle with the edge of the pavement?—A. I couldn't quite tell you the angle.

Q. If it is half way it is 45?—A. About 45.

Q. Facing what way?—A. Towards the lake.

Q. And?—A. He shut off his engine.

Q. Facing in an easterly or westerly direction?—A. Easterly direction.

Q. About 45 degrees at an angle facing easterly?—A. Yes.

Q. What happened then?—A. I don't remember anything that happened.

Q. Did you hear a crash?—A. No.

* * *

Q. When you were running off the pavement was there anybody said or did anything?—A. Well, Mrs. Grinham certainly screamed at that time.

1926

ARMAND v. CARR.

Idington J.

Mr. HEIGHINGTON: Is that evidence?

His LORDSHIP: Evidence that she screamed.

CROSS-EXAMINED BY MR. HEIGHINGTON

Q. When did she scream?—A. Screamed about the time we swerved, or about that time.

Q. Did she say anything?—A. Yes, she called out, "Gus, Gus, what are you doing."

* * *

CROSS-EXAMINED BY MR. BRACKEN

Q. Do I understand at the time of the accident the Armand car, the front of it, was facing toward the lake?—A. East and toward the lake. Easterly direction and towards the lake.

Q. It was the rear that was struck?—A. Yes.

Q. And you spoke about him swerving a moment ago. Was that swerve off the pavement to the south?—A. On to the pavement and back to the south.

Q. After he got off he swerved on to the pavement?—A. Yes.

Q. And he went over the centre line?—A. Yes.

Q. When he would go off to the south he would have to swerve back again?—A. Yes.

Q. It was just when he swerved up on to the pavement and got over the centre line, it was then he saw the other car?—A. I say the other car seemed——

Q. Let me read you a question from the examination for discovery. Question 13: "Will you just tell me as briefly as you can what took place that night in reference to the accident in your own words?—A. Well, we travelled about to the Gooderham farm—I don't know how far that is from Oakville—it might be five miles—I never measured the distance—when we approached the Gooderham farm there was a car on the brow of the hill with very bright lights, and Mr. Armand made the remark to me that the lights were bright, and they were bright—he said, 'Damn the lights,' that is exactly what he said, and he pulled over to his own side of the road, and he ran off the pavement.

"14. Q. One side of the car?—A. Yes, one side was right off the pavement—he turned over on to the pavement—he came up to about the centre of the road—it might have been a foot over—never more than a foot, and then he turned his head a little that way (indicating), getting squared up again, and I instantly said, 'Christ, the man is coming right at us,' and he turned further over towards the fence, and I put my foot off to avoid the collision with the fence—I thought we were going to have a head-on collision with the fence, and I braced myself, and I don't remember anything more after that."—A. In my examination I told the stenographer that he shut his engine off and put on his brakes.

Q. The point I want to get at is this: What happened, as I understand your story, is that he got off the pavement and swerved on over the centre and then when he looked out you called out about the car and the car was coming right down the road?—A. No, when I called out about the car it appeared to be coming straight on us.

Q. Any reason why he should come straight on you?—A. No.

Q. Anything you saw?—A. No.

Q. When that situation arose Mr. Armand's car would be pointing east and north when he got it over the centre?—A. That I couldn't say.

Q. He went about a foot over the centre?—A. He would not be a foot east and north.

Q. Which way?—A. East.

Q. Then at any rate whether it was north and east or where it was, it was over the centre, and when you spoke of the lights of the oncoming car—. A. I said in a monotone under my breath—I would not excite anybody driving.

His LORDSHIP: Don't you mean south and east?—A. He swerved to the right.

His LORDSHIP: He went south and east after that?

Mr. BRACKEN: And he turned further over towards the fence.

Q. He swerved the car to his right?—A. To his own side of the road.

Q. The front of the car would be pointing towards the lake?—A. Lake and east.

Q. At that moment the other car struck you in the rear?—A. Yes.

CROSS-EXAMINED BY MR. HEIGHINGTON

Q. I believe you said in your examination for discovery, Mr. Carr, that if Mr. Armand went at all over the centre of the road after he turned off the concrete it was very slightly he went over.

His LORDSHIP: He said if at all. The witness I understood to say he came well back on to his own side before he was struck?—A. Yes.

Mr. HEIGHINGTON: Q. Do you remember my asking you this question: "How do you know Mr. Armand went over the centre of the road?—A. In watching things you can see very quickly when there is about two feet of pavement this side—you know very well that you are travelling here (indicating with hand), you know that you are—when you see about two feet of pavement from my side of the car." That is the right hand side?—A. Yes.

Q. You could see two feet of pavement, is that right?—A. Yes.

Q. Which side did you see it?—A. My right hand side.

The concrete pavement on the said highway is only eighteen feet wide. The strip on each side, macadam or gravel, is three feet, thus making the entire width of the travellable part twenty-four feet.

When the appellant for the first time and before his zigzagging turned to the right side, apparently to get out of the way of the respondent Wilcox coming at such a rate about two hundred yards distant, he did a prudent thing, and, as the Appellate Division held in reversing the judgment of the learned trial judge, had he remained there, to the plaintiffs, now respondents herein.

But by returning back and across the centre line of the concrete pavement, he did, in my opinion, a most reckless and unjustifiable thing and thereby rendered himself liable to the plaintics, now respondents herein.

And assuming that he immediately turned with a view to go back to his own side of the highway, can anyone understand why he shut off his engine and put on his

1926

ARMAND v. CARR.

Idington J.

brakes at the same time, instead of moving out of the way of the oncoming Wilcox car?

Some people imagine that if they get on to their own side of the centre line, they can allow any wild driver to run them down, and smash their car, and the passengers therein, without being liable in any way.

That, I submit, is not the law; in law the driver is bound to use all reasonable care to protect his passengers against the possibilities of injury at the hands of clearly approaching danger, whether of a wild, reckless driver, or other similar source of danger.

Mr. Carr says he cannot remember anything after Armand shut off his engine and put on his brakes. He seems not to have been asked whether the car he was in moved, or instantly stopped. I suspect it is quite possible that appellant Armand's sudden halting stop helped, and probably was the entire cause of himself and others being thrown out of the car, as they were. I shall presently refer further to this peculiar feature of this case.

I cannot understand why, in all these movements, no warning was given by appellant, such as usually is given when such signs of approaching danger appear. I assume there was none or we should have heard of it.

I must say that a perusal of the entire evidence in this case does not convince me that the appellant's car only crossed the centre line of the highway by a foot, as Mr. Carr testifies to. I certainly do not think or suspect for an instant that he knowingly errs, but the best of mankind make grave mistakes in their estimates under even less favourable circumstances than here. The night was dark. There is no evidence of any painted line such as sometimes is put in the centre of the road to indicate to travellers just where they are. If this concrete pavement had no such mark, such as I refer to, I fail to see how it was possible to form an accurate sort of judgment of measurement.

I have read many times the quotation from his examination for discovery presented to him by counsel for appellant, and copied in the foregoing part I have quoted, but cannot satisfactorily understand how "seeing about two feet of pavement from my side of the car" helps to accuracy.

I shall presently advert to that situation but wish first to present my view of the result of the evidence given by the respondent Fred Carr as to the shutting off by Armand of the engine and applying the brakes thereto.

The probabilities of such abrupt action are, that the car suddenly stopped, and in consequence thereof, when going at eighteen miles an hour, the shock therefrom was such —quite independently of the collision—as to throw, as I submit it did, everyone therein, out on to the highway, and hence their very serious injuries, except in the case of Mrs. Grinham.

On the other hand nobody was thrown out of the Studebaker Special, driven by respondent Wilcox which carried the same number of passengers as appellant's car and struck with its left front spring and penetrated the left hind wheel of the Armand car.

To demonstrate what I thus submit, I must quote from the respective witnesses each car carried, so far as able to speak thereto. Taking those in appellant's car first, I may point to what I have already said, that Armand, the appellant, was thrown out on to the highway, and so seriously injured as to be unable at the trial to recall anything that happened for some time before the accident.

His wife was thrown out on to the highway and so seriously injured that she could not be a witness at the trial, and we were told by counsel at the hearing hereof that she had since died. Dr. Wilson, who had attended her, told such a story of her injuries that anyone hearing it should not be surprised at such a result.

Mr. Fred Carr, one of the respondents quoted above, was thrown from the car on to the highway and seriously injured.

Mrs. Carr, his wife, who was also thrown from the car and seriously injured, tells, amongst other things, the following:

Q. Where were you sitting?—A. In the centre of the back seat.

Q. Who was sitting with you?—A. Mrs. Armand on my left and Mrs. Grinham on my right.

Q. Who was in front?—A. Mr. Carr and Mr. Armand.

Q. Who was driving?—A. Mr. Armand.

Q. What kind of car is it?—A. It was a Dodge car.

Q. Dodge Sedan?—A. I think so.

Q. What do you remember just prior to the accident happening? Where did the accident happen?—A. I think we had been driving about

1926

ARMAND v. CARR.

Idington J.

ten minutes, then the car lurched about apparently and there was a crash.

Q. What car?—A. Ours.

Q. The car you were in?—A. Yes.

Q. What happened after that?—A. Then there was a crash.

Q. What do you mean by lurching about?—A. It seemed to pitch from side to side, I think, for a second or so.

Q. Then came the crash?—A. Yes.

Q. Did you know any more?—A. The next I remember I was lying on the road with Mrs. Armand.

His LORDSHIP: I did not get how long this pitch lasted?—A. A few seconds.

Mr. CAMERON: And then you say shortly afterward the crash came? —A. Yes.

Q. Do you know anything about that, how it was caused or anything?—A. I could not say at all. I was sitting in the centre of the back; I was not looking at the road.

His LORDSHIP: Did you observe anything extraordinary or out of the way before you felt this pitch?—A. No.

Q. Seemed to be running smooth for ten or fifteen minutes?—A. Yes, perfectly all right.

Mr. CAMERON: Were there any exclamations made by anybody at the time?—A. Yes, Mrs. Grinham screamed.

Q. She was sitting in the back seat with you?—A. On my right.

Q. When this lurching started she exclaimed something?—A. She said "Gus, where are you going?"

* * *

Mr. CAMERON: What did she say?—A. "Gus, where are you going?"

Q. Who was Gus?—A. Mr. Armand.

Q. Then the crash came. After the crash you found yourself where? —A. Lying on the road with Mrs. Armand between the cars.

Q. You and Mrs. Armand?—A. Yes.

Q. In what position were you?—A. I was lying with my head and shoulders on Mrs. Armand.

His LORDSHIP: Is it at all material?

Then Mrs. Grinham testifies as follows:

Mr. HEIGHINGTON: You are one of the fortunate ones?—A. Yes.

Q. You were sitting on the right hand side of the car?—A. Yes.

Q. The impact took place on the left?—A. Yes.

Q. Now just before the accident can you tell us how Mr. Armand was proceeding in this car and what side of the road he was on?—A. We were on our proper side and seemed to be going perfectly, I think, and I mind, I thought I asked Mr. Armand to go a little faster and he refused to do so. I said, "How are you feeling to-night?" and he said "Fine," and just then a car came along, and I said "What awful headlights," and Mr. Armand said "Yes." I don't remember any more after that.

* * *

Mr. HEIGHINGTON: Did anything else happen?—A. Nothing else happened. We seemed to be going along perfectly, I think, but I was unconscious for about five minutes after the accident, and it seemed to me everything was perfectly safe.

* * *

Q. Now after the accident you were the only one that was——A. Conscious.

Q. Did you observe yourself the position of the two motor cars on the road?—A. I did.

Q. Will you tell His Lordship how you found them?—A. Our car was going straight for Toronto, and it looked as if it had been stopped there.

Q. How close to the north side, the south side of the concrete road, the right hand side?—A. When I got out?

Q. You were sitting on the road?—A. Yes.

Q. You got out of the door?—A. I was thrown.

Q. From the back into the front?—A. Yes, Mr. Carr was on top of me.

Q. You had been sitting on the right hand side of the rear seat?—A. Yes.

Such are the stories of what happened those in the appellant's car.

Wilcox in his Studebaker Special had four passengers. Let us turn to the stories given respectively by these passengers.

Jeannette Graham says:

Q. On what side of the road was Mr. Wilcox's car at the time?—A. Right side.

Q. Did you get out of the car?—A. After Mrs. Pollock got out.

Q. Which side did you get out of?—A. Left hand side.

Evidently she was not thrown out.

Mrs. Margaret Pollock, another of said passengers in the Wilcox car, says:

Q. By reason of something your daughter said you looked?—A. Yes.

Q. When you looked ahead what did you see?—A. I saw a car coming along zigzagging on the highway. The last turn it gave it came straight down, and I seen it make one turn.

Q. Zigzagging and one straight turn?—A. Yes, and came right straight on to us, as if it was coming straight on to us.

Q. When it seemed it was coming straight on to you what side of the road was Mr. Wilcox's car on?—A. On his right side.

Q. What happened?—A. The care before it came on to us, gave a turn in from the road facing us, and they switched around.

Q. Then what happened?—A. The two cars knocked together.

Q. Did you get out of the car afterwards?—A. I was the first one to get out.

Q. Did you notice how the rear of Mr. Wilcox's car stood with reference to the side of the road, the right hand side of the pavement when you got out?—A. Yes, sir. I got out the right hand door. I couldn't get out the left hand door, as Mr. Armand was lying opposite the left door, and I had to get out the other side.

Q. The right hand side, close to the ditch?—A. Yes, I had to go around. The right hand wheel of his car was not very many inches from the grass.

His LORDSHIP: Front or hind?—A. Right hand back wheel.

Mr. BRACKEN: Did you go over to the Armand car?—A. Yes, sir.

1926

ARMAND v. CARR.

Idington J.

Q. Did you pass around it?—A. Yes.

Q. Back or front?—A. The front. It was straight across, practically straight across the highway.

Q. Facing the lake?—A. Yes.

Q. You went around the front?—A. Yes.

Q. In going around the front was it necessary to go off the pavement to get around the front?—A. No, they had about three feet from that side. You could get about three feet to go around.

Q. Then whom did you see first? Did you see Mr. Carr there?—A. I saw Mr. Carr.

Q. Did you speak to Mr. Carr?—A. Yes, sir.

Q. What did you say to Mr. Carr?—A. I asked if he was the one who was driving the car, and he said "No." I asked him—I said that was an awful thing what happened, and he said he guessed the man lost his head.

His LORDSHIP: He did not say which man?—A. He told me the man —I mean——

Q. Tell me his words?—A. He said, "I suppose he lost his head."

Q. You took it to be the other man?—A. He said, "The man on the ground."

Mr. BRACKEN: You did not tell us that before. Tell us again what words he said exactly.—A. I asked Mr. Carr if you are the man who was driving the car. He said, "No, it was this man here," pointing to Mr. Armand, and Mr. Armand was there, and I said, "What happened?" and he said, "I suppose he lost his head."

Q. You took that to mean Mr. Armand?—A. Yes, I knew it was. That is what he said, and he pointed to him.

Q. Why did you not tell us that the first time. You are not impressing His Lordship very favourably.

CROSS-EXAMINED BY MR. CAMERON

Q. Did you say you passed on the pavement around the Armand car without going off on the grass?—A. Yes.

Q. How far from the front to the south side of the pavement?—A. About three feet.

Q. You are sure you spoke to Carr?—A. Quite sure.

Q. He said Armand lost his head?—A. Yes.

His LORDSHIP: Was anyone in the car you were in hurt?—A. I had my hand hurt and a rib broken.

Q. Still you were able to get out and walk around the car and hear what was said?—A. I was always going around; I was never in bed. My eye was just blackened.

Miss Margaret Pollock says:

Mr. BRACKEN: Prior to the accident did anything unusual attract your attention.—A. Yes, sir.

Q. Where was it?—A. The lights of a car coming and going on the opposite side of the road, and then he turned back to his own side and came back again to our side, and it looked like a head-on collision, and he swerved around.

Q. It looked like a head-on collision?—A. Yes.

Q. And then what did he do?—A. The car swerved around, and the back left of his car hit the front left of our car.

Q. Were you injured at all?—A. I was bruised.

Q. Did you get out of the car after the accident?—A. Yes.
Q. You saw the situation as it was then?—A. Yes.

Mrs. Walker, the only other passenger in said Wilcox car, testifies as follows:

Q. When Miss Pollock called out and you looked ahead, can you give me any idea at that time how fast Wilcox's car was going?—A. I know he had slowed down when she said that.

Q. What happened to you?—A. I don't know. I was in the back seat. When I woke up I was lying in the bottom of the car. I didn't know any more.

Q. What injuries did you suffer?—A. One wrist broken and one badly sprained.

Evidently nothing more serious than a broken wrist and the other sprained, for her doctor's bill was only $9.50.

Compare this recital of the injuries those in the Wilcox car suffered, with those suffered by the occupants of the appellant's car, and I submit that, though these circumstances (thus truthfully portrayed and not contradicted or otherwise explained) were lost sight of at the trial, I am fully justified in, with great respect, coming to the conclusion that the learned trial judge seriously erred in his appreciation of the facts in overlooking what I have called attention to.

I submit that the driver and passengers thrown from appellant's car and so most seriously injured, as they were, could not have resulted only and alone from the shock received from the blow of the Wilcox car.

It was, again with all due respect, too hastily assumed by the learned trial judge that the Wilcox car, coming with such an excessive rate of speed, could alone produce the results that followed to those in appellant's car.

I am quite free to admit that at the argument herein I had, from reading the judgment of the learned trial judge and briefly glancing at the judgments on behalf of the Second Appellate Division, come to the conclusion that this appeal should be dismissed, for the reasons assigned below, yet that it was highly probable Wilcox had been travelling at such an excessive rate of speed as possibly to account for the force of the collision alone producing such lamentable results. No other cause was suggested.

Another thing I felt was that Wilcox's story of having slowed down to a five-mile rate and being able to stop within a few feet could not be true.

1926

ARMAND v. CARR.

Idington J.

Hence, although decidedly of opinion that the Second Appellate Division was right for the reasons assigned by it, yet I felt, from what had happened, the majority of the court likely to take the other view and I must read, as usual when dissenting on mere matter of fact, the entire relevant evidence, and read, accordingly, the whole evidence. And in doing so I was startled to find that abrupt stoppage by appellant of his car at the critical moment in question, and that in all probability Wilcox, as sworn to by himself and others, had, on seeing the zigzag motion, slowed down to a comparatively slow rate, else he and his passengers, or some of them, would have been thrown out. I still think he cannot have got down to a five-mile rate. But certainly there are actual grave reasons, arising from the comparison of results, for rejecting the theory accepted at the hearing hereof that any such high rate of speed as suggested then, had been kept up to the time of the collision. For my part I was partly led to believe it by reason of the remarks of the learned trial judge discrediting not only Wilcox but also his four passengers.

A perusal of the evidence of the latter leads me to say I can find no reason for doing so, when they, or some of them, say what is doubted, I think they are quite right in describing the movements of Armand's car as "zigzag" and that Wilcox's attention was drawn to it and his rate slowed down as result.

But when it comes to describing the actual collision there is some doubt as to their accuracy; not from any desire to excuse Wilcox but from mental excitement rendering it impossible to observe accurately all that happened.

For example Mrs. Grinham is led by counsel thus—after telling of seeing the headlight, and hearing that someone said something answered by Armand thus:

> And Mr. Armand said "Yes." I don't remember any more after that.

Then counsel says:

> Q. What headlights were those?—A. Coming towards us.
> Q. Was there a crash?—A. Yes, almost instantly.

Evidently incorrect if we bear in mind what others, such as Mr. Fred Carr, tell us as quoted above.

There is too much of that sort of thing in this case. I therefore submit we must try if we can and get seized of such salient predominating facts, such as I have, in trying to ascertain the reason for the widely different results I have just referred to, arising from the shock of the collision.

I submit it is quite clear that the Wilcox car, hitting the other as described, could not alone have brought such diverse results, and that there is no doubt it was by reason of Armand's sudden stoppage. The shock therefrom immediately before, but almost concurrently with the Wilcox car getting locked with the other produced the injuries the Carr respondents have suffered, and are suing for. Hence both Armand and Wilcox, I hold, are liable jointly on that ground alone.

Also, I agree with the Second Appellate Division, for the reasons therein assigned, that Armand is jointly liable for not staying on the south side where he had gone to get rid of the danger.

And I further hold that there was on Armand's part quite enough, in the extraordinary zigzagging course he pursued as above detailed by Fred Carr, as well as expressed by several other witnesses, to render him liable herein for the misleading Wilcox as to where it would land him.

There is another feature of this remarkable case and that is the conflicting versions of the actual situation at the time of the collision and exactly where and how it happened. In view of what I have just set forth I am not much concerned in regard thereto, but seeing the prominence given to this feature by each party to this case, and other cases that were tried together therewith, I may point out the pith of the substance of each such contention on behalf of each of those concerned herein.

Wilcox swears he was on his own side of the road, meaning north of the centre line of the concrete pavement. And he presents a photograph copy of a sketch he made. A number of witnesses corroborate him to the extent of saying he was on the north side of the line.

Carr says Armand had certainly crossed the line a foot. As already remarked I cannot find that on as dark a night

1926

ARMAND v. CARR.

Idington J.

as it was, it was not possible for even an honest man to be mistaken. The blinding light from the car, or either of them, could help little for such a calculation.

And those witnesses such as Reid, who came along later, evidently found no very safe passageway to get on or pass at either side past these locked cars after the collision—until after they got separated.

Reid sums the thing up thus:—

Q. The rear portion of the Studebaker was where with regard to the centre line of the road?—A. On the left side.

Q. The rear portion would be on the left side?—A. Yes, there wasn't room to pass hardly between it and the fence.

Q. The whole of the pavement was taken up by the cars?—A. Yes.

His LORDSHIP: They could have passed by by going on the grass. You could have passed on the right hand side by going off the pavement on the grass?—A. There would hardly be room. It would be pretty close.

Q. Whatever the position of the cars were they occupied the whole of the pavement?—A. Yes.

This version could be well corroborated by taking the stories of others. And indeed it would agree with Wilcox's picture already referred to and leave him clear of being on the wrong side of the line.

I only cite this evidence to shew, in face of a mass of evidence clearly demonstrating how both drivers can, or ought to be, jointly held liable, why we should not waste time over the task of trying to decide conclusively on which side of the centre each car was and thereby alone solve the issues joined herein. For that evidence is most conflicting and the net result as expressed by Reid demonstrates that the two cars stretched across the travelled road in such a way as to indicate appellant was likely to have his left hind wheel across the centre.

Moreover let anyone turn back and read the evidence I have quoted from Mrs. Carr where she speaks of the appellant's car lurching about, and then a crash, and then that it seemed to pitch from side to side for a second or so, and then came the crash.

I submit this evidence is worth considering in connection with my suggestion herein that the sudden stoppage by appellant caused first, and accounts for, the pitching, and a second or so later the collision.

I am of the opinion that the learned trial judge, I submit with every respect, was clearly in error in holding that

a driver passing in quick succession, at a rate of from twenty-one to eighteen miles an hour, from one side to the other in zigzagging fashion, of his own side of the road, as some express it, was driving carefully, and hence, for the many foregoing reasons, I would dismiss this appeal with costs.

No one on the night in question pretends to have made any measurements or marks whereby measurements could later on have been made, yet the counsel for respondents, the Carrs, asked, when appealing to the court below, to be given, if the appeal not allowed, a new trial, as he had discovered since the trial new evidence that would conclusively determine the question in issue. Of course as their appeal was granted below, no new trial was needed.

He repeated that herein, but upon my asking him if he had cross-appealed herein, he said, "No."

Notwithstanding that, I would much prefer a new trial to the inevitable consequences of establishing as law that a man may act as appellant did and run no risk as a driver for the results of his doing so. In short may, with impunity, produce the shocking result appellant has produced, or helped to produce, and in question.

I would dismiss this appeal with costs.

If a majority would agree to a new trial I would assent thereto on usual terms.

Appeal allowed with costs.

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitor for the respondents, Fred Carr and Kitty Carr: *D. O. Cameron.*

Solicitor for the respondent Ernest Wilcox: *C. R. Widdifield.*

1926

*Feb. 22.
*May 4.

MATHIEU *v.* MATHIEU

Account—Testamentary executor—Statement as to revenues—Art. 918 C.C.—Appeal—Jurisdiction—Costs

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, Mercier J., which maintained the respondent's action.

The appellant, as testamentary executor of the estate of one Urgel Mathieu, had been condemned by both courts to render an account to the respondent.

Upon the appeal to the Supreme Court of Canada being called for hearing, the appellant's counsel was heard merely on a question of jurisdiction raised by the court as to whether the sum of $2,000 was involved in the appeal.

After hearing respondent's counsel, the court declared that, as then constituted, the court would decline jurisdiction to hear the appeal; but as a matter of indulgence, the hearing of the appeal was postponed and appellant was given permission to ask special leave to appeal to this court from the appellate court. If the appellant failed to obtain same, the appeal should be further spoken to. In the meantime, the appeal should stand on the list.

At a subsequent date, upon the respondent's counsel moving to dispose of the costs of the appeal owing to the refusal of the appellate court to grant special leave to appeal, the Supreme Court of Canada ordered that the appeal be dismissed with the costs of a motion to quash, holding that the parties were equally in default in not having the question of the court's jurisdiction determined at an early date: the appellant might have moved to affirm jurisdiction while the respondent might have moved to quash the appeal.

Appeal dismissed.

P. St. Germain K.C. for the appellant.

C. Laurendeau K.C. and *J. Desmarais K.C.* for the respondent.

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

(1) (1925) Q.R. 39 K.B. 235.

HIS MAJESTY THE KING (RESPONDENT) .APPELLANT; 1926

AND *Mar. 8. *May 4.

ELSIE PROUD (SUPPLIANT) .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Husband and wife—Evidence of marriage—Insurance—Claim under Returned Soldiers' Insurance Act, D., 1920, 10-11 Geo. V, c. 54.

Respondent, as widow of a deceased, claimed to recover from the Crown under a policy of insurance taken out by deceased under *The Returned Soldiers' Insurance Act,* D. 1920, 10-11 Geo. V, c. 54. Against her claim it was urged that satisfactory evidence of marriage had not been produced.

Held, that as she had lived with deceased openly as his wife, was evidently regarded by deceased as his wife, had children by him acknowledged by him to be legitimate, and was accepted by people of repute as his wife, a *prima facie* case arose in her favour; and the findings of the trial judge, who had accepted her statement of the fact of a marriage ceremony, should be affirmed, under all the circumstances, notwithstanding her failure to recollect details of such ceremony.

Judgment of the Exchequer Court ([1926] Ex. C.R. 1) aff.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1). The suppliant (now respondent) in her petition of right claimed to recover from the Crown under a policy of insurance issued upon the life of P. E. Proud under the provisions of *The Returned Soldiers' Insurance Act,* Statutes of Canada, 1920, c. 54, the beneficiary thereunder being named as "Elsie Proud, wife of the insured."

The insured died in Edmonton, Alberta, in February, 1924. The respondent applied to the department of Government administering the Act, for payment of the amount payable under the policy, but this apparently was refused upon the ground that no certificate of marriage, or satisfactory evidence of marriage, had been produced.

O. M. Biggar K.C. for the appellant.

O. F. Howe for the respondent.

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

(1) [1926] Ex. C.R. 1.

1926

THE KING. v. PROUD.

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

DUFF J.—The petitioner claims as the wife of the deceased Proud. The evidence of marriage might be more convincing, but the petitioner lived with Proud as his wife, openly, in Edmonton, had children by him acknowledged by him as legitimate, and was accepted by people of repute as his wife. Dr. Geggie's evidence is conclusive upon this point, namely, that Proud considered himself the husband—that is to say, the lawful husband—of the petitioner. When the doctor, on the day of his death, suggested a will, his answer was that his wife, with whom, admittedly, he was living on the most affectionate terms, would "get everything, anyway."

At least a *prima facie* case in her favour arises on these facts. A serious point is presented by the absence on her part of all recollection of the details of the marriage ceremony. On the whole it would appear, however, when the state of her health is considered, that there is no real ground for disagreeing with the finding of the learned trial judge, who accepted her statement that somewhere in New York she went through a marriage ceremony with Proud.

IDINGTON J.—This is an appeal from the judgment of the President of the Exchequer Court of Canada (1), in an action brought by the widow, formerly the wife, of a deceased soldier who, for her benefit, had taken a policy of insurance upon his life issued by the Dominion Government under the provisions of the *Returned Soldiers' Insurance Act,* 10-11 Geo. V, c. 54, for one thousand dollars.

The learned trial judge, who tried the case in Edmonton where the late Mr. Proud and his wife lived at the time of his death, and for some year or two previous thereto, after the evidence for her was all heard and none adduced by appellant, on the application of defendant, now appellant, allowed the case to stand over for a couple of months, at the urgent request of appellant's counsel, who pretended to doubt respondent's story in the witness box, as to the validity of the marriage with her late husband, and possibly might ask for a commission to take evidence. No

(1) [1926] Ex. C.R. 1.

1926

THE KING. v. PROUD.

Idington J.

such commission ever was asked for and if the respondent's story was false an investigation would certainly have enabled its falsity to have been demonstrated.

Such is the conclusion I have reached after reading the entire evidence.

She had been examined for discovery a week before the trial and I imagine at some length, for the appellant's counsel insinuated time and again it would contradict her story at the trial.

Although in the printed case herein it was put down apparently as one of the exhibits that reference thereto is cancelled.

It never was put in or used and all references thereto would seem to have been bluff, and, I suspect, the whole of that was inspired by slandering on the part of her deceased husband's relatives who expected to recover, if verified, said policy for themselves.

They evidently (if counsel before us for appellant right) dared not face the court.

The probability is that inquiry demonstrated no such case as pretended for defendant (now appellant) could be established or the commission would have issued.

I am, from a perusal of the evidence, quite clear that the judgment of the said judge was right and that this appeal should be dismissed with costs.

The story is a melancholy illustration of how often the poor returned soldier and his family have been improperly made to suffer.

Appeal dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondent: *McDonald, Weaver & Steer.*

SAMSON *v.* LEVACK

1926

*Feb. 23.
*May 4.

Contract—Conditions—Agreement to keep secret formula of patent—Art. 1080 C.C.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, Letellier J., which maintained the respondent's action.

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

(1) (1925) Q.R. 41 K.B. 53.

1926

SAMSON v. LEVACK.

The respondent claimed part of the price for which he had sold to the appellants a certain patent for manufacturing paint. The appellants made a counter-claim asking for the annulment of the contract. The Superior Court maintained the respondent's action and dismissed the appellants' counter-claim. The Court of King's Bench (1) affirmed the judgment, holding that the sale of interests in an industrial enterprise, subject to the condition that the vendor bind himself not to divulge the secret or the formula of the manufacturing process to any person, cannot be annulled on the ground that the formula at the time of the sale could be known by the public owing to the fact that it had been registered at the patents office at Ottawa, such registration having been made known to the buyers.

The Supreme Court of Canada, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

Ls. St.-Laurent K.C. and *A. Langlais K.C.* for the appellant.

L. G. Belley K.C. for the respondent.

1926

*May 10.

STANDARD TRUSTS COMPANY *v.* BRIGGS

Executions—Homestead—Transfer of by execution debtor to wife—Wife carrying on farm—Whether crop exigible under execution against husband.

MOTION for leave to appeal to the Supreme Court of Canada from a decision of the Appellate Division of the Supreme Court of Alberta (2), allowing an appeal by the defendant respondent from a judgment by McCarthy J. on an interpleader issue as to a wife's right as against her husband's execution creditors to the crops grown by her on their homestead and on other land leased by her.

---

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

(1) (1925) Q.R. 41, K.B. 53. (2) [1926] 1 W.W.R. 832.

1926

STANDARD TRUSTS CO. v. BRIGGS.

The Supreme Court of Canada, after hearing counsel for both parties, refused the motion with costs.

Motion refused with costs.

Geo. F. Henderson K.C. for motion.

S. Clark contra.

1926

*May 11.
*Oct. 5.

THE BOARD OF TRUSTEES OF THE LETHBRIDGE NORTHERN IRRIGATION DISTRICT (DEFENDANT) ..... } APPELLANT;

AND

HENRY FREDERICK MAUNSELL AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

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

Irrigation—Seepage—Flooding of land in vicinity—Liability of irrigation district board—Irrigation Districts Act, Alta. (R.S.A., 1922, c. 114)—Irrigation Act (R.S.C. 1906, c. 61)—Railway Act (D. 1919, c. 68; R.S.C. 1906, c. 37).

Defendant, a body corporate by virtue of *The Irrigation Districts Act,* Alta. (R.S.A. 1922, c. 114), and administering an irrigation district formed under that Act, applied under *The Irrigation Act* (R.S.C., 1906, c. 61, and amendments) for the water required and for authority to construct the necessary works for utilization thereof, and, having obtained this authority, constructed and maintained a main irrigation canal. At some point of the canal, not discovered, a seepage occurred, and by underground channels the water found its way to and flooded plaintiffs' ranch (which was not contiguous to the canal). Plaintiffs sued for damages.

Held, having regard to the provisions of *The Irrigation Act,* and of *The Railway Act* thereby made applicable, the defendant could not justify its flooding of plaintiffs' lands without compensation by claiming to have merely exercised its statutory rights without negligence; by the flooding the defendant had interfered with plaintiffs' rights over their lands, had exercised in respect thereof a veritable easement, which, as well as the right of interference, it could acquire only by following the course prescribed under *The Railway Act,* viz., a notice to treat and expropriation proceedings with the payment of proper compensation; no notice to treat having been given the defendant was in the position of a trespasser; the principle relied on in *Hanley* v. *Toronto, Hamilton & Buffalo Ry. Co.,* (11 Ont. L.R., 91), should be applied, and plaintiffs were entitled to recover damages in an action at law; they were not restricted to having the damages determined by arbitration under *The Railway Act;* it was for defendant to initiate proceedings thereunder. The damages awarded were restricted to

---

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

1926

LETHBRIDGE NORTHERN IRRIGATION DISTRICT v. MAUNSELL.

those accrued at the date of the trial, reserving the right to claim subsequent damages if the seepage continued.

Idington J., dissenting, held that, defendant having acted under statutory powers, its duty as water supplier having become imperative, and not being guilty of negligence, it was under no duty to do more than it did, and was not liable to plaintiffs; further grounds against plaintiffs' right to recover were: their failure to pursue the course provided by s. 41 of *The Irrigation Act;* their rejection of defendant's engineer's suggestion of drainage of their land, which would have mitigated the damage; and doubt, on the evidence, whether the water which damaged plaintiffs' land was from the canal.

Judgment of the Appellate Division of the Supreme Court of Alberta (21 Alta. L.R. 449) aff., Idington J. dissenting.

APPEAL and cross-appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which set aside in part the judgment of Tweedie J. (2).

The action was for damages caused by the alleged flooding of plaintiffs' lands by water escaping from the defendant's irrigation canal. The material facts of the case are sufficiently stated in the judgments now reported.

At the trial Tweedie J. awarded the plaintiffs $7,500 damages (2). The Appellate Division set aside this judgment in part, and held the plaintiffs entitled to recover for injury caused up to the time of the trial, with the right to seek further relief for injuries as they occur, and assessed the injury up to the time of the trial at $300, with the option to either party to have a reference at risk of costs of the reference.

Under special leave granted by the Appellate Division, the defendant appealed to the Supreme Court of Canada from so much of the said judgment as declared that the plaintiffs were entitled to recover any sum against the defendant for injury sustained by them; and the plaintiffs cross-appealed, claiming that their damages should be assessed at the trial once and for all at $7,500 with costs, as fixed by the trial judge, and in the alternative that the damages be assessed up to the date of the judgment in this appeal and an injunction granted restraining defendant from committing further damages or injury to plaintiffs' lands.

W. S. Gray and *J. J. Frawley* for the appellant.

R. B. Bennett K.C. and *J. D. Matheson* for the respondent.

(1) 21 Alta. L.R. 449; [1925] 3 W.W.R. 202.

(2) [1925] 1 W.W.R. 1047.

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

MIGNAULT J.—The appellant is a body corporate by virtue of a provincial statute, *The Irrigation Districts Act,* c. 114 of the Revised Statutes of Alberta, 1922. It administers an irrigation district formed under that Act, and as therein provided (s. 35), it applied to the proper authorities under the Dominion Statute, *The Irrigation Act,* c. 61 of the Revised Statutes of Canada, 1906, and amendments, for the water required for the irrigation of the district and for authority to construct the necessary works for the utilization of the water. Having obtained this authority, it constructed and it now maintains a main irrigation canal, or ditch, as it is sometimes called, the head-gates of which are on the Old Man River. Thence the water is carried in the main canal, which is some thirty feet wide at the bottom, and it crosses the river at a distance of about three miles from the head-gates, through a flume. From the flume, the course of the main canal is in a northerly direction, passing at a distance of some 4,000 feet from the respondents' ranch, which is not contiguous to the canal. This ranch occupies some bench lands leading to what is called a cut-bank, where the ground descends by a steep slope to a lower level, on which the respondents' house and buildings are situated. This cut-bank is emphasized as affording shelter to the cattle, and at its foot was a spring that was convenient for furnishing water.

The appellant's canal in the vicinity of the respondents' ranch is constructed through gravel lands, the gravel increasing somewhat in coarseness the further down the excavation goes. When the canal is full, the water is seven feet deep, and it appears to have been anticipated by the builders that there might be some loss of water through seepage on account of the character of the soil.

Water was first turned into the canal in May, 1923. Then a freshet came and caused damage to the works, and the water was withdrawn. It was again let into the canal in the following October. At some point of the canal which has not yet been discovered, a seepage took place, and by underground channels the water found its way to the re-

1926

LETHBRIDGE NORTHERN IRRIGATION DISTRICT v. MAUNSELL.

Mignault J.

spondents' ranch. This flow was first noticed at the spring, the discharge from which greatly increased, and I think it is unquestionable, and both courts have so found, that the respondents' land has been damaged thereby. The learned trial judge granted the respondents $7,500, as damages, assessed, I take it, for all time on the basis of a permanent depreciation of the property. The Appellate Divisional Court considered that no more than $300 should be allowed for damage caused up to the trial, but gave the parties, at their risk, the right to apply for a reference to show, if such be the case, whether the damages up to the trial were greater or less than that amount. Harvey C.J.A. and Hyndman J.A., dissented, and would have dismissed the action on the ground that the board of trustees had merely exercised without negligence its statutory rights, and was not responsible for damage caused thereby.

There is an appeal from the latter judgment by the appellant which relies on the grounds of dissent in the court below to ask for the dismissal of the respondents' action. The respondents also cross-appeal and seek to have the judgment at the trial restored.

The Irrigation Act (ss. 28 and following) confers expropriation powers on applicants for a license for water and for power to construct irrigation works such as this appellant, making *The Railway Act* applicable thereto, and subs. (2) of s. 29 states that all the provisions of *The Railway Act* which are applicable shall in like manner apply to fixing the amount of and the payment of compensation for damages to lands arising out of the construction or maintenance of the works of the applicant or out of the exercise of any of the powers granted to him under this Act.

Section 164 of *The Railway Act, 1919,* is a familiar provision, which has often been considered by the Canadian courts and by the Judicial Committee of the Privy Council. It enacts that the company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

In the view I take of this case it will not be necessary to determine whether or not the appellant was guilty of

any negligence in carrying out its statutory duty to supply water for irrigation purposes, as required by the provincial and federal statutes to which I have referred. Even assuming that there was no negligence, it does not follow, in my judgment, that the appellant can justify its flooding of the respondents' lands without compensation, by claiming to have merely exercised its statutory rights without negligence. The respondents' case, in my judgment, calls for the application of other principles. By flooding their lands, the appellant has interfered with the respondents' rights over their lands, and has exercised in respect of these lands what is a veritable easement, and this easement, as well as this right of interference, it could acquire only by following the course prescribed under *The Railway Act*, viz., a notice to treat and expropriation proceedings with the payment of proper compensation.

No notice to treat was ever given to the respondents, and the appellant, in flooding their lands, is in the position of a trespasser. To such a case I would apply the principle relied on by my brother Anglin in *Hanley* v. *The Toronto, Hamilton and Buffalo Ry. Co.* (1). To the same effect as the *Hanley Case* (1), and as showing the illegality of an entry on land without notice to treat, I might refer to the decision of the English Court of Appeal in *Cardwell* v. *The Midland Railway Co.* (2), affirming the judgment of Byrne J. at the trial (3). See also the decision of this court in *Leahy* v. *Town of North Sydney* (4), and the judgment of the Judicial Committee in *Saunby* v. *Water Commissioners of London* (5). The general principle governing such cases is stated by Lord Macnaghten in *Parkdale* v. *West* (6).

I am in accord, for the reasons given by Mr. Justice Clarke, with the decision of the Appellate Divisional Court, restricting the damages which should be awarded to the respondents to the damages which had accrued at the date of the trial, reserving the right of the respondents to claim subsequent damages if the seepage continues, and it may in time cease. This is supported by the decision of this court in *Gale* v. *Bureau* (7).

(1) (1905) 11 Ont. L.R. 91.
(2) (1904) 21 T.L.R. 22.
(3) 20 T.L.R. 364.
(4) (1906) 37 Can. S.C.R. 464.
(5) [1906] A.C. 110.
(6) (1887) 12 App. Cas. 602.
(7) (1911) 44 Can. S.C.R. 305.

1926

LETHBRIDGE NORTHERN IRRIGATION DISTRICT v. MAUNSELL.

Mignault J.

I do not think, under the circumstances, that the respondents have no recourse by action at law for their damages but are restricted to having these damages determined by arbitration under *The Railway Act*. It was for the appellant to initiate proceedings under this Act, and then a case would have been established for an arbitration. The appellant should not now be allowed to make this objection.

For these reasons, I would dismiss the appeal and cross-appeal with costs.

IDINGTON J. (dissenting).—The defendant is a body corporate formed under the provisions of *The Irrigation Districts Act* (R.S.A., 1922, c. 114), of which Act section 11 is as follows:—

> 11. The Board of every District formed hereunder shall be a body corporate, and shall have full power to acquire, hold and alienate water rights and all other powers and privileges under *The Irrigation Act* and to take, hold and alienate any property real or personal and shall, subject to the provisions of this Act, have all the powers necessary for the construction, working, maintenance and renewal of irrigation or drainage works necessary for the use and purposes of the district and the inhabitants thereof.

"The Irrigation Act" referred to in the above section is the Dominion Act, being R.S.C., 1906, c. 61.

The appellant filed a memorial with the Commissioner of Irrigation under the provisions of the *Irrigation Act,* asking permission to divert water from the Old Man river.

An authorization to construct the works was granted, but the memorial was amended and a new authorization to construct was issued on November 24, 1920.

The appellant acting upon such authority and the powers given it by the said *Irrigation Districts Act,* proceeded to construct a canal of about forty miles in length designed to distribute water on to the lands of water users within said district containing a hundred thousand acres or more.

The respondents own, outside of same, a ranch of about two thousand acres, the point of which nearest to said canal is some four thousand feet distant therefrom. Said ranch is chiefly on the flat land bordering the Old Man river and about seventy-five feet below the bottom level of said canal.

The said canal was constructed with such great care that the learned trial judge who heard the case out of which

this appeal arises, and all others judicially concerned in the court of appeal below, have held that there was no negligence on the part of those concerned in said construction.

It was finished so far that appellant was given, after due inspection, by duly constituted authority, of said work, a permit by the Minister of the Interior, dated the 15th of May, 1923, to divert from the said Old Man river, a specified quantity of water for use in the works so constructed, and it was turned on accordingly.

An unprecedented flood in the Old Man river about same time did such damage to the head-gates of said canal that no further water was turned on until the following October, 1923.

The suggestion was made by Mr. Houston (an engineer who had much to do with inspecting this work and passing upon the same), in the course of his evidence, if I understand him aright, that said rising may have so disturbed things as to be the cause of the seepage now in question herein.

I pass that meantime to continue the story of these proceedings.

The respondents' ranch suffered what may have arisen therefrom, but the turning on of the water in October into said canal, to serve its uses, and in the following spring again, for same purpose (it having been dry during the winter), were respectively, about three weeks thereafter, followed by a rising in a spring or well on the respondents' ranch, and the plaintiffs, now respondents herein, claim that that soaked into the adjacent ground making part of it boggy.

Thereafter, on the 30th October, 1924, respondents brought this action, claiming damages arising solely from said seepage, which was tried before Mr. Justice Tweedie, who held that the appellant had not been negligent in the construction of the said canal, or in turning on the water at first, but that when, as the evidence shewed, according to his finding, seepage from the canal had repeatedly shewn it was doing damage, the appellant had been negligent in not remedying the evil, and he entered a judgment for $7,500.

1926

LETHBRIDGE NORTHERN IRRIGATION DISTRICT v. MAUNSELL.

Idington J.

This evidently was founded upon the pretension of the respondents that the selling value of the land was affected by reason of the existence of said seepage.

On appeal to the Appellate Division of the Supreme Court of Alberta there seems to have been a diversity of view.

The learned Chief Justice, with whom Mr. Justice Hyndman concurred, held that under the principles laid down by Lord Watson in the judgment of the Judicial Committee of the Privy Council, in the case of the *Canadian Pacific Ry. Co.* v. *Parke et al* (1), from which he quotes from page 547 of the report, as follows:—

> The real question, therefore, in this case comes to be, whether these provisions ought to be construed as being in their substance, as well as in their form, permissive merely, and subject to the obligation, which in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility.

and then he points out the legal results and infers as follows:

> He considered that that case was within the first class: for he states in the following page:—
>
> "When the water has been conveyed to his land he is authorized to use it for purposes of irrigation; but it is left to his discretion to determine whether, as circumstances permit, he will use in irrigation the whole, or part, or none of it."
>
> In other words Parke was treated as a water user merely, not as a water supplier which the defendant in this case is under provisions which, as stated, clearly make it imperative that it shall carry the water through its ditch.

He held that it was on the evidence impossible to remove the possibility of any seepage, by any reasonable effort, or in law to stop the work, and quotes Brett M.R., in the case of *Heaven* v. *Pender* (2), where he gives the definition of actionable negligence, as follows:—

> The neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.

Mr. Justice Hyndman in his concurring judgment cites as appropriate law the following, to be found in the judg-

(1) [1899] A.C. 535. (2) (1883) 11 Q.B.D. 503, at p. 507.

ment of Lord Hatherly in *Geddis* v. *Proprietors of the Bann Reservoir* (1).

In referring to the case of *Cracknell v. The Mayor and Corporation of Thetford* (2), he says:—

"In that case, which has been followed by several others, it seems to have been laid down that persons having powers to execute certain works, and executing those works in such a manner as to perform that duty in compliance with an Act of Parliament, and being utterly guiltless of any negligence, cannot be liable to an action. If the person injuriously affected cannot find any clause in the Act of Parliament, giving him compensation for the damage which he has received, he cannot obtain compensation for that damage by way of action against the parties who have done no wrong. That is the simple proposition which is laid down in that case, and when it is expressed in those terms it is impossible for anybody to find any fault with it."

The line of thought thus expressed and verified by said quotations is what (with many other authorities, I am about to refer to, and rely upon) convinces me I must agree therewith.

Meantime I may point out that whilst so agreeing with the dissenting judges below, yet that the view the majority of said court took, if damages are to be assessed at all, they can only be damages up to the time of the bringing of the action, and that in such an action as this, if at all maintainable, it can be brought repeatedly and no means exist in the law whereby any such action can be made the ground of assessing damages as if upon the basis of an expropriation.

Moreover the respondents were in duty bound, if any such action is maintainable at all, to have taken such steps as would have mitigated their damages; yet when drainage was suggested to them by a competent engineer acting for appellant, the respondents seemed to scorn it.

It is clear to me as noon-day that drainage of said land, to relieve it of any damage flowing from said water, was the course the respondents should have followed, and especially so when suggested by a competent engineer acting for the appellant.

It would only have cost, according to the evidence of said engineer, about nine hundred to a thousand dollars, or, according to that of another engineer, perhaps up to

(1) (1878) 3 App. Cas. 430, at p. 448.

(2) (1869) L.R. 4 C.P. 629.

1926

LETHBRIDGE NORTHERN IRRIGATION DISTRICT v. MAUNSELL.

Idington J.

twelve hundred dollars; and, then, if done, I submit, probably would have added a large portion thereof to the previous value of the ranch, of which the land so treated formed a part. The evidence was not directed further to that consideration.

People acting in such a way, in such remarkable circumstances as in evidence herein, are not entitled to much straining of the law to help them out.

Before considering further that aspect of this case I desire to revert to a further consideration of the law bearing on that aspect of the case presented by the Chief Justice and Mr. Justice Hyndman set forth above.

The case of *Hammersmith and City Railway Company* v. *Brand* (1), long ago decided by the highest authority in England, that any such nuisances as might have arisen from the operation of said railway, in the way of noise, smoke or vibration of the dwellings on the respondent Brand's land, and no matter how seriously the value of his property, adjacent to the said railway, had been impaired thereby, gave him no right to damages unless part of his land had been taken.

That was a decision under the English *Railway Clauses Consolidation Act* of 1845, but followed by this court in the case of the *Canadian Northern Ontario Railway Company* v. *Holditch* (2), in an appeal from an appellate division of the Supreme Court of Ontario. Again on an appeal by Holditch from that decision by this court, to the Judicial Committee of the Privy Council (3), and that appeal was dismissed. The judgment of Lord Sumner, writing on behalf of said court, contains the following passage (cited by appellant's counsel herein) on page 544 of said report:

> The claim for depreciation by the prospective annoyance from noise, smoke and vibration was put thus: Sect. 155 of the Railway Act of Canada requires the company to "make full compensation * * * to all persons interested for all damage by them sustained by reason of the exercise of" the powers granted to them by this or by their special Act, and ss. 191 and 193 use language which draws a distinction between compensation for land taken and for damage suffered from the exercise of any of the powers granted for the railway. It was argued that the interference with convenient access to some of the lots by reason of the line being taken across the streets and the annoyance to be expected from

(1) (1868) L.R., 4 H.L. 171. (2) (1914) 50 Can. S.C.R. 265.
(3) [1916] 1 A.C. 536.

the noise, smoke and vibration of passing trains alike constituted damage suffered from the exercise of the powers granted for the railway.

Their Lordships are unable to adopt this view. The substantive obligation upon the railway company to make compensation is derived from s. 155, and the other two sections are only concerned with the procedure by which this obligation is to be enforced. The language of s. 155 is taken, with modifications to which in this case no importance can be attached, from the proviso to s. 16 of the Railways Clauses Consolidation Act, 1845, and it is well settled by decisions of the highest authority that land so taken "cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation." The decisions on this construction of the Railways Clauses Consolidation Act have been applied to the Canadian legislation many years ago.

The important feature of this is that it removes from doubt the distinction attempted therein between that case and the *Hammersmith Case* (1) above cited arising from the facts and wording of the Canadian *Railway Act* when compared with the English Act on which that case turned.

There would seem to have arisen considerable diversity of judicial opinion in the course of that *Holditch Case* (2) through our Canadian courts.

Holditch had subdivided a block of land he owned in Sudbury and filed in the registry office a plan thereof. The railway company expropriated certain of these lots as it was entitled to do, and on a reference to arbitration to determine the compensation he was entitled to, he contended, sometimes successfully, that he was entitled to damages for injury done other lots he owned in said subdivision by reason either of the railway crossing the street leading to such other lots rendering them less accessible—hence less marketable; or of the smoke, noise and vibration incidental to the use of the railway when constructed.

The damage done to Holditch's lands, then in question, I suspect, was much more serious than anything suffered by the respondents herein.

But there, as herein, no part of the lands which Holditch had subdivided, except the lots therein so expropriated, had been expropriated. Hence the basis of the litigation.

I submit that the Canadian railway statute in question therein was the same as that upon which the respondents herein rest their claim for compensation. And in face of said decisions I cannot see how it can be maintained that

(1) (1868) L. R. 4 H.L. 171. (2) (1914) 50 Can. S.C.R. 265.

1926

LETHBRIDGE NORTHERN IRRIGATION DISTRICT v. MAUNSELL.

Idington J.

there is any foundation for the respondents to rest their claim herein upon.

Their main pretension seems to have been throughout, that the *Railway Act* impliedly gave such rights as they claim because the *Irrigation Act,* R.S.C., 1906, c. 61, s. 29, subs. (2), reads as follows:—

> 2. All the provisions of the Railway Act which are applicable shall in like manner apply to fixing the amount of and the payment of compensation for damages to lands arising out of the construction or maintenance of the works of the applicant or out of the exercise of any of the powers granted to him under this Act.

and, it is claimed, gives such a claim. I submit it clearly does not do so, if we have regard to the relevant facts and the law as declared in the cases cited above.

Section 164 of *The Railway Act, 1919,* also put forward, is identically the same as section 155 of the *Railway Act* as it stood when Lord Sumner wrote the judgment in the *Holditch Case* (1), containing the above quotation therefrom, and the sections 191 and 193 to which he refers have been only so slightly modified in *The Railway Act, 1919,* as not to interfere with his said reasons above quoted.

But it is the *Railway Act,* R.S.C., 1906, c. 37, which I submit must be referred to, as I cannot find that the *Irrigation Act* which appeared in the same revision and by sections 28 and 29 *et seq.,* thereof, under the caption *Expropriation,* which tries to apply the *Railway Act* to solving such questions, has not been, since said revision, changed in this regard. And hence Lord Sumner's judgment, as quoted, proceeds on the express language in question herein.

I desire to refer to the case of *The London, Brighton, and South Coast Ry. Co.* v. *Truman et al* (2), which turned upon the Railway Act which provided for railways carrying cattle and purchasing lands wherein to provide conveniences for loading them and keeping in store until loaded, but failed to provide any compensation for those suffering damages by reason of such a nuisance. It was held therein that the respondents therein who had complained, had no alternative but to submit thereto without any compensation therefor.

(1) [1916] 1 A.C. 536. (2) (1885) 11 App. Cas. 45.

Lord Selborne in giving judgment (1), says at p. 57:—

Here there can be no question that the legislature has authorized acts to be done for the necessary and ordinary purposes of the railway traffic (e.g., such as those complained of in *Rex v. Pease* (2)), which would be nuisances at common law, but which being so authorized are not actionable.

Lord Blackburn in his judgment, at page 60, says:—

I do not think there can be any doubt that if on the true construction of a statute it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighbouring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the legislature.

Again in the case of *Mayor and Councillors of East Fremantle* v. *Annois* (3), where

The appellant municipality, in the exercise of authority conferred by the Western Australian Municipal Institutions Act (59 Vict., No. 10), s. 109 and at the request of the ratepayers, in order to improve a street reduced the gradient opposite the respondent's house so that it was left on the edge of a cutting with a drop of about six or eight feet to the road:—

Held, that the respondent was without remedy, since none had been given by statute, and the appellants had not exceeded the powers conferred.

Therein Lord Macnaghten, at page 217, says as follows:—

The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute.

The case of the *Canadian Pacific Railway Company* v. *Roy* (4), in some respects presents a case more like unto this than any other for undoubtedly upon the facts presented, the fire originated from a locomotive of the railway company, passing the land in question, and destroyed more property than in question herein.

It ultimately turned upon the question of negligence and the question of negligence was negatived, and hence Roy had no remedy.

(1) (1885) 11 App. Cas. 45.
(2) (1832) 4 B. & Ad. 30.
(3) [1902] A.C. 213.
(4) [1902] A.C. 220.

1926

LETHBRIDGE NORTHERN IRRIGATION DISTRICT v. MAUNSELL.

Idington J.

The Lord Chancellor, at page 229 of the Report, spoke as follows:—

> If the immunity claimed for the appellants were simply claimed upon the ground that they were a corporation without reference to what they are authorized to do in that capacity, the argument would be well founded; but the fallacy of the suggestion lies in supposing that that immunity is claimed because they are a corporation. If it were so, there would be no difference between the law of England and the law as so expounded in the province of Quebec; but the ground upon which the immunity of a railway company for injury caused by the normal use of their line is based is that the legislature, which is supreme, has authorized the particular thing so done in the place and by the means contemplated by the legislature, and that cannot constitute an actionable wrong in England any more than it can constitute a fault by the Quebec Code.

Apply that to this case, where a canal duly authorized by those having an absolute right to do so, and upon the material which it required, and was duly presented in compliance therewith, and the canal was constructed accordingly without negligence, and the water turned on after due inspection thereof, and permission given, and no negligence to be found up to that time, how can negligence be imputed by reason of such a very remarkable discovery as that alleged to have been made herein? I fail to see any ground therefor. There is no ground for the appellant refusing to carry on by reason thereof. The cost of protecting the respondent now is quite prohibitive according to the evidence. It is a corporation created for municipal purposes only, in a country that needs the supply of water for irrigation.

The duty has become imperative by virtue of the legislation of its creator, and that must be observed. And thus what is complained of falls within the definition of Lord Watson in disposing of the *Parke Case* (1) above referred to. And all the authorities recognize that when that has transpired, there is no ground for relief in the case of unexpected developments which the legislature must have decided not to recognize.

There is another feature of the legislation, bearing upon the questions arising herein, I may advert to.

It was decided by this court in the case of *Canadian Pacific Railway Company* v. *Albin* (2), that even where the property was in a sense damaged by improvements the

(1) [1899] A.C. 535. (2) (1919) 59 Can. S.C.R. 151.

railway needed, and the injury done to it as a place of business was such that it had to be abandoned, the arbitrator allowed $6,366 for injury to the property, and the injury being such as to destroy the business, he allowed $4,500 therefor, and this court, reversing that and the court below, held that the latter loss could not be compensated for. I dissented, but that binds me now. How can I hold respondents entitled in a much less meritorious case.

Especially so when there is nothing expressly provided by the legislature, for any compensation for any damages for anything arising after the continued operation of the work has become imperative.

The nature of the appellant's incorporation is, in a legal sense, the same as if it had been declared part of the municipal system of the province of Alberta, for the promotion of the interests of that province, and the duties cast upon appellant are purely of that nature and in no way for financial gain to appellant directly or indirectly.

A distinction has been often made, between such a body and other corporate bodies created solely with a view to financial gain, when it comes to determining whether or not the legislature had definitely decided that under such like relevant circumstances, there could not be any claim for damages, although, in similar circumstances, a private corporation solely for gain, might be held liable.

In the one case the legislature can hardly have intended to declare that a tort, which was done under the direction of certain public officers, specified in the legislation, and in strict compliance therewith, without any negligence.

In the converse case of a private corporation which I thus point out, a different construction might be put.

The appellant's counsel properly drew our attention to the fact that it is subject to the control of the Irrigation Council constituted under *The Irrigation Districts Act*, section 34, of which the relevant parts are as follows:—

34. (1) There shall be an irrigation council of three members, or any less number, whose duty it shall be to advise every board upon the conduct of the affairs of its district and who may forbid any act or course of conduct proposed to be done or entered upon by a board.

(2) The member or members constituting the council shall be appointed by the Lieutenant Governor in Council.

(3) No money received by any board upon debenture issue shall be expended at any time without the prior approval of the council.

1926

LETHBRIDGE NORTHERN IRRIGATION DISTRICT v. MAUNSELL.

Idington J.

(4) The council shall be entitled at all times to require from any board all such information as it may be in its power to give, with respect to anything done or proposed to be done by it.

* * * *

(8) No construction of any work shall be directed or begun and no contract for the construction of any work, entered into by any board, shall be of any effect whatsoever until the same shall have received the assent of the council.

And he cites in that connection the *Corporation of Raleigh* v. *Williams and Another* (1), and quotes from the judgment of Lord Macnaghton at page 550 of said case as follows:

> It was argued on behalf of the respondents that if a drainage work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of the insufficiency of the outlet, or by reason of some other defect which a competent engineer ought to have foreseen and guarded against, or if the result of a drainage work is to damage a person's land by throwing water upon it which would not otherwise have come there—that is actionable negligence on the part of the municipality. This argument in their Lordships' opinion is wholly untenable. On the other hand their Lordships do not agree with the argument of the appellants that municipalities are helpless instruments in the hands of the engineers they employ. They cannot indeed modify the engineer's plan themselves. That is no part of their business. But they may return the plan for amendment if they think that it is not desirable in the shape submitted to them. If, however, acting in good faith, they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute.

I accept that from such an eminent judge and great lawyer as an absolutely accurate statement of the law and, I may add thereto that it is quite clear when there is no express and definite provision of such a remedy that none exists, and the legislature never intended there should be any.

In the case last mentioned there happened to be a definite remedy applicable in the municipal law governing the drainage there involved.

The parties, plaintiff therein concerned, had sought the same sort of relief as the respondents had tried on herein, but were told by the court above that they had erred in doing so and must begin *de novo*.

There is another aspect of the law relevant herein, and that is the provision of the *Irrigation Act*, R.S.C., 1906, c. 61, s. 41, as follows:

(1) [1893] A.C. 540.

41. Should any person residing on or owning land in the neighbourhood of any works, either completed or in course of construction, apply to the Minister in writing for an inspection of such works, the Minister may order an inspection thereof.

2. The Minister may require the person so applying to make a deposit of such sum of money as the Minister thinks necessary to pay the expenses of an inspection, and in case the application appears to him not to have been justified, may cause the whole or part of the expenses to be paid out of such deposit.

3. In case the application appears to the Minister to have been justified, he may order the applicant for a licence or the licensee to pay the whole or any part of the expenses of the inspection, and such payment may be enforced as a debt due to the Crown.

4. Upon any inspection under the provisions of this section the Minister may order such applicant or licensee to make any addition or alteration which he considers necessary for their security to or in any works of the applicant or licensee, and if the applicant or licensee fails to obey to that effect, reciting all the facts and, in the province of Saskatchewan or Alberta, the judge of the Supreme Court of the Northwest Territories for the judicial district in which such works lie pending the abolition of that court by the legislature of the province, and thereafter any judge of such superior court as in respect of civil jurisdiction is established by the legislature of the province in lieu thereof, and, in the Northwest Territories, a stipendiary magistrate having jurisdiction in the district or place where such works lie, upon the production of such certificate, shall hear and determine the matter in a summary manner and shall order the applicant or licensee to proceed with all despatch to take such measures as the judge or magistrate considers necessary in the premises; and the refusal or neglect to obey any order made by a judge or magistrate under this section may be treated and punished as contempt of court, and such other proceedings may be had and taken thereon as in the case of non-compliance with any other mandatory order of the said court or a judge thereof.

5. This section shall not apply to cases where the Minister waives the filing of plans.

The last subsection has no application for there was no such waiver, but the rest of the said section may well have.

The respondents never pursued that course and I submit that is another good reason in law why they ought not to succeed herein.

I am, as result of reading the evidence relevant to the question of negligence on the part of the appellant, most decidedly of the opinion that there was no negligence on their part of which the respondents can complain.

Had the ground underneath the said canal been composed, as respondents' declaration sets forth, entirely of gravel or loose stones, there would have been no trouble for the water would have sunk pretty straightly down

1926

LETHBRIDGE NORTHERN IRRIGATION DISTRICT v. MAUNSELL.

Idington J.

through same for at least seventy-five feet, and never have travelled the four-fifths of a mile sideways to reach the respondents' ranch.

If the seepage in question came from the canal it clearly was by reason of its meeting an expansion of rock or other material impervious to water.

I must repeat the doubts I above expressed as to the water from the canal being that which got into the well or spring on the respondents' ranch, but will not labour that question. No one can tell absolutely for the engineers testify that under any ordinary circumstances it would take much longer than three weeks to travel the four-fifths of a mile sideways.

I fail to see any analogy, in fact or in the relevant law, between this case and either the case of the *Corporation of Parkdale* v. *West* (1), or *North Shore Railway Company* v. *Pion et al* (2).

The injury done to those respectively complaining in each of said cases seems to me to have been so flagrant that I cannot understand how those respectively responsible proceeded as they did by ignoring the law and failing to take the steps required of each respectively, by the several particular statutes in question in each of said cases.

In this case, now in hand, appellant was confronted with nothing it could have invoked to justify an appeal to any authority to expropriate or pass upon its property in any way save as in the way it did, by watching and so puddling with material parts possibly porous. And that is abundant reason for the dismissal of this action.

I am, for the many reasons assigned by me in the entire foregoing, clearly of the opinion that the respondents never had any cause of action in law against the appellant, and that the appeal by it herein should be allowed and the action of the respondents dismissed with costs throughout, and that the respondents' cross-appeal herein should be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellant: *Shepherd, Dunlop and Rice.*

Solicitor for the respondents: *Joseph D. Matheson.*

(1) (1887) 12 App. Cas. 602. (2) (1889) 14 App. Cas. 612.

SALTER & ARNOLD, LTD. (PLAINTIFF) .APPELLANT; 1926

*Feb. 9, 10.
*May 4.

AND

THE DOMINION BANK (DEFENDANT) . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Bankruptcy—Alleged preferential payments by debtor—"Intention" to give a preference—Bankruptcy Act, D., 1919, c. 36, s. 31—Banks and banking—Bank's lien on, and right to appropriate, credit balance in current account.

Appellant, trustee in bankruptcy, sued to recover from respondent bank the amount of certain payments to the bank made within three months of the assignment in bankruptcy, alleging that said payments were illegal, as made with a view to giving the bank a preference over other creditors and therefore obnoxious to s. 31 of the *Bankruptcy Act*. The debtor firm had with the bank a current account and a "liability account." All moneys were paid into the current account and the firm's cheques were charged to that account. When that account became overdrawn the credit balance was restored by a loan secured by a demand note, the amount of which was credited in the current account, the note being recorded in the liability account. Interest was charged on these notes, and it was the practice when, from time to time, the current account was in funds, to transfer moneys available to the firm's credit in the liability account so as to reduce the interest bearing obligations. Of the six impeached payments, five were made by cheque, charged to the firm's current account, retiring notes previously given, in accordance with this practice, and one was effected by the bank charging the amount of an unpaid note to the current account without the formal authority of a cheque.

Held, on the evidence, the *prima facie* presumption under s. 31 (2) that the payments were made with a view to giving a preference to the bank had been displaced. There was not, within the meaning of said Act, an intent to create a preference on the part of the debtor firm or of the bank. The circumstances in evidence indicated that the firm gave the cheques without any expectation that the bank would obtain advantage over any other creditor. It is settled law that the intention to give a preference envisaged by s. 31 is an intention in fact, and it must be an intention entertained by the debtor. As to the payment effected by appropriating the credit balance in the current account for the payment of the note, the bank possessed a lien upon any such balance as security for any indebtedness and a right to set off such indebtedness against any such balance. The question would have been different if it could have been maintained that the credit balance was composed of moneys deposited in such circumstances as to mark the deposits themselves as preferential payments, but any such contention in this case was untenable.

Judgment of the Court of Appeal for Manitoba (34 Man. R. 565) aff.

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

1926

SALTER & ARNOLD, LTD. v. DOMINION BANK.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) reversing the judgment of Galt J. in favour of the plaintiff (2) on the trial of issues directed to be tried pursuant to the provisions of *The Bankruptcy Act* and rules thereunder.

The plaintiff (appellant) was the authorized trustee in bankruptcy of the estate of Daniel Coughlin and J. L. Coughlin, carrying on business as "D. Coughlin & Company," and claimed to recover from the defendant (respondent) bank the amount of six payments made by the debtor firm to the bank within three months preceding the authorized assignment.

The trial judge, Galt J., found that the payments in question had the effect of giving the bank a preference over other creditors of D. Coughlin & Company, and that the bank had failed to rebut the presumption raised by the statute against it, and gave judgment in favour of the plaintiff for the amount of its claim. The Court of Appeal for Manitoba set aside this judgment and ordered that the issues directed to be tried be decided in favour of the defendant and that the action and claim of the plaintiff be dismissed. The plaintiff appealed to the Supreme Court of Canada (on leave given by a judge of that court).

Hugh Phillips K.C. and *C. K. Guild* for the appellant.

I. Pitblado K.C. and *E. F. Haffner* for the respondent.

The judgment of the court was delivered by

DUFF J.—The questions involved in this appeal are, in substance, questions of fact only. The claim of the appellants, the trustees in bankruptcy of Daniel Coughlin and J. L. Coughlin, trading under the firm name of D. Coughlin & Company, is to recover from the respondent bank the amount of six several payments in the months of September and October, 1920, which are alleged to have been illegal, as made with a view to giving the bank a preference over the other creditors of D. Coughlin & Company, and therefore obnoxious to s. 31 of *The Bankruptcy Act*.

(1) 34 Man. R. 565; [1925] 1 W.W.R. 207; 5 C.B.R. 416; [1925] 1 D.L.R. 401.

(2) [1923] 3 W.W.R. 257; 4 C.B.R. 379.

The assignment in bankruptcy took place on November 30, 1920. Since 1906, the firm had been carrying on business as live stock brokers, buying and selling live stock on commission, and occasionally as principals, and financing cattle buyers. The firm banked with the respondent bank, and for some years, at all events, before the assignment, working capital was provided chiefly through advances by the bank. From the year 1918 onwards, the firm had two accounts with the bank—a current account and an account known as the "liability account." All moneys were paid into the current account, and the firm's cheques were charged to that account. When the current account became overdrawn, the credit balance was restored by a loan secured by a demand note, the amount of which was credited in the current account, the note being recorded in the liability account. Interest was charged on these notes at the rate of seven per cent, and, as no interest was allowed to the firm upon its credit balances in the current account, it was the practice when, from time to time, the current account was in funds, to transfer moneys available for that purpose to the firm's credit in the liability account, with the object of reducing the interest-bearing obligations. Of the impeached payments, five were made by cheque, charged to the firm's current account, retiring notes previously given, in accordance with this practice. One was effected by the bank charging the amount of an unpaid note to the current account, without the formal authority of a cheque.

These payments were made within three months of the assignment in bankruptcy, and consequently fall within subsection 2 of section 31. There is therefore what the statute describes as "a *prima facie*" presumption that they were made with a view to giving a preference to the bank, and the question of fact is whether or not that presumption has been displaced.

The Court of Appeal unanimously held that there was not, within the meaning of the statute, an intent to create a preference on part either of the debtors or of the bank. This view is, I think, well founded.

In the summer of 1920, the position of the firm was considered by Mr. Patton, the assistant general manager

1926

SALTER & ARNOLD, LTD. v. DOMINION BANK.

Duff J.

at Winnipeg, who had before him a report of Mr. Sheffield, the local manager of the stock yards branch at St. Boniface, where the account was kept. Mr. Patton's view, after a careful survey of the assets of the firm, as well as of those belonging to Mr. Daniel C. Coughlin, personally, was that, taking into account these last mentioned assets, there was a surplus, and he informed Mr. Daniel Coughlin that, if certain named conditions were complied with, the bank would carry on the account as before. The evidence of Mr. Sheffield and Mr. Patton is explicit that, if these conditions were met, there was no question of the willingness of the bank to continue to do business with the firm on the existing footing. Mr. Patton was absent from Winnipeg in September and the early part of October. Unfortunately, disputes arose between Mr. Coughlin and Mr. Bearsto, who was left in charge. There was ultimately, on the 8th of October, a heated interview: Mr. Bearsto demanded instant compliance with the conditions; Mr. Coughlin demanded that action should be postponed until Mr. Patton's return; and, as he remained obstinate in this, he was informed that he must make banking arrangements elsewhere. In the meantime, large sums of money had been paid in to the credit of the current account, and, in the ordinary way, cheques had been given on that account, five of which are among the impeached payments. No hint of difficulty seems to have arisen until October. During the month of September (September 4), Mr. Bearsto authorized an advance of $25,000, and in explanation of that advance he states in his evidence that the firm was not insolvent when the personal assets of Daniel Coughlin were taken into account; and further, that in October, if the security demanded by the bank had been given, there would have been no rupture of the relations between the bank and the Coughlins. His evidence is entirely in accord with that of Mr. Patton, who says that, if the conditions were complied with, there was no thought of requiring the firm to liquidate its obligations: what the bank wanted was formal security upon Daniel Coughlin's assets.

In considering the question of intent, the acts of the bank officials in August and September must be regarded as affording weighty evidence. There was an investigation by the bank officials directly concerned—the assistant general manager at Winnipeg and the local manager charged with the supervision of the account—of the value of the available assets; an investigation conducted with the specific object of ascertaining whether or not the resources of the firm and of the members of the firm were such as to justify the bank in continuing to extend credit to the firm as before. There was a decision that the assets were sufficient, and that the credits might be continued if certain conditions, quite within the power of D. Coughlin & Company, should be complied with. This decision was communicated to Daniel Coughlin, and upon the view thus arrived at, as to the value of the assets, the bank acted, in September, in making the advance mentioned.

As to Daniel Coughlin, there seems no room for dispute that he not only believed himself to be solvent, but that he had so much confidence in his financial solidity as to suppose that a refusal by the Dominion Bank to give him further credit would not gravely embarrass him.

Such being the circumstances, the conclusion of the Court of Appeal seems founded on sufficient grounds that D. Coughlin & Company gave the impeached cheques in the full expectation, an expectation not without reason, that the account would be carried on, as it always had been, and that the outstanding cheques would be fully paid, and, in a word, that the bank would obtain no advantage over any other creditor in consequence of these payments.

As regards the payments made by cheque, this seems sufficient to dispose of the appeal. It is settled law that the intention to give a preference envisaged by s. 31 is an intention in fact, and whatever else may be said about it, it must be an intention entertained by the debtor.

As to the payment effected by appropriating the credit balance in the current account for the payment of the note of $14,000, I see no reason to differ from the opinion of two of the learned judges in the court below, that the bank possessed a lien upon any such balance as security for any indebtedness to it from the firm, and a right to

1926

SALTER & ARNOLD, LTD. v. DOMINION BANK.

Duff J.

set such indebtedness off against any such balance. The question presented would of course have been a very different one if it could have been maintained that the credit balance was composed of moneys deposited in such circumstances as to mark the deposits themselves as preferential payments. Sufficient has already been said to shew that in this case any such contention would be untenable.

It is necessary to refer to the able and elaborate judgment of the learned trial judge, Mr. Justice Galt. With great respect, I think the learned judges of the Court of Appeal are right in considering that the learned trial judge misdirected himself in relation to two rather important subjects: First, in considering the question of intent, an adequate survey of the facts would necessarily seem to embrace the fact that the bank was relying upon, and that D. Coughlin & Company knew that the bank was relying upon, the separate assets of Daniel Coughlin, as included in the resources justifying the credit extended to the firm; the full force of this was not appreciated by the learned judge. Second, the claim of the appellant was not based upon an allegation—and, indeed, it is difficult to understand how such a claim could be successfully advanced—that the bank was in possession of moneys received by D. Coughlin & Company in a fiduciary capacity, and therefore not subject to their disposition, and that such moneys they wrongfully, and with the bank's knowledge of their fraud, transferred to the bank in liquidation of their indebtedness. The statement of claim as originally drafted comprised a claim on this basis, but the relevant allegations were struck out, and there was no issue properly before the learned trial judge as to the right of the customers of D. Coughlin & Company to recover from the bank moneys which the learned judge seemed to think were held by D. Coughlin & Company in trust for such customers. The case, as presented on the pleadings, rested upon the allegation that moneys, the property of D. Coughlin & Company, available for the satisfaction of the claims of their general creditors, were improperly and illegally paid by way of preference to the respondent bank. That allegation would not be established by making out that the payments alleged to constitute the preferences charged

1926

SALTER & ARNOLD, LTD. v. DOMINION BANK.

Duff J.

were effected by transfers of funds which in equity were the property of D. Coughlin & Company's principals, who, so far as appears, have never complained of these transfers, and who, again, for aught that appears to the contrary, may, by their conduct or otherwise, have sanctioned them. The appellants' claim rests upon the hypothesis that the payments were made out of moneys subject to the disposition of D. Coughlin & Company, and it is on that hypothesis that the litigation must be decided.

Appeal dismissed with costs.

Solicitors for the appellant: *Phillips & Scarth.*

Solicitors for the respondent: *Munson, Allan, Laird, Davis, Haffner & Hobkirk.*

Affirmed 1927 3 WWR. 67

1926

WM. DONOVAN STEAMSHIP COMPANY (INCORPORATED), (PLAINTIFF).. } APPELLANT;

*May 6, 7.
*Oct. 11.

AND

THE SS. *HELLEN* (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision in river—Ship passing another going in same direction—Respective duties of overtaking ship and overtaken ship—Navigation Laws and Pilot Regulations for Inland Waters of United States on Pacific Coast.

Two vessels, the *D.* and the *H.*, were going down the Chehalis river in the State of Washington, seaward bound. The *H.* signalled her desire to pass the *D.* on the port side. The *D.* signalled her willingness. A collision took place, as to the cause of which, and the way in which it occurred, there was conflicting evidence. Martin L.J.A. held ([1925] Ex. C.R. 114) that both vessels were equally in fault and should bear the damages equally. This judgment was reversed by Maclean J., President of the Exchequer Court (hearing the appeal with the assistance of two nautical assessors), who held ([1926] Ex. C.R. 59) the *D.* wholly to blame. On appeal to the Supreme Court of Canada:

Held (*per* Duff, Newcombe and Rinfret JJ.): The appeal should be allowed and the judgment of Martin L.J.A. restored. The *H.* was the overtaking ship, and, having regard to the Navigation Laws and Pilot Regulations for the Inland Waters of the United States on the Pacific Coast, which were admittedly applicable, and especially

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

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

to the requirement that "every vessel overtaking any other, shall keep out of the way of the overtaken vessel," the *H.* had not, on the evidence, satisfied the burden resting upon her to excuse her collision with the overtaken ship. Moreover the evidence did not disclose that the *D.* materially altered her course or attempted to crowd upon the course of the *H.* or executed any movement material to the case which would affect the bearing as between her and the *H.* which was not, or should not have been, reasonably anticipated by the *H.* A vessel "keeps her course" within the meaning of said rules if, in proceeding from one reach of a river channel to another, she keeps the course which would ordinarily be expected of a vessel making that passage. The court, however, was not prepared to reverse the findings of Martin L.J.A. as to the responsibility of the *D.*, as, in the special circumstances of the case, good seamanship required that the *D.* should have given the *H.* more sea room. Both vessels were persistently navigating the channel on the side opposite to that to which they were equally directed by the regulations. Under the rules, the effect of the passing signal was to commit the *H.* to a passage on the port hand of the *D.*; and when the master of the *D.* realized that the *H.* was on a course to cross his bow he should not have been so late in porting his helm; and in obeying and construing the rules he did not observe due regard to the dangers of navigation and collision.

As to the character of the obligation of an overtaking vessel, *The Saragossa*, (1892) 7 Asp. M.C. 289, followed.

Anglin C.J.C. and Idington J., dissenting, would affirm the judgment of Maclean J.

Per Anglin C.J.C. (dissenting): The *D.* was alone to blame. The collision was caused by her failing, after assenting to the *H.* passing her to port, to maintain her course, and by her crowding upon the course of the *H.*, in contravention of articles 21 and 18 of said rules. Correlative to the obligation of the *H.*, as an overtaking ship, to keep out of the way of the *D.*, was that of the *D.* to maintain her course and in no case to attempt to crowd upon the course of the passing vessel. The guide of the overtaking vessel is the presumption that the other will keep her course. To excuse herself the *D.* must show that her departure from her course was necessary to avoid immediate danger and was no more than was necessary. Where the leading ship alters her course in contravention of article 21, the otherwise absolute obligation imposed on the overtaking vessel by article 24 "to keep out of the way" is satisfied by her using all reasonable care and skill, and if, having done so, a collision nevertheless ensues, she will not be held in fault.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1) reversing the judgment of Martin J., Local Judge in Admiralty of the Admiralty District of British Columbia (2).

(1) [1926] Ex. C.R. 59.

(2) [1925] Ex. C.R. 114; 34 B.C.R. 461.

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

The action was brought by the owner of the U.S. motorship *Wm. Donovan* against the Norwegian ss. *Hellen* for damages caused by a collision betwen the two vessels in the Chehalis river, state of Washington, U.S.A., on April 10, 1924, at about 5.15 p.m. The *Hellen* counterclaimed. Martin L.J.A. held (2) that both vessels were equally in fault for the collision and consequently should bear the damage thereby occasiond in like proportion. This judgment was reversed by Maclean J., President of the Exchequer Court (who heard the appeal with the assistance of two nautical assessors) who held (1) that the *Wm. Donovan* was wholly to blame for the collision, and that the plaintiff's action and cross-appeal should be dismissed and the defendant ship, the *Hellen,* should succeed in its defence and counterclaim in its action below, and in its appeal. The plaintiff appealed to the Supreme Court of Canada.

C. W. Craig K.C. for the appellant.

Martin Griffin for the respondent.

The judgment of the majority of the Court (Duff, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The collision occurred on the Pacific Coast of the United States, in the estuary of the Chehalis River, in the lower part of the defined channel. The *Wm. Donovan* is a twin screw motor ship of 2,204 tons register, length 243 feet, beam 47 feet, which, on 10th April, 1924, was outward bound from Aberdeen, in the state of Washington, to San Pedro, California, laden with lumber. The *Hellen* is a single screw steamship of 3,270 tons register, length 413 feet, beam 52 feet, which left Aberdeen on that day, partly laden, to complete her lading at Vancouver, where, upon arrival, she was arrested, at the suit of the appellant company, to answer the collision damages. These vessels left their moorings about three o'clock in the afternoon and proceeded down the channel, which is marked by red buoys on the south side and by black buoys on the north, the latter bearing the uneven numbers. The *Donovan* was drawing about 23 feet of water, the *Hellen* about 6 inches more. The *Donovan's* speed is estimated at 8 knots, and that of the *Hellen,* which proved to be the faster, at about 8 or 9

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Newcombe J.

knots. The *Hellen* saw the *Donovan* ahead of her in the channel at a distance of about a mile and a half, and this she gradually reduced until, about an hour later, just below no. 6 inner red buoy, she had approached to within eight to twelve hundred feet of the *Donovan,* when, it being apparent that the *Hellen* was overtaking, she blew two blasts of her whistle to indicate that she desired to pass the *Donovan* on the port side of the latter. The *Donovan* answered by two blasts, signifying her willingness that the *Hellen* should so pass. At this time the two ships were in a reach of the river which was straight, in a southwesterly direction, as far as no. 2 inner red buoy, a distance of nearly two miles. Here the river turns to the southward, and, from the bell buoy, no. 8 red, a little less than three-quarters of a mile below no. 2, pursues a more westerly direction to no. 6 outer red buoy, a distance of about a mile and a quarter, where it turns still further to the westward and follows that course, about west southwest, to no. 4 outer red buoy. It was in this part of the river, and about opposite to no. 4 outer red buoy, that the collision occurred. The width of the channel from no. 2 inner to no. 4 outer varies; it is 1,500 feet at no. 2; 2,200 feet at the bell buoy; 1,200 feet at no. 5, which is about midway between the bell buoy and no. 6 outer; 2,200 feet at the latter, and 1,200 feet at no. 4 outer, after which it becomes broader again to the southward until, at no. 2 outer, at or immediately inside of the bar, the width is 2,000 feet. The formation is sandy, and there is a note on the chart that the bar is subject to frequent changes and that the buoys are shifted accordingly.

The case of the *Donovan* is that the two vessels coming down the river in its several reaches had pursued practically parallel courses, the *Hellen* being abeam or nearly abeam of the *Donovan* from the turn at no. 2 inner, but that, when passing no. 4 outer, and about 400 feet to the northward, the Hellen came across the bow of the *Donovan,* causing the collision.

The case of the *Hellen* is not materially different, except that, according to the evidence of her witnesses, the *Donovan,* at the place of collision, instead of pursuing her parallel course, sheered abruptly to the southward and thus caused the impact.

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Newcombe J.

The *Donovan* would have it that the *Hellen* struck with her starboard bow in the fore rigging of the *Donovan* and forged ahead on the *Donovan's* port bow and stem, which was split. The *Hellen* on the other hand contends that the *Donovan* struck her abaft of amidships, practically head on, or, as one witness says, at an angle of forty-five degrees. The result was serious damage to the *Donovan,* and some damage to the *Hellen,* which had several stanchions bent, and some port lights broken.

The case was tried before the local judge in Admiralty of the Exchequer Court at Vancouver.

It was assumed for the purposes of the case that the Navigation Laws and Pilot Regulations for the Inland Waters of the United States on the Pacific Coast apply, and these are admitted to be as stated in paragraph 9 of the defence, and in a certified official pamphlet, published by the Government printing office at Washington, which was put in as an exhibit. These rules appear to be in substantial conformity with the general regulations for preventing collisions at sea, but they contain some special provisions. The pertinent clauses, as pleaded and admitted, are the following:—

Art. 18, Rule VIII: When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.

Art. 21: Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.

Art. 23: Every steam vessel which is directed by these rules to keep out of the way of another vessel shall on approaching her, if necessary, slacken her speed, stop or reverse.

Art. 24: Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Newcombe J.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.

Art. 25: In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel.

The learned local judge found that the *Hellen* had not passed the *Donovan* at any time before the collision, although she had, about forty-five minutes previously, given the signal of her desire or intention to pass on the port side of the *Donovan;* that both vessels were, having regard to Art. 25, on the wrong side of the channel, though neither had charged the other with this breach of the regulations; that, by reason of the contraction of the channel in the reach where the collision occurred greater caution was required, and that the *Hellen,* having assumed the obligation of a passing ship, was pursuing a course which, if both ships maintained their speed, would bring her into dangerous proximity at least to the *Donovan,* if they both continued to keep the wrong side of the channel; while the *Donovan,* keeping her speed, was embarrassed by reason of the strange conduct of the *Hellen,* by which I understand the learned trial judge to refer to the fact, which is implicit in his judgment, that the *Hellen,* although having given her passing signal, had not availed herself of her subsequent opportunities to pass, but had maintained her parallel course at speed practically no more than equal to that of the *Donovan.* The local judge found the case very unusual and perplexing, and, after careful study, it appeared to him impossible to reconcile the conflicting evidence, "or to accept in entirety either of the irreconcilable accounts of what occurred." In the result the only conclusion he could arrive at, satisfactory to himself, was that the collision was caused by the unseamanlike conduct of both vessels in not appreciating the dangerous position in which they were and taking proper steps to avoid it.

From this judgment the *Hellen* (defendant, now respondent) appealed to the Exchequer Court, and the *Donovan* (plaintiff, now appellant) gave notice by way of cross-appeal to vary the judgment by awarding to the plaintiff the full amount of the damages claimed, and dismissing the cross-appeal.

The appeal and cross-appeal were heard by the learned President of the Exchequer Court, who agreed with the local judge that the *Hellen* was an overtaking ship, but this he thought was a circumstance of minor importance, and he found the governing consideration in the fact that the *Donovan,* after receiving the *Hellen's* passing signal, did not take up and keep a course on her starboard side of the channel, as required by Art. 25 for the navigation of narrow channels. He considered that at no. 2 outer buoy, where the channel turns to the southwestward

the *Donovan* should have steered for no. 3 starboard buoy from no. 2 port buoy, and kept that starboard course, and not have gone close to port buoy no. 4.

In summing up he said:—

I agree with the trial judge that the *Donovan* was on the wrong side of the channel at the times here material, and those who advise me are also of the same opinion. I also think that the *Donovan* crowded upon the course of the *Hellen,* and steered a course which was likely to cross the course of the *Hellen,* in violation of Rule 8, and in this my assessors also agree. I cannot, however, concur in the view of the learned trial judge that the *Hellen,* in relation to the *Donovan,* was on the wrong side of the channel. In attempting to pass the *Donovan,* her proper place to attempt to do so in view of the signals exchanged, was on the port side of the channel, and at least on the port side of the *Donovan.* Having to pass on the port side of the *Donovan,* if at all, there was no other place in which she could make the attempt than where she did, and except for the conduct of the *Donovan,* it at no time involved a risk of collision. I cannot agree that the *Hellen* was on the wrong side of the channel, at least the *Donovan* cannot be heard to say so. She had undoubted right to be there, though perhaps at her own risk in respect of other ships navigating on that side of the channel. A situation might be imagined wherein another ship going up the channel might say so, but not the *Donovan.* I think the *Hellen* did everything that could reasonably be expected of her in passing the *Donovan,* that she was not guilty of negligence in any respect, and that it was the conduct and seamanship of the *Donovan* alone that brought about the collision. In all this, the persons who advise me, agree.

He accordingly found that the collision was caused entirely by the fault of the *Donovan.*

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Newcombe J.

Now in considering the facts of the case there is little difficulty in finding the course, relative position and procedure of each of these vessels from the time when they first came into relation with each other down to the time when, approaching outer red buoy no. 4, one or the other was put on the intersecting course which led to the collision. Down to this point the evidence of the witnesses is in substantial agreement upon the facts which are material. When the *Hellen* blew her two blasts she was, according to her pilot's testimony, very close to the line of no. 6 and no. 4 inner red buoys, and the *Donovan* was ahead two or three ship's lengths on the *Hellen's* starboard bow. At that place the channel is very broad, upwards of 2,000 feet. The learned President refers to a passage in the testimony of the Master of the *Donovan,* where he is asked why, upon acknowledging the signal, he did not starboard his helm, and he answers

> No. I didn't alter it because she was over—and I was pretty well on the right side of the channel and she had plenty of room to pass me.

From this the President infers that the *Donovan* was at that time on her starboard side of the channel, or upon a course directed to that side. It seems to be clear upon the evidence however that the *Donovan* was not, either at the time of the passing signal, or at any time subsequently, on her starboard side of the channel, or on a course which, having regard to its sinuosities, would lead her to that side. The master of the *Donovan* says, immediately following the passage which I have quoted:—

> Q. You didn't alter your course?
>
> A. No, because he had plenty of room over on my port side and had plenty of room to pass.
>
> Q. How much room was there from side to side?
>
> A. Oh, in the side, I guess he was—well, 100 feet anyway on the side.
>
> Q. He was 100 feet to the side of you?
>
> A. That being a little astern of me, of course.

From this I understand his meaning to be that the *Hellen* had plenty of room to pass, because there was at least 100 feet of clear water between the port side of the *Donovan* and the starboard side of the *Hellen* upon the course which the latter was following, close to the line of the red buoys; from which it follows that the *Donovan* was at that time several hundred feet at least to the south of mid-chan-

nel. There is no express explanation in the evidence as to why both of these vessels were pursuing their way along the southern bank; but, looking at the chart, and assuming that neither vessel was impressed with the necessity of following strictly the starboard hand rule, it is easy to see that naturally the convenient and shorter course would be that which they followed. The river trends generally in a southwesterly direction; there is a very pronounced bend to the southwest at inner red buoy no. 2, and more gradually to the westward at the bell buoy, and again at outer red buoy no. 6, and the inside course is obviously the shorter. Both vessels seem to have considered that they had plenty of space on the southern side, and, shortly after the time when the signal was given, they actually met an incoming steamer, which they passed alternately port to port. It is significant, moreover, that the *Hellen,* neither in her preliminary act nor pleading, makes any complaint based upon Art. 25, and her case is founded entirely upon the alleged sudden sheer in the course of the *Donovan* at no. 4 outer buoy. The two ships went down the channel in its various reaches upon parallel courses, the *Hellen* close to the red buoys, the *Donovan* about 300 feet to the northward of the *Hellen,* the latter making the greater speed until the rounding of the point at no. 2 inner red buoy, where, according to her allegations and testimony, she passed the *Donovan,* which, being outside, would make the longer turn. At no. 6 outer they were however still abeam and at the same distance between their parallel courses. The weather was hazy, but the vessels were at all times within easy sight of each other. On approaching no. 6 outer the haze or fog prevented the *Donovan* temporarily from seeing no. 4 outer. Hitherto she had been steering by the buoys, but then, as no. 4 was not visible, she continued by compass, southwest by west half west, passing no. 6 outer on this course. Then there is a slight, though inconsequential, conflict in the testimony of the witnesses, the *Hellen* maintains that, after passing no. 6 outer, she steered for no. 4, which was at all times visible; her master says that between no. 4 and no. 6 the two vessels maintained their relative positions " about the same," keeping parallel courses. Ivor Vaumond, the

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Newcombe J.

Hellen's pilot, gives the following testimony in his direct examination:—

Q. Now, tell us what happened when you got down there towards no. 6 red buoy, what manoeuvres did the two ships execute?

A. Well, after I got down to no. 6 red buoy I changed the course to starboard, getting lined up for the Bar which is on the turn.

Q. You changed the course to starboard?

A. Towards starboard, yes, ported the helm; so did the *Donovan*.

Q. Now, how far apart were the two vessels when that manoeuvre was executed?

A. Well, as near as I could estimate it never changed very much at any time. Of course, I wasn't all the time watching the channel, looking ahead.

Q. About 300 feet then?

A. Practically, just an estimate.

Capt. Malmgren of the *Donovan*, who appears to be a fair and honest witness, says that

the *Hellen* seemed to alter her course towards no. 4. She wasn't going parallel with us any more, she was going over to the south jetty.

The south jetty is projected westerly from Point Chehalis along a sand-bank, at the edge of the deep water, from 1,200 feet or more to the southward of the line of no. 6 and no. 4 outer red buoys. Capt. Malmgren had directed his mate and second mate to look out for no. 4 buoy, and he says

I was going on my course and I asked the mate and third mate if they seen it and they said "No." A couple of seconds after I looked with the glasses. I sighted the buoy (no. 4 outer) which was right ahead, the *Hellen* then being fully four to five ship's lengths on the port side of me.

He says that then he altered his course one-half point to the northward so as to clear no. 4 by 400 feet, and that his ship had been on that course for five-eighths of a mile, or about one-half the distance between no. 6 and no 4. Now if we are to have regard to the preliminary act and pleadings of the *Hellen*, to the evidence, and to the course of the trial, there is nothing material to the cause of the collision in the fact, to which Capt. Malmgren deposes, that on passing buoy no. 6, when no. 4 was shut out of view by the fog, he proceeded for a short distance upon a compass course which was found to require a correction of half a point to the northward when, midway between the buoys, no. 4 became visible. There is nothing in the case to suggest that the *Hellen* was thereby misled or embarrassed or affected in her navigation. On the contrary she did not observe any change in the bearing of the

Donovan between no. 6 and no. 4, and she makes no complaint of the *Donovan's* course or navigation until the ships came abeam of no. 4. Immediately after the collision, on the very day of its occurrence, the master of the *Hellen* wrote to the owners of the *Donovan* informing them of the accident, saying:—

> Steamer *Hellen* outbound from Aberdeen to sea running abreast of the M/S *Wm. Donovan,* at no. 4 red buoy, between Pt. Chehalis and the bar, the M/S *Wm. Donovan* suddenly took a sheer and collided with the Norwegian steamer *Hellen* and done considerable damage. For this damage I hold you responsible.

By the preliminary act of the *Hellen,* which was filed on 22nd April, the specific fault alleged against the *Donovan* is that she was allowed to take a sudden sheer into the *Hellen,* and the facts are thus stated in the defence, which was pleaded on 16th July:—

> 5. Between the bell buoy and outer red buoy no. 4 the *Wm. Donovan* gained a little on the *Hellen* and when the latter ship was in a position close to the said outer red buoy no. 4 she had the *Wm. Donovan* off her starboard quarter about 300 feet distant. Both vessels were then steering parallel courses along the channel out to sea.
>
> 6. When the vessels were in the said position close to outer red buoy no. 4 those on board the *Hellen* saw the *Wm. Donovan* suddenly alter her course and head directly for the side of the *Hellen,* which said alteration of course made a collision between the two vessels inevitable. Immediately thereafter the bluff of the port bow of the *Wm. Donovan* struck the starboard side of the *Hellen* abaft amidships doing damage to the *Hellen.*

The undisputed fact therefore is that the *Donovan* reached the longitude of the point of collision, at no. 4 buoy, at a distance of about 400 feet to the northward of that buoy, and that she passed no. 6 at the same distance, without in anywise disturbing or interfering with the course of the *Hellen,* and upon a course which the master and pilot of the *Hellen* describe as parallel with hers. The suggestion that the accident was due to the *Donovan* having gradually approached the *Hellen* upon an intersecting course, while running down the distance between no. 6 and no. 4, is thus negatived, not only by the formal allegations of the *Hellen,* but also by the testimony of the witnesses on both sides of the case, and is without justification in fact.

It was as to the *Hellen's* course and the occurrences abreast or nearly abreast of no. 4 that the serious dispute occurs. This is what the master of the *Donovan* says, referring to the time when, five-eighths of a mile to the east-

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Newcombe J.

ward of the buoy, he altered his course half a point to the northward:—

Q. That is the time you saw the *Hellen* approaching you?
A. Yes.
Q. And the *Hellen* was then two to three ship lengths away?
A. Yes.
Q. Do you want to increase that. Tell us how far?
A. No, I could not tell you how far. It is impossible.
Q. 500 to 750 feet, to the best of your belief?
A. Yes.
Q. And she started to approach you and draw in towards you?
A. Yes.
Q. And then finally when she got near the no. 4 she shouted out "get over" or words to that effect?
A. Yes.
Q. How near were you to no. 4 then?
A. We were close up to no. 4.

On the other hand, the master of the *Hellen* says:—

We proceeded the usual way down the channel, keeping close to the red buoys all the way. The *Donovan* seemed to keep closer over towards the black buoys and made a little shorter cut there like, so by the time we got down between no. 4 and 6, the outer buoys, she had gained a little on us again, and about between 3 and 6 buoys I would say that her stem was a little abaft of our amidships.

Q. That was between no. 4 and no. 6 outer buoy?
A. Yes.
Q. Being the red buoys?
A. Yes.
Q. Just state the position of the two ships, Captain, then, will you?
A. At that time?
Q. At that time, you mean when the ships were in a position between—
A. No. 4 and 6 buoys.
Q. 4 and 6 red buoys?
A. Yes, she was running pretty near a parallel course, I should say about 300 feet apart.
Q. Which ship was leading?
A. We was ahead of the *Donovan*.
Q. How far astern of you was the *Donovan?*
A. Her stem was a little abaft amidships.
Q. Abaft amidships of the *Hellen?*
A. Yes.
Q. That was the position of the two ships just after passing no. 6 outer red buoy?
A. Yes, I should say.
Q. About what time was this roughly?
A. Oh, that should be about five o'clock.
Q. And what was the weather like at that time?
A. It was nearly the same as when we started, a little misty, but quite visible. We could see all we wanted to see.
Q. Could you see quite clearly all the buoys in the channel?
A. Yes, sir, oh, yes.

Q. Explain what happened after you passed no. 6 outer buoy?

A. Just a little bit before we got to no. 4 buoy or practically abreast of no. 4 buoy I happened to look out and I saw that the *Donovan* was getting a little nearer and I drew the pilot's attention to it. I said: "Look, she is getting closer." The pilot then went over to the side of the bridge and shouted over to the other ship, "Where are you going, why don't you keep over," or something of that kind. He said, "Where are you going?" That was quite clear, and somebody that I took for the captain, came out from the wheelhouse and shouted back, "I am broke down."

Q. Yes, then what happened?

A. The pilot then came right in amidships and ordered the wheel hard astarboard.

Q. What was the *Donovan* doing at that time?

A. Heading right down on us at a right angle of ninety degrees. He did this, as we could see that a collision would take place, and he thought it would lessen the impact of the blow by swinging parallel with her.

Q. Could anything have been done at that time to avoid a collision?

A. Nothing could have been done at the time she swung over, it was done in a second.

Q. Where did the collision take place?

A. At that time I looked at my watch, I took particular note and it was just 4.13.

Q. Or 5.13?

A. 5.13 at the time and I was abreast of no. 4 outer buoy.

Q. Abreast of no. 4 outer buoy the collision took place?

A. Yes.

Q. And this you have been telling us about, your telling the pilot that the ship was coming near and so on, that was the work of a few seconds?

A. The work of a few seconds, the shortest possible time.

Q. Did the *Donovan* slow down?

A. I could not say. It looked to me as if she was coming full speed ahead all the time. That is hard to say, but it looked to me that way, she was coming down at such a speed.

Q. Where did the *Donovan* strike you?

A. She struck us about thirty or forty feet abaft of amidships.

Q. Then what did she do?

A. She bumped us and bent some stanchions, she bumped us again and bumped again and slid along the *Hellen* after doing some damage until she got clear.

Q. Did she do any damage to the *Hellen?*

A. Yes, sir, she did.

Captain Malmgren was impressed with the view that, after he had acknowledged the passing signal, his duty required him to keep his course and speed, and he is not charged to have done otherwise, except, in the last few hundred feet, at no. 4 outer red buoy. He denies any sheer towards the *Hellen,* or any breakdown of his machinery, and he and his witnesses maintain that there was no change of the *Donovan's* course in this locality. It was

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

not until the collision became imminent, by the approach of the *Hellen,* that the *Donovan* ported her helm, and later reversed her engines. Capt. Malmgren says that his ship did not answer her hard aport helm, and this he attributes to the proximity of the *Hellen,* which was then coming very close. But, however that may be, there was no defect in the working of his steering gear. The ship had steered perfectly on the various courses down river, and did so after the collision, on the reverse of these courses to Hoquiam for repairs. It is, I think, apparent that neither the port helm nor the reversing on the *Donovan* had any substantial effect with relation to the collision or its consequences. The *Hellen* was only 40 feet or 50 feet off when the *Donovan* reversed, and the porting and reversing were too late to be of any use.

There is no finding by either of the learned judges who have considered the case that the *Donovan* suddenly sheered to the southward. It is only if she did that the *Hellen* can be held free from blame. I find nothing in the circumstances to indicate a greater probability that the *Donovan* abruptly changed her course to the southward than that the *Hellen* more gradually approached her from that direction. On the contrary, the *Donovan* was on her course, and was passing no. 4 buoy about 400 feet outside of it, as she had passed the other port buoys coming down channel. If she deviated from this course and approached the *Hellen* head on, or at any lesser angle which would bring the ships into contact in so short a space and time, it must have been by reason of a hard astarboard helm, but in the execution of her voyage at that place the *Donovan* had no use for a starboard helm. If the *Hellen* had the obligation of an overtaking ship, as both the learned judges find she had, she was under absolute obligation to keep out of the way of the *Donovan.* In fact, however, her pilot and master did not realize their duty, they considered that they had already passed the *Donovan,* that the latter had become the following ship, and that the course and navigation of the *Hellen* were no longer burdened or affected by any requirement of the law to keep clear. This appears, not only by the evidence, but is set up by the pleadings, paragraphs 4 and 10 of the defence. The *Hellen's* stem was admittedly ahead of the *Donovan's.*

The officers of the *Hellen* say that the *Donovan's* stem was abaft the beam of the *Hellen*. What actually happened is somewhat in the region of conjecture, but there is evidence that those responsible for the navigation of the *Hellen* were no longer keeping the *Donovan* in mind. There seems to have been no efficient lookout on the position or movements of the *Donovan*. The ships were coming up to the buoy, upon passing which they would naturally alter their course to the southward. The pilot of the *Hellen* was looking forward, he did not realize that the vessels were approaching each other until they were nearly in contact, when his attention was directed to the *Donovan* by Capt. Ommundsen, who said that he happened to look out and saw the *Donovan* coming down at an angle of 90 degrees, when nothing could have been done to avoid the collision. I have already quoted his evidence. The chief officer of the *Hellen*, who went on watch at four o'clock, says:—

Q. When you first saw that there was going to be a collision, could anything have been done by the *Hellen* to avoid an accident?

A. No, it was too late. The only thing to do was to try and minimize the damage.

and again:—

Q. It all happened in the course of one continuous act; the *Wm. Donovan* moved to port?

A. Suddenly moved to port.

Q. And struck you?

A. Yes, shortly after.

Q. How long after?

A. The time it would take to go from 300 feet and right into the *Hellen*.

Bendiksen, the able bodied seaman, who was at the wheel of the *Hellen*, and taking his orders from the pilot, naturally did not see the *Donovan*. He says he could not see as he stood inside the wheelhouse but "he says when the *Donovan* went on him he got the order hard astarboard."

The witnesses agree that the collision occurred in the channel opposite, or nearly opposite, no. 4 outer buoy, and the evidence to which I have referred is, to my mind, suggestive of the fact that the pilot and officers of the *Hellen*, believing that they had passed the *Donovan*, and that she was already "finally past and clear," in order to avoid the buoy, and preparatory to the change of course which was necessary upon passing it, had come too far to

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Newcombe J.

the northward on a course to cross the bow of the *Donovan*, which their stem was leading by half a ship's length. I think it more likely that the accident occurred in this manner than by the extraordinary event of a breakdown in the machinery of the *Donovan*, or the starboarding of her helm; and moreover if, as admitted, immediately before the vessels assumed their conflicting courses, they were on parallel lines about 300 feet apart, and if, as said by the *Hellen's* witnesses, the *Donovan's* stem was then abaft her beam, it is impossible that, if the *Hellen* maintained her speed, and the course which she claims to have pursued, the *Donovan* could have come into contact with her where they say she did by any abrupt change of her course.

It must, I think, be conceded that the *Hellen* was the overtaking ship and that the passing rules applied. These rules, in their present application, were enacted specially for inland waters, and must therefore have been intended to operate in rivers, where it is necessary for a vessel frequently to change its course, following the windings of the channel, and I should think that a vessel keeps her course, within the meaning of the rules, if, in proceeding from one reach of a channel to another, she keeps the course which would ordinarily be expected of a vessel making that passage, and, as I have said, there is no complaint here that the *Donovan*, after acknowledging the passing signal, pursued any general course other than that which was anticipated.

The character of the obligation which the law casts upon an overtaking vessel is shown by the judgment of the Court of Appeal in the well known case of *The Saragossa* (1), where Lord Esher, M.R., said, referring to the collision regulations then in force:—

> If the ships were an overtaking vessel and a vessel being overtaken, then the first rule is this: "Every ship, whether a sailing ship or a steamship, overtaking another, shall keep out of the way of the overtaken ship." That is an absolute rule, equivalent to an Act of Parliament. If that rule stood alone, whatever the overtaken ship did, however much she might deviate from her course, the other is bound absolutely to keep out of her way, and nothing can excuse it except inevitable accident. There was a case in the House of Lords in which the nautical advisers found that a man was put into such a position with regard to the other ship by the fault of that ship that any sailor of ordinary care and skill

(1) (1892) 7 Asp. M.C. 289.

would have done just what the man did. The House of Lords held, nevertheless, that he was within the rule, and was bound to keep out of the way. It was a severe finding, I think—it overruled the Court of Appeal—but it shows that the rule is absolute. What is the effect of it? Why you say to a man, "You are to keep out of the way. We don't tell you how to keep out of the way. It may be by starboarding or by stopping and reversing, or going at full speed. It may be in any way you please. You are to have the choice; you have the obligation of doing it which way you will, but do it you must." It was thought right that if you put that tremendous obligation upon the overtaking ship you must give him all the means to carry it out, and therefore there is another rule: "Where by the above rule, one of two ships is to keep out of the way, the other shall keep her course." That is, that the ship on whom the heavy obligation lies may not be hampered by anything the other does. He must have his full liberty to go ahead of you, astern of you, within ten feet of you on one side or the other. If he is to have that obligation you must keep your course, so that he may not be hampered by you in any way as to his choice. Then it seems to me that that at once makes the rules correlative, and that the obligation on the one and the obligation on the other exists at the same time.

This exposition of the rule may, I think, be accepted for the present case, save as it is affected or qualified by the additional express provisions, which were not introduced into the general collision regulations until 1897, that

the vessel ahead shall in no way attempt to cross the bow or crowd upon the course of the passing vessel,

and that, when a vessel becomes an overtaking vessel,

no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

I am unable, after attentive consideration of the evidence, to find that the *Donovan* materially altered her course, or that she attempted to crowd upon the course of the *Hellen,* or that the *Donovan* executed any movement material to the case, which would affect the bearing as between her and the *Hellen,* which was not, or should not have been, reasonably anticipated by the latter. Even were it otherwise, the enactment is specific that

notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel;

and, having regard to the whole evidence in the case, I do not think that the *Hellen* has satisfied the burden which rests upon her to excuse her collision with the overtaken ship, or to set aside the original findings against her.

I would experience some difficulty in coming to the conclusion that the *Donovan* should be held at fault in any

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Newcombe J.

respect, notwithstanding that both vessels were persistently navigating the channel on the side opposite to that to which they were equally directed by the regulations, were it not for the fact that the effect of the passing signal, Art. 18, Rule VIII, was to commit the *Hellen* to a passage on the port hand of the *Donovan,* and therefore that the *Hellen* could not be in any manner impeded or embarrassed, in the course which she had notified, by the *Donovan* going further to the northward; and I am disposed to think that when the master of the *Donovan* realized that the *Hellen* was on a course to cross his bow he should not have been so late in porting his helm. I do not think that in obeying and construing the rules he observed due regard to the dangers of navigation and collision; I think that, in the special circumstances of the case, good seamanship required that he should give the *Hellen* more sea-room, and for this reason, I am not prepared to reverse the finding of the learned local judge as to the responsibility of the *Donovan.*

I would therefore allow the appeal, and restore the judgment at the trial.

ANGLIN C.J.C. (dissenting).—I have had the advantage of reading the opinion prepared by my brother Newcombe. I regret that I cannot agree in his conclusion.

The evidence, as I read it, supports the view of the learned President of the Exchequer Court that the collision was really caused by the *Donovan's* fault in failing, after having assented to the *Hellen's* passing her to port, to maintain her course, and in crowding upon the course of the *Hellen,* in contravention of Arts. 21 and 18 (Rule VIII).

The evidence of Malmgren, master of the *Donovan* (which I find unreliable except where he makes admissions adverse to the interest of his vessel), is that, up to a certain point, he had been steering by the red (or south) buoys and had maintained a course some 300-750 feet to the north of the *Hellen;* that after passing red buoy no. 6 his vision of outer red buoy no. 4 was obscured by fog or haze (which does not seem to have troubled anybody on the *Hellen*)

and remained so for some appreciable time; that he again saw red buoy no. 4 when about five-eighths of a mile, or 3,375 feet, east of it and found his ship heading for it, or, according to his earlier and more probable story, with that buoy a quarter of a point on her starboard bow; that he altered his course half a point northerly when 4 or 5 ship lengths (about 1,100 feet) from buoy no. 4, enough, he says, "to clear" that buoy, to which he also says that both vessels "passed close," although he elsewhere maintains that his vessel was over 300 feet to the north of the buoy; that shortly before the collision, when the *Donovan* was only 50 or 60 feet away from the *Hellen*, he heard the pilot of the latter shout to him "get over" or words to that effect.

I regard as most significant the fact that Malmgren did not reply to that demand by saying "keep over yourselves," or something of the kind, as one would have expected had he thought himself on his proper course and the *Hellen* encroaching upon it, which is now contended. Apparently conscious of his own default at that time, according to witnesses for the *Hellen* he answered "I am broken down" or "I can't handle her," or something to that effect, and, according to his own story, "I am trying to get her back." But, he says, the *Donovan* did not answer her helm, although it was then put hard over to port. She did not come "back," i.e., to her proper course, until after she had run into the *Hellen*.

Opposite buoy no. 4 the channel is 1,200 feet wide and there is no reason why the *Donovan* should not have passed that buoy at a distance of some 700 or 800 feet from it. Maintaining her course as it had been up to buoy no. 6 she would have passed it some 400 to 600 feet on her port side. The course of the *Hellen* lay to the north of buoy no. 4 and she was obliged to keep to the north of it in order to remain in the channel. She was steering as close to the red buoys on the south side as it was prudent for her to go. Thus, as found by the learned trial judge, she passed within 40 or 50 feet of the no. 6 outer red buoy, the south buoy immediately above and about 1¼ miles distant from outer red buoy no. 4. When passing buoy no. 6 the *Donovan*

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Anglin C.J.C.

was about 300 feet further out in the channel and running on a course practically parallel to that of the *Hellen*. From this point the *Hellen* steered a course to carry her past buoy no. 4 close on her port side. That buoy was plainly visible to her pilot from the time she passed buoy no. 6.

The weight of the evidence points to the collision having occurred some 50 to 100 feet to the north of outer red buoy no. 4—as put by the learned President, "quite close to no. 4 buoy." It seems obvious to me that during the time her master says that his vision was obscured by fog or haze the course of the *Donovan* must have been materially altered to the southward so as to crowd upon that of the *Hellen*. His statement that when the fog lifted he had no. 4 red buoy slightly on his starboard bow five-eighths of a mile ahead makes this abundantly clear. In fact he eventually crowded in upon the course of the *Hellen* so much that he did not leave her sufficient room to pass buoy no. 4. This alteration of course and crowding in became apparent to the officers of the *Hellen* too late to permit of their doing anything to avoid the collision then apparently inevitable. The evidence does not show that they were at fault in not having sooner realized their danger. When they did perceive it, all they could do was to sheer off in order to minimize the results. The master of the *Donovan*, when 3,300 feet east of buoy no. 4, perceived that buoy one-quarter of a point on his starboard bow. Although he knew he was running on a course which would intersect that of the *Hellen*, he apparently maintained that course for 2,200 feet and changed it, at the most half a point, only when about 1,100 feet to the east of buoy no. 4. Assuming that he still had that buoy one-quarter of a point on his starboard bow when he made this change of course, it would bring his ship less than 60 feet to the north of that buoy when abreast of it. He did not put his helm hard-a-port until the pilot of the *Hellen* shouted to him to "get over" —the two ships being then only 50 or 60 feet apart. That the *Donovan* failed to answer—or to "get back"—her master admits.

In my opinion the proximate cause of the collision was breach of articles 21 and 18 by the *Donovan* after her mas-

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Anglin C.J.C.

ter had assented to the *Hellen* passing his vessel to port and his negligent failure to rectify that error, rather than to any blameworthy omission on the part of the *Hellen* to observe article 24.

I agree in the view expressed by the learned President of the Exchequer Court, with the concurrence of his assessors, that after passing the no. 6 buoy "the *Donovan* steered a course which was likely to cross that of the *Hellen*"—that "in view of the signals exchanged" the *Hellen* was rightly "on the port side of the *Donovan*" endeavouring to pass her, and that, "except for the conduct of the *Donovan* the attempt (of the *Hellen* to pass) at no time involved a risk of collision"—that "the *Hellen* did everything that could reasonably be expected of her in passing the *Donovan*, that she was not guilty of negligence in any respect, and that it was the conduct and seamanship of the *Donovan* alone that brought about the collision." "In all this," adds the learned president, "the persons who advise me agree."

Whether the deviation in the course of the *Donovan* was intentional in an endeavour to take a short cut in passing buoy no. 4, either regardless of the rights of the *Hellen* or in the mistaken belief that the *Hellen's* course would carry her out of the channel and to the south of buoy no. 4, or, as seems more likely, it was due to bad seamanship during the time when the master says his vision was obscured by haze or fog, and the failure of his belated attempt to rectify his error should be ascribed to some defect in the *Donovan's* steering apparatus, or to some other cause, it is a little difficult to determine; but that the *Donovan* did in fact change her course so that it would intersect that of the *Hellen;* that her master consciously persisted in that course for two-fifths of a mile and then altered it too little, and that the *Donovan* did in fact crowd upon the course of the *Hellen* and that her master made no attempt to correct his error until it was too late—all this in my opinion, upon the evidence, admits of no doubt.

The President of the Exchequer Court was, I respectfully agree, entirely right in his interpretation of the mean-

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Anglin C.J.C.

ing of the word " course " in article 21. *The Roanoke* (1); *The Velocity* (2); *The Echo* (3). The view taken by that learned judge that correlative to the obligation of the *Hellen*, as an overtaking ship, " to keep out of the way " of the *Donovan* (art. 24) was that of the latter " to maintain her course " (Art. 21) and " in no case to attempt * * * to crowd upon the course of the passing vessel " (Art. 18) is also abundantly warranted by the authorities. " The rule requiring a ship to keep her course and speed must be strictly observed." *The Olympic and H.M.S. Hawke* (4). The guide of the overtaking vessel is the presumption that the other will keep her course. *The Roanoke* (1). To excuse herself the *Donovan* must show that her departure from her course was necessary to avoid immediate danger and was no more than was necessary. Marsden, Collisions at Sea, 8th Ed., p. 388. There is no suggestion of anything of the kind. Where the leading ship alters her course in contravention of article 21, the otherwise absolute obligation imposed on the overtaking vessel by article 24 " to keep out of the way " is satisfied by such overtaking ship using all reasonable care and skill, and if, having done so, a collision should nevertheless ensue she will not be held in fault. *The Saragossa* (5); *The Effie Gray* v. *Inkula* (6). The " tremendous obligation " imposed on the overtaking ship by article 24 implies that its discharge must not be hampered by the leading ship; the two rules are correlative. If the ship which is bound to do so fails to keep her course and takes away part of the water to which the other is entitled she hampers her and the latter's " absolute obligation to keep out of the way " is gone.

For these reasons I would affirm the judgment appealed from.

IDINGTON J. (dissenting).—This action arises out of a collision between the steamship *Wm. Donovan* owned by appellant company, and the respondent when proceeding down the Chehalis river in the state of Washington and through Grays harbour out to sea.

(1) [1908] P. 231 at pp. 241, 247.
(2) (1869) L.R., 3 P.C. 44.
(3) [1917] P. 132, at pp. 136, 137.
(4) [1913] P. 214 at pp. 241, 245.
(5) (1892) 7 Asp. M.C. 289.
(6) (1921) 9 Ll.L.L. Rep. 264

The course as a whole is somewhat tortuous and liable to confuse mariners, strangers to it, in giving evidence, and hence, I imagine, arises some of the conflicting evidence presented.

The appellant brought this action which was tried before the Honourable Mr. Justice Martin, the local judge in Admiralty; and the respondent counterclaimed.

The learned trial judge finding they were, at the point of collision, both on the wrong side of the channel, though sailing in the same direction down the river, found that both were to blame and hence divided the damages and costs.

The rule he invoked is, I take it, to meet the cases of vessels meeting each other head to head in a narrow channel and the contingencies possible in such a case, but, I respectfully submit, that rule does not apply to this case, and especially where no other vessels going the other way implicated or mentioned.

Hence the present respondent appealed, from so much of said judgment as awarded against the said respondent a moiety of the damages and costs, to the Exchequer Court of Canada.

That appeal came on for the hearing thereof at Vancouver before the President of said court, assisted by two nautical assessors.

After hearing and duly considering said appeal the said President of said court allowed the said appeal with costs; dismissed the present appellant's action with costs, and allowed the present respondent's counterclaim with costs.

As I quite fully agree with the reasoning of the said learned President, assigned in support of his said judgment, I need not repeat same here.

I may be permitted, however, to add that having read the entire evidence, I too have come to the conclusion that on the conflict of evidence between the two sides of the contending parties the weight of evidence on all material points in issue is entirely in favour of the present respondent.

The evidence adduced by some of the witnesses for the present appellant, in regard to the essential features in dispute, was for the most part very unsatisfactory, as I read it, and especially that of the appellant's captain in charge

1926

WM. DONOVAN STEAMSHIP CO. (INC.) v. THE SS. HELLEN.

Idington J.

at the time. The learned trial judge was charitable enough to assign that feature to his want of knowledge of English to an extent that I cannot agree with, though I hope making all due allowance for the want of knowledge of English and for the advantage the learned trial judge had over me in seeing the witness.

The dense haze which he alleges prevented him from seeing as others did can hardly be attributed to want of English.

Nor can the contradictions of his own evidence taken before the court of investigation be so, I submit.

And his theory of suction seems to have been only a guess and dispelled by evidence of an expert on that point.

The chief evidence of the respondent's witnesses was taken *de bene esse* as they could not be detained in the country and hence the appellant had the advantage of knowing it all before the trial and what it had to meet.

And that story is given, on the whole, very fairly I think, though of course in all such cases there are apt to be differences of recollection and of apprehension.

I am not at all inclined to hold that the appellant's captain was a wilful liar. It was, in my humble estimation, unfortunate that his peculiar mode of thought was likely to be upset by the least excitement. And this probably caused him to take inconsistent steps at the time of the approaching collision, as well as being much puzzled on the cross-examination he had to meet.

I refer to this phase of the case briefly lest anyone should be inclined to challenge the narrow ground on which the President of the Exchequer Court goes, though I agree with him.

I merely desire to point out that there is much more to be said in support of his judgment in the line of thought I am adverting to than he has given expression to, or I either, except to indicate that independently of the first ground the evidence as a whole renders it impossible for me to consent to the appellant succeeding herein.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Mayers, Lane & Thomson.*

Solicitors for the respondent: *Griffin, Montgomery & Smith.*

JACK PONG (DEFENDANT) ..... APPELLANT; 1926

AND *Oct. 5.

LUM QUONG AND LUM CHONG (PLAINTIFFS) ..... } RESPONDENTS.

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

Appeal to Supreme Court of Canada—Jurisdiction—Value of matter in controversy—Parties each claiming right to lease of premises used for laundry—Elements to be considered in estimating value.

On a motion to affirm jurisdiction in the Supreme Court of Canada to entertain an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, deciding which party was entitled to a certain lease of premises used for a laundry business, the Registrar affirmed jurisdiction, taking into account, in estimating the value of the matter in controversy, the exceptional value of the premises by reason of the existing privilege of running a laundry business thereon; and his order was affirmed by the court. In such a case the question to be considered, with regard to jurisdiction, is the value of the subject matter as between the parties.

MOTION by respondents by way of appeal from the Registrar's order affirming jurisdiction.

The Appellate Division of the Supreme Court of Ontario, reversing the order of Mowat J., had declared that the defendant Pong was trustee for the plaintiffs of a certain lease of premises used in the carrying on of a Chinese laundry, and ordered that the defendant Pong assign the lease to the plaintiffs and that the plaintiffs should covenant in the assignment to indemnify the defendant against the lessee's covenants contained in the lease (1).

The defendant Pong appealed to the Supreme Court of Canada, and moved before the Registrar of that Court for an order affirming its jurisdiction to hear his appeal. The Registrar's decision, delivered 21st June, 1926, was as follows:

The sole question for determination on this motion to affirm jurisdiction, is with respect to the elements which can be taken into consideration when estimating the value of a leasehold property in view of its commercial possibilities.

In Toronto premises can not be used for the purpose of carrying on a Chinese laundry except with the approval of the ratepayers in the

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

(1) (1925) 56 Ont. L.R. 616.

1926

PONG v. QUONG.

neighbourhood. The premises in question have received that approval. A laundry business has been established there for many years. The premises therefore have an exceptional value for this special purpose. I have no doubt on the evidence, that without this privilege, the property would not have a leasehold value sufficient to give the court jurisdiction, but with the privilege, I think the amount in controversy is more than $2,000. I therefore affirm the jurisdiction of the court; costs in the cause.

If I am wrong in the above expressed view, there is nothing to prevent the respondent, when the case comes to be heard on the merits, from moving to quash for want of jurisdiction. No order made by me can confer jurisdiction, if otherwise there is none.

The respondents moved by way of appeal from the Registrar's order affirming jurisdiction, on the ground that the sole question at issue was the right to possession of the premises under the lease in question, and that any rights conferred upon the occupant of the premises by virtue of a license from the city of Toronto to conduct a laundry business were not appurtenant to the said lease as between the parties to this appeal.

After argument, judgment was rendered dismissing the motion with costs, the Chief Justice stating that the members of the court were all agreed that the proper question to be considered was the value of the property as between the parties, and it was impossible to say that the Registrar had erred in his appreciation of the evidence.

Motion dismissed with costs.

Fraser Raney for the motion.

Norman Sommerville K.C. contra.

1926

*Nov. 2.
*Nov. 4.

JUNGO LEE (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Alien—Conviction under Opium and Narcotic Drug Act, 1923 (D.), c. 22, s. 4 (d)—Accused held for deportation under s. 25—Immigration Act (D.) 1910, c. 27—Habeas corpus proceedings—Appeal to Supreme Court of Canada—Jurisdiction—Supreme Court Act, R.S.C., 1906, c. 139, s. 36, as enacted 1920, c. 32.

Where an alien has been convicted, after his entry into Canada, of an offence under para. (*d*) of s. 4 of *The Opium and Narcotic Drug Act, 1923*, (D.), c. 22, and, after expiry or determination of the period of

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

imprisonment imposed upon him on such conviction, he is held in custody awaiting deportation, under a warrant showing on its face that he is so held as a consequence of such conviction, under the authority of s. 25 of said Act, any "proceedings for or upon a writ of habeas corpus" directed to bring him before the court in order that the legality of his detention under such warrant may be enquired into, are necessarily proceedings "arising out of a criminal charge," and come within the exception to the jurisdiction of the Supreme Court of Canada under s. 36 of The Supreme Court Act.

MOTION on behalf of His Majesty the King for an order quashing the appeal brought by the defendant on the ground that the court is without jurisdiction to hear the appeal because the judgment from which the same is brought is a judgment in proceedings for or upon a writ of habeas corpus arising out of a criminal charge. The facts are sufficiently stated in the judgment now reported.

The defendant's appeal was from the judgment of the Court of Appeal for British Columbia (1), dismissing an appeal from an order of Morrison J., refusing, on the return to an order *nisi* for habeas corpus, to release the defendant from close custody under an order or warrant of deportation, dated 21st March, 1923, made by the Deputy Minister of Immigraton and Colonization.

O. M. Biggar, K.C. for the motion.
W. Schroeder contra.

The judgment of the Court was delivered by

ANGLIN C.J.C.—The respondent moves to quash this appeal on the ground that it is an appeal "in proceedings for or upon a writ of habeas corpus arising out of a criminal charge" within the exception to the jurisdiction of this court made by s. 36 of the *Supreme Court Act* (as amended 1920, c. 32).

The appellant is an alien and was convicted after his entry into Canada of an offence under para. (*d*) of s. 4 of *The Opium and Narcotic Drug Act, 1923*. Section 25 of that statute enacts that any alien so convicted

shall, upon the expiry or sooner determination of the imprisonment imposed on such conviction, be kept in custody and deported in accordance with the provisions of the Immigration Act relating to enquiry, detention and deportation.

(1) [1926] 2 W.W.R. 734.

1926

JUNGO LEE v. THE KING.

Anglin C.J.C.

The warrant on which the appellant is held in custody awating deportation shews on its face that he is so held, no doubt under the authority of s. 25 of *The Opium and Narcotic Drug Act, 1923,* as a consequence of his conviction of an offence against para. (*d*) of s. 4 of that statute. The scope of any enquiry under *The Immigration Act* in such a case must be limited to ascertaining officially that the person in question was an alien, that he had been convicted after his entry into Canada of an offence within the ambit of s. 25 and that the period of imprisonment imposed upon him on such conviction had expired or been determined. It follows, in our opinion that any " proceedings for or upon a writ of habeas corpus " directed to bring the convicted alien before the court in order that the legality of his detention under such warrant may be enquired into are necessarily proceedings " arising out of a criminal charge " within the meaning of s. 36 of the *Supreme Court Act.*

It is *nihil ad rem* that the alien has served the sentence imposed on him, except that the expiry or determination of his term of imprisonment is by s. 25 made a pre-requisite to the custody for, and the deportation which it ordains. The statute, in addition to such imprisonment as may be imposed, subjects him as a result of his conviction and, therefore, as something directly flowing from the judicial finding of his guilt of the criminal charge laid against him, to the further consequences prescribed by s. 25. It is impossible to say that the custody and deportation imperatively ordered by that enactment do not " arise out of the criminal charge " of which the alien was convicted; it is equally impossible to maintain that curial proceedings to enquire into the legality of the detention pending deportation do not likewise so arise.

The motion to quash is granted.

Motion granted.

Solicitor for the appellant: *A. J. B. Mellish.*

Solicitor for the respondent: *E. Meredith.*

THE LOWER ST. LAWRENCE POWER COMPANY (PLAINTIFF)..... APPELLANT;

AND

L'IMMEUBLE LANDRY, LIMITÉE (DEFENDANT)..... RESPONDENT.

1921

*May 26, 27.
*June 14.

Approved: Bell Telephone v. St Laurent 1936 A.C. 73

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

Sale—Electric lighting system—Immovable or movable—Vendor's lien—Registration—Public streets—Severance of the plant—Arts. 1983, 2009, 2014, 2016. C.C.

The pipes, poles, wires and transformers included in an electric lighting system erected in, and on, the public streets of a municipality are immovables. (*Bélair* v. *Ste. Rose,* 63 Can. S.C.R. 526 and *Montreal L.H. & P. Cons.* v. *City of Westmount,* [1926] S.C.R. 515, foll.); and the registration upon them of a memorial (*bordereau*) to preserve a vendor's lien is not illegal nor void.

They do not cease to be immovables because these pipes, poles, wires and transformers have been sold separately from the generators in and on the property of the vendor for the purpose of being connected with other generators belonging to the buyer.

The express stipulation of a vendor's privilege on some of the equipment and machinery sold does not result in the exclusion of the other things sold from the purview of the privilege prescribed by the code.—A vendor's lien is created by law (Arts. 1983, 2009, 2014 C.C.) and it is not essential to reserve it in the conveyance. The vendor can waive it, but his intention to do so must expressly appear from the deed of sale.

A vendor's lien resulting from the sale of an electric lighting plant can be registered by indicating in the memorial (*bordereau*) the cadastral numbers of the lots upon which the poles, etc., are erected, although the land itself is not hypothecated or cannot be hypothecated, as for instance in this case where these lots are public streets.—Nothing in the Civil Code definition of a lien (Art. 1983 C.C.) or of a hypothec (Art. 2016 C.C.) is opposed to its affecting only a structure independently from the soil on which it stands; and it does not matter that the soil is municipal land and, as such, inalienable.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Letellier J. and dismissing the appellant's action.

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

1926

LOWER ST. LAWRENCE POWER CO. v. L'IMMEUBLE LANDRY LTÉE.

Under a by-law adopted by the municipal council of Mont-Joli on the 7th December, 1908, the Foundry and Machine Company obtained the exclusive right to install and operate lighting systems in the municipality. On the 26th April, 1915, the liquidator of that company then insolvent sold the plant to L. who, on the 7th October, 1915, sold it to R. for $20,000. In this last conveyance was included a lot of land with the " buildings thereon, the plant and machinery in the buildings or on the said land***." The deed also contained the following covenant: " The equipment and machinery attached to the buildings sold or being situated in such buildings as well as all future improvements thereto shall be subject to a vendor's lien to guarantee the payment of the balance of the purchase price of the vendor." R. operated the franchise until the 24th August, 1923, when he sold the entire plant to the appellant company, except machinery, poles, wires and transformers situated on R.'s property; but the deed was not registered until the 25th September, 1923. On the previous day, L. had registered a memorial (*bordereau*), setting out the conveyance of the electric system from him to R. and declaring that $8,000 of the purchase price was still owing and that this sum was protected at law by a vendor's lien covering the land as well as all the machinery and equipment and including the poles, wires and transformers in the streets of Mont-Joli. The memorial then proceeded to describe by the lot and plan number each of the streets in which were installed the electric system and requested the registration against them of the vendor's lien. Upon the respondent's refusal to discharge this registration, the appellant instituted the present action for a declaration that the lien was illegal, null and void.

Louis St. Laurent K.C., for the appellant. The poles, wires and transformers did not become immovable by their nature because of being assembled together in a line for the transmission or distribution of electricity for lighting purposes.

These poles, lines and transformers were not permanently attached as a dependency of the electric generator and gasoline engine in R.'s foundry but only temporarily attached thereto.

The parties themselves by their agreement treated these poles, lines and transformers as things to which the vendor's hypothecary lien did not attach.

The principal question to be decided is as to whether this transmission line is governed by articles 376 and 377 or by articles 379 and 380 of the Civil Code. If the material entering into a transmission line and the assembling thereof, is apt to make the result a building within the terms of article 376, then the matter may be concluded against the appellant by the decision of this court in *Bélair and The town of Ste. Rose* (1). If, on the other hand, such material, poles, wires and transformers are only apt to become immovable by destination when placed on real property for a permanency or incorporated therewith, then they would not have become such an immovable, because the real property on which they had become incorporated was not owned by the original vendor nor by R., but was owned by the municipal corporation. (*La Banque d'Hochelaga* v. *Waterous Engine Works Company*). (2)

Ferdinand Roy K.C., for the respondent. The deed of sale by L. to R. has created explicitly or at least implicitly a vendor's lien on the electric distribution line. (Arts. 2009 (8) and 2014 C.C.).

The electric lighting plant, composed of a series of poles planted in the ground, supporting wires which bind them together as a whole, with transformers and other accessories, is an immovable and subject to the constitution of a mortgage.

The registration of the vendor's lien as made by the respondent is regular and legal.

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

RINFRET J.—Ce litige a trait au "réseau d'installation pour distribuer la lumière électrique au village de Mont-Joli". Pour l'intelligence de la cause, il est nécessaire de faire d'abord l'historique des contrats dont ce réseau a été l'objet.

(1) (1922) 63 Can. S.C.R. 526. (2) (1897) 27 Can. S.C.R. 406.

1926

LOWER ST. LAWRENCE POWER CO. v. L'IMMEUBLE LANDRY LTÉE.

Rinfret J.

Il a été construit en vertu d'un règlement adopté par le conseil municipal de Mont-Joli le 7 décembre 1908. Par là, la Compagnie de Fonderie et Machineries, Limitée, obtenait

les droits exclusifs d'installer et d'exploiter des systèmes d'éclairage dans le village de Mont-Joli.

Ce règlement accordait "le droit de passer et de faire des travaux dans la municipalité"; il octroyait même (mais sur la légalité de cet octroi il peut y avoir lieu à des réserves)

les mêmes droits que la municipalité pour l'obtention des terrains ou pouvoirs d'eau nécessaires au système d'éclairage projeté.

La municipalité, cependant, conservait l'option "dans dix ans ou avant" d'acheter les systèmes d'éclairage en donnant au propriétaire

une somme qui, mise à intérêt à 5%, donnera autant que les systèmes d'éclairage en bénéfice net.

Ce règlement venait à la suite d'une résolution en date du 5 octobre 1908 par laquelle la Compagnie de Fonderie et Machineries, Limitée, avait été

autorisée à poser des poteaux et fils dans les rues du village pour l'installation de la lumière électrique, sauf dans les endroits où il est impossible de poser ces poteaux, et pourvu que ces travaux soient faits sous la surveillance du conseil municipal.

Le 28 avril 1915, Joseph Dubé, en sa qualité de liquidateur dûment nommé à la Compagnie de Fonderie et Machineries, Limitée, et autorisé à cet effet en vertu d'une ordonnance de la Cour Supérieure siégeant à Rimouski, a vendu ce réseau électrique à M. Arthur C. Landry.

Le règlement et l'acte de vente dont il s'agit sont invoqués et produits à l'appui de son plaidoyer par l'Immeuble Landry, Limitée.

L'appelante, dans sa réponse, se contente de dire qu'ils "parlent par eux-mêmes et doivent être interprétés suivant "leur teneur". Mais elle n'en attaque nullement la légalité et elle ne prend nulle part de conclusions à cet égard. Elle aurait d'ailleurs mauvaise grâce à le faire puisque c'est, en somme, de ces deux documents qu'elle tire elle-même son propre titre.

Il convient d'ajouter tout de suite que la corporation du village de Mont-Joli n'est nullement intervenue dans l'action et que la validité du règlement municipal et de la

cession du liquidateur n'est donc en aucune façon soulevée dans la cause.

Le 7 octobre 1915, Arthur C. Landry a vendu le réseau de distribution de lumière électrique, avec garantie de droit, à Rouleau, Limitée, pour le prix de $20,000.

Il vendait en même temps un terrain situé au village de Mont-Joli avec les

bâtisses dessus construites, l'outillage et machineries situés en les dites bâtisses ou sur le dit terrain * * * et l'embranchement du chemin de fer Intercolonial courant sur le terrain.

L'acte contenait, en outre, la stipulation suivante:

L'outillage et machineries attachés aux bâtisses vendues ou étant situés dans telles bâtisses ainsi que toutes les améliorations qui pourront être faites dans le futur demeureront spécialement hypothéqués par privilège de vendeur à la garantie du paiement de la balance du prix de cette vente en faveur du vendeur.

A la date de cette vente, le règlement du 7 décembre 1908 ainsi que la résolution qui l'avait précédé étaient toujours en vigueur; et le droit de M. Landry d'occuper les rues du village pour son réseau de distribution électrique n'est pas mis en doute.

Rouleau, Limitée, ayant ainsi succédé à Landry, continua sans aucune contestation d'occuper les rues de Mont-Joli avec les poteaux et les fils de son installation électrique et de fournir l'éclairage au village et à ses habitants jusqu'au 24 août 1923.

Par acte qui porte la date du 24 août 1923 mais qui ne fut enregistré que le 25 septembre 1923, Rouleau, Limitée, vendit à l'appelante

le réseau de distribution électrique qu'elle possède dans le village de Mont-Joli et dont elle se sert actuellement pour éclairer le dit village et ses habitants, comprenant les poteaux, fils, services, transformateurs, compteurs et tous autres appareils et accessoires faisant partie du dit réseau, lesquels se trouvent actuellement, partie dans les rues du dit village de Mont-Joli, et partie dans les magasins, résidences privées et autres édifices du même endroit, et partie sur les propriétés de Rouleau, Ltée, excepté toutefois les machines servant à la production de l'électricité, ainsi que le poteau principal situé à quelques pieds de l'usine électrique, le transformateur fixé à ce poteau, et les fils reliant le dit transformateur au générateur se trouvant actuellement dans et sur les propriétés de Rouleau, Limitée.

Toutefois, quant aux autres poteaux et fils se trouvant sur les propriétés de Rouleau, Limitée, la partie de la seconde part (l'appelante) les enlèvera à demande de la partie de la première part (Rouleau Limitée), après avis de soixante jours.

1926

LOWER ST. LAWRENCE POWER CO. v. L'IMMEUBLE LANDRY LTÉE.

Rinfret J.

L'acte déclare que Rouleau, Limitée, vend également à l'appelante

mais sans d'autres garanties que celles de ses faits et promesses, son commerce d'énergie électrique sous toutes ses formes dans le village de Mont-Joli et sa clientèle en rapport avec le dit commerce, ainsi que tous les droits et privilèges et franchises qu'elle peut avoir à cette fin de la corporation du village de Mont-Joli, spécialement ceux décrits dans un règlement de la corporation du dit village passé et adopté en date du 7 octobre 1915.

Cependant, le 24 septembre 1923 (et, par conséquent, la veille du jour où l'appelante faisait enregistrer le contrat que lui avait consenti Rouleau, Limitée) l'intimée, l'Immeuble Landry, Limitée, cessionnaire de la succession de feu Arthur C. Landry, enregistrait un bordereau, daté du 22 septembre 1923, qui relatait l'acte de vente du réseau de distribution électrique du 7 octobre 1915 par Arthur C. Landry à Rouleau, Limitée, et qui déclarait qu'il restait encore dû sur le prix de vente une somme de $8,000 avec intérêts depuis le 1er septembre 1923 et que cette somme était protégée en vertu de la loi par un privilège de bailleur de fonds qui affectait le terrain désigné dans l'acte de vente, ainsi que toutes les machineries, outillage et réseau de distribution d'énergie électrique se composant des poteaux, fils, transformateurs, liens et accessoires situés en les rues du village de Mont-Joli. Le bordereau procédait ensuite à décrire par les numéros du cadastre officiel chacune des rues dans lesquelles étaient installés les poteaux, fils, transformateurs, liens et accessoires du réseau de distribution d'énergie électrique et requérait sur iceux l'enregistrement du privilège de vendeur résultant de l'acte de vente consenti le 7 octobre 1915 par M. Arthur C. Landry à Rouleau, Limitée.

Dès que l'appelante s'aperçut de l'enregistrement de ce bordereau, elle requit (le 6 octobre 1923) l'Immeuble Landry, Limitée, d'avoir à le faire radier sans délai; puis, comme l'intimée ne se conformait pas à cette mise en demeure, la présente action fut instituée concluant à ce que la déclaration contenue dans le bordereau fût déclarée irrégulière, illégale, nulle et de nul effet et que la cour en ordonnât la radiation du bureau d'enregistrement.

Ce sont là les faits. La Cour Supérieure et la Cour du Banc du Roi (sauf le dissentiment de l'honorable juge Flynn) ont débouté l'appelante des fins de son action.

Il y a eu, à l'audition devant cette cour, un incident au sujet d'une question qui ne paraît pas avoir été soulevée devant les autres cours et à laquelle l'argumentation contenue dans les factums des parties ne faisait même pas allusion.

Le 7 octobre 1915 (c'est-à-dire le jour où Rouleau, Limitée, acquérait le réseau électrique d'Arthur C. Landry) le conseil municipal du village de Mont-Joli aurait adopté un règlement, qui n'a pas été produit et qui n'est pas au dossier, par lequel il aurait accordé à Rouleau, Limitée, une exemption de taxes municipales générales ou spéciales entre autres

pour son système d'éclairage électrique pour une période de vingt années consécutives à compter du 1er novembre 1915

et un droit exclusif de

passage et d'usage des rues et places publiques de la municipalité pour y installer son système d'éclairage électrique à l'usage des habitants de la municipalité.

Le 19 août 1920, Rouleau, Limitée, écrivait à la municipalité qu'à raison du coût élevé du charbon et de la main-d'œuvre, le taux d'éclairage aux termes du contrat qu'il avait avec la municipalité devait être haussé. Par une résolution en date du 2 novembre 1920, le conseil municipal s'est déclaré prêt à accorder cette augmentation si Rouleau, Limitée, s'engageait à fournir continuellement un courant de 110 volts. Cette condition ne fut pas acceptée, et Rouleau, Limitée, continua à fournir l'éclairage jusqu'à la date de sa vente à The Lower St. Lawrence Power Company (l'appelante actuelle).

La corporation du village de Mont-Joli aurait alors saisi la Commission des Services Publics de Québec d'une requête par laquelle elle demandait à cette commission d'ordonner à The Lower St. Lawrence Power Company d'exécuter le contrat qui serait intervenu entre la corporation de Mont-Joli et Rouleau, Limitée, l'auteur de l'appelante. Le 2 mai 1924, la Commission des Services Publics de Québec émit une ordonnance au sujet de cette requête. Une copie de cette ordonnance est au dossier, bien qu'il ne soit pas bien facile de comprendre comment elle peut s'y trouver. C'est de cette copie que nous avons tiré le récit des faits que nous venons de relater quant à l'incident soulevé ici.

1926

LOWER ST. LAWRENCE POWER CO. v. L'IMMEUBLE LANDRY LTÉE.

Rinfret J.

Or, cette ordonnance constaterait que, par son règlement du 7 octobre 1915, la municipalité du village de Mont-Joli aurait accordé à Rouleau, Limitée, une franchise de plus de dix années pour l'exploitation de son système d'éclairage à l'électricité et que, contrairement à la loi (S.R.Q. 5917 et suiv.), ce règlement n'aurait pas été soumis à l'approbation des électeurs municipaux dans les trois mois de sa passation par le conseil. Il serait donc frappé de nullité et il n'aurait jamais eu ni force ni effet. D'où la Commission des Services Publics déduit qu'il ne saurait être résulté de ce règlement un contrat valide; et, en conséquence, elle a refusé d'ordonner à l'appelante actuelle, successeur de Rouleau, Limitée, l'exécution d'un contrat qu'elle a considéré comme inexistant.

L'appelante a profité de cette ordonnance pour soulever devant cette cour la prétention que le système d'éclairage dont elle est actuellement propriétaire est donc installé sans droit dans les rues du village de Mont-Joli. Elle a ainsi invoqué la prétendue irrégularité de sa propre situation. Il résulterait de l'ordonnnace de la Commission que son occupation des rues de Mont-Joli est précaire; par suite, d'après elle, le réseau de distribution électrique n'aurait donc pas le caractère immobilier.

Nous anticipons sur l'un des points de droit qui se soulèvent dans cette cause; mais nous pensons qu'il faut dès l'abord élucider ce point invoqué devant nous pour la première fois dans cette cause. Nous ne croyons pas que l'appelante puisse s'en prévaloir. Dans notre opinion, la copie de l'ordonnance de la Commission des Services Publics de Québec est irrégulièrement au dossier. Cette ordonnance ne peut être opposée à l'intimée, l'Immeuble Landry, Limitée, qui n'était pas partie aux procédures devant la Commission.

En plus, la légalité de la présence dans les rues de Mont-Joli des poteaux, fils, transformateurs et accessoires du réseau de distribution électrique n'est pas en discussion dans cette cause. Cette question n'est pas posée, soit dans les plaidoiries écrites, soit dans le litige entre les parties. Ce règlement du 7 octobre 1915 n'est pas même mentionné. La production au dossier de l'ordonnance de la commission n'a pas été expliquée et ne peut pas se justifier.

Pour les fins de la cause qui est devant nous, il suffit de savoir que M. Arthur C. Landry (aux droits de qui a succédé l'Immeuble Landry, Limitée), lorsqu'il a consenti à Rouleau, Limitée, l'acte de vente du 7 octobre 1915, avait le droit, pour le réseau électrique qu'il vendait, d'occuper les rues de Mont-Joli. Cela n'est pas mis en doute. Mais la résolution du 5 octobre et le règlement du 7 décembre 1908 en font foi. C'est à l'époque de cette vente qu'il faut se placer pour discuter la question qui se soulève en cette cause de savoir si le réseau électrique avait alors un caractère mobilier ou immobilier et si le privilège de vendeur de Landry affectait un meuble ou un immeuble. Depuis lors, le système électrique est demeuré dans les rues de Mont-Joli; il y est encore; il fournit encore l'éclairage à Mont-Joli; et nous ne savons même pas, vu qu'il n'est pas au dossier, si le règlement du 7 décembre 1915 avait pour but d'abroger celui de 1908 ou s'il se contentait d'accorder à Rouleau, Limitée, un supplément de pouvoirs et d'avantages. Nous considérons donc que nous n'avons pas à tenir compte, pour les fins de notre décision, de l'ordonnance de la Commision des Services Publics en date du 2 mai 1924.

La première question qui se présente est celle de savoir si Arthur C. Landry, par suite de la vente qu'il a consentie le 7 octobre 1915 à Rouleau, Limitée, a acquis sur le réseau de distribution électrique un privilège pour toute balance qui lui restait due sur le prix. Pour prétendre le contraire, l'appelante s'appuie d'abord sur la dissidence de l'honorable juge Flynn en Cour du Banc du Roi.

On se rappelle que l'acte de vente contient une stipulation spéciale par laquelle

> l'outillage et machineries attachés aux bâtisses vendues ou étant situés dans telles bâtisses ainsi que toutes les améliorations qui pourront être faites dans le futur demeureront spécialement hypothéqués par privilège de vendeur à la garantie du paiement de la balance du prix de cette vente en faveur du vendeur.

A cause de cette mention particulière, et par application de la règle *Inclusio unius fit exclusio alterius*, l'on veut que cette stipulation spéciale d'un privilège sur quelques-unes des choses qui ont fait l'objet de la vente ait pour résultat d'exclure le privilège du vendeur sur les autres.

Nous ne le croyons pas. Le privilège du vendeur résulte de la loi (arts. 1983, 2009 et 2014, C.C.). Pour le moment,

1926

LOWER ST. LAWRENCE POWER CO. v. L'IMMEUBLE LANDRY LTÉE.

Rinfret J.

nous n'avons pas à nous occuper du caractère du droit immobilier cédé par le contrat.

Le privilège prend naissance toutes les fois qu'il y a vente d'un immeuble, sans distinguer s'il s'agit d'un immeuble par nature ou d'un droit immobilier, vente d'un usufruit ou d'une action immobilisée de la Banque de France, constitution d'une servitude, cession de la mitoyenneté d'un mur de séparation. (Colin & Capitant, 3e éd. vol. 2, p. 841).

Il n'était pas nécessaire de le stipuler dans l'acte de vente. Sans doute, le vendeur peut y renoncer; mais on ne peut déduire cette intention du seul fait de l'absence de stipulation ou de la mention spéciale de quelques-uns des objets vendus. Il aurait fallu une déclaration expresse pour que le privilège du vendeur fût exclu.

Il suffit d'ailleurs de bien examiner la clause spéciale du privilège. Elle ne parle que de l'outillage et des machineries attachés aux bâtisses vendues. Elle n'inclut même pas le terrain sur lequel ces bâtisses sont situées, ni d'ailleurs ces bâtisses elles-mêmes. Personne ne songerait à prétendre cependant que les parties, par la mention spéciale de l'outillage et des machineries, ont voulu exclure le terrain et les bâtisses du privilège du vendeur. Il paraît clair que leur stipulation a été faite pour écarter le doute si l'outillage et les machineries attachés aux bâtisses vendues seraient affectés par le privilège du vendeur et l'on a fait une disposition spéciale pour ce cas particulier, sans que pour cela le privilège soit restreint aux seuls cas ainsi exprimés. Il y a lieu à l'application de l'article 1021 du code civil.

Il est donc résulté de la vente du réseau électrique un privilège en faveur de Landry et le contrat ne comporte pas de renonciation implicite à ce privilège. Encore moins en contient-il l'exclusion.

Mais — c'est la seconde question et c'est la plus importante de la cause — est-ce un privilège sur un meuble ou un privilège sur un immeuble?

La réponse est nécessaire pour la solution de cette cause, puisque le réseau a depuis été vendu par Rouleau, Limitée à l'appelante qui l'a payé comptant et en a pris possession (art. 199 C.C.); et également parce que, si le réseau électrique est un meuble, l'enregistrement du bordereau qu'a effectué l'intimé pour conserver son privilège est irrégulier et inefficace.

La Cour Supérieure et la Cour du Banc du Roi ont été d'avis que le réseau de distribution électrique était un immeuble, et nous nous rangeons de ce côté.

Nous devons, tout d'abord, référer à un arrêt de cette cour qui présente avec la cause actuelle certains points d'analogie. C'est celui de *Bélair* v. *La Ville de Sainte-Rose* (1). Par un statut du Bas-Canada de 1830, un nommé James Porteous, dont Bélair était le cessionnaire, avait été autorisé par la Couronne à ériger un pont de péage qui traversait la rivière entre la ville de Sainte-Rose et la paroisse de Sainte-Thérèse. La Couronne s'était réservé le droit d'acquérir ce pont au bout de cinquante ans en en payant la valeur. La ville prit une action pour recouvrer des taxes qui avaient été imposées sur une partie du pont.

Il y fut décidé que le pont, dans ces circonstances, devait être considéré comme un immeuble au sens de l'article 5730 de la loi des cités et villes. L'honorable juge Anglin, maintenant juge-en-chef de cette cour, étudie, dans ses notes, la portée du mot " immeubles " dans le titre " De la distinction des biens ", au code civil, et constate que le mot " bâtiments " de l'article 376 C.C. y est employé dans le sens de " structures "; puis, s'appuyant sur Demolombe (vol. 9, n° 128), Aubry & Rau (vol. 2, n° 164) et Huc (vol 4, n° 9), il ajoute qu'il importe peu que les " constructions ", pourvu qu'elles soient incorporées au sol, aient été élevées par le propriétaire du sol ou par un tiers.

Bien que l'on ne trouve pas, dans les opinions écrites par les autres juges, de mention expresse de ces deux propositions, il est évident que la cour devait nécessairement les accepter pour en arriver à la conclusion que le pont en question était un immeuble imposable.

En vertu du code civil de la province de Québec, tous les biens, tant corporels qu'incorporels, sont meubles ou immeubles (art. 374 C.C.). Les fonds de terre et les bâtiments sont immeubles par leur nature (art. 376 C.C.). Les commentateurs sont d'accord pour dire que l'expression " bâtiments " ne doit pas être limitée à son sens étymologique, mais qu'il faut l'employer par analogie à toute espèce de " construction ".

Planiol (Traité Elémentaire — 6e éd., vol. 1, n° 2207) résume bien l'opinion générale en disant qu'il

(1) 63 Can. S.C.R. 526.

1926

LOWER ST. LAWRENCE POWER CO. v. L'IMMEUBLE LANDRY LTÉE.

Rinfret J.

faut comprendre non-seulement les bâtiments proprement dits, tels que les maisons d'habitation, magasins, ateliers, hangars, granges, etc., mais aussi les travaux d'art de toute espèce, tels que ponts, puits, fours, digues, barrages, tunnels, etc. Par conséquent, il faut définir ici les édifices: tout assemblage de matériaux consolidés à demeure, soit à la surface du sol, soit à l'intérieur.

Cette définition peut comprendre le réseau de distribution électrique vendu par Landry à Rouleau, Limitée, composé de piliers ou poteaux enfoncés dans le sol, reliés par des fils, auxquels sont attachés des transformateurs, liens et autres accessoires situés dans les rues publiques, et qui s'identifient et ne forment qu'un seul tout, constituant une construction consolidée à demeure et faisant corps avec le sol. (Laurent, vol. V, nos 408, 409 et 411).

Il présente par là tous les caractères d'un immeuble par nature.

La question vient pour la première fois devant la Cour Suprême du Canada, car elle ne se posait pas dans *The Town of Westmount* v. *Montreal Light, Heat and Power Co.* (1) Il s'agissait là simplement de décider si la charte de Westmount, qui autorisait la taxation de " tout terrain, lot de ville ou portion de lot " pouvait permettre à cette ville d'imposer, sous ces dénominations, une taxe sur le système d'énergie et d'éclairage au gaz et à l'électricité appartenant à la compagnie et décrit au rôle d'évaluation " gas mains and equipment, poles, transformers, wires, etc." — Il y fut jugé dans la négative; et c'est là tout ce que comporte ce jugement. Aussi est-ce à tort qu'on l'a interprété différemment dans l'arrêt *re Village de Pierreville* v. *Bell Telephone Co.* (2) qui, pour cette raison, ne saurait entrer ici en ligne de compte.

Au contraire, les quelques allusions à la question qui nous occupe maintenant faites par Sir Charles Fitzpatrick (p. 367) et par les juges Idington (p. 371) et Anglin (p. 384), au cours des notes qu'ils ont écrites, indiquent plutôt qu'ils étaient d'avis que le réseau de distribution de la Montreal Light, Heat & Power Company était un immeuble; mais ils n'étaient pas alors appelés à en décider.

Il faut également élaguer l'arrêt dans la cause de *La Municipalité Scolaire de Sainte-Cunégonde* v. *The Montreal Water & Power Company* (3) où le juge Laurendeau décide

(1) (1910) 44 Can. S.C.R. 364. (2) (1915) 17 Q.P.R. 161.
(3) (1912) Q.R. 41 S.C. 500.

que les tuyaux posés sous terre, dans les rues publiques, par une compagnie d'aqueduc, ne sont pas des bien-fonds au sens du paragraphe 16 de l'article 2521 des Statuts Refondus de Québec, 1909, et n'étaient pas imposables pour fins scolaires en vertu de la loi telle qu'elle existait alors (8 mars 1912). C'est une question du même genre qui est tranchée dans la cause de *Montreal Light, Heat & Power Co.* v. *Village de Chambly Bassin.* (1)

Dans chacun de ces arrêts, il s'agissait d'interpréter un statut spécial et de décider si un réseau de distribution d'eau, de gaz ou d'électricité pouvait être classifié dans l'une des catégories de biens que la corporation scolaire ou municipale avait le droit de taxer en vertu des pouvoirs restreints conférés par le statut qui la régissait. Tel n'est pas ici le point en litige.

Mais le juge Tait en a fait une étude très élaborée dans la cause de *Sherbrooke Gas and Water Co.* v. *City of Sherbrooke* (2), de même que le juge White dans une cause de *The Bell Telephone Co.* v. *The Corporation of Ascot* (3). Tous deux ont jugé qu'un système de canalisation (en l'espèce, pour l'eau ou pour le téléphone), comme celui qui a fait l'objet de la vente de Landry à Rouleau, Limitée, devait être considéré comme immeuble par nature.

Un instant la jurisprudence du Québec a paru incliner dans une direction contraire (*The Town of Cookshire* v. *The Canadian Telephone Co.*, (4); *The Bell Telephone Co.* v. *La cité de Hull* (5); mais elle n'a pas tardé à revenir à son point de départ et, plus récemment, la première opinion a prévalu dans les jugements très étudiés *re Cité de Westmount* v. *Montreal Light, Heat & Power Coy.* du juge de Lorimier (6) et de la Cour du Banc du Roi (7) (réserve faite pour les compteurs ainsi qu'il est expliqué dans l'arrêt de la Cour Suprême rendu à la même date que le présent jugement) (8), auxquels sont venus s'adjoindre ceux, non moins fortement raisonnés, qui ont été rendus dans la présente cause (9).

(1) (1915) 24 D.L.R. 665.
(2) (1891) 15 L.N. 22.
(3) (1899) Q.R. 16 S.C. 436.
(4) (1913) Q.R. 44 S.C. 126.
(5) (1922) Q.R. 61 S.C. 222.
(6) (1924) 30 R. de J. 81.
(7) (1926) Q.R. 38 K.B. 406.
(8) [1926] S.C.R. 515, at p. 521.
(9) (1926) Q.R. 41 K.B. 363.

1926

LOWER ST. LAWRENCE POWER CO. v. L'IMMEUBLE LANDRY LTÉE.

Rinfret J.

Les deux principales objections que l'on oppose à l'opinion des réseaux de ce genre sont des immeubles, celles qui ont prévalu dans les arrêts qui ont décidé dans la négative et celles que l'on a fait valoir de nouveau au cours de l'argumentation devant cette cour, sont les suivantes:

1. Ces réseaux (poteaux, fils, etc.) ne sont pas immeubles par nature, parce qu'ils ne sont pas fixés à perpétuelle demeure;

2. Ils ne sont pas immeubles par destination, parce qu'ils ne sont pas incorporés au fonds de terre par le propriétaire de ce fonds.

Nous croyons que ni l'une, ni l'autre de ces objections ne peut trouver d'appui soit dans la doctrine, soit dans la jurisprudence française qui est appelée à interpréter des textes équivalents à ceux du Code Civil de la province de Québec.

La très grande majorité des commentateurs enseigne qu'il n'est pas nécessaire que la construction, pour être considérée comme immeuble par nature, soit fixée au sol à perpétuelle demeure. Il suffit que l'incorporation ne soit pas purement passagère et accidentelle. C'est le fait de l'attachement au sol que la loi considère. La condition de rigueur est que " la construction, quelle qu'elle soit, fasse corps avec le sol "; qu'elle y soit " cohérente ", suivant l'expression de Pothier, ou " adhérente ", suivant celle de Laurent. C'est toujours la règle: *Quod solo ineadificatur, solo cedit.* Nous référons à Laurent, 5e éd., vol. V, nos 406 à 411; Planiol, 6e éd., vol. I, nos 2203, 2207 à 2209; Beaudry-Lacantinerie, 3e éd. Des Biens, nos 25 et 26; Aubry et Rau, 5e éd., vol. II, pp. 6 et 7; Colin et Capitant, 4e éd., vol. I, p. 680 et 681.

De même, les bâtiments ou autres ouvrages unis au sol sont immeubles par leur nature, qu'ils aient été construits par le propriétaire du fonds ou par un tiers possesseur; et ce, dans le cas même où le tiers constructeur se serait réservé la faculté de les démolir lors de la cessation de sa jouissance. Nous ne pouvons faire mieux sur ce point que de référer à Aubry et Rau, 5e éd., vol. II, p. 7, et à la note 6 qui s'y trouve, ainsi qu'aux auteurs et arrêts qui y sont cités, à Laurent, vol. V, nos 412 à 416, 432; Beaudry-Lacantinerie, des Biens, no 27; Planiol, vol. I, no 2208; Colin et Capitant, vol. I, p. 681.

Il n'y a pas à rechercher,

(dit Domolombe, vol. 9. n° 104),

par qui, ni aux frais de qui, ni avec quels matériaux le bâtiment ou le travail quelconque a été fait; par le propriétaire lui-même du sol, ou par un fermier, un locataire ou un tiers possesseur. Le bâtiment, une fois construit, est immeuble par sa nature, c'est-à-dire d'une manière absolue et indépendamment de la qualité du constructeur. Sans doute, lorsque le propriétaire construit sur son terrain avec les matériaux d'autrui, ou lorsqu'un tiers construit sur le terrain d'un autre avec ses propres matériaux, il y a lieu, de part et d'autre, à un règlement; et nous verrons qu'en effet le code Napoléon a prévu cette double hypothèse. Mais quant à la qualification du bâtiment lui-même, sous le rapport de sa nature immobilière, le principe demeure toujours, et dans tous les cas, le même.

Il convient de compléter par une citation de Beaudry-Lacantinerie (des Biens, n° 40 *in fine*):

L'hypothèse se présente assez souvent en pratique pour les constructions et bâtiments élevés en vertu d'une permission administrative sur des terrains dépendants du domaine public; ces édifices sont immeubles, tant que l'incorporation subsiste et ils sont immeubles vis-à-vis du constructeur qui a obtenu l'autorisation voulu (Cass. 10 avril 1867, S. 67.1. 277; D. 67.1.397).

Nous tenions à mentionner ce passage qui s'applique particulièrement à l'espèce actuelle, où les poteaux et fils sont placés dans les rues de la municipalité. Et c'est, en somme, la conclusion à laquelle cette cour était elle-même arrivée dans la cause de *Bélair* v. *Ville de Sainte-Rose* (1).

D'après la jurisprudence de la Cour de Cassation de France, " c'est le fait actuel qui décide si une chose est " mobilière ou immobilière " (Dalloz 1861.1.225; 1867.1. 398); et il n'importe pas que le droit en vertu duquel elle se trouve adhérente au sol soit résoluble.

Les principes généraux que nous venons d'exposer ont été appliqués aux "tuyaux de canalisation souterraine, * * * bien "qu'ils aient été placés par un possesseur à titre pré- "caire au lieu de l'être par le propriétaire du fonds" (Cass., Comp. Gén. des Eaux, S.P.1900.1.446), aux " conduites " d'eau placées dans le sol des voies d'une commune par une " société concessionnaire pour la distribution de l'eau aux " habitants " (Cass. S. 91.1.488, *Cie Générale des Eaux* v. *Octroi de Clichy*), aux " conduites destinées à amener le " gaz au dehors de l'usine et passant sous les voies publi- " ques et privées " (Fuzier-Herman, Répertoire, vo. Biens,

(1) 63 Can. S.C.R. 526, at pp. 531 et seq.

1926

LOWER ST. LAWRENCE POWER CO. v. L'IMMEUBLE LANDRY LTÉE.

Rinfret J.

n° 135); et " il n'est pas douteux qu'il faut assimiler aux " canalisations d'eau (les seules auxquelles on pouvait pen- " ser lors de la codification de nos lois) celles de gaz et celles " d'électricité " (Planiol, vol. I, n° 2209; Colin et Capitant, vol. I, p. 681; *Ville de Dijon* c. *Compagnie des Eaux*, D. 1902.1.492).

C'est ainsi qu'une construction élevée sur une dépendance du domaine public, en vertu d'une permission essentiellement temporaire et révocable, a le caractère d'immeuble (Dalloz, Dict. de Droit, vo. Biens, no. 3 (et) les tuyaux employés à la canalisation d'eau et de gaz établis sous les voies publiques sont immeubles par nature (Dalloz—Dict. de Droit, vo. Biens, no. 4).

Le réseau d'installation pour distribuer la lumière électrique au village de Mont-Joli vendu par Landry à Rouleau, Limitée, était donc un immeuble lors de cette vente et, vu que son adhérence au sol a toujours subsisté depuis, il est demeuré immeuble jusqu'à ce jour. Il n'a pas cessé d'être immeuble parce que les poteaux, fils, transformateurs et accessoires situés dans les rues de Mont-Joli ont depuis été séparés des

machines servant à la production de l'électricité * * * se trouvant * * * dans et sur les propriétés de Rouleau, Limitée,

pour être reliés aux machines génératrices d'énergie électrique appartenant à l'appelante. Au point de vue des principes établis plus haut, cette modification n'a pu affecter le caractère immobilier du réseau. Ce réseau, d'après l'opinion la plus générale, est un immeuble par lui-même, en tant que construction adhérente au sol, et non pas seulement comme faisant partie intégrante de l'usine génératrice de l'électricité.

De plus, cette séparation du réseau d'avec l'usine, causée par la vente à l'appelante, ne donne pas ouverture, comme l'appelante l'a prétendu, aux recours prévus par les articles 2054 et 2055 du code civil. Ces recours sont limités au cas où le débiteur ou le tiers-détenteur " détériore " un immeuble grevé de privilège ou d'hypothèque, " dans la vue de " frauder " le créancier hypothécaire.

Ici, il s'agit d'une vente ordinaire. Le privilège ou l'hypothèque ne dépouille pas le débiteur ou le tiers-détenteur de son droit de propriétaire. Il peut aliéner la propriété (art. 2053 C.C.), sauf qu'elle reste sujette au privilege ou à l'hypothèque. Si, comme dans le cas actuel, une partie

seulement de l'immeuble est vendue, le privilège reste indivisible et subsiste en entier sur chaque partie de la propriété affectée (arts. 2017, 2058 C.C.). Nous ne voyons pas quelle distinction on peut faire, sous ce rapport, entre le cas actuel et celui de la vente de partie d'une terre hypothéquée.

Mais il se pose une troisième question, et l'on dit: Même si ce réseau est un immeuble, il n'est pas susceptible d'être hypothéqué ni, par conséquent, d'être affecté par un privilège immobilier, parce qu'on ne saurait admettre un tel privilège ou une hypothèque sur une construction indépendamment du sol, et que, en plus, dans le cas présent, le sol est la rue municipale, soit un domaine public inaliénable.

Cette prétention pourrait s'appuyer sur Laurent (vol. 30, nos 214 et 215). Mais cet auteur déclare lui-même que son

opinion est à peu près isolée * * * La jurisprudence est contraire ainsi que la doctrine (Vol. 30, no. 216).

Rien dans la définition donnée par le Code du privilège (art. 1983, C.C.) ou de l'hypothèque (art. 2016, C.C.) ne s'oppose à ce que l'un ou l'autre n'affecte que la construction, sans affecter le sol sur lequel elle est édifiée.

En général, on peut dire que tous les biens immobiliers sont susceptibles d'être donnés en hypothèques, pourvu qu'ils soient dans le commerce et qu'ils soient saisissables (Planiol, vol. II, nos 2718, 2721; Colin et Capitant, vol. II, p. 887; *Rémillard* v. *Duval* (1).

Les bâtiments sont donc immeubles, (dit Pont, Privilèges et Hypothèques, vol. I, no. 359, p. 352) aussi bien lorsqu'ils sont l'oeuvre du propriétaire du sol que lorsqu'ils ont été construits par un autre, et par suite ils sont susceptibles d'hypothèque.

(Voir également le même auteur—vol. II, no 634.)

Dans les Codes annotés de Sirey (3e éd., 1892), sous l'art. 518 du Code Civil, on trouve la note suivante, qui résume bien la situation:

No. 15.—Les constructions élevées sur un terrain dépendant du domaine public, en vertu d'une permission de l'administration, constituent, bien que cette permission soit révocable, des immeubles qui peuvent être valablement transmis, hypothéqués et saisis comme tels, sous la condition résolutoire de la révocation de la permission. Cass. 10 avril 1867, S. 67.1. 277. P. 67.1.728.—D. 67.1.397.—Sic Pont, Priv. et Hypoth., n. 350.

Cela est conforme à l'art. 2038 du Code Civil.

(1) [1886] 34 L.C.J. 83.

1926

LOWER ST. LAWRENCE POWER CO. v. L'IMMEUBLE LANDRY LTÉE.

Rinfret J.

Il a été jugé que

des constructions élevées par un locataire peuvent être frappées d'hypothèques du chef du locataire, sous la condition résolutoire de la démolition à la fin du bail.

(*Turge* vs *Hospices civils de Lyon* (1).

et cet arrêt fut confirmé par la Cour de Cassation (2).

Le propriétaire des constructions édifiées sur un terrain qui appartient à autrui (dit Colin & Capitant, 3e éd. vol. II, p. 887) par exemple, le locataire jouissant d'un long bail, peut certainement hypothéquer les constructions par lui faites (Gand, 29 mai 1895, D.P. 97.2.218). Mais ce droit d'hypothèque s'éteindra avec le droit de propriété du constituant (Paris, 8 février 1892, D.P. 92.2.409, note de M. Planiol). De même, une canalisation destinée à amener les eaux d'un torrent à une usine pour produire une force électrique, est un immeuble par nature susceptible d'hypothèque (cf. Grenoble, 16 juin 1904, D.P. 1906.2.209, note de M. Planiol).

Et même le locataire d'un terrain faisant partie du domaine communal, et placé hors du commerce par sa destination publique, peut hypothéquer la construction qu'il y a élevée avec l'autorisation de la municipalité (D.P. 1866. 2.94).

Il suit de tout ce qui précède que le privilège immobilier de Arthur C. Landry sur le réseau de distribution électrique vendu à Rousseau, Limitée, pouvait faire valablement l'objet d'un enregistrement et d'un droit de suite (art. 2056, C.C.).

Or, dès que l'on admet que le droit de privilège immobilier existe, la méthode de son enregistrement ne saurait présenter de difficulté insurmontable.

Quelques jours seulement après la vente par Landry à Rouleau, Limitée, cet acte avait été enregistré par transcription sur les numéros de cadastre officiel du terrain où se trouvait l'usine génératrice. Cela déjà serait complet, d'après le tribunal de Grenoble (D.P. 1906.2.209) qui, dans le cas d'une source exploitée pour fins d'aqueduc, a jugé qu'il

suffit que cette hypothèque soit inscrite au bureau des hypothèques de l'arrondissement d'où ressort la source hypothéquée, alors même que les canalisations s'étendraient sur d'autres arrondissements.

L'on voit tout de suite l'analogie avec le présent cas. Mais, après tout, l'enregistrement a surtout pour but de rendre publics les actes et les droits réels (art. 2171, C.C.). En particulier, en ce qui concerne le privilège, l'enregistrement

(1) D.P. 1871.2.191. (2) D.P. 1872.1.256.

ne le crée pas, non plus qu'il ne le confère; il ne fait que le conserver et lui donner effet (art. 2082, C.C.).

L'acte de vente ne contenait pas les numéros des rues dans lesquelles étaient posés les poteaux et les fils du réseau. A vraiment parler, cet immeuble particulier constitué par le réseau n'avait pas et n'a pas de numéro de cadastre.

L'acte de vente et, par suite, le droit de privilège n'en sont pas moins existants et valides car, dans ce cas, la loi n'exige pas, comme elle le fait pour l'hypothèque conventionnelle (au sujet de laquelle nous entendons laisser la discussion ouverte),

> que l'acte désigne spécialement l'immeuble hypothéqué avec mention des tenants et aboutissants, ou du nom sous lequel il est connu ou du lot, de la partie du lot et du rang, ou du numéro de l'immeuble sur le plan et le livre de renvoi du bureau d'enregistrement, si tels plan et livre de renvoi existent.

(art. 2042, C.C.); *Mullarky* v. *Montreal Loan and Mortgage Company* (1).

Ce privilège n'est pas le produit de la convention des parties. Comme l'hypothèque légale, il " résulte de la loi " (arts. 1983, 2020, C.C.) et la loi n'exige pas, pour qu'il soit " valable ", la désignation spéciale requise par l'art. 2042, C.C.; surtout lorsque, comme dans l'espèce, on ne se plaint pas de l'insuffisance ou de l'irrégularité du bordereau (art. 2139, C.C.).

Même si le numéro officiel du cadastre ne se trouve pas dans le titre, il peut y être suppléé par le bordereau qui le résume (art. 2144a, C.C.) ou au moyen d'une réquisition ou un avis (art. 2168, C.C., *in fine*). C'est ce qui a été fait ici. Le droit de privilège existait. Le créancier l'a fait enregistrer par la méthode indiquée par le Code Civil qui s'adaptait le mieux au cas particulier.

Nous sommes d'avis de confirmer les jugements de la Cour Supérieure et de la Cour du Banc du Roi.

IDINGTON J.—For the reasons assigned by Mr. Justice Dorion in the appellate court below and for the reasons assigned by my brother Rinfret, I agree with the latter.

Appeal dismissed with costs.

Solicitors for the appellant: *Sasseville and Gagnon.*
Solicitors for the respondent: *Drolet and Tardif.*

(1) (1894) 2 R. de J. 253.

1926

*Oct. 8, 11.
*Nov. 4.

BERTHA P. KNIGHT (PLAINTIFF).....APPELLANT;

AND

GRAND TRUNK PACIFIC DEVELOPMENT CO. (DEFENDANT).....RESPONDENT.

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

Negligence—Dangerous premises—Invitee—Licensee—Duty of hotel proprietor to person attending banquet—Jury trial—Verdict.

In an action under *The Fatal Accidents Act*, 1922, c. 196, by the widow of a person who had been in attendance at a banquet given by an association in the defendant's hotel and, after the conclusion thereof, met his death by falling into a private service elevator shaft, a general verdict was rendered by a jury in favour of the plaintiff, upon which judgment was entered for $40,000 damages. Upon appeal to the Appellate Division, judgment was reversed and the action was dismissed.

Held, affirming the judgment of the Appellate Division (22 Alta. L.R. 237), that, upon the undisputed facts disclosed at the trial, the deceased was not at the time and place of the accident, entitled to be treated as an invitee, and, as the defendant's liability must be determined in view of its duty to a mere licensee, there was no failure of duty to the deceased on the part of the defendant company. Beyond the material facts in proof and their fair implication, everything was left to conjecture; and, although the courts must be careful to distinguish between the separate functions of judge and jury and to avoid the disposition of a case upon inferences inconsistent with findings which there is evidence to sustain, there was no evidence in this case to support the finding implied in the general verdict that the deceased was invited, or was justified to believe that he was invited, by the defendant company to enter or to use the private passage, or to meddle with the door of the service elevator.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Walsh J., with a jury and dismissing the appellant's action.

The appellant is the widow and administratrix of the estate of one A. M. Knight, in his lifetime a barrister in the office of the Attorney General of Alberta, who was accidentally killed in the MacDonald Hotel in Edmonton, which is owned and operated by the respondent company. On the night of December 20, 1924, the Alberta Bar Asso-

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

(1) 22 Alta. L.R. 237.

ciation, of which the deceased was a member, held a banquet in the hotel at which the deceased was present. While in the hotel he fell down an elevator shaft and was killed. The action was brought under the *Fatal Accidents Act* for damages. It was tried with a jury and a verdict for $40,000 damages was rendered. That judgment was reversed by the Appellate Court. The trial judge instructed the jury that the deceased, in attending the banquet, was an invitee of the company and that the duty owed the deceased was something more than was owed a mere licensee. The Appellate Court held that although it was true that the deceased was the invitee when attending the banquet he was, at the time and place of the accident, a mere licensee, as at that time the banquet was over; and the Appellate Court held further that whatever duty might be owed a mere licensee along the main corridors or immediately adjacent thereto, there was no duty owed him to keep an elevator door free from danger, situated as it was at the end of a service passage which the public had no right or reason to use.

Eug. Lafleur K.C. and *H. A. Friedman* for the appellant.

N. D. Maclean K.C. for the respondent.

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

The judgment of the court was delivered by

NEWCOMBE J.—The appellant's husband met his death on the evening of 20th December, 1924, at or about 11.30 o'clock, by falling down the shaft of the private service elevator in the MacDonald Hotel at the city of Edmonton, a distance of about 30 feet. He was a barrister, residing and practising at Edmonton, and, that evening, had attended a banquet held on the mezzanine floor of the hotel by the Alberta Bar Association, of which he was a member. The respondent company, the proprietor, carrying on the business of the hotel, had provided and served the banquet for the Bar Association. The service of the dinner had concluded before 10 o'clock, and some speeches

1926

KNIGHT v. G. T. PAC. DEV. CO.

Newcombe J.

followed, but after these were finished, and sometime previously to the accident, the banquet had broken up, and the guests had left the mezzanine floor. Shortly before 11.30 o'clock, the deceased had visited a room on the 2nd floor, which was occupied by a guest of the hotel, and where some friends of the guest were, but he remained there only a few minutes; he enquired of a witness whether there were a lavatory in the room, and, being informed that there was none, said that

he had looked all down the corridor and couldn't find one.

There were in fact two marked lavatories, one at each end of this corridor. He was next seen, after a short interval, in the corridor contiguous to the banquet-room which leads from the main stairway and passenger elevators. This corridor runs east and west. The deceased was seen at the east end of the corridor, the main stairway and passenger lifts being situated to the westward. Adjoining the banquet-room, the entrances to which from the main corridor are on the north side of the latter, there is a narrow corridor or passage leading from the main corridor to the service elevator, a distance of about 15 feet, and from the east side of this passage a stairway leads down to a cloak room in connection with the main dining room on the floor below. The stairway extends only between the main or ground floor and the mezzanine floor, and is used for service purposes exclusively. The passage from the main corridor to the private service elevator is of a width at the entrance of about 3 feet. There is no door, but, within the entrance, the passage has a uniform width of about 4½ feet. This space was in part occupied by a buffet or sideboard, used for service purposes, which stood in the middle of the passage against the wall on its western side, and was of the dimensions of about 7 feet by 2½ feet, so that there would be, opposite to the sideboard, a space of not more than 2½ feet between the sideboard and the rail which guards the well of the private stairway. It is said by the coroner, who visited the place immediately after the accident, that

it was very narrow between the sideboard and the railing to get in there.

The passage was used by the waiters for service on the mezzanine floor, and, during the dinner, had been occupied

1926

KNIGHT v. G. T. PAC. DEV. CO.

Newcombe J.

by the attendants who served the wine. It provided no accommodation for the use of guests.

At the time when the deceased was last seen in the mezzanine corridor he crossed that corridor and went into this private service passage, and to the door of the elevator, which is at the end of it, where he stood rattling the door. A few minutes later he was found in an unconscious and dying condition on the concrete at the bottom of the shaft. The door of the elevator was closed when the deceased went to it, but there is evidence that the lock was defective, and apt to be released because of insufficient tension. When the deceased fell the lift itself was at one of the floors above, and in its descent the attendant found the mezzanine door open, and closed it, and, when he reached the basement, he discovered the deceased lying in the pit.

The trial judge describes the lift in his charge to the jury. He says:

> The elevator itself was, in appearance a typical elevator. I don't mean to say that it was anything like the two large passenger elevators which we saw in the hotel when we were over there on Tuesday, but it was a structure built of frame with glass in the upper part and some kind of wire netting, if I am not mistaken, behind the glass. There was no handle on the door, there were push buttons beside it—up and down, the regulation buttons that are observable at the side of every other elevator, a dial above the door to indicate the location of the elevator cage.

It should be added however that, as the lift was not used by passengers, and was operated only by the private service waiter, the push buttons and dial had not been connected with the mechanism, and did not serve their purposes.

Immediately to the eastward of the passage leading to this private elevator, and beyond the stairway, was the pantry or serving room for the mezzanine floor, which opened off the main mezzanine corridor, so that there was, adjoining the private dining rooms, which on this occasion had been thrown into one large banquet-room a considerable space or block, comprising the private passage, stairway, elevators and pantry, devoted exclusively to service purposes.

The action was brought by the widow and administratrix of the deceased on behalf of herself and her children, of whom there were four, to recover compensation under the

1926

KNIGHT v. G. T. PAC. DEV. CO.

Newcombe J.

statute, and it resulted in a general verdict for the plaintiff, upon which judgment was entered for $40,000 damages. The defendant company appealed and the Appellate Division allowed the appeal and dismissed the action. The Chief Justice, who pronounced the judgment on behalf of the court, after reviewing the evidence, referred to the cases of *Walker* v. *Midland Railway Co.* (1); *Mersey Docks and Harbour Board* v. *Proctor* (2), and *Connor* v. *Cornell* (3), and particularly to the speech of Lord Selborne in the first named case, where it is said, at p. 490:

> I think it impossible to hold that the general duty of an innkeeper to take proper care for the safety of his guests extends to every room in the house, at all hours of night and day, irrespective of the question whether any such guests may have a right or some reasonable cause to be there. The duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go, in the belief reasonably entertained that they are invited or entitled to do so.

And the learned Chief Justice concluded, having regard to these authorities, that it was established by the undisputed facts, that at the time and place of the accident the deceased was not entitled to be treated as an invitee, and that therefore there was no failure of duty to him on the part of the defendant company.

I have considered the evidence very carefully and I do not think that the judgment of the Appellate Division should be disturbed. The material facts in proof have been stated. Beyond these and their fair implications, everything is left to conjecture. The court must of course be careful to distinguish between the separate functions of judge and jury and to avoid the disposition of a case upon inferences inconsistent with findings which there is evidence to sustain. But here the case does not depend upon contradicted evidence, and I find no support for the finding, which, in view of the charge of the learned trial judge, must necessarily be implied in the general verdict, that the deceased was invited, or was justified to believe that he was invited, by the respondent to enter or to use the private passage, or to meddle with the door of the service elevator. There can be no doubt that the hotel management did not intend or expect that he should or would go into the private service quarters. It is suggested that

(1) (1886) 55 L.T. 489. (2) [1923] A.C. 253.
(3) (1925) 57 Ont. L.R. 35.

he was still looking for a lavatory, but there was no lavatory in the passage, and no reason is disclosed why he should expect to find one there, and of course he had no permission to search the recesses of the hotel. The lavatories were in the basement, as he knew, or would have learned by inquiry. If the deceased were looking for an exit, why did he leave the passenger lift, or main stairway, by which he had come up, and by which he had descended from the second floor to the mezzanine, and which would have taken or led him direct to the ground floor? Evidently he was not looking for an elevator. It is said however that, having found this one, he shook the door in order to summon an attendant. That is a surmise which has, perhaps, some suggestion of probability, but certainly there was no holding out of the place to be used by visitors in that manner or for that purpose. I see no evidence to indicate that, by anything for which the hotel is responsible, the deceased was misled into a belief that he was invited to use the private passage; and, having gone there, where he had no right to be, he was not entitled to rely, if he did rely, upon the adequacy of the lock of the elevator door to withstand the shock which he gave it.

If, on the other hand, the view were taken that the defendant company was negligent in the execution of its duty to the deceased, the question would remain as to whether there be in proof a state of facts from which the jury might infer that the defendant's negligence was the cause of the accident, and the considerations suggested by *Wakelin* v. *The London and South Western Ry. Co.* (1), would arise; but, having regard to the conclusions which I have expressed, it is unnecessary to consider this question.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Friedman, Lieberman & Gallaway.*

Solicitors for the respondent: *Short, Cross & Maclean.*

(1) (1886) 12 App. Cas. 41.

1926

*May 18.
*Oct. 5.

THE SHIP "STRANDHILL" (DEFENDANT) ..... } APPELLANT;

AND

WALTER W. HODDER COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT

Maritime law—Shipping—Ship's necessaries—Maritime lien—Foreign law —Exchequer Court of Canada—Jurisdiction

Hodder Co., carrying on business at Boston, in the United States of America, sought, by action *in rem*, to recover the price of necessaries furnished to the appellant ship, in an American port, under a contract made there with the owner and to enforce against the ship the maritime lien therefor which was created and recognized by law of the United States. The owner of the ship, at the time of the contract, was domiciled and resident in the United States and the ship, then called the *Lincolnland*, was registered there, but it was alleged in the defence that later, before action, she was sold, her name changed and that she became of British registry.—The Exchequer Court of Canada has been declared, in pursuance of the *Colonial Courts of Admiralty Act* (1890) 53-54 Vict., c. 27, to be a Court of Admiralty and has, on its Admiralty side, under s. 2, subs. 2, of that Act, jurisdiction "over the like places, persons, matters and things, as the Admiralty Jurisdiction of the High Court in England * * *," which jurisdiction, relating to claims for ship's necessaries, is defined by two statutes of the United Kingdom, (1840) 3-4 Vict., c. 65, s. 6 and (1861) 24 Vict., c. 10, s. 5.

Held that, although by the laws of this country the respondent might not have a maritime lien for necessaries supplied to the appellant ship, the Exchequer Court of Canada, in Admiralty, could entertain an action *in rem* for the recovery of the price where a maritime lien therefor is created under foreign law. A right acquired under the law of a foreign state will be recognized, and may be enforced, under the law of England, unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right; and, as the contract in this case is not void on the ground of immorality nor contrary to any positive law which would prohibit the making of it, the right which has accrued under or incident to it may be recognized and enforced by a court having the requisite jurisdiction; and *held* that, in view of the above stated statutory enactments, the Exchequer Court of Canada has the requisite jurisdiction in this case: Inasmuch however as the case was submitted upon points of law arising upon the statement of claim, the court expressed no opinion upon a question of priorities suggested by the defence.

Pittsburgh Coal Co. v. *SS. Belchers* ([1926] Ex. C.R. 24) dist.

Judgment of the Exchequer Court of Canada ([1926] Ex. C.R. 226) aff.

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

1926

SHIP *Strandhill* v. HODDER CO.

APPEAL from an order of the Exchequer Court of Canada, Nova Scotia Admiralty District (1), affirming jurisdiction in an action *in rem* for the recovery of the price of certain necessaries furnished to the appellant ship in the port of Boston. Upon motion of the appellant it had been ordered that the question of law arising from the pleadings, to wit: that the court was without jurisdiction, be set down for argument before the trial on the merits.

C. B. Smith K.C. for the appellant. The Exchequer Court of Canada in Admiralty has no jurisdiction to entertain an action *in rem* for necessaries supplied to the *Strandhill* (then the *Lincolnland*) in the United States of America.

The Exchequer Court of Canada in Admiralty has no jurisdiction to enforce by action *in rem* a lien created by the law of the United States under facts and circumstances that would not give rise to a maritime lien under British Admiralty law.

A maritime lien cannot be created by foreign law otherwise than by a judgment *in rem,* and when so created cannot be enforced in the Exchequer Court.

By virtue of the American law the respondent did not acquire a right in the ship which attached to and followed the ship even through change of ownership.

The statement of claim disclosed no cause of action which could be enforced by an action *in rem* in the Exchequer Court.

The Exchequer Court of Canada was wholly without jurisdiction to entertain this action as an action *in rem.*

The arrest of the *Strandhill* in this action was wrongful *ab initio.*

Alfred Whitman K.C. for the respondent. The respondent can recover in this action *in rem* for necessaries supplied to the *Strandhill,* a foreign ship in a foreign port. The respondent can invoque the statutory lien.

The Admiralty Court has jurisdiction over claims for necessaries.

The appellant has a maritime lien, by the laws of the United States of America and of the Commonwealth of Massachusetts, for the necessaries supplied to the *Strandhill.*

(1) [1926] Ex. C.R. 226.

1926

SHIP *Strandhill* v. HODDER CO.

Where a maritime lien attaches it is not dependent on the personal liability of the owners at the time the lien is sought to be enforced. A maritime lien travels with the thing into whosesoever possession it may come and may be enforced into whosesoever possession the thing may come.

The Court of Admiralty has also inherent jurisdiction in matters of maritime liens. The ship was under the control of and in the hands of that court.

The Admiralty Court can enforce the law of the United States.

The courts do not enforce a foreign law or judgment but the rights of a party acquired under the law of a foreign country.

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

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 claim which the plaintiff, respondent, seeks to recover is for the price of necessaries supplied to the defendant ship, appellant, under an American contract, and which, by the law of the United States, was secured by maritime lien upon the ship. I say American contract, because the vendor was carrying on its business in the United States; the contract was made in the United States for the sale and delivery of the goods; the defendant, *Strandhill*, then called the *Lincolnland*, was an American ship; the goods were delivered to her as ship's necessaries, in an American port, at the request of the owner, who was domiciled and resident in the United States, and there was thus no point of contact with any other country, save that the ship, in the course of her navigation, might visit or sometime be found in a foreign port.

The question arises upon the submission by the defence that the statement of claim discloses no cause of action within the jurisdiction of the Exchequer Court of Canada in Admiralty, wherein the action was brought; this is substantially the effect of the objections set out as points of law in the defence.

The hearing took place upon an order of the local judge setting down the questions of law to be heard before the

trial. The case therefore depends upon the allegations of the statement of claim, which is concisely drafted, and may conveniently be set out in full:

Statement of Claim

1. The plaintiff at the time of the occurrence hereinafter mentioned carried on business at Boston in the Commonwealth of Massachusetts, United States of America, as dealers in ship supplies, provisions and chandlery.

2. The said ship *Strandhill* at the time the necessaries hereinafter mentioned were supplied to her was an American ship called the *Lincolnland* and was lying in the said port of Boston under the command of one Rupert Wry as master.

The owner of the said ship at such time was Joseph F. Fertitta, of the city of New York, in the state of New York, and he was at all material times domiciled and resident in the said city of New York.

3. The said ship did not belong to the port of Boston at the time such necessaries were supplied, and at the time of the institution of this cause no owner or part owner of such ship was domiciled in Canada.

4. The plaintiff at the request and upon the order of the said owner, or alternatively at the request and upon the order of a person authorized by such owner to order necessaries for the use of said ship, namely, the said master Rupert Wry, supplied on the 24th and 26th days of October, 1922, necessaries (within the meaning of the fifth section of the *Admiralty Court Act*, 1861, and within the meaning of the United States Acts of 1910, chapter 373), for the necessary use of the said ship then called the *Lincolnland* to the value of $1,091.84; and a promissory note dated October 27, 1922, for $1,000 signed by said owner Joseph F. Fertitta and endorsed by said master Rupert Wry was given by the said owner and master to the plaintiff but said note was dishonoured by non-payment on due presentation and there is now due and unpaid to the plaintiff in respect to such necessaries the sum of $1,091.84 with interest thereon. Particulars of such necessaries are delivered herewith.

5. Said necessaries were supplied by the plaintiff on the credit of said ship and not merely on the personal credit of the master or the owner.

6. By the laws of the United States of America and the said Commonwealth of Massachusetts at the time the said necessaries were supplied, any person furnishing repairs, supplies or other necessaries to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessels, or of any person by him or them authorized had a maritime lien on such vessel which might be enforced by a proceeding *in rem*.

7. The plaintiff repeats the foregoing paragraphs of this statement of claim and says that at the time such necessaries were supplied to said ship a maritime lien in its favour on such ship was created which might be enforced by a proceeding *in rem*, and that such lien has at all times up to the present continued in force, and the plaintiff now asks for its enforcement in this court.

8. The plaintiff claims:—

(1) Judgment for the said sum of $1,091.84 together with interest thereon.

1926

SHIP *Strandhill* v. HODDER CO.

(2) That the defendant and his bail be condemned therein with costs.

(3) A sale of the said ship and payment of the said sum and interest out of the proceeds of said sale, together with costs.

(4) Such further and other relief as the case may require.

Newcombe J.

There is a bail bond, by which the National Security Company submits itself to the jurisdiction of the court, and becomes responsible for what may be adjudged in the action.

While, upon the record of the submission, the evidence of the law of the United States is to be found in the 6th paragraph of the statement of claim, we were at the hearing, by tacit consent, referred also to the *Ship Mortgage Act*, 1920, as enacted by congress and published in the statutes at large of the United States, vol. 41, part I, p. 1005. By subs. P. of that Act, introduced under the caption of "Maritime Liens for necessaries," it is enacted that:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

It must therefore be considered that, according to the intention and law of the contract, the plaintiff company had a maritime lien on the vessel for the price of the necessaries supplied.

The nature of a maritime lien is expounded in *The Bold Buccleugh* (1). It is said by Mellish L.J., delivering the judgment of the Judicial Committee of the Privy Council, in *The Two Ellens* (2):

> A maritime lien must be something which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged, either by being satisfied or from the laches of the owner, or in any other way by which, by law, it may be discharged. It commences and there it continues binding on the ship until it comes to an end.

In *The Ripon City* (3), Gorrell Barnes J., in the course of an instructive judgment, adopts Lord Tenterden's definition, and he says:

> The definition of a maritime lien as recognized by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim

(1) (1851) 7 Moo. P.C. 267, at p. 284.

(2) (1872) L.R. 4 P.C. 161, at p. 169.

(3) [1897] P.D. 226, at pp. 241, 242, 243, 246.

upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process.

* * *

The result of my examination of these principles and authorities is as follows: The law now recognizes maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages, disbursements and liabilities, and damage. According to the definition above given, such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—*a jus in re aliena*. It is, so to speak a subtraction from the absolute property of the owner in the thing.

This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. The person who has acquired the right cannot be deprived of it by alienation of the thing by the owner. It does not follow that a right to a personal claim against the owner of the res always co-exists with a right against the res. The right against the res may be conferred on such terms or in such circumstances that a person acquiring that right obtains the security of the res alone, and no rights against the owner thereof personally. A simple illustration of this is the case of bottomry.

* * *

Lastly, as pointed out above, a maritime lien travels with the vessel into whosesoever possession it comes, so that an innocent purchaser of a ship may find his property subjected to claims which existed prior to the date of his purchase, unless the lien is lost by laches or the claim is one which may be barred by the Statutes of Limitation. This rule is stated in *The Bold Buccleugh* (1), to be deduced from the civil law, and, although it may be hard on an innocent purchaser, if it did not exist a person who was owner at the time a lien attached could defeat the lien by transfer if he pleased.

This exposition must I think be taken as descriptive of a maritime lien for the purposes of the case in hand, there being no averment or proof of judicial interpretation of the foreign law, *Lloyd* v. *Gilbert* (2).

Then it is clear, upon abundant authority, that a right acquired under the law of a foreign state will be recognized, and may be enforced, under the law of England, unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right, *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (3); *Hooper* v. *Gumm* (4); *Jacobs* v. *Crédit Lyonnais* (5); *In re Missouri Steamship Co.* (6); and I think it may be said of the law

(1) 7 Moo. P.C. 267.
(2) (1865) L.R., 1 Q.B. 115, at p. 129.
(3) (1865) 3 Moore P.C. N.S. 272, at pp. 290, 291.
(4) (1867) L.R. 2 Ch. 282, at p. 289.
(5) (1884) 12 Q.B.D. 589 at 600.
(6) (1888) 42 Ch. D. 321.

1926

SHIP *Strandhill* v. HODDER CO.

Newcombe J.

of the United States regarding ship's necessaries, as was affirmed by the Exchequer Chamber in *Cammell* v. *Sewell* (1), when upholding the passing of property in a ship under the law of Norway, that

> it does not appear to us that there is anything so barbarous or monstrous in this state of the law as that we can say that it should not be recognized by us.

Inglis v. *Usherwood* (2), exemplifies the application of this principle in a case in which the Court of King's Bench recognized and gave effect to a Russian modification or extension of the right of stoppage *in transitu* as sanctioned by the *lex fori*. In Storey's Conflict of Laws, 4th ed., s. 322 b, p. 527, he says, after referring to the right of stoppage *in transitu;* the lien of a bottomry bond on a thing pledged; the lien of mariners on a ship for their wages and the priority of payment *in rem*, which the law sometimes attaches to peculiar debts, or to particular persons,

> In these, and like cases, where the lien or privilege is created by the *lex loci contractus*, it will generally, although not universally, be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the *lex fori*.

And in s. 327, p. 551:

> The law of a foreign country, is admitted, in order that the contract may receive the effect, which the parties to it intended. No state, however, is bound to admit a foreign law even for this purpose, when that law would contravene its own positive laws, institutions, or policy, which prohibit such a contract, or when it would prejudice the rights of its own subjects.

In Lord Watson's speech in *The Henrich Björn* (3), he says:

> Many foreign states, whose systems of jurisprudence are based on the civil law, admit a maritime lien for necessaries, but the ground upon which the courts of England have declined to recognize such a lien is not, in my opinion, that it is opposed to some rule or principle peculiar to English law, but that it is contrary to the general principles of the law merchant.

It cannot of course be said that the contract is void on the ground of immorality, nor is it contrary to such positive law as would prohibit the making of it, and therefore I think that the right which has accrued under or incident to it, may be recognized and enforced, if the tribunal to

(1) (1860) 5 H. & N. 728, at p. 743.

(2) (1801) 1 East 515.

(3) (1886) 11 App. Cas. 270, at p. 279.

which the plaintiff has resorted have the requisite jurisdiction.

I observe that Lord Tenterden in his great work on Shipping, 5th edition, the last for which he was responsible, in a passage which is preserved by the learned authors of the 14th edition, at p. 177, says:—

> Lord Mansfield is reported to have said generally in a case depending for judgment in the Court of King's Bench, that a person, who supplies a ship with necessaries, has not only the personal security of the master and owners, but also (*Rich* v. *Coe* (1). An expression of the same import was also used by his lordship in the case of *Farmer* v. *Davies* (2)), the security of the specific ship. But in a recent case, to which I have had more than once occasion to refer, Lord Kenyon, alluding to two cases that will be presently mentioned, expressed a doubt whether the doctrine of Lord Mansfield on this subject was not too generally laid down (*Westerdell* v. *Dale* (3)); and upon the view of the decisions which I am about to quote, one of which was pronounced by Lord Mansfield himself, it appears that the law of England has not adopted this rule of the civil law with regard to repairs and necessaries *furnished here in England.*

The words which I have emphasized suggest, if they do not invite, the inference that necessaries, furnished in a country where the rule of the civil law prevails, may nevertheless be regarded in England as entitled to the lien conferred by the law of the contract, and, if so, it follows that the liability of the ship would be adjudged by a court of competent jurisdiction.

Indeed it is difficult to perceive any reason why an American citizen, the owner of a ship which is by American law subject to a maritime lien for the price of necessaries purchased by him in an American port, could avoid the enforcement of the lien by sending his ship to Canada, if there be a Canadian tribunal having jurisdiction to enforce it.

The case, as now presented, does not involve a question of priorities as between competing creditors to be determined by the *lex fori,* as in cases like *The Tagus* (4); *Clark* v. *Bowring* (5); *The Colorado* (6). Nor is it a claim by way of real privilege or lien on a chose in action, depending on the law for the recovery of the latter, as in the

(1) (1777) Cowp. 636; Trin. T. 17, Geo. 3.

(2) (1786) 1 Term Rep. K.B. 109.

(3) (1797) 7 Term Rep. K.B. 312.

(4) [1903] P.D. 44.

(5) [1908] Sc. Sess. Cas. 1168.

(6) [1923] P.D. 102.

1926

SHIP *Strandhill* v. HODDER CO.

Newcombe J.

much debated decision of Dr. Lushington in *The Milford* (1). The case is concerned only with the vindication of the right claimed against the ship. It must, however, be remembered that it is the right, and not the remedy, which is regulated by the *lex loci;* and, as said by Story, in his commentaries on the Conflict of Laws, 4th ed., s. 327, p. 550:

> Mr. Chancellor Kent has laid down the same rule in his Commentaries, as stated by Huberus and Lord Ellenborough in *Potter* v. *Brown* (2), and has said: "But on this subject of conflicting laws, it may be generally observed, that there is a stubborn principle of jurisprudence, that will often intervene and act with controlling efficacy. This principle is, that when the *lex loci* contractus and the *lex fori* as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land. *In tali conflictu magis est, ut jus nostrum, quam jus alienum, servemus.*"

The defence is pleaded by Wm. P. Cant, alleged to be the owner of the ship at the date of the writ, and it is said that he is a subsequent purchaser for value. The present issue as to the sufficiency in law of the statement of claim is not affected by these allegations; but, if it should appear at the trial that subsequent interests have intervened and that conflicting priorities are to be adjudged, other considerations may arise, which have not been debated, and as to which I am careful to say that I do not express any opinion.

As to the remaining question, the jurisdiction of the High Court of Admiralty in England, relating to claims for ship's necessaries, is defined by two statutes of the United Kingdom, 3 and 4 Vict. (1840), c. 65, s. 6:

> And be it enacted, that the High Court of Admiralty have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or seagoing vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessaries furnished, in respect of which such claim is made.

As to the application and effect of this section, see the observations of Mellish L.J., in *The Two Ellens* (3); also *The Anna* (4).

(1) [1858] Swabey 362.
(2) (1804) 5 East, 124.
(3) L.R. 4 P.C. 161, at p. 167.
(4) (1876) 1 P.D. 253.

The other statutory enactment is 24 Vict. (1861), c. 10, s. 5, the material part of which provides that:

> The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales.

The Exchequer Court of Canada, having been declared, in pursuance of the *Colonial Courts of Admiralty Act,* 1890, 53-54 Vict., c. 27, to be a court of Admiralty, has, on its Admiralty side, under s. 2, subs. 2 of that Act, jurisdiction

> over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court of England, and shall have the same regard as that court to international law and the comity of nations.

And, by s. 3, in interpreting the Admiralty jurisdiction, so conferred, in its application to this Dominion, "Canada" is to be read in substitution for "England and Wales."

Now in view of these enactments I apprehend that if a provision, corresponding to that of the United States statute which I have quoted, had been enacted in England, the High Court of Admiralty would have found itself adequately equipped to enforce it, in the cases provided for in the Acts of 1840 and 1861. And, seeing that equivalent local jurisdiction exists, the Exchequer Court of Canada is empowered, when, in those cases, the claim for necessaries is secured by a maritime lien, to enforce that lien, notwithstanding that the right may have been acquired under the law of a foreign country.

The conclusion which I have reached, while in accord with that of the learned trial judge, and with the view expressed by Routhier L.J.A. in *Coorty* v. *S.S. Coldwell* (1), is not in conflict with the recent judgment of the learned local judge at Toronto in *Pittsbrugh Coal Co.* v. *S.S. Belchers* (2), to which our attention was directed, because, to mention one reason only, in that case, the ship against which the lien was asserted was registered in Canada, where the owner was domiciled.

I would dismiss the appeal with costs.

(1) (1898) 6 Ex. C.R. 196. (2) [1926] Ex. C.R. 24.

1926

SHIP *Strandhill* v. HODDER CO.

Idington J.

IDINGTON J.—This appeal is from the Exchequer Court of Canada, Nova Scotia Admiralty District, in a case wherein Mr. Justice Mellish heard an argument on the law applicable to the state of facts set forth in the statement of claim. Apparently it was a substitute for a demurrer to same.

The first six paragraphs of the statement of claim, containing all that is material for our consideration, are as follows:—

> The plaintiff at the time of the occurrences hereinafter mentioned carried on business at Boston in the Commonwealth of Massachusetts, United States of America, as dealers in ship supplies, provisions and chandlery.
>
> 2. The said ship *Strandhill* at the time the necessaries hereinafter mentioned were supplied to her was an American ship called the *Lincolnland* and was lying in the said port of Boston under the command of one Ruper Wry as master. The owner of the said ship at such time was Joseph F. Fertitta of the city of New York, in the state of New York, and he was at all material times domiciled and resident in the said city of New York.
>
> 3. The said ship did not belong to the port of Boston at the time such necessaries were supplied, and at the time of the institution of this cause no owner or part owner of such ship was domiciled in Canada.
>
> 4. The plaintiff at the request and upon the order of the said owner, or alternatively at the request and upon the order of a person authorized by such owner to order necessaries for the use of such ship, namely, the said master Rupert Wry supplied on the 24th and 25th days of October, 1922, necessaries (within the meaning of the fifth section of the *Admiralty Court Act* 1861 and within the meaning of the United States Acts of 1910, chapter 373) for the necessary use of the said ship then called the *Lincolnland* to the value of $1,091.84; and a promissory note dated October 27, 1922, for $1,000 signed by said owner Joseph F. Fertitta and endorsed by said master Ruper Wry was given by the said owner and master to the plaintiff but said note was dishonoured by non-payment on due presentation and there is now due and unpaid to the plaintiff in respect to such necessaries the sum of $1,091.84 with interest thereon. Particulars of such necessaries are delivered herewith.
>
> 5. Said necessaries were supplied by the plaintiff on the credit of said ship and not merely on its personal credit of the master or the owner.
>
> 6. By the laws of the United States of America and the said Commonwealth of Massachusetts at the time the said necessaries were supplied, any person furnishing repairs, supplies or other necessaries to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessels, or of any person by him or them authorized had a maritime lien on such vessel which might be enforced by a proceeding *in rem*.

On the assumption that the foregoing statements are each and all, including, of course, that in paragraph six,

stating the laws of the United States of America and of the Commonwealth of Massachusetts, correctly stated, I am of the opinion that Mr. Justice Mellish has, for the reasons he assigns, reached an absolutely correct conclusion.

Having read, amongst others, the cases he cites, I may say that they are not by any means founded upon exactly the same sort of facts as set forth in the foregoing statement of claim, but the principles therein proceeded upon are concisely as enunciated by Lord Justice Baggallay in *The City of Mecca* (1), where, at page 119, after expressing his entire adoption of the proceedings *in rem* and *in personam*, as quoted by the Master of the Rolls in the case of *The Bold Buccleugh* (2), he quotes this additional passage which he says he thinks should be read:—

> This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached.

The third edition of Dicey, cited by Mr. Justice Mellish, is the last edition of that work (and properly read supports his conclusion), but the second edition is persistently referred to by counsel for appellant, why so puzzles me. I have the third edition at hand, but not the second.

The appellant's factum claims this case and the case of *Pittsburg Coal Co. et al* and *SS. Belchers* (3), are the same; and that Mr. Justice Hodgins' decision is directly contrary to that of Mr. Justice Mellish herein. With due respect, I cannot assent to that, for, so far as the latter case is concerned, the vessel there in question is simply set down as registered and owned in Canada, and no record of its ever having been registered elsewhere appears.

This probably is the basis of the different results.

The American law seems to have made the advance for necessities a maritime lien on American vessels.

And certainly to maintain the appellant's contention herein would open wide the door to fraud. It would be,

(1) (1881) 6 P.D. 106. (2) 7 Moo. P.C. 267.
(3) [1926] Ex. C.R. 24.

1926

SHIP *Strandhill* v. HODDER CO.

Idington J.

I submit, intolerable to enable owners of American vessels to get advances on faith of such a maritime lien and move up to Canada and sell out.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. A. Henry.*

Solicitor for the respondent: *Alfred Whitman.*

1926

*May 17.
*Oct. 5.

A. R. WILLIAMS MACHINERY COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

JOHN T. MOORE AND JAMES MURPHY, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF MOORE & MURPHY, A REGISTERED PARTNERSHIP (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Contract—Sale of goods—Sum paid to satisfy claim under lien agreements—Securities handed over—Alleged failure of consideration—Suit to recover sum paid—Interpretation of contract—Interpretation of "dragnet" clause in lien agreement—Appropriation of payments—Appropriation by creditor, after debtor's bankruptcy, of payments not previously appropriated.

Defendant sold machinery to C. Co. under four lien agreements, duly registered. C. Co. made an assignment in bankruptcy. Defendant filed a claim for $771.44 as the balance then due on the machinery covered by said agreements. It subsequently notified the trustee in bankruptcy of its intention to remove said machinery. Subsequently the plaintiffs, who had taken a temporary lease, from the trustee and inspectors, of C. Co.'s premises and plant, etc. (from which lease was excepted such plant, machinery, etc., as was subject to liens) and were in possession, desired to purchase the property, but their proposals to the inspectors were rejected, and it was decided to advertise for tenders. On Oct. 13, 1921, plaintiffs wrote defendant: "We have taken over the plant of [C. Co.] We understand that you hold a lien on part of the machinery of this plant. This amount,

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

we understand which is due, is in the vicinity of $800. In order that you realize this amount it might be necessary for you to remove considerable machinery at a cost which would not mean anything to you and which would naturally depreciate this plant. We feel sure that we can come to some terms with you. Will you kindly let us have a reply at once so that we may know what machinery is held by you and what your demands are." Defendant replied on Oct. 17, referring plaintiffs to its solicitors and stating its requirement of immediate payment to avoid its repossessing the machinery under its lien. On Oct. 26 plaintiffs telegraphed defendant "Your letter October 17th, make sight draft against Bill of Sale receipted. Wire amount so that we can arrange finances." Further correspondence ensued and defendant's solicitors made a sight draft on plaintiffs for $1,003.09, to which were attached the four lien agreements receipted. Plaintiffs paid the draft and obtained the documents. Plaintiffs removed the machinery covered by the lien agreements to another site. This machinery was however recovered from the plaintiffs by the trustee in bankruptcy in a replevin action in which it was held that, on a proper appropriation of the payments made by C. Co. to defendant, the lien agreements had been paid by C. Co., and that the present plaintiffs could not claim as under an assignment of the lien agreements, as there had been no notice or filing of the assignment. Plaintiffs then sued defendant for, among other things, return of the $1,003.09 which they had paid to it, claiming that there had been a total failure of consideration for such payment.

Held: There had been no failure of consideration and plaintiffs could not recover. The correspondence must be interpreted in the light of the facts and circumstances as known to and affecting the parties at the time. The "bill of sale" mentioned in plaintiffs' telegram of Oct. 26 must be taken to mean the lien agreements. Plaintiffs had got what they stipulated for, namely, the four lien agreements receipted. There had been no representation, concealment or warranty as to defendant's claim or security or right to payment. Defendant had its claim which it was endeavouring to recover and which it considered exigible and adequately secured. No question had then been raised as to the validity of the claim or the security for it. The principles laid down in *Smith* v. *Hughes* (L.R. 6 Q.B. 597 at 606-607), *Haigh* v. *Brooks* (10 A. & E. 309 at 320), and other cases, were applicable.

While deciding the case on the above ground, the Court considered the interpretation and effect of the "drag-net" clause in the lien agreements, providing that "the title in the said machinery and goods, and all other machinery and goods, included in former orders, and orders which may hereafter be given * * * shall not pass * * * till all moneys payable and notes given under this order and such other orders, and all judgments obtained therefor, have been paid and satisfied," and expressed the view that the word "orders" must have been intended to apply only to conditional orders, and that machinery unconditionally sold and delivered after the time of the agreements in question was not within the application of the clause. *Re Canadian Optical Co., A. R. Williams Company's claim* (2 Ont. L.R. 677), dist.

Quaere as to the question whether defendant, after bankruptcy of C. Co., could appropriate payments not previously appropriated.

1926

A. R. WILLIAMS MACHINERY CO. LTD. v. MOORE.

Judgment of the Supreme Court of Nova Scotia *in banco* ([1925] 2 D.L.R. 1009) reversed.

APPEAL by the defendant, by special leave granted by this court, from the judgment of the Supreme Court of Nova Scotia *in banco* (1) which, reversing judgment of Rogers J., held that the plaintiffs were entitled to recover from the defendant the sum of $1,003.09 with interest. The facts of the case are sufficiently stated in the judgment of the majority of the court delivered by Newcombe J., now reported. The appeal was allowed.

J. L. Ralston K.C. for the appellant.

Finlay MacDonald K.C. and *J. A. Ritchie K.C.* for the respondents.

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

NEWCOMBE J.—The plaintiffs, who are the respondents in the case, brought their action in the Supreme Court of Nova Scotia against the defendant company, appellant, for the recovery of damages for breach of an alleged contract of sale and delivery of machinery purchased by the respondents from the appellant, averring that it was an implied condition or warranty of the sale that the appellant was the owner of the machinery and had the right to sell, and, moreover, that the appellant falsely and fraudulently represented to the respondents that it was the owner and had the right to sell; that in fact the machinery was not the property of the appellant, but of one Geo. E. Faulkner, trustee in bankruptcy of the Cape Breton Engineering Works Ltd., who subsequently recovered the possession from the respondents. These allegations were denied, and the parties went to trial, but, at the trial, the plaintiffs were permitted to amend by adding to their statement of claim a paragraph to the effect that what the defendant company agreed to sell was its right and title under certain conditional agreements of sale, whereby the defendant had sold the machinery to the Cape Breton Engineering Works; that the plaintiffs paid the defendant

(1) [1925] 2 D.L.R. 1009.

the purchase price of $1,003.05, but that the defendant had no right or title, as the Cape Breton Engineering Works had fully paid for the machinery; that there was therefore a total failure of consideration for the payment made by the plaintiffs to the defendant, and that the plaintiffs were entitled to have their payment of $1,003.05 returned to them. The defendant company pleaded, with other matters of defence, that the payment sought to be recovered by the plaintiffs was made pursuant to an arrangement, whereby the latter, representing themselves to be equitable owners of the goods, agreed to pay to the defendant the stipulated sum upon delivery by the defendant to the plaintiffs of the agreements of sale receipted, and that the defendant complied with this condition, and received the payment in question in consideration of the delivery of the sale agreements, and the defendant's acknowledgment of the payment of the sum claimed to be due thereon.

The facts are very fully stated in the judgment of Rogers J., who tried the case, but for present purposes may be usefully recapitulated.

In March, April, May and June, 1920, the defendant company, which is a dealer in machinery, at St. John, N.B., sold to the Cape Breton Engineering Works, Ltd., a company then carrying on the business of machinists at Sydney, N.S., various articles of machinery for the aggregate purchase price of about $13,000. The sales were evidenced by four agreements in writing, identical in form, and signed by the purchaser, by which it was stipulated that the purchase price should be paid, one-half in cash on delivery, and the balance in two equal notes, at three and six months, with interest at 7%; that, if default were made in any payment, the whole amount should then become due; that the goods should be at the purchaser's risk; that the purchaser would at all times keep the goods insured for an amount sufficient to cover the vendor's interest, and that

> the title in the said machinery and goods, and all other machinery and goods, included in former orders, and orders which may hereafter be given by me, us, to you, shall not pass from you until all the terms and conditions of this order and such other orders shall have been fully complied with by me, us, and till all moneys payable and notes given under this order and such other orders, and all judgments obtained therefor, have been paid and satisfied;

1926

A. R. WILLIAMS MACHINERY CO. LTD. v. MOORE.

Newcombe J.

it was also provided by the agreements that the purchaser should not sell or remove the goods without the vendor's consent, and that, in case of default or breach of any of the provisions of agreement, or if the goods were seized for rent or taxes or other execution, or if the purchaser should make an assignment for the benefit of its creditors or become insolvent, the vendor might enter upon the purchaser's premises and take down and remove the goods and sell them, crediting the proceeds, less expenses and commission of sale, the purchaser agreeing to pay the deficiency, and there was a further stipulation on the part of the purchaser that

> any note or notes or other security given by me, us, to you for any indebtedness under this or any of said orders or any part thereof, shall be collateral thereto, and that you may apply all payments made by me, us, to you as you may at any time desire.

These agreements are known in the case as lien agreements, and the learned trial judge tells us that they were in due course filed with the Registrar of Deeds in compliance with the provisions of the *Bills of Sale Act* relating to hiring and purchase agreements, but they were not treated as bills of sale under the earlier sections of the Act, and were not therefore accompanied by the affidavits of bona fides appropriate to a bill of sale as such.

The *Bills of Sale Act*, as in force at the time, was c. 11 of 1918, and, by the definitions of the Act, the expression "Bill of Sale" includes among other meanings "authorities or licenses to take possession of personal chattels as security for any debt."

After the transactions represented by these lien agreements, the defendant sold and delivered to the Cape Breton Engineering Works on credit, during the succeeding months, from July to November inclusive, tools or machines, the price of which amounted to $838.08. It is claimed on behalf of the appellant that, although these goods were sold unconditionally, they were nevertheless subject to the terms and conditions of the preceding agreements, because of the clause therein, known as the dragnet clause, which is quoted above. The Cape Breton Engineering Works made large payments on account, but other payments fell into arrears, and the appellant, on 8th February, 1921, placed its claim in the hands of solicitors for collection. At that time the amount due was $3,209.05, including all items, whether specifically secured by the agreements or not; of this amount $2,295.74 repre-

sented balances due upon the lien agreements, and $913.31, including interest, was for the tools and machinery subsequently purchased.

On 25th July, 1921, the Cape Breton Engineering Works made an assignment in bankruptcy to Geo. E. Faulkner, an authorized trustee. Previously, in March, the company had paid the sum of $750, on account, to the appellant's solicitors, and had given a promissory note for the balance, which, at the time of the assignment in bankruptcy, had been reduced by payments to the sum of $617.66, and it is admitted that this balance, with interest, insurance premium and costs, constituted the total of the appellant company's claim against the bankrupt estate of the Cape Breton Engineering Company. As to the amounts collected by the solicitors, Mr. Mather, the vice-president and manager of the appellant company, testifies:—

Q. The account was sent to McLean, Burchell and Ralston for collection in February, 1921?

A. Yes.

Q. They collected a certain amount. What was done with the money remitted to you from time to time?

A. We credited it to the Cape Breton Engineering Co., Ltd. Later, when we had notice of their assignment, we treated the moneys as applying to goods not covered by specific liens, and made up our balance under the liens and forwarded it with the orders to the trustee.

Q. As proof of the debt?

A. Yes.

Thus, after the assignment, the appellant company appropriated the payments, and filed its claim against the trustee in bankruptcy for the sum of $771.44, as the balance then due on the property covered by the lien agreements, valuing the security furnished by these agreements at $3,895, and the trustee recognized the appellant as a secured creditor.

The plaintiffs had been largely interested as stockholders and employees of the Cape Breton Engineering Works, and, immediately after the suspension of that company, entered into partnership and began the business of machinists on their own account. By lease of September, 1921, the trustee and inspectors of the bankrupt estate, by authority of a resolution of the creditors, leased to the plaintiffs

1926

A. R. WILLIAMS MACHINERY CO. LTD. v. MOORE.

Newcombe J.

All and singular the plant, machinery, tools, equipment, office furniture and premises of the said Cape Breton Engineering Works Limited situate and being at Sydney aforesaid; excepting and reserving therefrom all and any plant, machinery and equipment upon which any persons, firms or corporations have chattel mortgages, bills of sale or other liens.

for and during the term of three months, for the monthly rent of $470, and it was provided by the lease that the tenancy might be determined at any time, during the term, by the lessors giving the lessees at least fifteen days' notice to that effect. It will have been observed that, according to the description of the demised premises, plant, machinery and equipment under chattel mortgage, bill of sale or other lien are excepted.

On 1st September, 1921, the appellant gave to the trustee in bankruptcy notice that, at the expiration of fifteen days, the company would remove from the premises of the Cape Breton Engineering Works all its property covered by the four lien agreements. On 5th October, the trustee gave to the respondents the requisite fifteen days' notice, stipulated by the lease, requiring them to vacate the leased premises on 20th October. The plaintiffs desired to purchase the property, and had submitted proposals to the inspectors, but these were rejected by the creditors at their meeting on 12th October, when it was decided to advertise for tenders. The plaintiff, Moore, admits that his proposition had been unfavourably received and that he knew that he was not likely to get the property. In this posture of affairs, on the day following, 13th October, the plaintiffs wrote the defendant company as follows:—

> We have taken over the plant of the Cape Breton Eng. Works, Ltd., Sydney, N.S.
>
> We understand that you hold a lien on part of the machinery of this plant. This amount, we understand which is due, is in the vicinity of eight hundred dollars $800.
>
> In order that you realize this amount it might be necessary for you to remove considerable machinery at a cost which would not mean anything to you and which would naturally depreciate this plant.
>
> We feel sure that we can come to some terms with you.
>
> Will you kindly let us have a reply at once so that we may know what machinery is held by you and what your demands are.

To this the defendant replied, on 17th October, that its claim was in the hands of its Nova Scotia solicitors, to whom it was forwarding the plaintiffs' letter for attention, adding however that the company would not consider any

further extension of credit, and that, if its claim were not paid within two weeks, it would proceed to repossess all the machinery under its lien, concluding with an expression of hope that the plaintiffs would be able to raise the funds necessary, as the amount of the claim was not very large. On 26th October, the plaintiffs, having received no other communication from the defendant or its solicitors, telegraphed direct to the defendant, saying:—

> Your letter October 17th, make sight draft against Bill of Sale receipted. Wire amount so that we can arrange finances.

That by "bill of sale" in this message the plaintiffs meant the lien agreements is, I think, clear beyond question; that was the sense in which at the time both parties understood and acted upon the message.

At an adjourned meeting of the creditors, held on 26th October, it was decided to accept the offer of Capt. H. C. Verner, who had been the managing director of the bankrupt company, and his associates, for the purchase of the plant. On 27th October, the defendant replied to the plaintiffs' telegram of the preceding day, reminding them that the matter was entirely in the hands of the company's solicitors, to whom it was posting instructions to get in touch with the plaintiffs, but intimating that the solicitors could proceed upon a cash basis only, and that no delay or partial payment could be considered. On 28th October, the defendant's solicitors at Halifax telegraphed the plaintiffs as follows:—

> As instructed by A. R. Williams, we are forwarding to-morrow Bills of Sale receipted with sight draft attached for one thousand and three dollars nine cents covering claim interest, insurance, solicitors' charges.

The solicitors then made a sight draft for $1,003.09 upon the plaintiffs, to which were attached the four original lien agreements, with the following receipt endorsed upon each of them:—

> Paid. A. R. Williams Machinery Co. (Maritime) Ltd., October 29th, 1921, A. P. Coleman, Halifax.

Mr. Coleman was the defendant's Halifax manager. On or before 2nd November, the plaintiffs paid and took up the draft, with the documents attached, and, on the last mentioned date, they telegraphed to the defendant company, saying:—

> Have paid draft and obtained papers attached. Solicitor advises that your agent here formally repossess articles and transfer same to us.

1926

A. R. WILLIAMS MACHINERY CO. LTD. v. MOORE.

Newcombe J.

The defendant telegraphed the plaintiffs, on the same day:—

> Telegram received. Will instruct our solicitors to act accordingly.

And they wrote the plaintiffs, at the same time, as follows:—

> We have your wire as follows:
>
> "Have paid draft and obtained papers attached. Solicitors advise that your agents here formally repossess articles and transfer claim to us."
>
> In reply we have wired you as per copy attached, that we are instructing our solicitors to act accordingly, and we are urging them to see that there is no further delay.
>
> We are glad to know that you have taken over the plant of the C. B. Engineering Works, and also that you are able to pay our claim and thus prevent the dislocation of the plant.
>
> You can rest assured, that if you are prepared to operate this plant we will be only too glad to assist you as far as our means will permit. We understand our Halifax Office has quoted you on a certain drill you asked about, and we trust to have your order in due course. We have a large stock of machinery and supplies, and our prices are right, and we only ask the opportunity to show you what we can do.

On 2nd or 3rd November, the plaintiffs, being still in possession of the leased property, disconnected the machinery covered by the lien agreements, and removed it to a site which they had acquired for themselves. On 11th November, the solicitors wrote the plaintiffs, saying:—

> *Re* C. B. Engineering Works.
>
> Mr. Coleman has asked us to write you in connection with this matter.
>
> Your telegram to the A. R. Williams Machinery Company of St. John instructed the A. R. Williams Machinery Company to make a sight draft with lien agreements attached and receipted. In accordance with this telegram we attached the original lien agreements duly receipted to sight draft made by ourselves on you. The draft was paid and receipted lien agreements delivered to you. This is the end of the matter so far as the A. R. Williams Machinery Company is concerned and they have nothing further to do with the matter and we have advised them accordingly.

Shortly after this, Mr. Faulkner, the trustee in bankruptcy, caused the machinery to be replevied. The plaintiffs defended the replevin action, which was tried before Mellish J., who upheld the proceedings and the right of the trustee. Thus the plaintiffs lost the property, which it was no doubt the object of their negotiations with the defendant company to acquire, and it was in consequence of this that they instituted the present action.

The defendant company was not a party to the replevin suit, but the judgment of Mellish J., and a transcript of the evidence upon which he proceeded, were put in as exhibits in this case. That learned judge reviewed the state of the account between the Williams Machinery Co., the present appellant, and the Cape Breton Engineering Works. He considered that the question depended upon the appropriation of the partial payments, and he found that the payments which had been made to the solicitors ought to be appropriated to the earlier items of the account, and therefore that the secured claim of the Williams Company had been paid, and that, although Moore and Murphy, defendants in replevin, claimed the machinery under an assignment to them of the lien agreements, they had given no notice of the assignment, and moreover that the assignment was not filed as required by the *Bills of Sale Act,* and therefore he upheld the claim of the replevisor.

Rogers J. reviewed the evidence very carefully. He considered that the case was to be determined upon the interpretation of the correspondence which had taken place by letter and telegram previously to the payment of the $1,003.09 on 2nd November. He referred to the opening sentence of the plaintiffs' letter of 13th October, "we have taken over the plant of the Cape Breton Engineering Works," as "a statement which, to say the least, was entirely lacking in frankness"; he found that the plaintiffs could not recover upon the allegations of the statement of claim upon which they went to trial; that there was no sale, and that it was not intended that there should be a sale, of specific articles. He said that

> the original inquiry was made by the plaintiffs as ostensible owners of the whole estate, and of the equity in the machinery, and concerned itself only with request for information for the details, so that they may know what machinery is held and what the demands are. The plaintiffs, as owner of the plant, could then, as fully known by both parties, have acquired ownership only from the trustee, and the plaintiffs (sic) had filed their claim and an account along with copies of their agreement for lien with the trustee. The plaintiffs knew of the amount (about $800) and there was available to them all the information asked for. Doubtless the purpose of the letter of the 13th October was to begin a negotiation which they hoped would place them in an advantageous position thereafter and perhaps enable the plaintiffs ultimately to discharge defendant's claim at a reduced amount, but the defendants were in no mood to lessen their demand. They stood on what they, I have no doubt, honestly believed were their legal rights.

1926

A. R. WILLIAMS MACHINERY CO. LTD. v. MOORE.

NewcombeJ.

He found that

> there was no misrepresentation on the part of the defendant company, nor is there any express warranty or undertaking, either as to the title to the goods, or as to the amount of the indebtedness. There is a simple release to the supposed owners of the plant of the liens which the defendants held and believed enforceable, and which they wished to be released without delay. Their reasons for this anxious haste became apparent on the trial. They anticipated on October 12th that they would soon become proprietors of the going concern (so much so that they represented themselves as already proprietors), but, on October 27th their hopes were shattered by the creditors. What they had failed to obtain by negotiation they sought, at any rate as to part of the machinery, to obtain by acquiring defendant company's rights and thus dislocating and depreciating the plant now acquired by their rivals in business, a proceeding which they themselves deprecated in the initial communication of the 13th. They paid their money for precisely what they got: from defendant company's standpoint, the payment of its claim by the ostensible owner of the equity; from the plaintiffs', an opportunity to hamper their rivals, and the possibility of procuring a lot of valuable machinery at a very inconsiderable cost.

He considered that the defendant company was not bound by the judgment in replevin, and that it was unnecessary to express an opinion as to the appropriation of the payments made by the Cape Breton Engineering Works, or as to whether the indebtedness secured by the four agreements had actually been paid. He said that the consideration was completely executed on both sides by the plaintiffs' payment, and the delivery by the defendant of the documents evidencing its claim; that it was immaterial that the documents proved to be of less value to the plaintiffs than they anticipated, and that they must be regarded as worth to the plaintiffs what they were willing to pay for them, seeing that they could not acquire them for less.

The learned Chief Justice, who pronounced the judgment of the court *en banc,* interpreted the transaction differently. He thought the bill of sale referred to in the plaintiffs' telegram of 26th October was "a bill of sale or transfer of four lien agreements and the amount due thereon." He thought that the defendant had represented the amount due and secured by the four lien agreements to be $777.44, which was the amount of its claim against the bankrupt estate; that the plaintiffs had seen this account, and, adding interest, had understood it to be in the vicinity of $800. He referred to the letters and telegrams and he said that

in the face of this correspondence the defendants must be treated as if they had volunteered the information as to the amount due and secured by the lien agreements, and if the representation was untrue they must be responsible.

He reviewed the question as to appropriation of payments, and considered that the defendant would have been bound, by the judgment of Mellish J., if there had been an express contract of indemnity, but not otherwise. If I understand his judgment, his conclusion was that the defendant was not estopped by that judgment. Referring to the drag-net clause of the agreements he said,

I think it obvious that these orders referred to are orders similar to the four lien agreements, and that the object of the clause was to tie together all these liens and give the vendors the right to claim under the other three any amount still due under any one of them after the specific security had been exhausted.

and he expressed a view, in accordance with that of Mellish J. in the replevin suit, that

the defendants had, long before that suit was begun, wrongfully wiped out the unsecured claim on their books by crediting thereon payments specificially made on the secured debt.

He held moreover that the right of appropriation did not survive the bankruptcy of the debtor. Accordingly, by the judgment of the court *en banc*, the appeal was allowed, and the plaintiffs recovered $1,003.09 with interest.

This amount being below the ordinary appealable jurisdiction of the Supreme Court of Canada, application was made to this court for special leave to appeal, and leave was granted upon the submission that the case involved the interpretation of the lien agreements, which were in common form and in general use, and that the view expressed by the court *en banc* was in conflict with the judgment of the Divisional Court of Ontario in *Re Canadian Camera and Optical Co., A. R. Williams Co's. claim* (1). In that case the claimant had delivered to a company which was or became insolvent a turret lathe upon an order signed by the latter, by which it was to pay the price, one-quarter in cash, and the balance in three equal payments, on specified credit, and it was stipulated that the title should not pass to the insolvent until payment of the moneys payable by it under the order in question, as well as under any other orders which might be given by the insolvent to the

(1) (1901) 2 Ont. L.R., 677.

1926

A. R. WILLIAMS MACHINERY CO. LTD. v. MOORE.

Newcombe J.

claimant before the lathe was actually paid for. After the purchase of the lathe, the insolvent ordered and received from the claimant other goods, which were not paid for, and the price of which, together with one of the instalments upon the lathe, remained unpaid at the beginning of the winding up proceedings. The claimant contended that the lathe was subject to a lien, not only for the instalment of the purchase price unpaid thereon, but also for the price of the goods subsequently purchased. The liquidator, while admitting the lien for the instalment due upon the lathe, contended that the claimant must rank upon the estate as an ordinary creditor for the balance of its claim. Street J., who pronounced the judgment of the Divisional Court, in disposing of the question, said:

> The good faith of the parties to the contract is not impeached or attacked, and the agreement must be taken to express the true contract between them, viz., that, until the bailees should pay, not only the purchase money of the lathe itself, but also the purchase money of any other goods they should purchase after the sale of the lathe and before it was fully paid for, the property in it should remain in the claimants. I can find nothing in any statute affecting the validity of a contract of this kind, and I think it, therefore, entitled to prevail.

A copy of the contract itself is not set out in the report, but, according to the effect of it as therein stated, there are noticeable differences between the clause which was there intended to provide security for the payment of the price of goods purchased in the future and the clause which is described in this case as the drag-net. In the latter it is stipulated that the title in the machinery and goods purchased, and all other machinery and goods included in former orders and orders which might thereafter be given

> shall not pass * * * till all moneys payable and notes given under this order and such other orders, and all judgments obtained therefor, have been paid and satisfied.

Now although, for the reasons which I am going to state, it becomes unnecessary for the purposes of this case to determine the interpretation of the agreements in this particular, yet, inasmuch as the question has been argued, and as leave to appeal was granted for review of the opinion expressed by the court *en banc* upon this branch of the case, I think it right to say that I have come to the conclusion that since the clause is expressed to apply, not only to the machinery and goods specified, but also to other

machinery and goods, whether previously purchased or subsequently to be purchased, it can be intended to apply only to conditional orders; obviously it does not affect property which had already passed, and therefore it does not apply to previous unconditional sales, but the word "orders" as used in the clause must naturally have the same meaning when used as descriptive of orders to be given as it has with relation to orders previously given, and therefore, if this be so, the machinery unconditionally sold and delivered after the time of the agreements here in question is not within the application of the clause.

This however does not determine the defendant's liability. In the order granting leave to appeal, there is, fortunately for the appellant, but unfortunately for the uniformity of practice in the court, no limitation of the questions which are to be discussed. The appellant is permitted to appeal from the judgment of the court *en banc*, and any question of law or fact which is raised, affecting the propriety of that judgment, must be considered.

In my view the findings of the learned trial judge ought not to have been reversed. Upon the first question propounded by the learned Chief Justice—what were the plaintiffs to get for the $1,003.09 which they paid to the defendant?—I think, with the utmost respect, that there can be only one answer: they got what they stipulated for, namely the four lien agreements, or bill of sale, as the agreements were called in the plaintiffs' telegram, and the defendant's acknowledgment upon each of them that the debt secured thereby had been paid. In order to interpret the correspondence we must look to the state of the facts and circumstances as known to and affecting the parties at the time. As said by Blackburn J., in *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1),

> the language used by one party is to be construed in the sense in which it would be reasonably understood by the other.

And Lord Watson said in *Birrell* v. *Dryer* (2),

> I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view, when they entered into the contract.

(1) (1863) 3 B. & S., 917, at p. 929.

(2) (1884) 9 App. Cas. 345, at p. 353.

1926

A. R. WILLIAMS MACHINERY CO. LTD. v. MOORE.

Newcombe J.

It was known to the parties that the Cape Breton Engineering Works was indebted to the defendant; that it had made an assignment in bankruptcy; that the defendant had filed its claim as a secured creditor with the trustee for $777.44, for which it claimed the security of the four lien agreements, which were registered under the *Bills of Sale Act;* that the security had been valued under the provisions of the *Bankruptcy Act,* by the affidavit of the defendant's local manager, at $3,895, and that the machinery ordered by the Cape Breton Engineering Works, and of which it had received possession under these agreements, was still in place in the factory, or on the premises of the Engineering Works. Also it was known that the defendant company had given notice to the trustee of its intention to remove the machinery covered by the agreements. In this state of the case the plaintiffs introduced themselves to the defendant, by their letter of 13th October, with the statement that they had taken over the plant of the Cape Breton Engineering Works. They intimated their understanding that the defendant had a lien on part of the machinery of this plant, the amount of which was in the vicinity of $800; they referred to the fact that it might be necessary for the defendant to remove the machinery in order to realize; they expressed a desire to come to terms, and asked for a reply stating what machinery was held by the defendant, and what the defendant's demands were. The answer, on 17th October, refers the plaintiffs to the company's solicitors, stating however that the claim was long overdue, and that no further extension would be considered. The appellant company had its claim, which it was endeavouring to recover, and which it considered exigible and adequately secured. Nobody had suggested a question as to the validity of the claim, or the security for it. The respondents cannot complain if the appellant proceeded upon the assumption that they were telling the truth when they said that they had taken over the plant. If, as is the necessary inference from the respondents' letter, the plant which they said they had taken over included the machinery subject to the lien agreements, the desirability from their standpoint of obtaining a discharge of these agreements was sufficiently obvious. The appel-

lant's papers and business with respect to its claim against the Engineering Works were in the hands of its solicitors, to whom it naturally referred the respondents. Then came the respondents' urgent message of 26th October requesting sight draft against bill of sale receipted, and the draft, with the agreements receipted, was forwarded to the respondents by the appellant's solicitors on 29th October, and paid in due course by the respondents, who then took up the receipted documents. It is surprising in these circumstances to hear of charges of fraud or misrepresentation, or breach of warranty, on the part of the appellant company, or that it concealed information which it was bound to communicate. There are two very apt passages in the judgment of Blackburn J. in the well known case of *Smith* v. *Hughes* (1):

> In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.
>
> * * * *
>
> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

See also *Monforts* v. *Marsden* (2). I find nothing in the case to indicate that the parties did not agree in the same sense, or that there was any representation, concealment or warranty as to the appellant's claim or security or right to payment, and it appears to have been a very reasonable and convenient transaction in the course of business that the respondents should pay off a comparatively small charge upon their property, and that the appellant should hand over its documents constituting the security to the

(1) (1871) L.R. 6 Q.B. 597, at pp. 606-607.

(2) (1895) 12 Cutler's Patent, Design, and Trade Mark Cases, 266.

1926

A. R. WILLIAMS MACHINERY CO. LTD. v. MOORE.

Newcombe J.

respondents, who, upon the case as represented by them, had acquired the property subject to the charge.

In *Haigh* v. *Brooks* (1), Lord Denman said:—

> The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge.

See also *Lawes* v. *Purser* (2). These authorities, and there are many others, seem fully to justify the finding that there was no failure of consideration.

It is not necessary to enter upon the question of appropriation of payments as between the appellant and the Cape Breton Engineering Works. It is beyond the reach of controversy that the appellant honestly believed in its claim in the hands of the trustee in bankruptcy as filed and attested, and, if the trustee had questioned the validity of the claim, or its right to rank upon the machinery covered by the agreements, I am not satisfied that the claim could have been displaced by the evidence of appropriation of payments to be found in the case. It is contended that the appellant after the bankruptcy could not impute payments which had not been appropriated previously. I find no provision to this effect in the *Bankruptcy Act*, and none was cited at the argument; but that is however a question which I would be disposed to consider further, if it were material.

For these reasons I have come to the conclusion that the appeal should be allowed, and that the judgment at the trial should be restored; but, seeing that leave to appeal was granted upon the condition that the appellant should pay, in any event, to the respondents their costs of and incident to the appeal to this court, these costs will be disposed of accordingly. The appellant should however have the costs of the appeal to the Supreme Court of Nova Scotia *en banc*.

(1) (1839) 10 A. & E., 309, at p. 320.

(2) (1856) 6 E. & B., 930

1926

A. R. WILLIAMS MACHINERY CO. LTD. v. MOORE.

Idington J.

IDINGTON J.—For the reasons assigned by Mr. Justice Rogers in his comprehensive judgment as trial judge, I am of the opinion that this appeal should be allowed and the judgment of the said learned trial judge be restored with costs of the appeal therefrom to the Supreme Court of Nova Scotia *in banco*.

Appeal allowed.

Solicitor for the appellant: *C. J. Burchell.*

Solicitor for the respondents: *Finlay MacDonald.*

THE CONSUMERS' GAS COMPANY OF TORONTO (DEFENDANT)..... APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA (PLAINTIFF)..... RESPONDENT.

1926

*Nov. 5.
*Nov. 9.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Negligence—Escape of gas during making of gas connections—Explosion and fire—Destruction of buildings—Responsibility—Inference from facts in evidence—Onus as to explanation of accident.

APPEAL from judgment of Maclean J., President of the Exchequer Court of Canada (1), holding the appellant liable to the respondent in damages for the loss sustained by the respondent through the destruction by fire (following an explosion) on February 22, 1923, of certain buildings and contents located at Rosedale Heights in the city of Toronto, the accident being alleged to be due to negligence of the appellant's workmen or servants whilst installing gas connections into the buildings.

The appeal was heard by the Supreme Court of Canada on the 5th November, 1926, when judgment was re-

---

PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Magee (*ad hoc*) JJ.

(1) [1926] Ex. C.R. 137.

1926

CONSUMERS' GAS COMPANY OF TORONTO v. THE KING.

served, and on the 9th November, 1926, the Chief Justice orally delivered the judgment of the Court as follows:

"Consideration of this case, in the light of the arguments addressed to us, has not satisfied us that we would be justified in interfering with the conclusion reached by the learned President of the Exchequer Court.

The appeal will, accordingly, be dismissed with costs."

W. N. Tilley K.C. and *W. B. Milliken K.C.* for the appellant.

R. S. Robertson K.C. and *D. Henderson* for the respondent.

INDEX

29508—3

APPEAL—*Continued*

6 —— *Criminal law — Conviction for manslaughter quashed by court of appeal— Leave to appeal to Supreme Court of Canada—Sections* 1013, 1021, 1011, 1024A *Cr. Code—Appeal to court of appeal on objection as to qualification of juror not raised at trial—Right of appeal to court of appeal without leave—Court of appeal judgment conflicting with judgment of another court of appeal in like case.*] The Court of Appeal for British Columbia quashed a conviction for manslaughter on the ground of disqualification of a juror by deafness, which disqualification that court found to be established by evidence taken subsequent to the trial. The defendant had not before the verdict raised objection as to the juror's qualification. The Court of Appeal held that the question as to the deafness of the juror and its effect in respect to the trial and conviction was a question oi law only, and under s. 1013 (1) (a) of the Criminal Code an appeal to it lay without leave, and it therefore refused leave to appeal as being unnecessary. The Attorney-General for British Columbia moved for leave to appeal to the Supreme Court of Canada.—*Held*, that, having regard to clauses (*b*) and (*c*) of s. 1013 (1), and to s. 1011, of the Criminal Code, the motion should be favourably cousidered if the pre-requisite of jurisdiction to entertain the projected appeal, viz., conflict between the judgment from which it was sought to appeal and that of any other court of appeal in a like case (Criminal Code, s. 1024A) existed; that decisions prior to the enactment of s. 1013 in 1923 on some of the matters covered by that section might properly be regarded as having been rendered in like cases; that such conflict as aforesaid existed by reason of the cases of *Reg.* v. *Earl* (10 Man. R. 303), and *Rex* v. *Battista* (21 Can. Cr. Cases 1); and the motion should be granted. THE KING *v.* BOAK..... **481**

7 —— *Jurisdiction—Value of matter in controversy—Parties each claiming right to lease of premises used for laundry—Elements to be considered in estimating value.*] On a motion to affirm jurisdiction in the Supreme Court of Canada to entertain an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, deciding which party was entitled to a certain lease of premises used for a laundry business, the Registrar affirmed jurisdiction, taking into account, in estimating the value of the matter in controversy, the exceptional value of the premises by reason of the existing privilege of running a laundry business thereon; and his order was affirmed by the court. In such a case the question to be considered, with regard to jurisdiction, is the value of the subject matter as between the parties. PONG *v.* QUONG..... **651**

APPEAL—*Concluded*

8 —— *Leave to appeal — Agreement between railways—Order from Board of Railway Commissioners—Interpretation— Future rights — Public interest.* THE QUEBEC RY. L. AND P. CO. *v.* CAN. PAC. RY. CO..... **1**

9 —— *Leave to appeal — Matter in controversy—Debentures over* $2,000*—Action for interest coupons—Future rights—Amount exceeding* $1,000*—Supreme Court Act,* 10-11 *Geo. V, c.* 32, *s.* 41. LA VILLE DE CHATEAUGUAY *v.* VIGNEAULT..... **3**

10 —— *Jurisdiction — Judicial separation — Permanent alimony—Divorce — Matrimonial cause—Jurisdiction affirmed by registrar—Appeal quashed—Question of costs.* CLAMAN *v.* CLAMAN..... **4**

11 —— *Agency — Finding of trial judge — Duty of Appellate Court*..... **144**
See AGENCY 1.

12 —— *Criminal law — Evidence—Homicide—Admission of dying declaration— Admissibility upheld by court of appeal— Motion for leave to appeal to Supreme Court of Canada under S.* 1024a *Cr. Code— Alleged conflict with decision in Allen* v. *The King,* 44 *Can S.C.R.,* 331..... **492**
See CRIMINAL LAW 3.

13 —— *Jurisdiction — Dissenting opinion —Sections* 1002, 1013 (5) *and* 1024 *Cr. C*..... **539**
See CRIMINAL LAW 5.

14 —— *Jurisdiction—Value of matter in controversy—Alleged cause of action of a plaintiff (respondent) distinct from that of co-plaintiff—Requirement for right of appeal de plano—Negligence—Automobile collision—Injury to gratuitous passengers— Responsibility of driver—Care "reasonable under all the circumstances"* **525**
See NEGLIGENCE 2.

15——*Jurisdiction—Costs*..... **598**
See ACCOUNT.

16 —— *Jurisdiction — Alien — Opium and Narcotic Drug Act*..... **652**
See CRIMINAL LAW 6.

APPEAL TO PRIVY COUNCIL... **90**
See PRACTICE AND PROCEDURE 1.

ASSESSMENT AND TAXES—*Crown lands—Over-valuation*..... **155**
See CROWN LANDS 1.

2 —— *Municipal taxation — Business tax*..... **349**
See CONSTITUTIONAL LAW 3.

3 —— *Trustee — Judicial tax — Ultra vires*..... **450**
See CONSTITUTIONAL LAW 4.

4 —— *Trust — Construction of will— Income tax*..... **457**
See INCOME TAX.

COMPANY—*Sale of Shares Act, Man.—Non-compliance therewith—Effect—Sale of shares void—Repudiation by purchaser after winding-up order—Company incorporated by special Act—Application of Sale of Shares Act.*] If a company, to which the Manitoba *Sale of Shares Act* (R.S.M., 1913, c. 175, and amendments) applies, sells its shares without having complied with that Act, the sale, and all steps taken to carry it out, such as an allotment of shares, are void, and not merely voidable; and where the purchaser of the shares has not dealt with them or done anything from which an independent agreement to keep and pay for them can be implied, although his name has been placed on the register of shareholders, he can, even after a winding-up order has been made against the company, repudiate the purchase and successfully resist being placed on the list of contributories, where it appears that he only became aware, after the winding-up order was made, that the *Sale of Shares Act* was not complied with. *Oakes* v. *Turquand*, L.R. 2 H.L. 325; *In re Railway Time-Tables Publishing Co.; Ex parte Sandys*, 42 Ch. D. 98, and *In re Peruvian Railways Co.; Crawley's Case*, L.R. 4 Ch. App. 322, distinguished. *Welton & Saffery* [1897] A.C. 299, at 321-322, explained.—The company in question was incorporated by special Act which contained no reference to *The Sale of Shares Act*. It contained many provisions, one of which, s. 26, provided that "every person who makes application in writing for an allotment of shares to whom any share or shares is or are allotted in pursuance of such application, shall be deemed conclusively to have agreed to become a shareholder of the company in respect of the shares so allotted."—*Held*, that the *Sale of Shares Act* applied as to the matters in question, and s. 26 did not affect its operation or prevent the purchaser from disputing his liability as a shareholder.—Judgment of the Court of Appeal reversed, and its judgment in *In re Northwestern Trust Co) in re Moreau et al* (34 Man. R. 449. [1924] 3 W.W.R. 625) (which reversed the judgment of Dysart J. (34 Man. R. 342; [1924] 2 W.W.R. 1145)) overruled. Idington J. dissenting. MCASKILL *v.* THE NORTHWESTERN TRSUT CO.... **412**

CONDITIONAL SALE—*Default in payment—Repossession and resale—Seller realizing an excess on resale—Buyer's right to excess—B.C. Conditional Sales Act, R.S. B.C.*, 1924, *c.* 44..... **485**
See SALE OF GOODS 5.

CONSTITUTIONAL LAW — *Bankruptcy—Dominion Act—Civil law—Judgment—Registration—Judicial hypothec—Realization and distribution of assets—Bankruptcy Act, D.* [1920], *c.* 34, *s.* 6, *enacting ss.s.* 1 *and* 10 *of s.* 11]. The Royal Bank of Canada, having recovered judgment against Belanger for $14,036 caused it to be registered and with it a notice describing real estate of the debtor. Twenty months afterwards the debtor made an assignment under the Bankruptcy Act and the appellants were appointed trustees. The bank filed its claim with the trustees for the amount of the judgment, asserting a privilege in the nature of a judicial hypothec under the terms of art. 2121 C.C. which enacts that "the judgments and judicial acts of the civil courts confer hypothecs when they are registered * * *." Subsequently the trustees, acting under s. 53 of the Bankruptcy Act, disallowed the bank's claim in so far as it set up a privilege or hypothec upon the immovables, saving however the costs of registration, on the ground that the assignment took precedence of the bank's claim under subs. 10 of s. 11 of the Bankruptcy Act. That subsection provides that, from and after registration, a receiving order or authorized assignment in bankruptcy "shall have precedence of all certificates of judgment, judgments operating as hypothecs * * *."—*Held*, Rinfret J. dissenting, that the disallowance of the bank's claim by the trustees was valid. When the Dominion Parliament enacted in terms, by subs. 10 of s. 11, that an order or assignment in bankruptcy should have precedence of all certificates of judgment and judgments operating as hypothecs, that priority attached for all purposes, including distribution as well as realization of

CONTRACT—*Continued*

and the R. Co. understood that the repairs were to be charged to the latter only. DANSEREAU *v.* LAFRENIERE.. **138**

3 —— *Sale of goods—Sum paid to satisfy claim under lien agreements — Securities handed over—Alleged failure of consideration—Suit to recover sum paid—Interpretation of contract—Interpretation of "drag-net" clause in lien agreement—Appropriation of payments—Appropriation by creditor, after debtor's bankruptcy, of payments not previously appropriated.*] Defendant sold machinery to C. Co. under four lien agreements, duly registered. C. Co. made an assignment in bankruptcy. Defendant filed a claim for $771.44 as the balance then due on the machinery covered by said agreements. It subsequently notified the trustee in bankruptcy of its intention to remove said machinery. Subsequently the plaintiffs, who had taken a temporary lease, from the trustee and inspectors, of C. Co.'s premises and plant, etc. (from which lease was excepted such plant, machinery, etc., as was subject to liens) and were in possession, desired to purchase the property, but their proposals to the inspectors were rejected, and it was decided to advertise for tenders. On Oct. 13, 1921, plaintiffs wrote defendant: "We have taken over the plant of [C. Co.]. We understand that you hold a lien on part of the machinery of this plant. This amount, we understand which is due, is in the vicinity of $800. In order that you realize this amount it might be necessary for you to remove considerable machinery at a cost which would not mean anything to you and which would naturally depreciate this plant. We feel sure that we can come to some terms with you. Will you kindly let us have a reply at once so that we may know what machinery is held by you and what your demands are." Defendant replied on Oct. 17, referring plaintiffs to its solicitors and stating its requirement of immediate payment to avoid its repossessing the machinery under its lien. On Oct. 26 plaintiffs telegraphed defendant: "Your letter October 17th, make sight draft against Bill of Sale receipted. Wire amount so that we can arrange finances." Further correspondence ensued and defendant's solicitors made a sight draft on plaintiffs for $1,003.09, to which were attached the four lien agreements receipted. Plaintiffs paid the draft and obtained the documents. Plaintiffs removed the machinery covered by the lien agreements to another site. This machinery was however recovered from the plaintiffs by the trustee in bankruptcy in a replevin action in which it was held that, on a proper appropriation of the payments made by C. Co. to

CONTRACT—*Continued*

defendant, the lien agreements had been paid by C. Co., and that the present plaintiffs could not claim as under an assignment of the lien agreements, as there had been no notice or filing of the assignment. Plaintiffs then sued defendant for, among other things, return of the $1,003.09 which they had paid to it, claiming that there had been a total failure of consideration for such payment.—*Held:* There had been no failure of consideration and plaintiffs could not recover. The correspondence must be interpreted in the light of the facts and circumstances as known to and affecting the parties at the time. The "bill of sale" mentioned in plaintiffs' telegram of Oct. 26 must be taken to mean the lien agreements. Plaintiffs had got what they stipulated for, namely, the four lien agreements receipted. There had been no representation, concealment or warranty as to defendant's claim or security or right of payment. Defendant had its claim which it was endeavouring to recover and which it considered exigible and adequately secured. No question had then been raised as to the validity of the claim or the security for it. The principles laid down in *Smith* v. *Hughes* (L.R. 6 Q.B. 597 at 606-607), *Haigh* v. *Brooks* (10 A. & E. 309 et 320), and other cases, were applicable.—While deciding the case on the above ground, the Court considered the interpretation and effect of the "drag-net" clause in the lien agreements, providing that "the title in the said machinery and goods, and all other machinery and goods, included in former orders, and orders which may hereafter be given * * * shall not pass * * * till all moneys payable and notes given under this order and such other orders, and all judgments obtained therefor, have been paid and satisfied," and expressed the view that the word "orders" must have been intended to apply only to conditional orders, and that machinery unconditionally sold and delivered after the time of the agreements in question was not within the application of the clause. *Re Canadian Optical Co., A. R. Williams Company's claim* (2 Ont. L.R. 677), dist.—*Quaere* as to the question whether defendant, after bankruptcy of C. Co., could appropriate payments not previously appropriated.—Judgment of the Supreme Court of Nova Scotia *in banco* ([1925] 2 D.L.R. 1009) reversed. A. R. WILLIAMS MACHINERY CO. *v.* MOORE..... **692**

4——*Sale of goods—Breach*..... **18**
See SALE OF GOODS 1.

5 —— *Agreement — Sale — Cement — Delivery—Price.* BELGIAN INDUSTRIAL CO. *v.* CANADA CEMENT CO..... **244**

declaration. Shortly before her death her said statement was read to her (she being first told that the statement about to be read was the one she had made previously) and she assented to its correctness and signed it by her mark. This latter declaration and evidence thereof was admitted at the accused's trial, and its admissibility was upheld unanimously by the Court of Appeal for British Columbia. Application was made on behalf of accused for leave to appeal to the Supreme Court of Canada under s. 1024A of the Criminal Code, on the ground that the judgment of the Court of Appeal conflicted with the judgment of the Supreme Court of Canada in *Allen* v. *The King*, 44 Can. S.C.R., 331.—*Held*, that the judgment of the Court of Appeal did not conflict with the judgment in the *Allen Case*, and the application was dismissed. DEBORTOLI *v.* THE KING..... **492**

4 —— *Strike — Picketing — Besetting and watching "wrongfully and without lawful authority"—Section* 501 *(f) Cr. C.*]. By s. 501 *(f)* of the Criminal Code everyone is guilty of an offence who "wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain * * * besets or watches the house or other place where such other person resides or works or carries on business or happens to be."—The conviction of defendant thereunder for conduct in the "picketing" of coal mining premises in the course of a strike by certain mine workers, which conviction was affirmed by the Appellate Division of the Supreme Court of Alberta (Clarke J.A. dissenting), was affirmed by the Supreme Court of Canada, which held that there was evidence at the trial that the besetting and watching in which defendant was engaged was "wrongful and without lawful authority" within the meaning of the section.—Defendant's acts were wrongful and unlawful if the besetting and watching in which he, in common with his comrades or associates, was engaged, amounted to a nuisance or a trespass, or if the men who were besetting and watching constituted an unlawful assembly, and the conduct in question (discussed in the judgments) afforded evidence of each of these particulars.—While apparently the hill occupied by the party to which the defendant belonged was somewhat outside the mining property, the hills surrounding the mine in other directions belonged to the mine owners and the groups stationed there were trespassers, and since the picketing was carried on in pursuance of a common design or project to which all the strikers including defendant were parties, he must be held responsible for the trespasses

equally with those who actually occupied the mine owners' property.—*Per* Idington J.: The section clearly forbids anyone from besetting another's house or place of business with a view to compel him to abstain from doing anything which he has a lawful right to do. Such an act, which at common law might be the basis of a civil action, was always at common law wrongful, and is in itself "wrongful and without lawful authority" within the meaning of the section unless some lawful authority (e.g., as often there might be with a sheriff, etc.) exists. RENERS *v.* THE KING..... **499**

5 —— *Evidence — Accomplice—Corroboration—Warning to jury—Duty of judge—Appeal—Jurisdiction—Dissenting opinion —Sections* 1002, 1013 (5) *and* 1024 *Cr. C.*] An entry in the formal judgment of an appellate court, signed by its president, that two judges dissented from the judgment for the reasons in law stated in their respective notes, is sufficient to found jurisdiction for appeal to the Supreme Court of Canada upon these questions of law under sections 1013 (5) and 1024 Cr. C. Idington J. *dubitante*.—When the evidence against a prisoner is the uncorroborated evidence of an accomplice, it is wrong for the judge to tell the jury that, if they are quite certain that the accomplice is telling the truth, they have not only the right to convict the prisoner but that it is their duty to do so. *Rex* v. *Beebe* (41 T.L.R. 635; 19 Cr. App. Cas. 22) foll. Idington J. dissenting.—*Per* Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ. In such a case, the judge should follow the rule laid down in *Baskerville's Case* (12 Cr. App. Cas. 81): the judge should warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice and, in his discretion, may advise them not to convict upon such evidence; but he should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. GOUIN *v.* THE KING..... **539**

6 —— *Alien — Conviction under Opium and Narcotic Drug Act*, 1923 *(D.), c.* 22, *s.* 4 *(d)—Accused held for deportation under s.* 25*—Immigration Act (D.)* 1910, *c.* 27*—Habeas corpus proceedings—Appeal to Supreme Court of Canada—jurisdiction—Supreme Court Act, R.S.C.*, 1906, *c.* 139, *s.* 36*; as enacted* 1920, *c.* 32.] Where an alien has been convicted, after his entry into Canada, of an offence under para. *(d)* of s. 4 of *The Opium and Narcotic Drug Act*, 1923, (D), c. 22, and, after expiry or determination of the period of imprisonment imposed upon him on such conviction, he is held in custody awaiting deportation, under a warrant showing on its face that he is so held as a consequence

parties could not be restored to their former position, what had been done should stand and the city should compensate the college on certain bases laid down and directed a reference to the Master. The college appealed to the Supreme Court of Canada.—*Held*, that although there were disputes in certain respects as to the terms of the agreement, both parties understood that the college was to be fairly compensated; if there was no agreement the college must be compensated on equitable terms; so in the practical result it mattered little whether the right to compensation was considered as springing out of a specific agreement or resting upon equitable considerations; fair compensation would include payment of the value of the lands taken, not necessarily limited to the market value, but the value to the college in view of the purposes for which the land was used, and to which it had been dedicated; also compensation for any loss in respect of the diminution in value to the college of the remaining property in view of the purposes for which the property was in use or had been dedicated, whether caused by the construction or maintenance of the street or the severance of the lands taken; also indemnity for any loss consequent upon changes necessitated by the severance of the lands taken, such, for example, as the destruction and re-erection of buildings, in so far as this head of compensation was not included under the next preceding head; the value of the lands taken and the diminution in value of the property retained should be ascertained as of the date when the city took possession, and interest should be allowed from that date.—The judgment also provided for the closing of a certain street under certain conditions, and of a lane, and conveyance to the college, as had been agreed; for certain allowances to the city; and for assessment of compensation by the board of arbitrators which had been already constituted. It not having been explicitly agreed that the city should bear the expense of providing additional lands for the site of an Arts College, the question whether the cost of re-instatement in that sense would be a proper measure, in whole or in part, of the loss caused by the construction and maintenance of the street opened by the city must be one for the arbitrators.—The difficulties usually attending an action to compel specific performance of an agreement to refer to arbitration did not arise. The action was strictly an action founded upon the equity vested in the college, in consequence of the acceptance of possession by the city and its subsequent acts, to have the terms upon which possession was given carried into effect. In such a case,

the absence of statutory formalities touching the evidence of those terms is not an answer, as it would be in a common law action—for services, for example, as in *McKay* v. *Toronto* ([1920] A.C. 208)—and the court will not hesitate to exert its powers as far as possible to see that the agreement is carried out, even though some of its terms should not be susceptible of enforcement by process *in personam*. *Wilverhampton & Walsall Ry. Co.* v. *London & N.W. Ry. Co.* (L.R. 16, Eq. 433). In view of the fact that the board of arbitrators had been constituted, it was a proper case for a declaratory judgment. ST. MICHAEL'S COLLEGE *v.* CITY OF TORONTO..... **318**

4 —— *Assessment — Valuation roll — Pipes, poles, wires and transformers— Meters — Immovable or movable—"Immovable," "real estate," "real property"— Terms similar for purposes of taxation— Action for taxes—Defence — Property — Non-assessable — Cities and Towns Act, art.* 5730, *R.S.Q.* 1909—*Art.* 2731, *R.S.Q.* 1909—*Arts.* 376, 380, 384 *C.C.*] The respondent brought an action to recover from the appellant company $8,626.86 for municipal taxes and $4,831.05 for school taxes as assignee of the Board of Schools Commissioners, for the years 1920-21, 1921-22 and 1922-23. The subjects of the taxation were gas mains or pipes located in the public streets, a system of electric poles and wires, almost entirely upon the public streets, and meters placed in the houses of the consumers in the municipality. In the valuation roll for the years 1920-21 and 1921-22 all the electric property of the appellant company, including the meters, which were of substantial value, was embraced in a single gross valuation and was the subject of but one assessment. In the exercise of their powers of taxation, instead of using the term "immovable" as found in art. 5730, R.S.Q. 1909, the municipal corporation substituted in its by-laws the term "taxable real estate" and the Board of School Commissioners in its resolutions the term "taxable real property."—*Held* that the pipes, poles, wires and transformers are immovables within the meaning of that term as used in art. 5730 of the Cities and Towns Act, R.S.Q., 1909, and are subject to taxation as such. *Bélair* v. *Ste. Rose* (63 Can. S.C.R. 526) foll.—*Held*, also, that the meters, being movables within art. 384 C.C. do not lose that character by reason of the mode or purpose of their being placed by the company upon immovables not belonging to it, to which they are, when in use, temporarily affixed; and they are not therefore taxable immovables. Idington J. dissenting.—*Held*, also, that the assessments of the electric system for the

SALE — *Litigious rights — Retrait — Absolute tender—Conditional tender void—Arts.* 1576, 1582, 1583, 1584 *C.C.*] The debtor wishing to exercise the *retrait* of litigious rights must make an unconditional tender of the amount owed to the buyer in payment of "the price and incidental expenses of the sale, with interest, etc." (Art. 1582 C.C.).—A tender of that amount by the debtor to the buyer so made that it would be paid to him upon his signing a deed of sale of the property acquired, is not valid within the terms of Art. 1582 C.C.—The sole effect of the *retrait* is that the debtor assumes the bargain (*le marché*) of the buyer of the litigious right, so that the debtor is merely substituted for and subrogated to the buyer; therefore, the buyer is not bound to sign a deed of sale, as, in doing so, he would subject himself to legal warranty of the rights sold (Art. 1576 C.C.). MCNAUGHTON *v.* IRVINE..... **8**

2——*Fraud—Instrument containing release of existing liability—Signed with no intention to give release—Action for specific performance—Onus probandi.*] Under an agreement between the respondent and the appellant company for the sale of the respondent's brick plant, the appellant undertook to incorporate a new company to take over the business and also agreed to assume and pay the amount due from the respondent to one B. on a chattel mortgage. Some months later, the respondent signed another instrument transferring the brick property to the new company which assumed liability for the payment of the mortgage, but the instrument expressly released the appellant company from its obligation to pay off the mortgage. In an action for specific performance of the first agreement.—*Held*, that the basic fact on which the respondent's case must rest is that he executed the instrument containing the release clause in ignorance of its presence and effect and the burden of proving such ignorance rested on him; and that his evidence, which alone was offered to substantiate it, did not discharge that onus.—Judgment of the Court of Appeal ([1925] 2 W.W.R. 267) reversed. NANOOSE WELLINGTON COLLIERIES LTD. *v.* JACK..... **495**

3 —— *Electric lighting system—Immovable or movable—Vendor's lien—Registration—Public streets—Severance of the plant—Arts.* 1983, 2009, 2014, 2016 *C.C.*] The pipes, poles, wires and transformers included in an electric lighting system erected in, and on, the public streets of a municipality are immovables. (*Bélair* v. *Ste. Rose*, 63 Can. S.C.R. 526 and *Montreal L.H. & P. Cons.* v. *City of Westmount*, [1926] S.C.R. 515, foll.); and the registration upon them of a memorial (*bordereau*) to preserve a vendor's lien is not illegal nor void.—They do not cease to be immovables because these pipes, poles, wires and transformers have been sold separately from the generators in and on the property of the vendor for the purpose of being connected with other generators belonging to the buyer.—The express stipulation of a vendor's privilege on some of the equipment and machinery sold does not result in the exclusion of the other things sold from the purview of the privilege prescribed by the code.—A vendor's lien is created by law (Arts. 1983, 2009, 2014 C.C.) and it is not essential to reserve it in the conveyance. The vendor can waive it, but his intention to do so must expressly appear from the deed of sale.—A vendor's lien resulting from the sale of an electric lighting plant can be registered by indicating in the memorial (*bordereau*) the cadastral numbers of the lots upon which the poles, etc., are erected, although the land itself is not hypothecated or cannot be hypothecated, as for instance in this case where these lots are public streets.—Nothing in the Civil Code definition of a lien (Art. 1983 C.C.) or of a hypothec (Art. 2016 C.C.) is opposed to its affecting only a structure independently from the soil on which it stands; and it does not matter that the soil is municipal land and, as such, inalienable. LOWER ST. LAWRENCE POWER CO. *v.* L'IMMEUBLE LANDRY LTÉE..... **655**

SALE OF GOODS — *Contract — Contemplating building a factory—Preliminary order of bricks—"About a million and a half"—Written order—"All brick required"—Breach of contract—Damages.*] The defendant, an incorporated company contemplating building a sugar factory at Petrolia, wrote to the plaintiff, on September 29, 1922, asking a price on 500,000 brick f.o.b. Petrolia. In answer to this a price of $19 per thousand was quoted. This was met by a counter offer of $18. The plaintiff then suggested a price of

$18.50. An interview followed as to which the only evidence is that of the plaintiff. The plaintiff says that Mr. Schoen, the defendant's president, stated that he would need about 1,500,000 of brick for the buildings and the plaintiff then agreed to deliver the bricks at $18. Following this interview and after the delivery had started, a letter was sent by the defendant to the plaintiff to confirm the verbal order given. Enclosed with this letter was an order form in which the goods sold were described as "all brick" required for the Petrolia Sugar Factory, to be delivered at such time as ordered by us. * * * This is to confirm verbal order given your Mr. Howlett. Price $18 per thousand." Some half million bricks were delivered and paid for. In October, 1923, the defendant wrote to the plaintiff that it had decided not to use brick for the main building and would not be able to take any more. The plaintiff sued for breach of contract, declaring upon the written order.—*Held* that, although there were several expressions of expectation on the part of the defendant as to the quantity of bricks to be taken, there was no warranty and no fraudulent representations; that the purchase was not of 1,500,000 bricks, but merely of such brick as the defendant should require and order for the building of the factory, and that there had been no breach of the contract. PENINSULAR SUGAR CO. *v.* HOWLETT. **18**

2 —— *Thing lost or stolen — Second-hand automobile — Purchaser — Good faith — Arts.* 1487, 1488, 1489, 1490, 2268 *C.C.*] The purchaser of a thing lost or stolen is in "good faith" within the meaning of art. 1489 C.C., if he honestly believes that the vendor is the owner of the thing lost or stolen. It is not necessary that his good faith be *"une bonne foi éclatante,"* or that his error be an invincible one. GROSSMAN *v.* BARRETT..... **129**

3——*Steam engine—Purchaser unable to read English—Farm Implement Act, Sask., R.S.S.* 1920, *c.* 128—*Requirements of s.* 18—*Effect of non-compliance with s.* 18—*Effect of taking, retention, and use, of engine by purchaser.*] Section 18 of *The Farm Implement Act*, Sask. (R.S.S. 1920, c. 128), implies a prohibition against taking a contract for the purchase of a "large implement" from any person who cannot read in English, without first having such contract read over and explained to him in a language which he understands. A contract of purchase taken by the vendor without compliance with the section is not enforceable. On the sale of an engine the purchaser, a Roumanian, could not read English. The contract was read to him in English and some explanation given to him in Roumanian of certain clauses which he said he was unable to understand when read to him in English.—*Held* (Duff and Newcombe JJ. dissenting) that, upon the evidence in the case, English was not a language which the purchaser "understood" within the meaning of s. 18; that the vendor's action on the contract could not be maintained; and that, in the circumstances, the vendor could not succeed on an implied contract to take and pay for the engine on a *quantum meruit* basis. The court did not interfere with the order below enjoining the purchaser, as incident to his obligation, to return the engine and to account for such benefits as had accrued to him from its possession.—*Semble*, as the purchaser could not understand portions of the contract when read to him in English, the vendor was bound to have the entire contract read and explained to him in some other language (not necessarily his native tongue) which he understood sufficiently to enable him to appreciate the purport and effect of the contract to the extent to which an English-speaking person in his walk of life would be likely to appreciate them upon the contract being read over and explained to him in English.—*Per* Duff and Newcombe JJ. (dissenting): On the evidence and findings at trial it must be taken that the contract, previous to its being signed, was read over and explained to the purchaser in a language which he understood sufficiently to become aware thereby of the meaning of the contract, which is all the statute requires.—*Per* Newcombe J. (dissenting): If there were any defect in the explanation which the statute contemplates, the contract became thereby no worse than voidable at the purchaser's option, and, by his length of possession and extent of use of the engine, the purchaser had lost the right of avoidance. ADVANCE RUMELY THRESHER CO. *v.* YORJA... **397**

4 —— *Sale by description and sample—Implied warranty that goods are merchantable.*] *Held*, at common law, on a sale by description and by sample of goods (such as "black Italian cloth"), the ordinary use of which goods is well established, and the description being the usual commercial description well known in the trade, although the purpose for which they are bought is not communicated to the vendor, and although the vendor is not the manufacturer of the goods, and does not know of any defect, there is an implied warranty that the goods will answer such description and be merchantable under that description for the ordinary and usual purpose for which they are used. Neither inspection of the sample nor of the bulk, so far as concerns defects not discoverable on reasonable inspection, excludes such

STATUTE—*Continued*

STATUTE—*Concluded*