# 1927

# CANADA
# LAW REPORTS

## Supreme Court of Canada

REPORTERS
ARMAND GRENIER, K.C.
S. EDWARD BOLTON

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1927

# JUDGES

OF THE

# SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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The Right Hon. FRANCIS ALEXANDER ANGLIN, C.J.C., P.C.

" JOHN IDINGTON J.

" " LYMAN POORE DUFF J., P.C.

" PIERRE BASILE MIGNAULT J.

" EDMUND LESLIE NEWCOMBE J., C.M.G.

" THIBAUDEAU RINFRET J.

" JOHN HENDERSON LAMONT J.

" ROBERT SMITH J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ERNEST LAPOINTE K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. LUCIEN CANNON K.C.

## ERRATUM

Page 190, second line, insert, after "subsection (3),", the words: "after the expiration of one month from the commencement of this Act,".

## 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.

*Attorney-General for British Columbia* v. *The Canadian Pacific Ry. Co.* ([1927] S.C.R. 185). Leave to appeal granted, 4th May, 1927.

*Attorney-General for Canada v. Attorney-General for Alberta.* ([1927] S.C.R. 136). Leave to appeal granted, 21st November, 1927.

*Canadian National Ry. Co.* v. *Lepage.* ([1927] S.C.R. 575). Leave to appeal *in forma pauperis* refused, 28th November, 1927.

*Clarke* v. *Babbitt.* ([1927] S.C.R. 148). Leave to appeal refused, 14th July, 1927.

*Corporation Agencies Ltd.* v. *Home Bank of Canada.* ([1925] S.C.R. 706). Appeal dismissed with costs, 18th January, 1927.

*Donovan Steamship Co.* v. *The SS. Hellen.* ([1926] S.C.R. 627). Appeal dismissed, 17th June, 1927.

*Fairbanks* v. *City of Halifax.* ([1926] S.C.R. 349). Appeal allowed with costs, 1st October, 1927.

*Gale* v. *Thomas.* ([1927] S.C.R. 314). Leave to appeal refused, 3rd May, 1927.

*Gordon MacKay & Co., Ltd.* v. *Capital Trust Corp. Ltd.* ([1927] S.C.R. 374). Leave to appeal granted, 27th July, 1927.

*King, The,* v. *Canadian S.S. Lines.* ([1927] S.C.R. 68). Leave to appeal refused, 31st May, 1927.

*Labadie* v. *McMillan.* Leave to appeal refused, 11th November, 1926.

*Luscar Collieries Ltd.* v. *McDonald.* ([1927] S.C.R. 460). Appeal dismissed, 28th July, 1927.

*Minister of Customs and Excise* v. *The Dominion Press Ltd.* ([1927] S.C.R. 583). Leave to appeal granted, 27th July, 1927.

*Montreal, City of,* v. *Bélec.* ([1927] S.C.R. 535). Leave to appeal refused, 28th July, 1927.

*Montreal L.H. & P. Cons.* v. *City of Westmount.* ([1926] S.C.R. 515). Leave to appeal refused, 15th November, 1926.

*McLeod* v. *Minister of Customs and Excise.* ([1926] S.C.R. 457). Leave to appeal refused, 8th July, 1926.

*Ontario Jockey Club* v. *McBride.* ([1927] S.C.R. 84). Appeal allowed with costs, 18th July, 1927.

*Reference in re Precious Metals.* ([1927] S.C.R. 458). Leave to appeal granted, 17th June, 1927.

*Tiny Separate School Trustees* v. *The King.* ([1927] S.C.R. 637). Leave to appeal granted, 2nd December, 1927.

*Windsor, City of,* v. *Union National Guarantee Co.* Leave to appeal refused, 17th June, 1927.

*" Yuri Maru "* v. *" Snia Viscolia."* Appeal dismissed, 6th July, 1927.

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# CASES

DETERMINED BY THE

# SUPREME COURT OF CANADA

## ON APPEAL

FROM

## DOMINION AND PROVINCIAL COURTS

HORACE B. FORMAN (PLAINTIFF).....APPELLANT;

AND

THE UNION TRUST COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

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*Nov. 4, 5.
*Dec. 1.

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

*Evidence—Letter signed intended to embody terms of deposit of money —Inadmissibility of parol evidence to contradict, vary or explain— Evidence received without objection at trial put aside by appellate court.*

Plaintiff deposited with defendant $20,000 to be held and paid out on certain terms. At an interview between plaintiff and defendant's manager there was drafted in the latter's handwriting and signed by plaintiff the following letter from plaintiff to defendant, which was intended to embody plaintiff's full instructions to defendant: "There will be paid to you * * * $20,000 * * * This payment is in connection with the Hayes-Lorrain Syndicate. You will please hold these funds until such time as you are instructed by [G.] that it is proper for you to pay same out and you will pay same to such persons, firms or corporations as [G.] may direct and this shall be your sufficient authority." The moneys were (as found by the court) paid out by defendant according to G.'s directions.

*Held*, that parol evidence was not admissible to show a stipulation, alleged by plaintiff but denied by defendant, that, as a term of the deposit, the moneys were not to be paid out by defendant unless the sum of $50,000 should be received by the defendant under the provisions of an earlier document known as the "Hayes-Lorrain Syndicate agreement." The reference in the letter to the Hayes-Lorrain Syndicate, on its face, merely identified the matter for which the money was to be held and used, and did not cover such a stipulation as alleged by plaintiff; and extrinsic evidence of the intention of the parties in making it was not admissible.

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

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The rule of law that extrinsic evidence is not, in general, admissible to contradict, vary or explain written instruments must be enforced in cases that fairly come within it.

Although the plaintiff's evidence of the antecedent conversation, at said interview, as to the terms of his deposit was received without objection and acted upon by the trial judge, the appellate court, upon being satisfied that a writing had been agreed to which was meant to embody those terms, rightly put that evidence aside and decided the case upon the evidence properly admissible. (Jacker v. International Cable Co., 5 T.L.R., 13).

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) allowing an appeal from the judgment of Kelly J. in favour of the plaintiff (2).

The plaintiff's claim was to recover the sum of $20,000 and interest for moneys alleged to have been paid to the defendant upon certain trusts, and alleged to have been paid out by the defendant otherwise than in accordance with the said trusts. The defendant denied any indebtedness to the plaintiff, stating that the moneys were paid out in accordance with the plaintiff's instructions. The material facts of the case are sufficiently stated in the judgment now reported.

The appeal was dismissed with costs.

*J. A. Worrell K.C.* and *R. H. Sankey* for the appellant.

*W. N. Tilley K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff sues to recover a sum of $20,000 deposited by him with the defendant. The deposit of the money and that it was held on some terms is common ground. The plaintiff complains that the moneys were wrongfully paid out by the defendants in contravention of the terms of deposit.

One of the two terms alleged by the plaintiff is denied by the defendant. The existence of the other is common ground and the question is as to its fulfilment, the defendant maintaining and the plaintiff denying that it was in fact observed.

(1) 29 Ont. W.N. 448. (2) 28 Ont. W.N. 331.

The learned trial judge, Kelly J., upheld the plaintiff's contention on both grounds (1). The Appellate Division unanimously accepted the view put forward by the defendant on both points (2).

The terms of deposit alleged by the plaintiff were

(*a*) that the moneys were not to be paid out by the defendant " unless the full $50,000 (referred to in the Hayes-Lorrain Syndicate agreement) was actually paid into the Trust Company; and

(*b*) then not to pay it out except on instructions by Mr. Gallagher and to whom Mr. Gallagher might direct, all for the purposes of the Hayes-Lorrain agreement."

Whether the existence of term (*a*), which was not observed, is established by evidence legally admissible is one question; and, if not, whether term (*b*) was complied with is the other. A decision of either in the plaintiff's favour would mean the allowance of his appeal.

It may be as well to say at once that consideration of the evidence has fully satisfied us that on the second question the conclusion reached by the Appellate Division, that payment was made by the defendant with Gallagher's approval, is right and cannot be disturbed. It is true that Forman did not advise Gallagher of the fact that he had made his (Gallagher's) approval a condition of the Trust Company's payment out of the $20,000 and also that he did not authorize Gallagher to give such approval; but Lang (the defendant company's trust manager) communicated these instructions to Gallagher on the 23rd of May —both he and Gallagher say so—and Gallagher with knowledge of them undoubtedly authorized the payment over to the vendors by the Trust Company of all the moneys held by it in connection with the purchase of the properties in question. The Trust Company was fully justified in concluding that such payments were sanctioned by Gallagher and had no reason to suspect that such sanction had not been authorized by the plaintiff.

The question whether the Trust Company held the plaintiff's money subject to the condition that before payment of it out $50,000 should be actually in its hands in pay-

(1) 28 Ont. W.N., 331. (2) 29 Ont. W.N., 448.

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ment of subscriptions under the Hayes-Lorrain Syndicate agreement must now be considered.

The arrangement for the deposit with the defendant company of the $20,000 was made at an interview on the 22nd of May, 1923, between Mr. Lang and the plaintiff, no other person being present. There is direct conflict between them as to the $50,000 stipulation, the plaintiff deposing that it was distinctly made by him and assented to by Lang and the latter that nothing of the kind took place. Both are, however, agreed that Lang during the interview expressed the desire that the plaintiff's instructions as to the deposit should be put in writing, and that the plaintiff acceded to this request. On this point the plaintiff says:—

> Mr. Lang stated that he understood me perfectly in the matter but would prefer to have it in writing over my signature so he called in a typist and dictated what is known as my letter of instruction to the Trust Company of May 22.
>
> Q. Is that the letter signed by you?—A. No, I do not think this is it; it looks like my signature, but I thought it was typed; he called in somebody who typed it, I am almost sure.
>
> Q. That is your signature?—A. It appears to be my signature, yes.

And on cross-examination he said:—

> Q. I also understood you to say that as soon as you started to mention conditions upon which your money might be paid out, Mr. Lang at once said: "We must have written authority from you, Mr. Forman"?—A. Yes; written authority over my signature.
>
> Q. And this letter (Exhibit 14) was then signed by you?—A. Yes.

Lang explicitly denied that there was any allusion by the plaintiff at the interview of the 22nd of May to the Hayes-Lorrain Syndicate agreement or to the retention of his money by the Trust Company until it should have received $50,000 under that agreement. His account of the interview, so far as material, is as follows:—

> Q. I want you to come to this interview which the plaintiff had with you on the 22nd of May, 1923, and I would like your account of that interview in as much detail as you can give it to me?—A. Well, Mr. Forman came into the office without any introduction at all, and told me who he was, and that he wanted to give us some money.
>
> Q. Yes?—A. I am pretty sure that I told him that we had title deeds there in connection with these mining claims he talked about, which were being held by us against payment.
>
> Q. Of the purchase price?—A. I do not recollect that I told him the purchase price; I cannot be sure of that.
>
> Q. Yes?—A. The next thing, as I recollect it, was his mention of Mr. Gallagher's name, and the greater part of that interview consisted of him telling me about Mr. Gallagher, and asking me what I knew

about him, and his statement that he was going to leave it entirely to Mr. Gallagher, and whatever Mr. Gallagher did was going to be all right. Following that I told him if he wanted to give us any money he should give us instructions in writing as to what we were to do with it. He agreed to that, and I pulled a sheet of paper out of my drawer and proceeded to take down his instructions.

Q. Had he or had he not before this time outlined his instructions —before the paper was produced?—A. The first part of the conversation was very general as far as I know. We did not get down to business until I pulled this paper out of my desk and started to write down what he wanted me to do. So far as that letter was concerned, I wrote it, it is in my handwriting.

Q. That is the letter of May 22nd, 1923, which has been put in as Exhibit 14?—A. Yes.

Q. Yes?—A. That letter, I would say, was really at Mr. Forman's dictation; he did not dictate the words I should use—I did that myself because I was writing it—but he undoubtedly told me what he wanted put in that letter, and that is the way it was written.

Q. Was there some discussion during the drafting of that letter as to the various points which it mentions?—A. I do not think so; the letter was written without any difficulty at all as to instructions.

Q. Was the letter signed, the first draft of it, or were several drafts required?—A. It was signed immediately without any change.

Q. Did the interview continue after the signing of the letter for some time, or did it end shortly afterwards?—A. I would not be sure, but the interview was short, in any case; it did not last very long.

Q. About how long?—A. Not more than ten to fifteen minutes at the outside.

Q. Have you given me your account of the interview as fully as you can?—A. Except this, that most of our talk was about Mr. Gallagher, in my office, and his reliance upon Mr. Gallagher; I cannot emphasize that too much.

Q. Was that mentioned once or more than once?—A. Mentioned repeatedly.

Q. Mr. Forman has said that the interview was opened by his producing a copy of the syndicate agreement, as he calls it, and that you glanced at that agreement and told him it was unnecessary for you to read it, because the Trust Company had a copy. What do you say to that?—A. I cannot recollect that at all.

Q. You have no recollection as to that conversation taking place? —A. Absolutely not, none at all.

* * *

Mr. Thomson: As I understood Mr. Forman's evidence he said that he told you clearly and in a way not capable of being misunderstood by you that he was paying this sum of $20,000, or the additional sum of $15,000—I have forgotten which—under the syndicate agreement? —A. No, that is not my recollection of it at all.

* * *

His Lordship: Give us his instructions as you say he gave them to you?—A. His instructions were that he was to give us this money and we were to pay it out when Mr. Gallagher said it was all right to do it.

Mr. Thomson: Q. And Mr. Forman said very definitely that in addition to the stipulations which are covered by the document, Exhibit 14, he made a further stipulation not covered by the document, to this

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effect: "My money is not to be paid out until $50,000 has been subscribed to the syndicate agreement." What do you say as to that?—A. I say that he is absolutely mistaken about that, that it is not correct.

Q. At any rate I suppose you endeavoured to cover in the writing (Exhibit 14) and to cover accurately Mr. Forman's instructions to you? —A. Undoubtedly so.

Q. Do you think you did?—A. Yes.

The letter written by Lang in his own hand, and not by a typist as Forman thought, reads as follows:—

UNION TRUST COMPANY,
TORONTO.

The Union Trust Company, Limited,
Toronto, Ont.

DEAR SIRS,—There will be paid to you in the course of a few days a total of $20,000 sent for my account from Bioren & Co., of Philadelphia. This payment is in connection with the Hayes-Lorrain Syndicate. You will please hold these funds until such time as you are instructed by Mr. Ziba Gallagher that it is proper for you to pay same out and you will pay same to such persons, firms or corporations as Mr. Ziba Gallagher may direct and this will be your sufficient authority.
Dated May 22, 1923.

HORACE B. FORMAN, Jr.,
Haverford, Pa., U.S.A.

Witness: D. W. Lang.

Kindly send draft for the premium on these funds for my credit at Bank of Montreal, Gananoque, Ont.

HORACE B. FORMAN, Jr.

Both Forman and Lang agree that this letter was intended to embody the plaintiff's full instructions to the Trust Company as to the terms on which the latter should accept and hold the $20,000. As to the disputed term the plaintiff says he understood it to be covered by the sentence: "This payment is in connection with the Hayes-Lorrain Syndicate." Lang says this reference was merely to identify the matter for which the money was to be held and used. The reference does not *ex facie* import what the plaintiff says he understood it to cover; its apparent significance is what Lang attributes to it. Extrinsic evidence of the intention of the parties in making it is not admissible.

Moreover, if, as the plaintiff suggests, it was meant thereby to recognize the existence of the so-called syndicate agreement and to subject the holding of the plaintiff's money by the defendant to its terms, it must be borne in mind that the 30 days during which, under that agreement, the Trust Company was to hold the plaintiff's

money had already expired and there is no hint of any other period having been substituted, so that, if the $50,000 were not paid to the Trust Company it might have been obliged to hold the plaintiff's money indefinitely. This syndicate agreement had not been executed by anybody except the plaintiff and by him only as to his original $5,000 subscription. When he agreed to put up the extra $15,000 he entered into an arrangement with Kemmerer, one of the vendors to the syndicate, that he should become interested with him (Kemmerer) in the transaction and bargained for a share of Kemmerer's promotion stock. Gallagher, who had been apprised of these facts on the morning of the 22nd of May, then understood that the syndicate agreement had been abandoned and was no longer to be taken account of. These considerations, however, rather bear upon the question whether the story told of the interview of the 22nd of May by the plaintiff or that told by Lang is the more probable and would scarcely suffice to outweigh the explicit finding of the learned trial judge that Forman's testimony rather than Lang's was entitled to credence.

But it seems clear that any parol evidence of the conversation during which the letter of the 22nd of May, 1923, was written is not admissible to add to or vary the instructions which it contains. That letter, according to the plaintiff's own story, having been written to formulate the terms and conditions of the Trust Company's authority in regard to the $20,000 deposit, it was, to quote the language of Judge Taylor (Taylor on Evidence, 11th ed., p. 776): " intended finally to embody the entire agreement between the parties." The admission of parol evidence in such a case would be fraught with all the dangers to obviate which it has been established as a rule of law that extrinsic evidence is not, in general, admissible to contradict, vary or explain written instruments. (Best on Evidence, 10th ed., p. 208). This salutary rule affords the best, often the only, protection against mistakes arising from treacherous memory, and courts must enforce it in cases that fairly come within it. The consequences of allowing it to be frittered away would be deplorable.

Although Mr. Forman's evidence of the antecedant conversation as to the terms of his deposit was received with-

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out objection and acted upon by the trial judge, the Court of Appeal, upon being satisfied that a writing had been agreed to which was meant to embody those terms, rightly put that evidence aside and decided the case upon the evidence properly admissible. *Jacker* v. *International Cable Co.* (1).

For these reasons the appeal fails and will be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Worrell, Gwynne & Beatty.*

Solicitors for the respondent: *Tilley, Johnston, Thomson & Parmenter.*

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1926
*Nov. 11.
*Dec. 1.

SUN INSURANCE OFFICE OF LONDON, ENGLAND (DEFENDANT)..... } APPELLANT;

AND

VICTOR G. ROY (PLAINTIFF).....RESPONDENT.

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GUARDIAN ASSURANCE COMPANY OF LONDON, ENGLAND (DEFENDANT) ..... ..... } APPELLANT;

AND

VICTOR G. ROY (PLAINTIFF).....RESPONDENT.

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

*Fire insurance—Renewal—Description of property—Failure to disclose change in description—Misrepresentation—Character of occupancy—Vacancy—Materiality—Statutory conditions—Ontario Insurance Act, R.S.O., 1914, c. 183.*

The effect of the renewal of a policy of fire insurance is that the property is insured subject to the terms and conditions of the policy, and the description of the property in the policy operates with relation to the date of renewal; and if, as the property then stands, it does not answer the description in the policy, there is a misdescription, which, if it be material and to the prejudice of the insurer, will, where

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

(1) (1888) 5 T.L.R. 13.

the policy is subject to such statutory conditions as were provided in *The Ontario Insurance Act,* R.S.O., 1914, c. 183, disentitle the insured to recover.

MacGillivray on Insurance, p. 298, and *In re Wilson and Scottish Ins. Corp. Ltd.* ([1920] 2 Ch. 28) referred to.

A change material to the risk was held to have occurred in the description of premises with regard to their occupancy. The Court referred to evidence going to establish materiality, but also indicated, referring to *Western Assurance Co.* v. *Harrison* (33 Can. S.C.R. 473), that a representation may be held material although no evidence of materiality be given at the trial except the proof of the representation.

Where the property insured is described as occupied in a particular manner, and occupation in that manner is material to the risk, the insurance does not attach to the risk if the premises, at the date of the contract, be not, and have not subsequently been, so occupied. *Farr* v. *Motor Traders Mutual Ins. Soc. Ltd.* ([1920] 3 K.B. 669) referred to.

A change in the property, from occupation as a residential store to vacancy, not being notified to the insurer, and being material, as found, was held to avoid a policy in question within the intent and meaning of no. 2 of the statutory conditions in R.S.O., 1914, c. 183.

A policy of fire insurance, dated 5th January, 1923, was on a building described as "occupied as general store and dwelling." The tenant had been notified by the insured to quit on 1st January, and began to move out on 2nd January and completed moving on 5th or 6th January, and the building ceased to be occupied as described. It was held that, either the property at the time of the policy did not answer to the description, or it must have been known to the insured that the building was in process of being vacated, and would immediately cease to be occupied as described, and this, having regard to the evidence and findings, constituted, if not a misdescription, a misrepresentation of, or omission to communicate, a material circumstance, or a change material to the risk, by reason of which, under nos. 1 and 2 of the statutory conditions in R.S.O., 1914, c. 183, the policy was avoided.

Judgment of the Appellate Division of the Supreme Court of Ontario (58 Ont. L.R. 351) which, reversing judgment of Riddell J. (58 Ont. L.R. 351), held plaintiff entitled to recover on certain fire insurance policies, reversed.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, reversing judgment of Riddell J. (2), held the plaintiff entitled to recover against the defendants under certain policies of fire insurance. The material facts of the cases are sufficiently stated in the judgment now reported. The appeals were allowed.

(1) (1926) 58 Ont. L.R. 351. (2) (1925) 58 Ont. L.R. 351.

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*D. L. McCarthy K.C.* and *W. R. West* for the appellants.

*Peter White K.C.* and *W. F. MacPhie* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—These two cases were tried together. The plaintiff (respondent) brought separate actions against the two Insurance Companies, defendants (appellants), to recover upon two policies of fire insurance which these companies had issued to him upon buildings, of which he was the proprietor, situate at the settlement of Earlton in Northern Ontario. There was a storehouse 25 by 36 feet with three rooms in the top fitted for living purposes, attached to which, in the rear, was a small dwelling 25 feet square. These had been occupied as a store and dwelling, but, in 1916, when the plaintiff acquired the property, he constructed a building, 78 by 33 feet, known in the case as the new store, which was attached to and communicated with the storehouse on the north side of the latter, and these buildings, as a group, are, as will presently be seen, described in the policies as the new building "and additions." The policies were thus intended to cover the same property, but the descriptions do not precisely correspond, and it will be convenient to consider each case separately. Both policies were, however, subject to the Ontario statutory conditions, which are printed on the back. These are identical, and the first and second of them are expressed in the following terms:—

1. If any person insures property, and causes the same to be described otherwise than as it really is to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

2. Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the unearned portion, if any, of the premium which has been paid for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force.

## THE SUN CASE



The original policy was dated 14th January, 1919, and it was renewed each year down to and inclusive of 14th January, 1923, the date of the last renewal. It stipulates that the insured, the plaintiff, is insured against direct loss or damage by fire during the year for the actual cash value of the property at the time of the loss, not exceeding $4,000, On the two story frame building 33 x 78 and additions thereto attached, with metal roofing, occupied as Residential Store, situate on the North West corner of lot No. 6 in the 3rd concession of the Township of Armstrong in the District of Temiskaming, Province of Ontario.

The buildings were totally destroyed by fire on 27th February, 1923. These buildings were wooden structures and the two older ones, the storehouse and dwelling, had wooden roofs, but the new store had a zinc roof. It was a building of two stories, with living quarters in the upper story, where the plaintiff lived while he carried on business there, and in which his tenant, Poirier, who succeeded him in the business, subsequently lived. The plaintiff occupied the premises until 1921, carrying on business as a general merchant, when he leased to Poirier for three years from 1st April, 1921. Poirier leased the dwelling at the rear of the storehouse to Boileau, who occupied it as his dwelling. Subsequently, Poirier having failed in business, his lease became void, and the plaintiff, in the autumn of 1922, notified him to quit, and arranged with Boileau that the latter was to remain in possession of the dwelling and pay rent to the plaintiff. Boileau did remain, and, although temporarily absent, was in occupation of the dwelling as the plaintiff's tenant at the time of the fire. Poirier moved out and quitted the premises on 5th or 6th January, 1923, and from that time until the fire, the buildings were unoccupied, except for Boileau's occupation of the small dwelling in the rear, subject however to the facts now to be stated. Sometime after Poirier gave up the premises, the plaintiff, as he says, decided to re-open his business in the new store. He lived at North Bay, and, on 28th January, he visited the premises, going there and returning to North Bay on that day. Subsequently, on 26th February, he returned to Earlton with two carpenters whom he left there with instructions to clear up, wash the floors, and build a wood shed. They took in a stove, stove pipe, spring

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NewcombeJ

mattress and blankets from another building belonging to the plaintiff at Earlton. The plaintiff remained with them, helping them with their work, for the day. The two men slept upstairs in the new store that night, and, on the night of the 27th, they slept downstairs, in the same building, to be near the stove, as the weather was cold. It was during that night that the fire occurred. The plaintiff testifies that it was his intention to return on 1st March, as it is suggested, then to re-open the shop.

It was, as I have stated, on 14th January that the policy was renewed. The effect of the renewal, as I interpret it, is that the new store, with metal roofing, occupied as a residential store, and the other two buildings, being the "additions thereto attached," were insured subject to the terms and conditions of the policy; this description must be held to operate with relation to the date of renewal; but it is certain that the building was not then occupied as a store, whatever may be the meaning of the qualification introduced by the word "residential," and this fact must be considered having regard to the first statutory condition quoted above.

In *In re Wilson and Scottish Insurance Corporation, Limited* (1), it was held by Astbury J., as appears to be accurately stated in the head note, that

> The renewal of a fire policy is impliedly made on the basis that the statements in the original proposal are still accurate.

This was a case where, in 1915, a motor car had been insured for its full value on a proposal stating the present value at £250. The policy was renewed from year to year and the car was burned in June, 1919, when it was found worth £400, and the question was whether the insured was entitled to indemnity upon the latter estimate of value. Counsel for the corporation argued that each renewal was a fresh insurance, re-incorporating the original statements in the proposal, and made on the basis of their continued accuracy at the date of renewal. He cited MacGillivray on Insurance, p. 298, and *Pim* v. *Reid* (2). The learned judge said in his judgment:

> There is no decision directly applicable, but I cannot help thinking that on renewing the policy on November 8, 1918, the insured must be deemed to have continued or repeated his "estimate of present value" at £250.

(1) [1920] 2 Ch. 28. (2) (1843) 6 Man. & G. 1, at p. 25.

The actual decision in *Pim* v. *Reid* (1), is not in point, but Cresswell J. said: "No fresh proposal appears, therefore, to be expressly required on either side at the end of the first year; but it may then be very material for the company to know of any change in the extent of the risk, to enable them to determine whether or not they will continue the insurance.

Mr. MacGillivray, in the passage referred to in his valuable work, says:

In fire policies and similar risks, where the insurers may decline to renew the policy at the expiration of the original period, each renewal is made on the faith of the continued truth of the original representations, and if there has been any change, that must be disclosed when the renewal premium is tendered.

The view thus expressed appears, in my judgment, to be sound and reasonable, and I have no hesitation in accepting it. It is true that the effect of the misdescription may be limited by the first condition to which I have referred, but, if the findings of the learned trial judge be accepted, the misdescription is material, and to the prejudice of the company. He finds that:

The plaintiff knew January 6 at the latest that the property was no longer a "residential store": he may have contemplated reoccupying it as a "residential store," but he did nothing in that direction for some 8 weeks, and he had not in fact reoccupied it as such at the time of the fire. This was a change material to the risk, increasing the risk, on principle and authority, evidence and common sense.

These findings, it must be remembered, relate to buildings in a frontier settlement; they seem, according to the evidence in the case, to rest upon reason and experience, and I should be reluctant to disturb them. Witnesses were called who were skilled in the business of insurance, an agent, an adjuster and appraiser, an inspector of agencies and the manager of two insurance companies. These gentlemen testified, having regard to their knowledge and experience, that vacancy was a condition material to a fire risk; that the risk was thereby increased. It was shown that three of the insurance companies, including the Sun (defendant), would not take unoccupied risks in the north country. Another witness, who is an adjuster, extends that statement generally to the insurance companies in the north country. None of this evidence was contradicted, although the plaintiff was offered an adjournment to make inquiries. The testimony of these witnesses is, it may be

(1) (1843) 6 Man. & G. 1, at p. 25.

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remarked, not confined to mere matter of opinion. Moreover I would direct attention to the fact that it was held by this court in *Western Assurance Co.* v. *Harrison* (1), that a representation was material, although no evidence of materiality was given at the trial, except the proof of the representation.

There are many cases referred to in the factums, and more in the books, with regard to the effect of words forming part of the description in a fire policy and intended to describe, sometimes in the present and sometimes in the future tense, the user of the premises, but there is none inconsistent with the view, the reasonableness of which commends itself, that, where the property is described as occupied in a particular manner, and occupation in that manner is material to the risk, the insurance is not attached to the risk if the premises, at the date of the contract, be not, and have not subsequently been, so occupied. See *Farr* v. *Motor Traders Mutual Insurance Society, Ltd.* (2).

Moreover, by the second statutory condition, to which the learned trial judge gave effect, it is declared that any change material to the risk, and within the control or knowledge of the assured, shall void the policy as to the part affected thereby, unless the change be promptly notified in writing to the company or its local agent. The change, from occupation as a residential store to vacancy, not being notified, and being material as found, therefore voids the policy within the intent and meaning of this condition. In this particular there appears to be an error of fact in the judgment of the Appellate Division, in that the change is described as occurring after the renewal, whereas, from the time of the renewal until the fire, there had been no occupation of any sort, except by the two carpenters on 26th and 27th February.

This appeal must therefore be allowed.

(1) (1903) 33 Can. S.C.R. 473. (2) [1920] 3 K.B. 669.

## THE GUARDIAN CASE

In this case the policy is dated 5th January, 1923, and by it the property, as described in the body of the policy, is insured in the sum of $2,000:

On the two story 33 x 78 frame building and additions attached thereto with metal roofing, occupied as General Store and dwelling, situate on the North West corner of lot No. 6, in the 3rd concession of the Township of Armstrong, Dist. of Temiskaming, Ont. Marked risk on diagram.

Warranted that no paints, oils or varnishes or other inflammable liquids (coal oil excepted), kept therein except in hermetically closed packages, bulk not broken.

It is a condition of this insurance and for which the premium has been reduced, that the property hereby insured is detached or is contained in a building detached not less than 40 feet, from any other building or shed and further that the building is and will be continually occupied during the currency of this policy for dwelling purposes above the ground floor.

Conditions nos. 1 and 2 and the evidence and findings are the same as in the Sun case already considered. The building which is prominent in the description, and the only one described by that name, is "the two-story 38 by 78 frame building," or new store, which, up to the date of the policy, had been occupied as a general store and dwelling by Poirier, or his trustee in bankruptcy, or his wife, who had bought the bankrupt stock from the trustee. It was the smaller of the two buildings described as additions, and which was situated at the rear of the addition known as the storehouse, that Boileau occupied as a dwelling. There were in this small building five rooms in all, two or three on the ground floor and the others on the upper floor. I do not think that the description admits of any interpretation other than that the building required by the condition to be continually occupied for dwelling purposes above the ground floor is the new store; a different meaning is not only incompatible with the text, but, in my view, too improbable to be seriously considered. Now it is not proved whether Poirier completed his moving on 5th or 6th of January, but it is certain that, from one or the other of these dates, there was, during the currency of the policy, no occupation of the new store for dwelling purposes above the ground floor, except in so far as the fact that the two carpenters slept there on the night before the fire constituted such an occupation for that night. The following day they moved down with their

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effects, because they found the place too cold, and so left the upper story unoccupied. Neither, it may be added, was there any occupation of any part of the new store for any purpose, except that of the carpenters, such as it was. There was thus a breach of the stipulation, but if this be a condition within the meaning of the *Ontario Insurance Act*, as distinguished from a limitation of the risk, a question which was not discussed, it is ineffective by the provisions of the statute, and therefore I shall put my decision upon the short ground which I am going to state.

Poirier's lease, according to the terms of it, became void by his bankruptcy. The plaintiff had notified him to quit on 1st January. He had made his arrangements for quitting; the moving began on 2nd January, and was completed on the 5th or 6th. In these circumstances, either the property at the time of the policy did not answer to the description, or it must have been known to the insured that the building described as "occupied as general store and dwelling" was in process of being vacated, and would immediately cease to be so occupied. This, having regard to the evidence and findings to which I have already referred, constituted, if not a misdescription, a misrepresentation of, or omission to communicate, a material circumstance, or a change material to the risk, by reason of which, under statutory conditions 1 and 2, the policy was avoided.

This appeal should therefore likewise be allowed.

*Appeals allowed with costs.*

Solicitors for the appellants: *McCarthy & McCarthy.*

Solicitor for the respondent: *W. F. MacPhie.*

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HOUGHTON LAND CORPORATION LIMITED (PLAINTIFF) ..... APPELLANT; *Oct. 5. *Dec. 15.

AND

THE RURAL MUNICIPALITY OF RICHOT AND JOSEPH JOYAL (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Appeal to Supreme Court of Canada—Jurisdiction—Title to land—Action to set aside tax sale—Seed Grain Act, Municipal Act, Assessment Act, Man. (R.S.M. 1913, cc. 178, 133, 134).*

Plaintiff sued to set aside a tax sale of its land by defendant municipality (in Manitoba), claiming that it was illegal because made for default in payment of notes given to the municipality by the plaintiff's tenant for moneys advanced to the tenant for seed grain, and for the cost of a well bored for the tenant, on the land. The advances for seed grain and the cost of the well amounted to $530. The land was worth over $2,000. Plaintiff's action was begun after one year from the day of the sale. The action was dismissed by Mathers C.J.K.B. (35 Man. R. 331) whose judgment was affirmed by the Court of Appeal for Manitoba (35 Man. R. 551). Plaintiff (whose application for leave to appeal was refused by the Court of Appeal) appealed *de plano* to the Supreme Court of Canada, and defendants moved to quash the appeal for want of jurisdiction.

*Held,* that the motion to quash the appeal should be refused; whether plaintiff still retained its right to redeem, and whether, through the effect of the "curative" section of the *Assessment Act* (Man.) it was precluded from obtaining the relief sought, were questions to be considered and were properly matters in controversy; the application to the case of the relevant sections of the *Municipal Act* and the *Assessment Act* was a point in dispute; it was therefore apparent that, as a result of the litigation, when all questions raised on both sides had been considered and according as the respective contentions were held well or ill founded, plaintiff's title might be affirmed or denied to lands the value of which exceeded the amount required to found jurisdiction for appeal.

Idington J. held that the right of appeal depended on whether or not the right of redemption still existed, and as this was not settled on the facts before the court the motion should be enlarged to be disposed of on the argument of the appeal.

MOTION by the respondents to quash, for want of jurisdiction, the plaintiff's appeal to this Court from the

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

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judgment of the Court of Appeal for Manitoba (1) affirming the judgment of Mathers C.J.K.B. (2) dismissing the plaintiff's action to set aside a tax sale by defendant municipality of certain lands. The facts of the case are sufficiently stated in the judgments now reported. The motion was dismissed with costs.

*D. H. Laird K.C.* for the motion.

*E. F. Newcombe contra.*

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

RINFRET J.—This is a motion to quash for want of jurisdiction. The plaintiff's statement of claim alleges that, in May, 1919, it was the legal owner of certain lands and entered into an agreement of sale of these lands to certain parties named Edward McGee and Fred McGee, who took possession; that Fred McGee subsequently executed a quit-claim to the plaintiff of his interest, and that Edward McGee continued to occupy as tenant of the plaintiff; that the defendant municipality, without the consent of the plaintiff, advanced seed grain to the said Edward McGee and, at his request, bored a well upon the lands in question, for all of which it took from him promissory notes in settlement; that the defendant municipality never gave notice to the plaintiff of the advances but, on default of payment of the notes, made a claim upon the plaintiff for the amount thereof, for which the lands were sold at a tax sale to the defendant Joyal.

The plaintiff claimed that this sale was illegal and asked that it be declared null and void and set aside. The action was dismissed (2). This was affirmed in appeal (1). The plaintiff applied to the Court of Appeal for leave to appeal to the Supreme Court of Canada. The application was refused. The plaintiff thereupon proceeded to appeal *de plano*, and security was allowed by a judge of the Court of

(1) 35 Man. R. 551; [1926] 2 W.W.R. 51.

(2) 35 Man. R. 331; [1925] 3 W.W.R. 695.

Appeal, who however said that his order " shall not be construed as giving leave to appeal " or " affecting in any way the question of the jurisdiction of the Supreme Court of Canada."

The respondents now move to quash on the ground that the case is not appealable.

They argue that the only question involved in the case is whether

> the amount required to redeem is some $530 less than the amount certified as arrears of taxes to the District Registrar who is now dealing with the application of Joyal for a certificate of title.

This sum of $530 represents the advances for the seed grain and the well repudiated by the plaintiff.

We do not think the litigation is so limited.

The tax sale took place on the 27th October, 1922. The action was begun on the 3rd January, 1924, or after the expiration of one year from the day of the sale.

The lands in question are proven to be worth well over $2,000.

Plaintiff asserts its ownership of these lands and claims to have been illegally divested of its title by the alleged illegal proceedings of the municipality.

Joyal, the tax purchaser, resists the plaintiff's claim and submits his rights to the court.

As a consequence, it may be that the plaintiff still retains the right to redeem; or it may be that, through the effect of the so-called curative section of the *Assessment Act*, plaintiff is now precluded from obtaining the relief sought by it; but these are questions which will have to be considered and they are properly matters in controversy. The application to the case at bar of the relevant sections of the *Municipal Act* and the *Assessment Act* is one of the points in dispute.

For the present, therefore, it is apparent that, as a result of this litigation, when all questions raised on both sides have been considered and according as the respective contentions are held well or ill founded, plaintiff's title may be affirmed or denied to lands the value of which clearly exceeds the amount required to found jurisdiction for appeal to this court.

We think, for these reasons, that the motion fails and should be dismissed with costs.

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IDINGTON J.—Assuming the lands have been sold and the possibility of redemption thereof by payment of the tax has passed, I agree with my brother Rinfret J. in the conclusion he has reached that the title of the land is in question and, therefore, as that seems to be worth over two thousand dollars, that there would be no doubt of our jurisdiction to hear the appeal. If, however, the time for redemption has not elapsed and it is still possible for the appellant to redeem the land for $800 or $900, or any sum less than $2,000, I can see no right to appeal here. In such a case the title to land is not necessarily involved, it is the damage done by casting a cloud upon the title and this does not, in itself, I think, give jurisdiction to come here.

As the evidence, in my view, does not conclusively establish either of the alternatives I have put, I would prefer the motion to be enlarged to be disposed of on the argument of the appeal.

*Motion dismissed with costs.*

Solicitor for the appellant: *Eric Browne-Wilkinson.*

Solicitors for the respondent The Rural Municipality of Richot: *Munson, Allan, Laird, Davis, Haffner & Hobkirk.*

Solicitor for the respondent Joseph Joyal: *C. M. Boswell.*

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*Oct. 29.
*Dec. 1.

TIDEWATER SHIPBUILDERS LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

SOCIETE NAPHTES TRANSPORTS (DEFENDANT) ..... } RESPONDENT.

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

*Lease and hire of work—Work by contract—Fixed price—Cancellation at will of owner—Indemnity of the workman—Damages—Art. 1691 C.C.*

Article 1691 of the Civil Code of Quebec gives the owner the right to cancel at his own will a "contract for the construction of a building or other works at a fixed price, although the work has been begun,

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

*on indemnifying the workman for all his actual expenses and labour, and paying damages according to the circumstances of the case."*

*Held* that the obligation to indemnify the workman for all his actual expenses and labour, to wit, to pay him for the work done, is absolute; and the liability for damages depends on the circumstances of each particular case. But the workman cannot demand, as damages, payment in full as if the work had been entirely performed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, maintaining in part an appeal to that court by the respondents and dismissing a cross-appeal by the appellants.

The material facts of the case are sufficiently stated in the judgment now reported.

*C. A. Barnard K.C.* and *W. F. Chipman K.C.* for the appellant.

*A. R. McMaster K.C.* and *L. J. Béïque 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, province of Quebec, modifying, by reducing the amount awarded, a judgment of the Superior Court which had granted the present appellant $35,000, under the contract to which I will presently refer. At the same time, the Superior Court rejected a claim of the appellant for $25,000, as damages for loss of profit, and as to this claim its judgment was upheld. The appellant now appeals to this court on both points.

The material facts of the case are as follows.

In 1920, the respondent had a ship under construction at Three Rivers by the Three Rivers Shipyards, Limited. This company went into liquidation before the work was finished, and the respondent then entered into an agreement with the appellant to complete the construction of the ship. This agreement, signed by the respondent in December, 1920, and by the appellant in March, 1921, contained the following covenants:—

Whereas the company (the respondent) are the owners of a ship commonly known as an oil tanker of approximately 6,500 tons deadweight now partially constructed in the yard of the Three Rivers Shipyards Company, Three Rivers, Quebec, and through their representative have mutually agreed with the shipbuilders (the appellant) to complete this vessel

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in accordance with the plans and specifications to be furnished to them by the company, and deliver to them at the port of Three Rivers fully equipped and ready for sea.

Now therefore this agreement witnesseth:

That the shipbuilders on the execution of this agreement will proceed under the supervision and instruction of the company's representatives to engage the necessary men and secure the necessary materials to complete and launch the ship at the yard of The Three Rivers Shipyards, Limited, and take the hull to the works of the shipbuilders, install machinery and complete and equip the ship ready for sea according to the plans and specifications and under the supervision and direction of the company's representative on the following terms and conditions:—

1. That the company's representative will arrange at the company's expense for the use of the facilities of Three Rivers Shipyards, Limited for the aforesaid purpose.

2. That the shipbuilders will engage all necessary men and order all necessary material rates of wages and prices to be made for all materials and deliveries to be approved from time to time by the company's representative.

3. That the company will furnish through their representative all the necessary plans and specifications for the completion of the work.

4. That all materials purchased for the ship will be billed to the company or their representative duly marked for use on this ship.

5. That the company's representative will make the necessary arrangements for prompt payment of wages of the men engaged in the work, and all material, machinery and supplies of every kind.

6. That the shipbuilders will furnish, on completion of the vessel, builder's certificate, and secure the certificate of classification societies, and in the event of the registration of the ship in Canada, the necessary certificate from the Canadian Government.

7. That the shipbuilders will, after the ship is launched and delivered at their shipyard, install engines, boilers and all auxiliary machinery which are to be furnished by the company from the boiler-room bulkhead up to the tail-shaft, and supply and install the necessary piping and valves to connect to the hull piping, sea-suctions, and discharges, all according to the specifications, for the sum of $65,000 in Canadian currency to be paid before the ship leaves the yards of the shipbuilders.

8. That in addition to this amount of $65,000 the shipbuilders will be paid by the company before the final delivery of the ship, as their recompense for superintending the construction and completion of the vessel, the sum of $35,000 in Canadian currency if the total cost of the ship, exclusive of this recompense of $35,000, but inclusive of the $65,000 payable under paragraph 7 and all expense for launching ways, trial trip, builders risk insurance, is $700,000 or more, and for every $10,000 less than $700,000 which the completion of the ship costs, the shipbuilders will receive an additional recompense of $3,000, so that, for the purposes of illustration, if the completion, exclusive of this recompense, costs finally $690,000 the shipbuilders will receive $38,000. If the completion costs $680,000 they will receive $41,000, and so on in proportion, but if the completion costs $650,000 or less, exclusive of this recompense, the shipbuilders will receive the sum of $50,000 as their recompense.

9. Further, it is mutually agreed and understood that for any work done in connection with the construction of the ship, exclusive of the installation of boilers, engines and auxiliary machinery, etc., between the

boiler-room bulkhead and the tail shaft, which is done at the works of the shipbuilders, and which is not covered by paragraph 7, the company will pay the actual cost to the shipbuilders of all material and labour, plus an overhead allowance of 65 per cent on labour, the labour contemplated to embrace workmen and the necessary foreman, but will not include anything for the services of the manager, shipyard superintendent or machine shop superintendent, or chief accountant, time-keepers or clerks of the company.

It being understood and agreed that:

The intention of the foregoing agreement is that the company through their representative will pay in addition to the $65,000 for the work and material covered by paragraph 7, all expenses of every kind for material, labour and overhead, as herein defined, incurred in completing the vessel ready for sea, plus the allowance for recompense of from $35,000 according to the total cost of the work of completion from the date of this contract but not including any expenses incurred prior to this date, and all to be paid for before the ship is finally handed over by the shipbuilders to the company's representative.

The appellant completed, at the shipyards of the Three Rivers Shipyards, Limited, the construction of the hull of the ship, which was launched on the 8th of June, 1921. There remained the installation therein of the engines, boilers and auxiliary machinery under clause 7, which was to be done at the appellant's shipyards about a mile up the St. Maurice river. On June 6, 1921, the respondent served a notarial protest on the appellant alleging that there was not in the channel of the St. Maurice river a sufficient depth of water to bring the ship up to the appellant's shipyards for the installation of the machinery, and to remove it from there after such installation, and that the appellant had failed in its obligation to have the channel dredged, and therefore the respondent, reserving the right to demand the cancellation of the contract, notified the appellant that it would itself proceed to have the boilers, engines, and machinery installed, after launching, at the wharf in the St. Lawrence river of The Three Rivers Shipyards, Limited.

The respondent followed up its protest by bringing an action before the Superior Court asking for the cancellation of the above agreement on the ground that the appellant had failed to fulfil its contractual obligations. The appellant then instituted an action against the respondent at Three Rivers, accompanied by a conservatory seizure of the ship, claiming payment of two items, to wit the $35,000 mentioned in paragraph 8 of the agreement, and $25,000 for loss of profit under its undertaking to install the boil-

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ers, engines and machinery. The trial of both actions, which had been consolidated, took place at Three Rivers. We were informed by the parties that at the argument on the first action, the one asking for cancellation, the appellant admitted that under art. 1691 of the civil code the respondent was entitled to cancel the agreement, and this point of view was accepted by the learned trial judge who pronounced the agreement duly cancelled. The appellant states that it acquiesced in the judgment in this action and paid the costs. In the second action, the learned trial judge awarded the appellant the $35,000, but rejected the claim for $25,000 for want of proper proof. Both parties appealed from this judgment to the Court of King's Bench. The latter court affirmed the judgment of the Superior Court in so far as the claim for $25,000 was concerned, but modified it in regard to the item of $35,000, which it reduced to $12,000, the respondent in its factum having expressed its willingness to pay the latter sum. The appellant now comes before this court asking that the judgment of the Superior Court be restored as to the award of $35,000, but reversed in respect of the other item of its demand.

The only judgment before us is that rendered in the appellant's action claiming $35,000, under clause 8 of the agreement and $25,000 damages for loss of profit under clause 7.

The appellant in its factum as well as in its argument before us, endeavoured to take the position that art. 1691 C.C. did not apply to the agreement in question, or, if it did, it was only with respect to the installing of the boilers, engines and machinery. Had the appellant taken that position before the trial court, it is likely that the learned trial judge would have made a finding on the question whether the appellant had fulfilled its contractual obligations, and whether the respondent had valid cause for cancelling the contract. The admission of the appellant that the case came within the scope of art. 1691 C.C., while to some extent an admission of law rather than of fact, no doubt influenced the course of the trial and the judgment. I am not disposed therefore to deal with the litigation on any other basis. Much of the evidence adduced at the trial is irrelevant on an issue governed by art. 1691 C.C.

The respondent, on the other hand, led considerable evidence to show that the contract had become impossible of performance for the reasons alleged in its protest, i.e., that the ship, for lack of sufficient depth in the channel of the St. Maurice, could not be brought to the appellant's shipyards for installation of the boilers, engines and machinery, or removed therefrom after the work was done. The testimony on this point is contradictory, and I am not satisfied that the respondent, which had the onus of establishing it, has shewn beyond doubt that performance of the contract had become impossible within the meaning of art. 1202 C.C. Moreover, the most that could be said is that, if the performance of the contract became impossible, it was through no fault of the appellant, which clearly could not be expected to dredge the bed of a navigable stream, and therefore the respondent would be bound to the extent of the benefit received by it. I prefer therefore to rest nothing on the alleged impossibility of performance, but I will view the case as being one calling for the application of art. 1691 C.C.

This article gives the owner the right to cancel at his own will a contract for the construction of a building or other works at a fixed price, although the work has been begun,

on indemnifying the workman for all his actual expenses and labour, and paying damages according to the circumstances of the case.

The obligation to indemnify the workman for all his actual expenses and labour, to wit, to pay him for the work done, is absolute. Liability for damages depends on the circumstances of each particular case. The workman is certainly entitled to payment for the work actually done and money expended by him, and the circumstances of the case may also, as a matter of justice, give him the right to claim damages.

It would be quite impossible, in my opinion, to say that the workman can demand, as damages, payment in full as if the work had been entirely performed, for the owner may have cancelled the contract because such payment would be beyond his means. Article 1794 of the Code Napoléon allows the owner to cancel the contract

en dédommageant l'entrepreneur de toutes ses dépenses, de tous ses travaux *et de tout ce qu'il aurait pu gagner dans cette entreprise;*

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it does not mention other damages. The codifiers in their report make no special mention of art. 1691 C.C., being content to say that

> the articles numbered from 78 to 84 (art. 1691 to 1697 C.C.), while they express the existing law, coincide substantially with the articles of the Code Napoléon cited under them.

The coincidence, in so far as art. 1691 C.C. is concerned, is certainly not very marked, and, in my opinion, while the French code has laid down a definite rule as to the basis of assessment of damages, our code has done so only in regard to " actual expenses and labour."

Pothier, *Louage,* no. 440, Bugnet ed., vol. 4, pp. 147, 148, to whom the codifiers refer under art. 1691 C.C., says:

> Par exemple, si j'ai fait marché avec un entrepreneur pour la construction d'un bâtiment, et que, depuis le marché conclu et arrêté entre nous, je lui déclare que je ne veux plus bâtir, et que je demande en conséquence la résolution du marché, l'entrepreneur ne peut pas s'opposer absolument à la résolution du marché, et prétendre que je doive lui payer le prix entier du marché, aux offres qu'il fait de remplir son obligation, et de construire le bâtiment porté au devis; car il a pu me survenir, depuis la conclusion de notre marché, de bonnes raisons pour ne pas bâtir, dont je ne suis pas obligé de rendre compte; il a pu me survenir des pertes dans mes biens, qui me mettent hors d'état de faire la dépense que je m'étais proposée. Mais si je dois être reçu à demander la résolution du marché, ce ne peut être qu'à la charge de dédommager l'entrepreneur, s'il souffre quelque dommage de son inexécution; *puta,* si avant que je lui eusse déclaré mon changement de volonté, il avait déjà fait emplette de quelques matériaux qu'il sera obligé de revendre à perte; s'il avait déjà loué des ouvriers qui lui deviennent inutiles. On doit aussi comprendre, dans les dommages et intérêts de l'entrepreneur, le profit qu'il aurait pu faire sur d'autres marchés que celui dont on demande la résolution lui a fait refuser.

Pothier's reference to claims which may be considered under the head of damages, is clearly only by way of examples. Our code, as I have said, is definite merely with regard to " actual expenses and labour," but I think it may be stated that Pothier's refusal to allow the contractor to claim

> le prix entier du marché aux offres qu'il fait de remplir de sa part son obligation

holds good under the true construction of art. 1691 C.C.

Coming now to the appellant's claim of $35,000 under clause 8 of the agreement, it is therein expressly stated that this sum is to be paid to it

> as their recompense for superintending the construction and completion of the vessel.

This supposes that the appellant has exercised this superintendence until full completion of the vessel, which of course would include the installation of the engines, boilers and machinery " which are to be furnished by the company (the respondent)," and that it supplied and installed the necessary piping and valves to connect to the hull piping, sea-suctions and discharges.

In other words, this " recompense," with the special price stipulated for installation of engines, boilers and machinery and the supplying and installation of the necessary piping and valves, may be assimilated to what Pothier calls " le prix entier du marché." In my opinion, only the part of this " recompense " which corresponds to the actual " superintendence " can be allowed either as damages or as " actual expenses or labour," and I think it comes better under the heading of " damages," for, under reserve of the question of the " sea chest " to which I will presently refer, it is not contended that all actual expenses and sums spent for labour or materials were not paid by the respondent.

I do not think the judgment of the Superior Court can be restored, for it awarded to the appellant the whole of the sum payable for superintending the construction until full completion of the vessel. There is however room for a difference of opinion whether an allowance of approximately one-third of the $35,000 is sufficient compensation for damages suffered by the appellant by reason of the cancellation of the contract under art. 1691 C.C. The question, however, whether any damages at all should be granted, and, if so, what should be their amount, are questions to be determined by the court under this article. The Court of King's Bench came to the conclusion that the appellant was entitled to damages, and granted it the sum of $12,000, and this court does not interfere with the quantum of such damages unless a wrong principle has been followed by the court in assessing them. This has not been shewn. I therefore do not feel justified in increasing the award with respect to these damages.

I may add that I do not find the proof satisfactory as to the portion of the " recompense " which can be said to correspond to the superintendence actually exercised. The appellant's witnesses say that the expenditure up to the launching amounted to $350,000, and that ten per cent of

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TIDEWATER SHIP-BUILDERS LTD. v. SOCIÉTÉ NAPHTES TRANSPORTS.

Mignault J.

this would be a fair compensation. This is not the proper test when dealing with an express contract stating for what superintendence the $35,000 is to be paid.

Both courts, including Mr. Justice Tellier who dissented, were of the opinion that the appellant had not sufficiently proved its claim for $25,000 for loss of the profit it would have made in installing the boilers, engines and machinery under clause 7 of the contract. In that I agree, but as to such a claim, it would suffice to say that the profit which the workman would have made, had the contract gone on to completion, is not, under art. 1691 C.C., the proper basis for the assessment of his damages. That, I have already stated, is clearly the effect of the article.

The appellant also claims that it is entitled to $2,896.70, which it expended in building a " sea chest " in connection with the carrying out of clause 7 of the contract. The " sea chest " was delivered to the respondent but was never paid for.

This the respondent does not deny, but its objection is that this amount was not specifically claimed in the action. The appellant admitted that in the argument before the Superior Court these expenses were overlooked. It seems to me that as this " sea chest " was really made and delivered to the respondent, it would be only fair to add the amount of the expenditure to the $12,000 granted by the Court of King's Bench.

With this variation, I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *C. A. Barnard.*

Solicitors for the respondent: *Béïque & Bissonnette.*

CHARLES W. GORDON (DEFENDANT).... APPELLANT; 1926

AND *Oct. 12, 13.

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WILLIAM ARTHUR HEBBLEWHITE, CARRYING ON BUSINESS UNDER THE FIRM NAME OF "WINNIPEG FINANCIAL CORPORATION" (PLAINTIFF) RESPONDENT; *Jan. 4.

AND

LOUNT ENGINEERING COMPANY LIMITED, C. T. LOUNT, JOHN L. LYON (DEFENDANTS).

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Surety—Promissory note endorsed by surety for certain purpose and on certain terms, known to creditor—Surety's rights—Creditor dealing with note—General hypothecation of note by creditor to bank—Inadmissibility of extrinsic evidence as to meaning and effect of hypothecation—Alteration of surety's position—Inapplicability of s. 26 (r) of King's Bench Act, Man. (R.S.M., 1913, c. 46)—Surety's obligation undertaken on terms that note be used only for advances by a bank and for advances to a certain required amount—Non-fulfilment of terms—Release of surety—Creditor's obligation as to application of payments.*

Plaintiff took a promissory note as collateral security for advances by him to L. Co., which note had been endorsed by defendant G. As found by the court, G. had endorsed the note on the terms and conditions, known to plaintiff, that it would be delivered as collateral security to a bank for a loan to be made by the bank to L. Co. of $10,000, in five advances of $2,000 each, to be used for payment of agreed upon instalments to L. Co's. creditors, and that repayment was to be secured by an assignment to the bank of whatever government ditching contracts L. Co. might secure in 1923. Plaintiff hypothecated the note to his bank, by a general hypothecation in the bank's usual form, as collateral to his own account with his bank.

*Held,* that the case, on the evidence, if not falling within the class of "those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor is a party," at least fell within the class of "those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger." In a case of the latter class the surety has against the debtor the rights of a surety, and the creditor receiving notice of his claim to those rights, is not at liberty to do anything to their prejudice. (*Duncan, Fox, & Co.* v. *North & South Wales Bank,* 6 App. Cas. 1 at pp. 11, 12).

*Held,* further, that the effect of the plaintiff's hypothecation to his bank was to expose G. to be held liable to the bank, as holder in due course,

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

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to the extent of his *ex facie* obligation under his endorsement, not merely for whatever indebtedness of L. Co. he had undertaken to guarantee, but for any indebtedness of plaintiff to the bank; and this obvious alteration in G.'s position involved a substantial extension of his responsibility which released him from liability to the plaintiff. The principle of *Archer* v. *Hudson,* 7 Beav. 551, and other cases cited, applied.

Plaintiff's unsupported testimony by which he sought to modify or restrict the plain meaning and effect of his general hypothecation to the bank, was wholly inadmissible and ineffectual. (*Forman* v. *Union Trust Co.* [1927] S.C.R. 1).

S. 26 (*r*) of *The King's Bench Act,* Man. (providing that "giving time to a principal debtor, or dealing with or altering the security held by the principal creditor, shall not of itself discharge a surety or guarantor * * *") did not apply. The security held by the creditor to which the enactment refers is not the obligation either of the debtor or of the surety, nor the instrument evidencing such obligation, but some other security held by the creditor for its performance. Here the charge against the plaintiff was not that of having dealt in an unauthorized manner with any such security, but rather that he had so dealt with the very instrument evidencing the surety's contractual obligation itself.

*Held,* further, that the facts, known to plaintiff, that G. endorsed the note only for use as collateral to a bank, and would not have endorsed it had he known it was to be used for advances to be made by plaintiff, a money lender, vitiated G.'s consent and prevented any obligation arising on his part in favour of the plaintiff. *Smith* v. *Wheatcroft,* 9 Ch. D. 223, at p. 230, and other authorities, cited.

*Held,* further, that as G. endorsed the note for the sole purpose of being used for a loan of $10,000 to be made in five advances of $2,000 each to L. Co., which advances were necessary to carry out an arrangement with creditors, the plaintiff, who knew these facts, by refusing and failing (as found by the court) to advance the final $2,000 promised, declined to fulfil an essential condition of G.'s undertaking of his obligation of guarantor, and thereby discharged him from his liability. (*Burton* v. *Gray,* 8 Ch. App. 932; *Whitcher* v. *Hall,* 5 B. & C. 269, at p. 275).

The burden of proving that the note was to be a general continuing collateral security, as alleged by plaintiff, was on him. (*In re Boys,* L.R. 10, Eq. 467; *Tatam* v. *Haslar,* 23 Q.B.D. 345, at p. 348).

Further, the court was inclined to hold that, assuming that plaintiff could claim against G. for the $8,000 advanced on the note, the claim was satisfied, partly by certain payments, by his appropriation of which the plaintiff was bound, and partly by a payment on a Government contract obtained by L. Co. and assigned to plaintiff. Though, as against L. Co., plaintiff might have a right to apply the payment received on the Government contract first against other moneys advanced to L. Co. to enable it to carry out that contract, yet he had no such right as against G. who was entitled to have his stipulation as to Government contract moneys (see first paragraph *supra*) carried out. (*Newton* v. *Chorlton,* 10 Hare, 646, at p. 653). Failure to apply these moneys as stipulated for by the surety would amount to a variation in the contract which would release him. (*Can. Bank of Commerce* v. *Swanson,* 33 Man. R. 127; *Pearl* v. *Deacon,* 1 DeG. & J., 461).

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APPEAL by the defendant Gordon from the judgment of the Court of Appeal for Manitoba, which, reversing the judgment of Galt J., held him liable to the plaintiff in the sum of $11,401.03 and costs. The plaintiff's claim against the said defendant was as endorser, and guarantor of payment, of a promissory note held by the plaintiff, dated 8th November, 1922, and delivered to the plaintiff on the 4th December, 1922, made by the defendant the Lount Engineering Co. Ltd., in favour of the defendant Lount, and endorsed by him and by the defendant (appellant) Gordon and by the defendant Lyon. The note was a demand note for $10,000 payable at the Royal Bank of Canada, Winnipeg, with interest at 8 per cent. per annum as well after as before maturity. The facts of the case and the questions in dispute are sufficiently stated in the judgment now reported. The appeal was allowed.

*E. Lafleur K.C.* and *E. D. Honeyman* for the appellant.

*W. L. Scott K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The evidence presents this case as falling either within the first or the second of the three classes of suretyship defined by Lord Chancellor Selborne in *Duncan, Fox & Co.* v. *North & South Wales Bank* (1). If not, as seems most probable, within the first class, namely

> those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor is a party,

it is, at least, within the second class, thus defined by His Lordship;

> those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger.

Of a surety of the latter class the Lord Chancellor says (p. 12) that he has against the debtor

> the rights of a surety; and that the creditor receiving notice of his claim to those rights, will not be at liberty to do anything to their prejudice.

The evidence establishes express notice to the respondent of the appellant's position as a surety and guarantor for the Lount Engineering Company—the debtor—and of

(1) (1880) 6 App. Cas. 1, at p. 11.

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the terms and conditions on which that position was assumed by him.

The law affecting the relations of creditor and surety is materially modified in the Province of Manitoba by s. 26 (*r*) of *The King's Bench Act*, R.S.M., 1913, c. 46:—

> Giving time to a principal debtor, or dealing with or altering the security held by the principal creditor shall not of itself discharge a surety or guarantor; in such case a surety shall be entitled to set up such giving of time or dealing with or alteration of the security as a defence, but it shall be allowed only in so far as it shall be shown that the surety has thereby been prejudiced.

Because it introduces a new principle in derogation of the ordinary legal rights of a surety this statute must be taken to alter the law only in so far as its terms clearly express legislative intent to do so. The security held by the creditor to which the enactment refers is not the obligation either of the debtor or of the surety nor the instrument evidencing such obligation, but some other security held by the creditor for its performance. Here the charge against the respondent is not that of having dealt in an unauthorized manner with any such security, but rather that he has so dealt with the very instrument evidencing the surety's contractual obligation itself. Except in the case of merely giving time to the principal debtor, nothing in the section under consideration interferes with the legal effect of a variation in the contractual obligation either of the debtor or of the surety effected without the surety's assent and any such change (not obviously unsubstantial) resulting from the action of the creditor will still discharge the surety in Manitoba as it does in other provinces where English law prevails. *Holme* v. *Brunskill* (1).

It is common ground that the promissory note, on which the appellant is sued as endorser and in respect to which he held, to the knowledge, and probably by the agreement, of the respondent, the position of a surety, was given to, and taken by, the respondent as collateral security either for a specific part (according to the appellant's contention) or for the whole (according to the contention of the respondent) of the indebtedness of the Lount Engineering Company to the respondent. That note was, nevertheless, hypothecated by the respondent to the Royal Bank of

(1) (1878) 3 Q.B.D. 495, at pp. 505-6.

Canada, by a general hypothecation in the bank's usual form, as collateral to his own account with the bank. The respondent admittedly had a large "line of credit" with the Royal Bank which was, at times, drawn against to its limit. The effect of the hypothecation was to expose the appellant to be held liable to the bank, as holder in due course, to the extent of his *ex facie* obligation under his endorsement, not merely for whatever indebtedness of the Lount Engineering Company he had undertaken to guarantee, but for any indebtedness of the respondent to the bank, which might, of course, be entirely disconnected with the Lount Engineering Company. The unsupported testimony of the respondent by which he sought to modify or restrict the plain meaning and effect of this general hypothecation to the bank was wholly inadmissible and ineffectual. *Forman* v. *Union Trust Co.* (1). This obvious alteration in the surety's position involved a substantial extension of his responsibility which, in our opinion, released him from liability to the respondent. Such a case is not within s. 26 (*r*) of the Manitoba *King's Bench Act,* R.S.M. 1913, c. 46. The principle of the following decisions applies: *Archer* v. *Hudson* (2); *Pybus* v. *Gibb* (3); *Finch* v. *Jukes* (4); *Newton* v. *Chorlton* (5). See too *Bank of Montreal* v. *Normandin* (6).

While this appeal might be disposed of on the short ground above stated, we think it proper to rest our judgment for the appellant as well on other grounds subjoined.

Other variations in the contract of the principal debtor —(1) by charging bonuses on advances which made the rates of interest exorbitant—well over 100 per cent. per annum on an eight months' basis of credit in the case of the first advance and over 75 per cent. in the case of the two later advances ("payment accordingly"; *vide infra*) —and (2) providing for interest at 20 per cent. on the notes finally taken to cover the balances due by the company, are also invoked by the appellant as grounds for release.

(1) [1927] S.C.R. 1.
(2) (1844) 7 Beav., 551, at pp. 561-4.
(3) (1856) 6 E. & B., 902, at p. 914.
(4) [1877] W.N. 211.
(5) (1853) 10 Hare, 646, at pp. 652-3.
(6) [1925] S.C.R. 587.

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But no specified rate of interest to be paid by the principal debtor on its borrowings would seem to have been stipulated for by the surety; and the 20 per cent. rate on the last notes taken does not appear to have been pleaded as a ground for discharge. We accordingly do not treat these variations, if they be such, as entitling the appellant to relief. Yet, while they may not serve as specific grounds of defence, these excessive interest charges imposed by the respondent make very clear the materiality to the appellant of his understanding (hereinafter dealt with) that he was guaranteeing the repayment of advances to be made by a bank and not by a note-shaving money-lender.

The respondent's testimony is unsatisfactory and cannot be relied upon when in conflict with that of other witnesses. This seems to have been the view of the learned trial judge; upon it he rejected the respondent's story as to the purpose for which the note in suit was taken by him; and a careful study of the record discloses that that view of Galt J. was fully justified.

While some of the testimony of the defence witnesses, Lount, Lyon, Williams and Gordon, detailing conversations between themselves in the absence of the plaintiff, may have been improperly received, there is enough admissible evidence to establish that the appellant Gordon endorsed the $10,000 note sued on upon the distinct understanding

(*a*) that it would be delivered as collateral security to a bank for advances to be made by the bank to the Lount Engineering Company;

(*b*) that it was to be collateral security only for a loan of $10,000, to be made in five advances of $2,000 each, to the Lount Engineering Company, and to be used for the payment of agreed upon instalments to its creditors;

(*c*) that repayment of these advances was to be secured by an assignment to the bank of whatever ditching contracts the debtor company might secure during the year 1923 from the Manitoba Government.

The respondent denies knowledge that the obligation undertaken by the appellant was subject to these terms and insists that the note sued on was handed to him by Lount, secretary of the Engineering Company, as a gen-

eral and continuing collateral security for any indebtedness which that company might incur to him and that he took the note without notice of any restriction affecting Lount's right so to use it.

(*a*) That both the appellant Gordon and his solicitor McWilliams were insistent with Lount that the note should be used to enable the company to borrow from a bank and that studied and successful efforts were made by Lount to conceal from Dr. Gordon that advances to the Lount Engineering Company were to be obtained not from a bank, but from the respondent, is made very clear in the evidence.

Lount says that Hebblewhite knew that his interest in the matter was being concealed from Dr. Gordon—that he told Hebblewhite that "we could not get Mr. McWilliams to recommend that Dr. Gordon go on the note unless the money were to be procured from the bank." This is, of course, denied by the respondent. The note now sued upon bears stamped above the endorsements of Lount, Lyon and Gordon the words: "Pay to the order of the Winnipeg Financial Corporation" (the respondent's business name) and below these endorsements, but above a second set of the same signatures, the words stamped: "I hereby waive protest, notice of protest and presentation of the within note and guarantee payment of the same." The respondent swore that both these stampings were put on the back of the note when he drew it up, according, he says, to his usual custom. His evidence when first given was rather in the nature of an inference from that custom than of an act of remembrance; but, when recalled in rebuttal he swore he positively remembered this fact; whereupon the learned trial judge significantly observed that he had become more explicit. It is abundantly proved that the first, or upper, stamping was not on the note when endorsed by Dr. Gordon, whereas the second, or lower, stamping was then upon it; and, in view of the respondent's evidence as to his "policy" of putting these stampings on all his notes when preparing them for signature, these incidents are most significant and strongly corroborative of Lount's statement that the respondent was fully cognizant of—indeed they suggest that he actively connived in—the concealment from Dr. Gordon of the fact that Hebblewhite

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was to be given the $10,000 note as collateral for advances to be made by him to the company. There can be no doubt that Hebblewhite was fully aware, when he took the $10,000 note, that Dr. Gordon had endorsed it only for use as collateral at a bank and that he would not have endorsed it had he known that it was to be used for advances to be made by Hebblewhite. The identity, in the sense of the character, of the person to whom he was to contract an obligation as endorser was so material as an inducement to Dr. Gordon that mistake as to it vitiated his consent and prevented any obligation arising on his part in favour of Hebblewhite. *Smith* v. *Wheatcroft* (1); *Said* v. *Butt* (2); Pothier, Traité des Obligations, s. 19; *Gordon* v. *Street* (3); *Cundy* v. *Lindsay* (4). If such a mistake as to person so induced will preclude an effective consent in the case of an ordinary contract, *a fortiori* must it do so in the case of a contract *strictissimi juris,* as is that of guarantee. *Owen* v. *Homan* (5).

(*b*) The sole purpose of the giving of the $10,000 note as collateral security was, to the knowledge of the respondent, to enable the Lount Engineering Company to carry out an agreement made with its creditors, whose claims aggregated some $50,000, whereby they agreed in consideration of the receipt of certain instalments, aggregating $2,000 monthly for five months, not to enforce the balances of their claims for a year. To carry out this arrangement $10,000 was necessary; no smaller sum would suffice. All this was fully explained by Lount to the respondent, who, at first, asked for a collateral note of $15,000 or $20,000, but, when told that Dr. Gordon would not endorse for more than $10,000, agreed to accept a note for the latter sum, telling Lount, not that he would have to take a smaller advance, but " that he would have to pay accordingly." And " accordingly " bonuses of $2,500 on the first advance of $4,000 and of $1,000 apiece on each of the two later advances of $2,000 were charged. The burden of proving that the $10,000 note was to be a general continu-

(1) (1878) 9 Ch. D., 223, at p. 230.
(2) [1920] 3 K.B. 497.
(3) [1899] 2 Q.B. 641, at p. 647.
(4) (1878) 3 App. Cas. 459.
(5) (1851) 3 Mac. & G., 378, at pp. 396-9.

ing collateral security was on the plaintiff: *In re Boys* (1); *Tatam* v. *Haslar* (2).

Lount deposes:—

* * * I spoke to Mr. Hebblewhite about getting the money, and he demanded that in addition to the order for any works which we might procure from the Provincial Government, that I get a collateral note signed by the other directors, as a further security for this loan.

Q. Did Mr. Hebblewhite, prior to the date of Exhibit No. 1, ask you to obtain from your co-defendant directors a collateral note for some $15,000 or $20,000?—A. When I went to Mr. Hebblewhite for the money he said that he would like a note of that size. I told him that it would be utterly impossible to get it, and he suggested $10,000, and I then endeavoured to get it.

Q. What did you say to him? Did you tell him how much money you wanted?—A. Yes. We had a table prepared—in fact we had taken it up with the creditors, and got letters from them, stating that on receipt of a proportion of it—the indebtedness of the company to them—which would amount to about $10,000, that they would withhold any action until the fall of 1923. I told Mr. Hebblewhite I thought that it would be impossible to get such a note. However, he insisted that he could not make the loan without it.

Q. You say that you told him as to the amount of money which you required for the purpose of satisfying the creditors of the defendant company, and that Mr. Hebblewhite insisted that you should get a note for the $10,000 that you required, endorsed by the other two directors of the company, Mr. John N. Lyon and Dr. C. W. Gordon, and you told him that you thought that it would be impossible to get such a note?—A. Yes.

Q. Did you tell him why?—A. I pointed out that they were not receiving any good—benefit—from the proposition, and, further, that Mr. McWilliams was very much averse to Dr. Gordon going on * * * I pointed out to Mr. Hebblewhite that Mr. R. F. McWilliams, who was acting for Dr. Gordon, seemed very much averse to the doctor going on any further with any guarantees whatever. However, I couldn't get the loan without this and, finally, after preparing a statement showing how we were going to spend the money, Mr. McWilliams authorized Dr. Gordon to take such a step.

* * *

Q. You had some discussion with Mr. Hebblewhite as to how the loan he was making should be returned?—A. Yes. It was to be made in five monthly payments of $2,000 each for four months, with the understanding that it be renewed for a like amount.

Q. You say that you had some discussion with Mr. Hebblewhite as to how the loan he was making was to be returned—repaid—and it was to be made in five monthly payments of $2,000 each, for four months, with the understanding that it be renewed for a like amount?—A. Yes, for a like period. That would bring it into the operating period of the dredge, from which we expected to pay it back. We expected a large Government contract.

(1) (1870) L.R., 10 Eq., 467. (2) (1889) 23 Q.B.D., 345, at p. 348.

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His LORDSHIP: The $10,000 to be advanced?—A. Yes. Q. Not all at once?—A. Of $2,000 per month, and that would extend the time of repayment into the operating period of the summer months of the machine, and we expected to get a large ditching contract from the Government, out of which we were going to pay this money back, and the contractors are paid in (by) monthly instalments by the Government.

Mr. HONEYMAN: Did you explain to Mr. Hebblewhite out of what fund the advance could be repaid?—A. Yes. It was to be repaid out of the ditching work.

Q. I show you Exhibit No. 36. You signed that document, I understand?—A. Yes.

Q. That is a letter addressed to the Winnipeg Financial Corporation, dated the first of December, 1922, which reads as follows:

"We hereby agree, upon being awarded a contract, or contracts, from the Manitoba Government, to give you an order on them, authorizing the Government to pay direct to you, all estimates for work performed. We agree to make this order read that it shall remain in force until cancelled by you, or the account is liquidated.

"We further certify that we have received a letter from each creditor, stating that upon receipt of certain small payments, which have been arranged, the balance will be carried until dates ranging from October 1, to November 30, 1923."

His LORDSHIP: It was not carried out that way, because you got $4,000 on the note?—A. That was arranged because we had arranged to pay the creditors that payment in November on negotiations direct as to these small payments, and we were able (*sic*) to do it, and, consequently, we were made two payments, and two more (payments) were carried out, and the fifth was not made.

His LORDSHIP: There were some other monthly payments?—A. Yes.

Mr. HONEYMAN: Q. How did you come to sign Exhibit No. 36, which I have just read to you?—A. Well, we had agreed to do that; the negotiations were practically through, and I gave Mr. Hebblewhite that letter.

* * *

The WITNESS: I told Mr. McWilliams that I would be getting the money through a bank.

Mr. HONEYMAN: Q. Mr. Lyon was there?—A. Yes; I didn't say anything about the Winnipeg Financial Corporation.

His LORDSHIP: He didn't know anything about the Winnipeg Financial Corporation?—A. No; he knew nothing.

Mr. HONEYMAN: Q. Did you tell Mr. McWilliams how the repayment of the moneys was to be secured to the lender?—A. On the Government contract for ditching, which we expected to get.

Q. Did you tell him what amount had been arranged for—what amount?—A. Yes, $10,000, $2,000 a month.

Q. And that was to be repayable how?—A. That was to be repaid out of the ditching work.

Q. On what terms, and at what times?—A. Well, in eight months from the time that the payments were made, so that it would go into the payments that we would be receiving.

His LORDSHIP: Q. These notes were to be at what length of time?—A. Four months, and renewable for four months.

Mr. HONEYMAN: You say that you didn't say anything of Mr. Hebblewhite?—A. No, certainly I did not.

Q. Why?—A. Well, I didn't think the loan would go through and the company needed it very badly, I concealed that fact.

Q. Mr. Lyon was present when you met Mr. McWilliams, and when you told him that?—A. Yes.

His LORDSHIP: Did he know anything about Mr. Hebblewhite?—A. I think not, my lord.

* * *

Mr. HONEYMAN: Q. Under what terms did you give that $10,000 note to Mr. Hebblewhite?—A. As a collateral security to the advances that he was to make. He was to advance $10,000 at the rate of $2,000 a month. He had at that time received an order, or assignment, of any work that we might get, or any contract we might get, and I gave a note for $6,500 I think, and received the first two months (advances) in advance.

His LORDSHIP: He was to advance the whole $10,000?—A. Yes.

Mr. HONEYMAN: In January what happened?—A. Mr. Hebblewhite made the next advance of $2,000.

Q. And took a note for $3,000?—A. Yes.

Q. That note is already in?—A. Yes.

Q. In February what happened?—A. He made a further advance of $2,000.

Q. Through the note which is already filed, for $3,000?—A. Yes.

Q. In March what happened?—A. He stated——

Q. You saw Mr. Hebblewhite in March?—A. Yes.

Q. What for?—A. To get the $2,000 to hold the final promise to the creditors.

Q. About what time in March was it?—A. I can't say that definitely. I presume it was around the first, as usual, though.

Q. What did he say then?—A. He said that he didn't have sufficient security to make the advance, and he couldn't do so.

Q. What did you say to that?—A. I pointed out that it was disastrous to us; that we had entered into an arrangement, and certainly we would be in a very bad shape if we didn't make the final payment to our creditors.

Q. What did he say?—A. Well, he had to have further security, or another note from Dr. Gordon, and I knew that that was utterly impossible to get it.

* * *

Q. When you were negotiating with Mr. Hebblewhite in the Fall of 1922 for the loan of $10,000, was there a discussion respecting other advances which he might have to make?—A. No. We believed that that contract would put us on our feet.

Q. Was there a discussion in the Fall of 1922, when the note in question, Exhibit No. 1, was being arranged, concerning your building contract, a building contract of the company, in the spring of 1923?—A. Do you mean the houses?

Q. Yes.—A. No.

Q. You heard what Mr. Hebblewhite said in respect of the note, Exhibit No. 1, being given to him as a collateral continuing security for all advances to be made by the company to him?—A. Yes.

Q. What do you say as to that?—A. There was no question of a continuing security. We were getting a loan of $10,000, which, as far as I was concerned, was to be the final loan.

Q. What would you say as to Mr. Hebblewhite's statement that he did not agree to loan any specified sum at all to you when you left the

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collateral note with you (him), and that he would only do what financing he could at the bank on it?—A. I don't recollect that statement. We went ahead on the basis of getting $10,000 to hold off our creditors.

* * *

Q. Did you ever get the last $2,000 upon the $10,000 advance from Mr. Hebblewhite, upon the security of the collateral note?—A. Not on the original security, no.

Q. Have you had any discussion with Mr. Hebblewhite subsequent to the handing over of Exhibit No. 1, the collateral note for $10,000, as to its being used for security for other advances?—A. No.

Q. When did you first learn that Mr. Hebblewhite was claiming that this note in question (Ex. No. 1) was given as security for all advances made the company?—A. After this action was started.

Q. Up to that time what had you thought?—A. I hadn't thought anything about it. It was put up originally for the one guarantee.

Q. For the one guarantee of what?—A. $10,000.

Q. Of which how much was advanced?—A. $8,000.

* * *

Q. How did you come to sign Exhibit No. 13?—A. According to the agreement that we made with Mr. Hebblewhite when he advanced us the $10,000, or agreed to advance it.

Q. That is, in accordance with the letter of December 1, you mean, is it?—A. Yes (Ex. No. 36). Yes. We had given a letter at the time we got, or about the time we got, the advance, that assignment of any contracts that we got.

Q. Exhibit No. 36 is the letter that you refer to?—A. Yes.

* * *

Q. In the fall of 1922, when you were discussing the collateral note with Mr. Hebblewhite, what outstanding accounts were there in connection with building accounts?—A. There were no outstanding accounts in connection with houses.

Q. What did you tell Mr. Hebblewhite about building in the summer of 1923?—A. I have no recollection of discussing housing operations at all. We were counting on the ditching work

Q. How did you know that there was going to be a ditch built—did you tell Mr. Hebblewhite?—A. Oh, yes, we knew it. It was in the papers as well that this work was coming up.

Q. And you were anticipating getting it?—A. Yes; we certainly did.

Q. If you had got it, what building would you have done in 1923?—A. The ditching contract was very large and it would have taken up every moment I had. It was "some size."

While the respondent, on every opportunity and although not at all responsively to the question put to him, interjects the statement that the $10,000 note was given and taken as continuing collateral to the general indebtedness of the Lount Engineering Company to himself, not a little corroboration of Mr. Lount's evidence to the contrary, and as to the actual bargain made, is to be found in the following passages from Hebblewhite's testimony:—

Mr. HONEYMAN: Q. The only sum which Lount wanted you to advance, when he came to you in the fall of 1922, was the $10,000 which

he required to pay off his past due debts with certain creditors. Isn't that so? And isn't that correct?—A. That was all for the moment, yes. Q. You didn't discuss advancing any further sums either, did you, at that time?—A. I can't just remember. I think there was some little discussion at that time, and I think the housing scheme was discussed at that time. I am not sure about that, of course.

Q. You advanced $8,000?—A. Yes.

Q. In December, January and February of 1922, 1923, that is, is it not?—A. Yes.

Q. And you say that Mr. Lount came to you in March and asked you for the final $2,000, did he not?—A. Yes,—he couldn't. There was no such arrangement made, and I couldn't undertake to guarantee to give him the money, when I had to look to the bank for the money.

Q. Didn't he ask you for $2,000 in March?—A. Yes; he asked me for $2,000 in March, and I refused to give it to him.

* * *

His LORDSHIP: I would like to know what the bargain was first of all. A man doesn't hand over a note for $10,000 you know, without there being some arrangement about it?

Mr. THOMSON: Q. What was the arrangement—what was your arrangement with regard to the matter?—A. The arrangement was, when Mr. Lount told me that he could not induce one of the endorsers, Dr. Gordon, to endorse a note for $15,000 or $20,000, but thought that he could arrange for a note for $10,000 and when he made that statement to me I informed him that he would have to pay accordingly. And he subsequently brought in a note for $10,000, with interest at eight per cent (8%) signed (Exhibit No. 1) by the defendant company, by himself personally, and endorsed by Mr. John N. Lyon * * *

Q. Why was it—the note in question—made for $10,000?—A. Because Lount couldn't obtain a note for any larger amount endorsed by the individual endorsers.

* * *

His LORDSHIP: They (the advances mentioned) were for the purposes of meeting the outstanding debts of the company at that time?—A. Yes, to pay the pressing creditors of the company, and the money was used for that purpose.

Q. The $4,000 was part of that?—A. Yes, that was part of it. That was the first advance I made, and Mr. Lount pointed out to me that he would require about $2,000 a month. Why he wanted it in that way I, of course, did not know. It was satisfactory to him anyway.

* * *

Q. You say that in December, 1922, or November, 1922, when you were first approached by the defendant company for the loan out of which this transaction grew, there was no money owing to you by the defendant company, that all previous transactions had been cleaned up?—A. Yes.

Q. And Lount approached you for a loan for a certain purpose, did he not?—A. Yes.

Q. He wanted money for the purpose of keeping the creditors quiet until next year, did he not?—A. Yes.

Q. And he required for that purpose, he told you, $10,000?—A. Yes.

Q. And he arranged with his creditors that certain sums be paid to them monthly?—A. Yes.

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Q. And the total monthly payments to his creditors, in order to keep them quiet, totalled $2,000?—A. That was his statement to me, yes.

Q. He told you how he hoped to repay the $10,000 loan, which he required?—A. From the profits of their business, which he hoped to be able to do.

Q. During the year, or summer of 1923, the ensuing summer?—A. Yes.

* * *

Q. When did you arrange that the $2,000 monthly advances which you were asking for, and which you did eventually get them to make from time to time, were to be repaid?—A. It was to be repaid from any contracts which they undertook; there was no definite time set for that —there couldn't be any, but Mr. Lount made the statement to the manager of the bank that he hoped to clean up all the notes under discount at the bank by the fall of 1923.

Q. It was specifically mentioned at that time that there would be at least one renewal?—A. No. Oh no. There was no such arrangement made in regard to one renewal at all, in regard to the payment of the notes. Mr. Lount understood that in regard to certain charges which were being made, that there would be no further charges in the next renewal.

Q. Mr. Lount told you that he understood, that he believed, that they had fairly definite arrangements made whereby they would get large ditching contracts in the summer of 1923, did he not?—A. He didn't put it as broadly as that. He hoped to get a contract in February, 1923, from the Provincial Government, which he did not get.

Q. And it was evidently out of the profits that he would make out of the ditching that he hoped to pay you, he told you?—A. Not only that, but any other contracts, any contracts from any other source from which they made their money.

Q. There was no sum mentioned in the discussion about the ditching contracts, when you were discussing the amount of the loan of $10,000.—A. Nothing beyond the fact that he hoped to get this Government contract in February, 1923, which he did not get.

Q. And you were going to be paid out of that?—A. If he got the contract—why not?

Q. You took an assignment of his company's contracts with the Provincial Government at that time, did you not?—A. I did.

Q. Did you not take an agreement to assign?—A. I did not. He gave me a letter, I think, stating that he would give me an assignment of any contracts that he got.

Q. Before you got the note, Exhibit No. 1, which has been put in evidence here, you took this letter from the defendant company, did you not?—A. Before making any advances to the defendant company I wished some assurance from them that I would get the orders, or the assignment against the work, and I wanted something definite on file.

* * *

Q. And you got it, the letter, before you got Exhibit No. 1 the note in question here, did you not?—A. Yes—I am not sure of that, of course. That was immaterial, anyway. All that I wanted was a letter and I wanted that assurance from Lount first, and I didn't care when I got it, but I was going to get it before I made any advances.

* * *

Mr. HONEYMAN: You have already told us, I think, that you got Exhibit No. 1 on the 4th of December, 1922.—A. Yes. I received Exhibit No. 1 on the 4th day of December, 1922.

His LORDSHIP: They must have put through an arrangement earlier, because it is dated the 8th of November, and your negotiations must have been going on all that time?

The WITNESS: Yes. They began in November, and it was then that he was afraid that he could not obtain Dr. Gordon's endorsement to the note, and that caused the delay, I understand.

Q. You drew the note on or about the 8th of November, I think, 1922—its date, I suppose, did you?—A. Yes.

Q. You gave it to Lount for what purpose?—A. For the purpose of obtaining the endorsement of Mr. John N. Lyon and Dr. Gordon.

Q. You asked him to get the endorsement of Dr. Gordon and Mr. Lyon to the note previously to that?—A. Yes. Mr. Lount first suggested obtaining these endorsers, and I told him if he couldn't do any better that would be satisfactory.

Q. Of course you knew that this note, Exhibit No. 1, would be endorsed as an accommodation note, endorsed as such by the two men mentioned—Dr. C. W. Gordon and John N. Lyon——?—A. It would be endorsed as a collateral note, and a continuing security, absolutely.

Q. You knew that it was an accommodation note that you were asking Dr. Gordon and Mr. Lyon for?—A. No. They were directors of the defendant company, and they were interested in the defendant company.

Q. And that was the only way that they were interested? They didn't owe any $10,000 to the Lount Engineering Co., did they?—A. Oh no, not that I know of.

Q. They were loaning their names. Isn't that what you thought?—A. They were endorsing the note.

* * *

Q. You were not taking much risk when you got Dr. Gordon's endorsement? We may figure that you were not?—A. I hoped not. I was taking the note as good security, endorsed by Dr. Gordon.

* * *

Q. And in January you advanced $2,000 to the defendant company pursuant to the arrangement you made with Mr. Lount for these monthly advances, did you not?—A. Yes.

* * *

Q. And that was a four months' note, was it not?—A. Yes.

* * *

Q. I say you knew Mr. Lount wanted $10,000 with which to hold off his creditors, and you promised them, the defendant company, that? You knew that he wanted that amount of money in order to keep his creditors quiet?—A. He told me that, yes. This was at the beginning of the negotiations.

Q. And, consequently, $1,000, or $2,000, or $3,000, or $4,000, would be of no use whatever?—A. Oh, I don't know about that. He didn't tell me that, but apparently it would not suit his purposes.

* * *

Q. It might have been possible that you would not be able to advance him any more than $4,000?—A. That is it exactly; I didn't know that I could give him more than the $4,000.

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Q. You want us to think that Mr. Lount would embark on that enterprise, try to get $10,000 in one month, and only get $4,000 the next, and run the chances of being put out of business, and not be able to pay his creditors?—A. That was exactly the risk that he would take.

Q. Did you say that you promised to get on that $10,000 note ($10,000 on that note (?))? Did you tell him that?—A. No. I told him that I would do my best to obtain the money, to obtain what money I could against this advance of $10,000 note given as collateral security.

Q. How much did you get?—A. Well, he got, altogether, up to and including April, $11,500.

Q. In March what?—A. $8,000.

Q. When he applied to you, what?—A. It was $8,000.

Q. You told him that he could not get any more?—A. He asked me, I think, for an additional $2,000, and I said no, Lount, and that was all that there was to it.

* * *

Q. You told him that you would do what you could on the collateral note?—A. I told him that I would do the best I could with the collateral note with the Royal Bank of Canada, and I didn't know what that would be.

Q. You didn't do what you could, not what you could, because you didn't approach the bank for any more money when he approached you for that extra $2,000?—A. I was quite determined I would not, and there was no contract or agreement to that effect and if there were I should have lived up to it.

* * *

Q. In your examination for discovery were you asked this question: "All you had in mind, in other words, at the time, was advancing of moneys to pay off his creditors, and accounts that were overdue?—A. Yes as against his collateral note."

That is correct?—A. Yes, that is correct. I was not interested in anything else at that time. There was only that to finance, as I have explained to you.

Q. Now question No. 371:

"And is the purpose for which you took the collateral note as you say?—A. Oh, I required security before I would make these advances, and he gave me that collateral note as security."

Q. That is correct?—A. Yes.

In his examination-in-chief the plaintiff divided his total advances to the Lount Engineering Company, aggregating $32,547, into three groups:—

Mr. THOMSON: Q. The first group of loans amounted to $8,000 in connection with the note, Exhibit No. 1, alone. Is that correct?—A. Yes.

Q. And the next group of loans amounted to $15,545.50?—A. Yes.

Q. All in connection with notes on the housing scheme?—A. Yes, orders taken in connection with the housing scheme.

Q. And the third group of loans was in connection with Exhibit No. 1, and the assignment, Exhibit No. 13. Is that correct?—A. Yes, clear enough.

Q. First $8,000, and then $15,545.50, and then $8,000 added?—A. Yes.

The last figure, $8,000, should be $8,912.71. He had said a little earlier:—

Q. What was the security for the $15,545?—A. The orders against the mortgage loans which were being placed on houses which Lount, or the defendant company, was building.

On careful consideration of all the relevant admissible testimony the only reasonable conclusion is that the plaintiff took the $10,000 note (which, when endorsed by Dr. Gordon, he regarded as "good security") as collateral security only for five advances of $2,000 each to be made monthly and which he definitely agreed to make and that he well knew and understood that Dr. Gordon's endorsement had been obtained on that basis and none other—save that Dr. Gordon also understood that the arrangement would be made with a bank and not with such a lender as Hebblewhite. The evidence fully warranted the findings to that effect made by the trial judge, and, with respect, they should not have been disturbed.

The evidence also fully supports the finding by the trial judge that only $8,000 was advanced against the note in question and that the respondent refused early in March, when it was due, to make the final advance of $2,000. The finding of the learned judge who delivered the judgment of the Court of Appeal that this balance was in fact advanced during March and April rests upon a misunderstanding of the first question and answer in the following passage from Lount's evidence:—

HIS LORDSHIP: Did you get the last $2,000 in some other way?—A. Yes. We had by that time found that we were not going to get the contract that we had been counting on, and I had started my houses, and I went to Mr. Hebblewhite and got money from him, both to carry on the houses and to pay off these creditors, and I used the money for both purposes.

Q. In that way you got your final $2,000?—A. Yes for a period of time. The first money I got in March was not all used to pay the creditors with.

Mr. HONEYMAN: The money which you got in March was advanced upon what?—A. On an order on the mortgage loan upon the houses I was building.

Q. That is the houses you were building in your own name?—A. Oh, yes.

Q. And that is the $1,000 in this exhibit which the plaintiff says that he advanced, the $1,000 on the 7th of March, 1923?—A. Yes.

Q. And that would be the $1,000 that you got by giving the order upon the houses which you were building personally, was it?—A. Yes.

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What the witness clearly meant was that he had obtained by other means the last $2,000 needed to pay the March instalment to the creditors and not that the respondent had advanced that $2,000 on the security of the collateral $10,000 note. Lount's evidence, on the contrary, is that Hebblewhite positively and distinctly refused to make that final advance and that in fact he never advanced more than $8,000 against the $10,000 note. The money actually lent in March and April is included in the $15,545 which was all secured by orders against the mortgages under the housing scheme.

By refusing to advance the final $2,000 promised against the $10,000 collateral note the respondent declined to fulfil an essential condition of the appellant's undertaking of his obligation as guarantor and thereby discharged him from his liability. *Burton* v. *Gray* (1); *Whitcher* v. *Hall* (2).

(c) Without going at all fully into this phase of the case, we incline to think that the learned trial judge was also right in finding that any claim of the plaintiff, assuming him entitled to hold the defendant Gordon for repayment of the $8,000 advanced against the note sued on, was fully satisfied. *Kinnaird* v. *Webster* (3).

A Manitoba Government contract—the only one obtained by the Lount Engineering Company—was duly assigned to the plaintiff in September, 1923, as promised in the letter of December 1st, 1922, and from it he received $5,762.08. He alleges that he made advances amounting to $8,912.71 to the company to enable it to carry out this contract and asserts the right to repayment of these advances before crediting the $5,762.08 of receipts against the earlier advances of $8,000 guaranteed by the note sued on. Against the Lount Engineering Company he may have such a right, but not, we think, against the appellant. As between him and the respondent the stipulation agreed to that the proceeds of any Manitoba Government contract assigned by the company to the respondent should be applied to the repayment of the advances made as against the note endorsed by the appellant was never in any way departed from or qualified. The appellant is en-

(1) (1873) 8 Ch. App. 932. (2) (1826) 5 B. & C., 269, at p. 275.
(3) (1878) 10 Ch. D., 139.

titled to have it carried out. *Newton* v. *Chorlton* (1). Failure to apply these moneys as stipulated for by the surety would amount to a variation in the contract which would release him. *Canadian Bank of Commerce* v. *Swanson* (2); *Pearl* v. *Deacon* (3).

Having voluntarily appropriated three other payments aggregating $4,648.40—$2,738.40, $1,000, $900—of the Lount Engineering Company's moneys toward payment of the notes taken for advances made against the $10,000 note now in suit, the plaintiff should not be heard to say that such appropriations were a mere matter of book-keeping and were not meant to extinguish *pro tanto* the liability for which alone the $10,000 note was collateral.

As to the item of $2,738.40 the plaintiff asserts that that was in fact paid out of the proceeds of another loan or advance made by him to the company and that he got no benefit from it and on this ground the Court of Appeal held him not bound to give credit for that sum. But the evidence shows that such other loan was in itself fully repaid to the plaintiff by the receipt of moneys from the Lount Engineering Company. This fact, or its significance, would seem to have escaped the attention of the Court of Appeal. The plaintiff is in our opinion bound by the appropriation of the three amounts above specified towards satisfaction of the $8,000 of the Lount Engineering Company's indebtedness secured by the $10,000 collateral note. The fact, though not strictly relevant, may also be noted that the advances made in March and April were fully repaid by the proceeds of housing-scheme orders.

For these reasons we are, with great respect, of the opinion that this appeal should be allowed with costs here and in the Court of Appeal and that the judgment of the learned trial judge, in so far as it dismisses the action with costs as against the defendant Gordon (who alone appealed to this court), should be restored.

*Appeal allowed with costs.*

Solicitors for the appellant: *McWilliams, Gunn & Honeyman.*

Solicitors for the respondent: *Thomson, Thomson & Thomson.*

(1) (1853) 10 Hare, 646, at p. 653. (2) (1923) 33 Man. R. 127.
(3) (1857) 1 DeG. & J., 461.

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*Oct. 26.
*Dec. 1.

DAME MARY W. MARSHALL (PETITIONER) ..... } APPELLANT;

AND

ALDERIC A. FOURNELLE (DEFENDANT) ..... } RESPONDENT.

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

*Habeas corpus—Minor child in care of third person—Rights of parents—Child 14 years of age—Right to choose where to live—Lack of restraint—Interest of the child—Judicial discretion.*

In the other circumstances of the case as found by the trial judge, the court declined to interfere with his order refusing a writ of *habeas corpus* to a mother asking for the possession of her daughter, when the latter, then being past 14 years and 8 months of age and not without adequate intelligence to make a reasonable choice, expressed her desire to remain with the respondent with whom she had been living happily for seven years.

Judgment of the Court of King's Bench (Q.R. 40 K.B. 391) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of Bruneau J. at the trial and refusing a writ of *habeas corpus* issued at the request of the appellant, the mother, asking for the possession of her minor daughter from the respondent.

The findings of facts by the trial judge are fully stated in the judgment now reported.

*J. F. R. Wilkes* for the appellant.

*Auguste Lemieux K.C.* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—It was upon the following *considérants* that Bruneau J., the learned judge of the Superior Court who heard the application, based his order quashing the writ of *habeas corpus,* which had been obtained by the appellant, the mother of the girl, Violet Marshall:—

Considérant que ladite Violet Catherine Marshall est âgée de 14 ans et qu'elle préfère demeurer chez l'intimé que chez sa mère, la requérante, pour le motif que celle-ci l'a battue et qu'elle craint le même traitement en retournant avec elle;

Considérant que ladite Violet Catherine Marshall a été placée chez l'intimé du consentement de la requérante il y a plusieurs années; que le choix de ladite Violet Catherine Marshall est volontaire, libre, et n'a

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

(1) (1926) Q.R. 40 K.B. 391.

été aucunement influencé par l'intimé ou son épouse; qu'au contraire, ces derniers ont rappelé à ladite Violet Catherine Marshall les devoirs qu'elle avait envers sa mère; qu'elle persiste néanmoins à vouloir demeurer chez l'intimé où elle est traitée parfaitement bien sous tous rapports;

Considérant que ladite Violet Catherine Marshall ne parait pas agir par caprice mais par un sentiment que l'on peut estimer être légitime;

Considérant qu'il n'y a pas lieu, dans l'intérêt même de ladite Violet Catherine Marshall, d'intervenir dans le choix qu'elle a fait de demeurer chez l'intimé;

Proceeding upon the assumption that the evidence discloses such restraint of the girl by the respondent as would, if the case were proved in other particulars, justify relief by *habeas corpus,* it must be observed that there is contradiction in regard to some of the material facts; but it is certain that there is in the record evidence which, if believed, justifies the findings, and these have not been disturbed upon appeal; moreover the learned judge had the parties before him and heard them and their witnesses, including the girl, *viva voce,* and therefore had a better opportunity than we to appreciate the weight which ought to be given to their testimony, and also to judge of the intelligence of the girl and of her capacity to choose. She was then past 14 years and 8 months of age, and a perusal of her testimony indicates that she was not without adequate intelligence to make a reasonable choice. See *Stevenson* v. *Florant* (1), affirmed on appeal by the Judicial Committee.

That the learned judge had a judicial discretion, to be exercised having due regard to the facts of the case, is admitted. The appellant's case is that he used this discretion improvidently, but that has not been established; and, considering the girl's age, now within a few months of 16 years; her desire to remain with the respondent, with whom she has been living happily for seven years, and the other circumstances of the case, we are not satisfied that we would consult the true welfare of the girl by compelling her return to her mother. *The Queen* v. *Gyndall* (2).

The appeal should therefore be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Holt & Wilkes.*
Solicitors for the respondent: *Robillard, Julien & Allard.*

(1) [1925] S.C.R. 532, at p. 544. (2) [1893] 2 Q.B.D. 253.

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*Oct. 11, 12.
*Dec. 1.

STANDARD TRUSTS COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

MUNICIPALITY OF HIRAM AND W. A. LAMROCK (DEFENDANTS)... } RESPONDENTS.

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

*Assessment and taxes—Sale for unpaid taxes—Defects in—Person interested—Absence of notice to—Effect of curative section 44a, Tax Recovery Act, 1919.*

A sale and transfer of land for unpaid taxes under the Alberta *Tax Recovery Act* of 1919, even though made prior to January 1st, 1924, can be successfully attacked on the ground that the notice required by s. 42, (amended by 1921, c. 25, s. 13) had not been sent to a "person interested" in the land (in this case a mortgagee), as the curative provision in that Act, s. 44*a* as enacted by 1923, c. 5, s. 26*c*, does not then apply.—The failure to give this notice is a defect so fundamental that it rendered the transfer ineffectual. The statute makes the giving of such notice a condition precedent to the exercise of the power to execute and deliver a transfer, and section 44*a* contains no provision to cover the absence of the notice.

A "person interested" in land sold for taxes has an absolute right to the formal notice prescribed by the Act, even if that person had knowledge, before the expiration of the delay for sending the notice, that the land had been so sold. *Toronto* v. *Russell*, [1908] A.C. 493 dist.

Judgment of the Appellate Division (22 Alta. L.R. 148) reversed.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Boyle J. at the trial and dismissing the appellant's action.

The judgment of the trial judge declared a sale of a quarter section of land for taxes to be illegal and void and directed the cancellation of the certificate of title issued to the respondent Lamrock, who was the purchaser at the tax sale. The sale was made for arrears of taxes for the year 1920 and took place on 29th October, 1921. The transfer is dated 30th November, 1923, and registered 21st January, 1924, and the certificate of title was issued some time afterwards. The consideration of the transfer was $75.35 (2). The respondents rely for the support of the sale and

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

(1) (1926) 22 Alta. L.R. 148; [1926] 1 W.W.R. 561.

(2) *Reporter's Note.*—Special leave to appeal to this court was granted, 14th June, 1926.

transfer upon *The Tax Recovery Act* of 1919, c. 20, and *The Tax Sale Relief Act*, 1922, c. 53. The appellant's interest in the land sold is as mortgagee.

*G. H. Steer* for the appellant.—The giving of the notice required by s. 42 of the Act of 1919 as amended by c. 25, s. 13, 1921, was a condition precedent to the giving of any transfer and the transfer given to the respondent Lamrock was not given pursuant to the Act and therefore did not cure the defects proved in the sale proceedings.

The transfer given to the respondent Lamrock did not come within the terms of the curative section of *The Tax Recovery Act* enacted as s. 26 (*c*) of c. 5 of the statutes of Alberta, 1923.

The transfer not being the transfer referred to in the Act did not have the curative effect set out in the section.

The cases relied on, *Toronto* v. *Russell* (1) and *McCutcheon* v. *Minitonas* (2), should be distinguished from this case.

*F. H. Chrysler K.C.* for the respondents.—The appellant's claim is barred by the provisions of the section 14*a* of the *Tax Sales Relief Act*, 1922, as enacted by chapter 5, 1923, s. 25, and also by section 44*a* of *The Tax Recovery Act* (1919) as enacted by chapter 5, s. 26, 1923.

The judgment of the court was delivered by

RINFRET J.—This appeal raises the question of the validity of a sale for arrears of taxes for the year 1920, held under the provisions of *The Tax Recovery Act* (c. 20 of the statutes of Alberta, 1919), by the respondent municipality of Hiram. The other respondent, William A. Lamrock, was the purchaser at the tax sale.

The sale took place on the 29th October, 1921. The transfer of the land sold was delivered to Lamrock on the 30th November, 1923, and was registered on the 21st January, 1924. A certificate of title was afterwards issued to Lamrock by the Registrar of the Land Titles District.

The appellant held in the land an interest as mortgagee under a memorandum dated March 17, 1919, and duly registered March 27, 1919. It commenced on the 4th

(1) [1908] A.C. 493. (2) [1912] 3 W.W.R. 275.

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February, 1925, this action alleging failure to comply with *The Tax Recovery Act*, claiming a declaration that the sale was illegal and void and asking for an order restoring the title to the name of the former registered owner with an endorsement thereon of the appellant's mortgage. This relief was granted by Boyle J., but his decision was reversed by the Appellate Division (Beck J. dissenting).

Under *The Tax Recovery Act* (as amended by statute of Alberta, c. 25 of 1921), the treasurer, assessor or collector of the municipality, to whichever of whom the taxes are payable, submits to the reeve or mayor, on or before the fourteenth of August, in each year, a list in duplicate of all lands liable to be sold for arrears of taxes, with the amount set opposite each parcel of land.

The reeve or mayor forthwith authenticates each of such lists by his signature and by the seal of the municipality, if any. One of these lists is then deposited with the clerk and the other is given to the treasurer with a warrant thereto annexed under the hand of the mayor or reeve and the seal of the municipality, if any, commanding him to levy upon the lands mentioned in the lists for the arrears due. And it is only after having received the list and warrant so authenticated by the signature of the reeve or mayor and the seal of the municipality that the treasurer may proceed to advertise and sell the lands.

In this case, the list was not signed by the reeve, and, although it must be assumed from the record that the municipality had a seal, the latter appeared neither on the list, nor on the warrant.

The Act then provides that the list shall be published for a certain period of time in local newspapers and in *The Alberta Gazette*, together with a notice that the lands will be offered for sale for arrears of taxes at the day, time and place therein stated; and it is claimed that the advertisements published failed in important particulars to comply with certain sections of the Act or to follow the forms by it required.

Finally, by ss. 35 and following, it is enacted that the owner of any land which has been sold for non-payment of arrears of taxes (or his heirs, executors and assigns) may at any time, within one year from the date of the sale, redeem such land by paying the amount of the arrears,

with costs and certain other sums for penalty; and the Act (as amended by s. 13 of c. 25 of 1921) says—and this is important, because it is the only notice to which a mortgagee is entitled—that if the land has not been redeemed at the expiration of nine months from the date of the sale,

the treasurer shall immediately send by registered mail to each person shown by the records of the land titles office to have any interest in such land a notice in form A in the schedule of this Act, or to the like effect, and any such person shall be entitled to redeem the land as agent of the owner of such land, as hereinbefore provided.

By the notice thus required to be sent, the recipient is informed of the fact of the sale on account of non-payment of taxes and he is advised that the year allowed for redemption will expire on a certain date. The notice contains a complete description of the land and adds:—

If you wish to contest the legality of the sale of such lands, you should immediately make application to the judge of the District Court of the judicial district within which the land is situated, for an order staying the issue of a certificate of title to the purchaser of such lands.

It is not proven that this notice was ever sent to the appellant and it is admitted that the appellant never received it.

Under *The Tax Recovery Act,* the notice in this case should have been mailed by the treasurer on or about the 30th July, 1922.

However, on 28th March, 1922, and, therefore, long before the expiration of the period of redemption and more than four months before this notice should have been sent, the legislature passed an Act to provide for the "Relief of Owners of Lands sold at Tax Sales." Under that Act, the owner of any land, which in the year 1920 was sold for non-payment of arrears of taxes, or any person in his name, could redeem it at any time prior to the first day of November, 1922. The procedure to be followed in the exercise of the right of redemption was there given.

By the 15th section of that Act, in the case of any parcel of land which was not subdivided land and was sold at a tax sale in the year 1921, the Lieutenant-Governor in Council was given authority to name a date in the year 1923 (with a proviso not material here)

on which the right of redemption of such parcel shall expire, notwithstanding anything in *The Tax Recovery Act* contained.

It is common ground that this section applied to the tax sale here in question.

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Then follows section 16 whereby the Lieutenant-Governor in Council, when naming such a date, may, among certain other things, give such directions as may seem proper to him, with regard to notices and to the procedure to be followed.

Under the authority of those sections, an Order in Council was passed on the 18th September, 1922, and, for lands sold in the year 1921, it extended the redemption period until the twenty-first day of October, 1923. The Order in Council was to take effect on and from the 6th September, 1922. This was later than the date (30th July of the same year) when the treasurer ought to have mailed his notice to the appellant. His failure to send it on or about that date cannot therefore be excused on any ground derived from the provisions of *The Tax Sale Relief Act* which, in respect of tax sales having taken place in the year 1921, by force of the Order in Council, came into operation only on the 6th September, 1922.

There was in the Order in Council a further direction

> that the procedure to be followed in the exercise of the right of redemption hereby given shall follow, as nearly as circumstances may permit, the procedure set forth in the said *The Tax Sale Relief Act*, with the change of the year 1921 for the year 1920, and of the year 1923 for the year 1922.

Among the sections of *The Tax Sale Relief Act* applicable to the redemption of lands sold for non-payment of taxes in 1920 was the following:—

> 9. In case notice as provided for in sec. 42 of *The Tax Recovery Act* has not been sent out as provided for therein, the treasurer shall before the first day of July, 1922, send out a notice in form A set out in the schedule of this Act, with respect to every parcel of land which is not subdivided land, which was sold for taxes in the year 1920, and has not been redeemed at the date of sending out such notice.
>
> 2. The said notice shall be sent by registered mail to each person shown by the records of the land titles office to have had any interest in such land at the time when notice in form A should have been sent out under the provisions of section 42 of *The Tax Recovery Act*.

The form of the notice, as set out in the schedule, is similar to that already outlined and provided for under section 42 of *The Tax Recovery Act*. The Order in Council of the 30th September, 1922, does not in terms give directions with regard to notices; but it seems a plausible contention that s. 9 is thereby made applicable to the exercise of the right of redemption of lands sold for taxes in the year 1921. The treasurer, however,

made no attempt under s. 9 to remedy the failure to give the notice which, under s. 42 of *The Tax Recovery Act*, should have been mailed on or about the 30th July, 1922.

This is not without importance, for the respondent argued with some force that the appellant became aware of the sale for taxes several months before the expiration of the time for redemption. In fact, the appellant knew as early as May 5th, 1923 that the lands had been sold at the 1921 tax sale and, on the 22nd of the same month, it was informed by the treasurer of the amount necessary to redeem. This, however, was in May, 1923. A month or so still had to run before the expiration of the time for sending the notice, under s. 9. The purpose of this notice was not to warn the appellant of facts which he knew already (as would appear from what transpired on the dates of May 5th and May 22nd already alluded to). The object of this notice was mainly to advise, on or before the 1st July, 1923, any person entitled to redeem that the time allowed for redemption would expire on the 31st October, 1923, and also to inform him that, if he wished to contest the legality of the sale, he should apply to a judge of the District Court for an order staying the issue of a certificate of title to the purchaser of the lands. The knowledge acquired by the appellant, through the correspondence exchanged on the 5th and 22nd May, 1923, did not include these important particulars. The appellant had an absolute right to the formal notice prescribed by the Act. Under no legitimate inference can it be held to have consented to dispense with such notice or to have waived it. The facts are widely different from those in *Toronto* v. *Russell* (1). In that case, moreover, their Lordships of the Judicial Committee were dealing with the debtor of the taxes and not, as here, with the mortgagee of the land sold.

The courts are, as a general rule, anxious to uphold the validity of municipal proceedings, if the circumstances admit of such a result. But, in statutes for the enforcement of taxes and which lead to the forfeiture of rights in property, the steps prescribed are usually considered essential and more particularly must provisions requiring notices be held imperative. Their omission, as in this

(1) [1908] A.C. 493 at pp. 500-501.

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case, is fatal, in the absence of statutory declaration to the contrary.

Apart from the effect of the curative section, we fully concur, therefore, with the view of both the trial judge and the appellate division that the defects proved were sufficient to invalidate the sale.

But the judgment in appeal found these defects to have been cured by s. 44a of *The Tax Recovery Act* as enacted by s. 26c of c. 5 of 1923 and that is the point which remains presently to be examined. (For the purposes of this case at least, s. 14a of *The Tax Sale Relief Act*, introduced by s. 25 of c. 5 of 1923, does not add anything to s. 44a and need not be considered separately.)

Sec. 44a is as follows:—

> 44a. From and after the first day of January, one thousand nine hundred and twenty-four, every sale of lands for arrears of taxes held under the provisions of this Act and every transfer issued pursuant to the provisions hereof shall, notwithstanding any informality or defect in or preceding such sale, be valid and binding to all intents and purposes except as against the Crown; and every such transfer shall from and after the said first day of January one thousand nine hundred and twenty-four, be conclusive evidence of the assessment and valid charge of the taxes on the land therein described and that all the steps and formalities necessary for a valid sale had been taken and observed as provided by this Act in that behalf; and thereafter any such sale and transfer and any certificate of title issued pursuant to any such transfer shall only be questioned on the following grounds or any of them and no other;
>
> (*a*) that the sale was not conducted in a fair, open, and proper manner; or
>
> (*b*) that there were no taxes whatever in arrears for which the said land could be sold; or
>
> (*c*) that the said land was not liable to be assessed for taxes.

The jurisprudence of this court is not lacking in precedents to the effect that enactments, such as this, will be given a construction which will cover defects so substantial and fundamental as to render the proceedings absolutely null and void, only if their language requires it. *McKay* v. *Crysler* (1); *O'Brien* v. *Cogswell* (2); *Whelan* v. *Ryan* (3); *Heron* v. *Lalonde* (4); *Temple* v. *North Vancouver* (5) might be referred to. Nevertheless these statutes, like all others, must receive their effect and, as was said by their Lordships of the Judicial Committee (*Toronto* v. *Russell* (6) ).

(1) (1879) 3 Can. S.C.R. 436.
(2) (1889) 17 Can. S.C.R. 420.
(3) (1891) 20 Can. S.C.R. 65.
(4) (1916) 53 Can. S.C.R. 503.
(5) (1914) 6 W.W.R. 70.
(6) [1908] A.C. 493, at p. 501.

since the main and obvious purpose and object of the legislature * * * was to validate sales made for arrears of taxes in the carrying out of which the requirements of the different statutes as to the mode in which they should be conducted had not been observed, and to quiet the titles of those who had purchased at such sales, the statute should, where its words permit, be construed so as to effect that purpose and attain that object.

But a careful examination of s. 44a discloses that it does not comprise in the word "sale" the whole of the proceedings taken under the statute up to and including the delivery of the transfer. On the contrary, a clear distinction is there made between the "sale" and the subsequent "transfer," which words are used to mean two separate and successive operations.

It follows that "sale" here is used in the restricted sense of the knocking down to the purchaser at the auction, and not in its wider meaning comprising the whole transaction up to its completion when the treasurer has executed and delivered to the purchaser a "transfer" of the land sold. As a result, by force of s. 44a, any informality or defect in or preceding the auction and knocking down to the purchaser is cured and validated. This covers the failure of the reeve to sign the list, the lack of a seal on the list and on the warrant, the insufficiencies in the forms of advertisement required by the Act, and, generally speaking, any of the proceedings connected with the sale anterior to and in the course of the auction and knocking down.

The section further enacts that, if the transfer is "issued pursuant to the provisions" of the Act, it becomes conclusive evidence that the assessment and charge of taxes were valid and that all steps and formalities necessary for a valid sale have been taken and observed; and the sale (i.e., auction and knocking down), the transfer itself and the certificate of title can thereafter be questioned only on any or all of the three grounds enumerated at the end of the section, none of which—it may be mentioned—has any connection whatever with the transfer proper.

This is equivalent to saying that once the actual transfer has been properly and legally issued, the validity of the assessment and charge of taxes and the regularity of all the steps and formalities attending the tax sale may no longer be challenged, unless either the auction was not

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"conducted in a fair, open and proper manner," or no arrears of taxes were due or the land was not liable to be assessed. But this provision is predicated upon the existence of an effectual transfer. It assumes the transfer to have been executed otherwise pursuant to the power conferred in the Act and obviously such requirement is essential to the applicability of the section.

The failure, in the present case, to give notice to the mortgagee is a defect so fundamental that it rendered the transfer ineffectual. The statute made that notice a condition precedent to the exercise of the power to execute and deliver a transfer and there is nothing in s. 44a to cover the absence of such notice. This precludes the application of the curative section.

The result is that the tax sale cannot stand, for it is impossible to conceive that the statute contemplated a sale which could not be completed by a valid transfer. It is obvious that absence of this notice to the mortgagee would be an absolute answer by the municipality to an action for specific performance by the purchaser at the tax sale. In this respect, the auction and the transfer may not be disconnected and together they form the successive and indispensable steps of a single conveyance or sale. There are no provisions whereby the notice could now be given to the mortgagee, even if it were found possible to cancel the transfer alone and put the parties back where they stood before it was executed.

The illegality of the transfer coupled with the impossibility of its being remedied therefore entails the setting aside of the whole tax sale.

Finally, section 21 of *The Tax Sale Relief Act* ought to be mentioned, because it appeared to some extent to be relied on by the respondent.

Here, the certificate of title was issued and s. 21 is to the effect that all proceedings taken under the provisions of *The Tax Sale Relief Act* with regard to the

obtaining of a certificate of title to lands, shall be good and valid, notwithstanding any want of compliance with the procedure prescribed at any period under the provisions of *The Tax Recovery Act*.

In this case, we think the failure to give notice to the mortgagee was not merely a defect of procedure, but went to the very root of the power to execute and deliver the transfer.

The appeal therefore ought to be allowed and the judgment of the trial judge restored.

*Appeal allowed with costs.*

Solicitors for the appellant: *Macdonald, Weaver & Steer.*

Solicitors for the respondents: *Auxier & Brennan.*

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DOMINION TEXTILE COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

DAME MARY LUCY SKAIFE ET VIR (PLAINTIFF) ..... RESPONDENT.

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*Oct. 20.
*Dec. 1.

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

*Practice and procedure—Pleadings—Inscription-in-law—Watercourses—Dam raising level of water—Action for damages and demolition—Defence alleging existence of dam for long period and act by owner of removing obstructions—Materiality of these facts—Trial judge—Demolition of a thing—Direction of the court—Art. 1066 C.C.—Arts. 105, 108, 110, 191, 192 C.C.P.*

The plaintiff respondent alleged in her statement of claim that she had been, since 24th July, 1914, owner of a parcel of land situate in the township of Magog and bounded on the west by lake Memphremagog; that the defendant company had been for several years the owner of certain dams and constructions at the outlet of the lake and by reason of their illegal use and maintenance had been interfering with and changing the "normal, usual and natural level" of the waters; that the appellant had created a public nuisance and thus gradually had damaged the respondent's land; and the respondent claimed not only to recover the loss so caused but also that the dam be demolished. The appellant, among other allegations of its defence, pleaded in paragraph 4 that the dam had existed since 1835 and at its present elevation since 1882; and that in 1915 the dam was carried away and replaced by a temporary structure erected in that year, which in turn was succeeded by the present dam in 1920 and 1921; and the appellant pleaded further in paragraph 5 that the appellant's auteurs, far from having caused the waters to rise, had removed obstructions from the outlet of the lake and enlarged the discharge, thereby preventing the water from reaching its normal height during freshets. The respondent inscribed in law against these two paragraphs of the defence, objecting that the facts therein alleged were irrelevant and did not support the conclusions of the defence.

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

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*Held* that the facts pleaded in these two paragraphs were not irrelevant to the issues between the parties and their proof should not have been excluded as immaterial, upon an inscription in law.

*Held* also that, under the Quebec "rules of pleading" (Arts. 105, 108, 110, 191, 192 C.C.P.), a paragraph of a defence is sufficient in law if it allege a material fact, even although the proof of other facts, which may be alleged in other paragraphs, be essential to justify the defendant's conclusion. Moreover a fact pleaded is not immaterial, although it have relation only to the damages claimed, or a part of the damages, as distinguished from the right which the plaintiff alleges to maintain the action. Mignault J. expressing no opinion.

*Held*, further, that, although by the terms of article 1066 C.C. a court may order demolition of a thing to be effected by its officer, or authorize the injured party to do it at the expense of the other, it seems only consistent with justice, and no doubt is intended, that that power shall be exercised by the court at its discretion. Mignault J. expressing no opinion.

APPEAL (1) from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of Coderre J. and maintaining the respondent's inscription in law against two paragraphs of the appellant's plea.

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.

*W. F. Chipman K.C.* for the appellant.

*A. Chase-Casgrain 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

NEWCOMBE J.—The plaintiff (respondent), by her declaration, filed 5th February, 1925, alleged that she had been, since 14th July, 1914, owner of a parcel of land therein described, situate in the township of Magog, and bounded on the west by lake Memphremagog; she made the following allegations against the defendant (appellant) in pars. 2 and 3 of her declaration:

2. The defendant is, and has been for several years, the owner of certain dams or constructions at the outlet of lake Memphremagog, and by reason of its illegal use and maintenance of said dams and construc-

(1) *Reporter's Note.*—Jurisdiction of this court was affirmed by a judgment of 2nd February, 1926, reported in [1926] S.C.R. 310; the court holding that the judgment appealed from was a "final judgment" within the meaning of par. *e* of s. 2 of the Supreme Court Act.

tions the defendant has for several years been interfering with and changing the natural course and level of the waters in lake Memphremagog, causing the same to rise beyond their normal and usual height to the detriment and loss of the plaintiff as hereinafter alleged.

3. By reason of such illegal interference with the level of the waters in lake Memphremagog, the defendant has not only caused the said waters to rise beyond their normal and usual height, but has caused said waters to remain at a higher level for considerable periods beyond the normal, usual and natural level of the said waters and were it not for the said acts of the defendant the average level of the said waters would be much lower.

The plaintiff proceeds to allege that, in consequence, a considerable part of the margin of her property upon the lake has been undermined and carried away by flooding, or had been rendered useless by the overflow; that the vegetation and a number of trees had been destroyed, and, by par. 5, that these damages had been caused gradually from day to day. The plaintiff moreover alleges by pars. 11 and 12 that:

11. As the dam constructed by the defendant at the discharge of of the said lake Memphremagog, which causes the above mentioned change in the level of the waters of the said lake, has been constructed by the defendant and has been kept and maintained by the defendant for the said discharge illegally and without right and constitutes a public nuisance which causes damage and will continue to cause damage to the plaintiff and to the plaintiff's said property hereinabove mentioned because the raising of the level of the said waters will continue to act as it has been acting for these last years, the plaintiff is entitled to ask that the defendant be enjoined from using the same dam and maintaining the same and be ordered to demolish the same, or at least any part thereof which causes or may be apt to cause a change in the level of the waters of the said lake Memphremagog opposite the plaintiff's said property.

12. Even if the defendant had the right to maintain and operate the said dam and raise the level of the said lake, as aforesaid, which the plaintiff denies, its exercise of such right would nevertheless in law be subject to the condition of paying all damages caused to third parties by the exercise thereof and the defendant would all the same be responsible towards the plaintiff for the said damages.

The conclusions are for damages; demolition of the dam, or such part thereof as may cause the flooding of which the plaintiff complains, and, "subsidiarily," that the defendant be enjoined from using the dam in such a way as to cause flooding of the plaintiff's land.

The defendant company, by its statement of defence, denied these allegations and pleaded two paragraphs, 4 and 5, the sufficiency of which is now in controversy. These paragraphs read as follows:

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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 auteurs, 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.

By par. 9 of the defence, the defendant also pleaded prescription of the damages alleged. The defendant, upon these and other allegations, concluded for the dismissal of the plaintiff's action.

The plaintiff, by her reply, under reserve of her partial inscription in law, to which I shall immediately refer, prayed acte of the admission that the defendant had been owner of the dam since April, 1923, alleging that, if

the defendant was not itself the owner of such dam prior to that date, it is in the rights and obligations of its auteurs in connection therewith and everything caused thereby,

and joined issue upon the other paragraphs of the defence, submitting however that the facts alleged therein were irrelevant. At the same time the plaintiff inscribed in law against pars. 4 and 5 of the defence, objecting that the facts therein alleged were irrelevant and did not support the conclusion of the defence, and in particular that, even if the facts were as pleaded in par. 4 of the defence, they would not justify the maintenance of the dam, as no such right could be acquired by prescription, or by user for any number of years, and that the facts alleged in par. 5 of the defence did not constitute a reason why the defendant should be entitled to keep the waters of the lake at a higher level than they would naturally reach at other times than in freshets, nor to change the natural conditions of the lake.

At the hearing of the inscription in law before Coderre J. of the Superior Court, the learned judge maintained the inscription, and ordered pars. 4 and 5 of the defence to be stricken out upon the considerant that the facts alleged did not constitute in law

valid reasons in support of the defendant's conclusions asking for dismissal of the plaintiff's action;

and, upon appeal to the Court of King's Bench, this judgment was, for the same reason, affirmed.

The pleadings are regulated by chapter XI of the Quebec Code of Civil Procedure, under the caption "General rules of pleading," by which it is provided (Arts. 105, 108 and 110) that

> in any proceeding it is sufficient that the facts and conclusions be concisely, distinctly, and fairly stated, without any particular form being necessary, and without entering into particulars of evidence or of argument; (that) the allegations are divided into paragraphs numbered consecutively; and each paragraph must contain, as nearly as may be, only one allegation, (and that) every fact which, if not alleged, is of a nature to take the opposite party by surprise, or to raise an issue not arising from the pleadings, must be expressly pleaded.

By arts. 191 and 192 C.C.P. it is provided, with regard to inscription of law, that an issue of law may be raised, as to the whole or part of the demand, whenever the facts alleged, or some of them, do not give rise to the right claimed; that the inscription must contain all the grounds relied upon, and that no other ground can be alleged at the hearing.

I do not interpret the rules of pleading to mean that every paragraph of a defence, separately numbered, must in itself contain an allegation which, if proved, would negative the cause of action as to which the paragraph is pleaded; and, in the narrative form which is contemplated, a paragraph is, I think, sufficient in law if it allege a material fact, even although the proof of other facts, which may be alleged in other paragraphs, be essential to justify the defendant's conclusion; moreover a fact pleaded is, I should think, not immaterial, although it have relation only to the damages claimed, or a part of the damages, as distinguished from the right which the plaintiff alleges to maintain the action. These rules are less exacting than the corresponding rules of pleading in England and in the other provinces, and they are remarkable for the absence of the exception which the latter rules contain that no denial or defence shall be necessary as to the damages claimed or their amount.

Coming then to the two paragraphs of the defence which are subject to objection upon the inscription in law, it must be observed that they are not very artistically pleaded and admit perhaps of some question as to their

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intent and purpose, but that is not one of the grounds of the inscription; they are subject to attack here for legal insufficiency, and each of them must be held good or bad depending upon the enquiry as to whether it contain a material allegation.

It will have been perceived that, according to the declaration the plaintiffs sue as riparian owners on lake Mamphremagog to recover damages for the flooding of their land for several years by the use and maintenance of a dam at the outlet of the lake. They allege that their land along the margin of the lake has been undermined and flooded; that it has in consequence become unfit for use, and that the vegetation and trees thereon have been destroyed; the relief claimed is not only damages, but the demolition of the dam. Now while it is true, as pointed out by the Court of King's Bench, that title to a servitude cannot be acquired by possession, art. 549 of the Civil Code, nevertheless I should think that long possession of the dam by the defendant company and its auteurs, and delay on the part of the plaintiff in the assertion of the right claimed, are facts material for the consideration of the court at the trial, as affecting the remedy if not the right. The question of demolition is an important one. It is claimed under art. 1066 of the Civil Code, but, although by the terms of that article the court may order demolition to be effected by its officer, or authorize the injured party to do it at the expense of the other, it seems only consistent with justice, and I have no doubt is intended, that the power shall be exercised at discretion. There can be no doubt as to the materiality of delay or laches upon applications for injunctions; cases of acquiescence are numerous, and mandatory injunctions are not infrequently refused because it would be oppressive to grant them. In *Claude* v. *Weir* (1), the plaintiff claimed as a lower riparian to have the defendant enjoined. The court considering the circumstances of the case, refused to grant an injunction, seeing that the effect of it would be to destroy a principal industry of the locality. In *Lid-*

(1) [1888] M.L.R. 4 Q.B. 197.

*stone* v. *Simpson* (1), it was held by the Court of King's Bench that a slight encroachment on neighbouring land by a party who builds a house, made in good faith and with the knowledge of the owner of the land, and without objection on his part, would not give the latter a right to sue for demolition, his recourse being for indemnity, the measure of which would be the value of the land so occupied. There are other cases in the province to the like effect, but it seems unnecessary to cite them, the principle of the decisions having recently been considered and applied by the Judicial Committee of the Privy Council in a Quebec case, *Michaud* v. *Cité de Maisonneuve and Cité de Montréal* (2). In that case the plaintiff asserted a claim to land in the city of Maisonneuve. There had been some negotiations for a gift of the land to the city for highway purposes, and the city had taken possession and paved the land as part of the public way, with the plaintiff's full knowledge, and without any objection or warning by him. The Court of King's Bench of Quebec, on its appeal side (3), affirming a judgment of the Superior Court of the district of Montreal, had dismissed the plaintiff's action. The judgment of the Board was delivered by the Lord Chancellor, who, disposing of the case, said that the principle to be followed was that which had been applied in some well known English cases, and he mentioned *Laird* v. *Birkenhead Railway Company* (4); *Ramsden* v. *Dyson* (5); he said that, under circumstances such as were disclosed in that case a man would not be permitted to assert his title to the land in question.

In *Crawford* v. *The Protestant Hospital* (6), Jetté J., having observed that the English and French law upon the subject were alike, said that one of the questions he had to answer was:—

Quel recours la loi reconnait-elle au voisin qui souffre préjudice de l'entreprise ou de la construction faite par le propriétaire sur son fonds?

and, in the course of his judgment,

Entrons maintenant dans l'étude des principes qui doivent nous guider, afin d'en faire ensuite l'application aux faits de la cause. Puisés à une

(1) (1907) Q.R. 16 K.B. 557.
(2) [1923] 3 D.L.R. 487.
(3) (1919) Q. R. 30 K.B. 46.
(4) (1859) 1 John. 500; 70 E.R. 519.
(5) (1865) L.R. 1 H.L. 129.
(6) (1889) M.L.R. 5 S.C. 70, at p. 73.

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source commune—le droit romain—ces principes sont les mêmes d'ailleurs, en droit anglais qu'en droit français, et nous les trouvons aussi facilement reconnaissables dans l'ensemble de la jurisprudence anglaise que dans les textes précis de notre droit français.

This passage received the approbation of Sir Henry Strong in *Drysdale* v. *Dugas* (1), which was an action to recover damages for nuisance under the Quebec law. And, in that connection, it may be useful, by way of illustration or examples, to mention *Attorney General* v. *Sheffield Gas Consumers Co.* (2); *Attorney General* v. *Grand Junction Canal Co.* (3); *Gaunt* v. *Fynney* (4); *Rogers* v. *Great Northern Ry. Co.* (5), all cases where mandatory injunctions were refused on the ground of laches and acquiescence.

Now what is the case as alleged by the pleadings? It is that the plaintiff became owner in July, 1914: that the defendant company has, for several years, been the owner of the dam, and that, for the same time, it has been interfering with the water and raising the level, creating a public nuisance, and thus gradually has damaged the plaintiff's land, and the plaintiff claimed therefore not only to recover the loss so caused, but also that the dam be demolished. The defendant, among other allegations of its defence, says in par. 4, in effect, that the dam has existed since 1835, and at its present elevation since 1882; that in 1915 the dam was carried away, and replaced by a temporary structure, erected in that year, which in turn was succeeded by the present dam in 1920 and 1921. There is no allegation or suggestion as to any protest or complaint by the plaintiff's auteurs, or by the plaintiff herself, previously to this action, the declaration in which was filed on 5th February, 1925. I have intended and endeavoured to say nothing more than is necessary which might affect the course of the trial, or the disposition of the case when it comes to be heard. It will be for the trial judge to consider all the facts as they may then appear, and to give such effect to them as the justice of the case may require, but for the reasons which I have stated, I do not consider that proof of the facts alleged in the 4th paragraph of the

(1) (1895) 26 Can. S.C.R. 20 at p. 23.
(2) (1853) 3 DeG. M. & G. 304.
(3) [1909] 2 Ch. D. 505, at p. 508.
(4) (1872) L.R. 8 Ch. Ap. 8.
(5) (1889) 53 J.P. 484.

defence should be excluded as immaterial; and, if not, they are facts which may be pleaded.

As to par. 5, the substantial fact pleaded is that the defendant's auteurs removed obstructions from the outlet of the lake, and enlarged the discharge, thereby preventing the water from reaching its normal height during freshets. This is, in my view, an answer to the declaration in so far as it applies to the raising of the level of the water in times of freshet. The complaint is that the defendant, by the works which it maintained, raised "the normal, usual and natural level." The defence, as stated in par. 5, is, in effect, that the defendant did not raise the level of the water during freshets, but, on the contrary, that the level was reduced. There is thus, although perhaps in an argumentative form, a denial of the defendant's responsibility for the damage complained of for at least a part of the period during which the damage is alleged to have been gradually taking place, and therefore I think that this paragraph must be maintained as against the reasons of insufficiency alleged.

I would allow the appeal with costs throughout.

MIGNAULT J.—In this case I would allow the appeal and set aside the judgments of the two courts below which struck from the appellant's plea to the respondent's action paragraphs 4 and 5 which are quoted in the judgment of my brother Newcombe. In my opinion, the fundamental question underlying the issue between the parties is: What is the normal and natural level of the waters of lake Memphremagog which the respondent says the appellant has raised to her detriment? Evidence adduced under these two paragraphs may be useful for the proper decision of this question, and I cannot therefore say that they are irrelevant to the issues.

I express no opinion as to the construction of art. 1066 of the civil code, nor with respect to the principles which should govern the decision of this case. I would merely leave these paragraphs in the plea, believing that the judge at the trial will be in a better position to determine the

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materiality of any fact which it may be desired to put in evidence.

The appellant is entitled to its costs here and below.

*Appeal allowed with costs.*

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Casgrain, McDougall, Stairs & Casgrain.*

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*Oct. 28.
*Dec. 1.

HIS MAJESTY THE KING (RESPONDENT) ..... } APPELLANT;

AND

CANADA STEAMSHIP LINES, LIMITED, AND ANOTHER (SUPPLIANTS)... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Crown—Navigation company—Wharf—"Slip" in bad condition—Accident in landing passengers—Inspection by government employee—Failure to make report—Liability of the Crown—Knowledge by the navigation company—Joint liability—Practice and procedure—Printing of appeal case—Failure to print exhibits in chronological order—No costs allowed for preparing and printing case—Rule 12, Supreme Court Act—Exchequer Court Act, s. 20c, as amended by 1917, c. 23, s. 2—Arts. 1106, 1117, 1118 C.C.*

The respondents seek to recover from the Crown $65,744.61, being the amount of claims paid out by them for personal injury and loss of property sustained by passengers landing from the ss. *Richelieu* owing to the collapse of the landing slip on a government wharf at L'Anse Tadoussac on the 7th July, 1923. The wharf, built in 1910-12, had been but little used. Early in 1923 the Canada Steamship Lines applied to the Minister of Public Works to have it put in condition. The minister assented and estimates for the cost were sanctioned late in June or early in July, 1923. To the knowledge of the navigation company, no substantial repairs to, and no thorough inspection of, the wharf had been made. Without further notice to the government, the steamboat *Richelieu* began to use the wharf in the latter part of June. On the fourth trip, 4th July, amongst the passengers disembarked at the wharf was one Brunet, a government engineer, then on a trip of inspection for his department. Brunet, seeing the crowd disembarking, had some apprehension as to the safety of the slip and made, the next day, a casual and perfunctory examination of it. Before leaving Tadoussac that evening, Brunet, instead of

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PRESENT:—Anglin C.J.C. and Duff, Mignault and Rinfret JJ. and Middleton J. *ad hoc.*

clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to the Department of Public Works at Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, merely asked one Imbeau, not a permanent or regular employee of the government, to examine the slip and to report to the department at Quebec the result of his inspection. Imbeau's report as to the bad condition of the slip, dated 7th July, was not received at Quebec until the 9th of July.

*Held,* reversing the judgment of the Exchequer Court of Canada ([1926] Ex. C.R. 13), that the Crown was not under contractual obligation to the Canada Steamship Lines to provide at L'Anse Tadoussac a reasonably safe landing place for passengers, the $2,000 per annum accepted by the Crown "in payment of commutation of wharfage" not being the equivalent of a rental for the use of the government wharves between Quebec and Chicoutimi.

*Held,* also, that Brunet, in allowing continued use of the wharf and slip pending Imbeau's report and in failing to give warning to the steamship company, was guilty of negligence as an "officer or servant of the Crown while acting within the scope of his duties or employment upon a public work" (*The King* v. *Schrobounst* ([1925] S.C.R. 458); and his neglect entailed liability of the Crown for consequent injuries in person and property sustained by passengers in attempting to land on the slip.

*Held,* also, that the Canada Steamship Lines was also guilty of negligence, in using the wharf and slip, without making an inspection of their condition and without intimating its intention to use them to the government from which it had demanded repairs that its officers knew had not been made.

*Held,* therefore, that there was a "common offence or quasi-offence" of the steamship company and of the appellant resulting in a joint and several obligation on their part to persons who sustained consequential injury (art. 1106 C.C.), with the result that there must be an apportionment of responsibility between these co-debtors (art. 1117 C.C.) and that one of them, the steamship company, having paid the debt in full, can recover from the other only the share and portion (in this case one-third) for which, *inter se,* such other was liable (art. 1118 C.C.). With this right of recovery, subrogation has nothing to do.

Costs of preparing and printing the appeal case disallowed the appellant on account of flagrant disregard of rule 12 of this court requiring exhibits to be printed in chronological order.

APPEAL from the judgment of the Exchequer Court of Canada (1) maintaining a petition of right against the Crown with costs and referring the case to the registrar of the Exchequer Court to enquire and report upon the amount of damages sustained by the suppliants.

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.

(1) [1926] Ex. C.R. 13.

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*Léon Garneau K.C.* for the appellant. The injuries to the persons mentioned in the petition of right did not result from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The Steamship company took possession of the wharf and operated the slip in question without previously notifying and warning the Crown of its intention so to do.

The Steamship company had applied to the Crown to have certain improvements made to such wharf and was aware that the Parliament of Canada had been asked to vote certain money appropriations for the purpose of carrying out such improvements, and before such appropriations were voted and available, the Steamship company proceeded, without warning to the Crown, to make use of such wharf and slip.

The Steamship company, its officers, employees and servants, before beginning to use such wharf, failed to examine the slip thereof and failed to notify the Crown of its possible dangerous condition.

The Steamship company caused such slip to be overloaded.

If the accident complained of was due to the wharf and slip in question not being in a proper state of repair, there was no duty on the Crown or on any Minister of the Crown to keep same in repair for the failure of which a petition of right lies against the Crown.

The facts complained of do not constitute a ground of relief by way of petition of right against the Crown in virtue of the provisions of the Exchequer Court Act.

The suppliants have no recourse against the Crown *ex contractu.*

The passengers injured in the accident complained of had no recourse in damages against the Crown.

The suppliants could not be subrogated in the alleged claims of the injured passengers and such subrogations are null and void.

The petition of right was founded on such subrogations and no amendment should have been granted allowing suppliants to change the nature of their petition and to sue on a new basis of action which was outlawed and prescribed.

*J. A. Mann K.C.* and *W. J. Chipman K.C.* for the respondents. Even had there been no duty on the part of the government engineers and their assistants and foremen to carefully examine the structure prior to the spring of 1923, an onerous duty was thrown upon them immediately that it became known that heavy traffic was about to use the wharf, but they all failed in the performance of a duty palpably necessary to be performed.

The Crown was under contract to supply the Steamship company with a safe landing for its passengers. The necessary, immediate and foreseeable consequence of the failure to fulfil this obligation would be injury to those who used the defective slip and consequent liability of the Steamship company to its passengers.

Under section 19 of the Exchequer Court Act, liability for breach of contract is not the only liability. The subject may seek relief "in respect of any matter which might in England be the subject of a suit or action against the Crown." It is submitted that in England there may be an action against the Crown for tort in the circumstances of this case and that the prerogative of the Crown does not apply where the Crown has undertaken duties of a managing nature which are not political but which are normally left to private enterprise. If there is an action for tort, the responsibility will be determined according to the law of the province in which the cause of action arises.

The Crown is liable under section 20c of the Exchequer Court Act. This is an express statutory liability accepted by the Crown for the particular case of quasi-delict by an employee in the course of his employment. The liability once accepted, the provincial law becomes applicable. It is submitted that the facts in this case show a series of negligences by public servants engaged in public work which were directly responsible for the accident upon which this case is founded. That the expression "on any public work" has not a geographical but a functional significance is settled by the case of *The King* v. *Schrobounst* (1).

(1) [1925] S.C.R. 458.

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The judgment of the court was delivered by

ANGLIN C.J.C.—This action arises out of claims for personal injury and loss of property sustained by passengers landing from the ss. *Richelieu,* owned and operated by the respondent Canada Steamship Lines, Ltd., owing to the collapse of the landing slip on the government wharf at L'Anse Tadoussac on the 7th of July, 1923. These claims were settled by the respondent Canada Steamship Lines and its insurers (and co-respondents), the Travellers' Insurance Co., and the amounts paid out by them, respectively, they seek to recover from the Crown by petition of right.

The learned trial judge held the Crown liable to indemnify the respondents on the ground that it had undertaken a contractual obligation to Canada Steamship Lines to make reasonably safe and sufficient provision for the landing of passengers from its steamboats, *inter alia,* at L'Anse Tadoussac wharf.

Two main questions arise on this appeal: (*a*) whether there was breach of a contractual obligation owed by the Crown (appellant) to the respondent Canada Steamship Lines in regard to the wharf at L'Anse Tadoussac entailing liability for consequential damages to that company; and, alternately, (*b*) whether the injuries suffered by the passengers from the *Richelieu*

resulted from the neglect of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work

so as to entail liability of the Crown under s. 20 (*c*) of the Exchequer Court Act, as amended in 1917 (c. 23, s. 2).

In the event of liability under s. 20 (*c*) being affirmed, a further question emerges, namely, (*c*) whether there was also negligence of the respondent Canada Steamship Lines in connection with its use of the L'Anse Tadoussac wharf sufficient to bring this case within the purview of arts. 1106 and 1118 C.C. Another phase of the appeal has to do with the efficacy of subrogations taken by the respondent, The Travellers' Insurance Co., when making payments under its insurance contract with its co-respondent.

(*a*) In determining that the Crown was under a contractual obligation to the Canada Steamship Lines to provide at L'Anse Tadoussac a reasonably safe landing place for passengers from that company's steamboats, the learned

trial judge treated acceptance by the Crown from the company of a sum of $2,000 per annum for the use of the Government wharves between Quebec and Chicoutimi as implying such an obligation. But, with respect, the learned judge's attention does not seem to have been directed to the significance of the fact that by the Order in Council of the 27th of February, 1917, which provided for the annual payment of this amount of $2,000, it is stated to have been agreed upon with Canada Steamship Lines, Ltd. " as commutation of wharfage," i.e., of wharfage tolls, and in the departmental letter of the 22nd of May, 1923, acknowledging the company's cheque for $2,000 for the season of 1923, it is also said to be " in payment of commutation of wharfage." This payment was, therefore, in no sense accepted as the equivalent of a rental for the wharves or for their use by the company, but was, as appears by the earlier Order in Council of the 12th of December, 1906, merely a convenient method of collecting the wharfage tolls imposed by statute for the use of the government wharves indicated, which are undoubtedly " public works." No contract, express or implied, is created with the Crown because an individual pays statutory tolls for the use of a public work and the commutation of such tolls for a lump sum does not imply any relations other than those which would ensue upon payment of the appropriate tolls on each occasion when the public work was used. *The Queen* v. *McFarlan* (1); *The Queen* v. *McLeod* (2). We are, therefore, of the opinion that the judgment of the Exchequer Court cannot be maintained on the ground on which it was put by the learned trial judge.

(*b*) The government wharf at L'Anse Tadoussac was built during the years 1910-1912. It appears to have been but little used, except by small schooners and local craft, until 1923, only an occasional call having been made at it by the steamboats of Canada Steamship Lines, Ltd., prior to that year. That company's steamboats usually moored at the other government wharf at L'Anse à l'eau. There had never been a wharfinger in charge of the L'Anse Tadoussac wharf. So far as appears no substantial repairs to, and no thorough inspection of, the L'Anse Tadoussac

(1) (1882) 7 Can. S.C.R. 216. (2) (1883) 8 Can. S.C.R. 1.

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wharf had been made from the time of its completion in 1912 until the 6th of July, 1923, the day preceding the collapse of the slip, and there is room for doubt whether the inspection then made was at all complete or thorough.

The wharf was equipped with a slip, or *cale-mobile,* which was intended to provide for convenience of landing at different tides. It was raised or lowered, when required, by men of the crews of the vessels using the wharf and was often left, we are told, for long periods with its lower end submerged in the sea, or so submerged at high tide and exposed at low tide to the air—conditions said to be most favourable to rapid deterioration of the spruce timbers or beams which formed its lateral supports. By means of chains, attached to iron bands, or eyes, through which the outer or lower ends of these lateral timbers ($11\frac{1}{2}$ inches by $5\frac{1}{8}$ inches) were inserted, and passed over pulleys, the slip was raised or lowered by the use of winches placed upon the wharf.

Early in 1923 Canada Steamship Lines, Ltd., applied to the Minister of Public Works to have this wharf put in condition for use by its steamboat *Richelieu* which it was then about to place on the Saguenay route. The draft of this steamer was too great to permit of its berthing at L'Anse à l'eau wharf and rock conditions precluded further dredging there. The work required to make the L'Anse Tadoussac wharf suitable included dredging, the extension of the face of the wharf and some general repairs. The Minister assented to the company's request, subject to estimates for the cost of the work being sanctioned by parliament. These estimates appear to have been passed late in June or early in July, 1923—the precise date is not given. Meantime, however, sufficient dredging had been done to enable the *Richelieu* to effect a landing and, without further notice to the government, that steamer began to use the wharf in the latter part of June. She had made landings at it on four trips prior to the date on which the slip collapsed.

On the fourth trip, i.e., on the evening of the 4th of July, when a large number of passengers disembarked at Tadoussac, there was amongst them one Brunet, a government engineer, who was then on a trip of inspection for his department. Brunet remarked the crowd disembark-

ing and says that this aroused apprehension in his mind ("*peur*") as to the safety of the slip, although he subsequently suggests that his doubts were rather as to the sufficiency of the chains and hoisting apparatus to sustain the weight. He made a casual and perfunctory examination of the wharf on the 5th of July and left Tadoussac on that evening. His inspection apparently did not include any examination of the slip except as to the winches and pulleys used in raising and lowering it, which he had been told were defective. Before leaving Tadoussac he called on one Imbeau, who, it is said, was engaged as a foreman by the Department of Public Works whenever government work was done at Tadoussac, but was not a permanent or regular employee of the department. Brunet requested Imbeau to examine the slip because, he says, he had reasons for apprehension. Imbeau was told to report to the department at Quebec the result of his inspection. Imbeau was not in the government's pay when requested to make this inspection, nor does it appear that he was remunerated by the government for making it.

On the 4th of July Imbeau had noticed a plank broken in the slip and repaired it, he says, gratuitously. He seems to have then seen enough of the condition of the slip to realize that it needed repair and should be carefully inspected. He confirms what Brunet says as to the instructions given him on the 5th of July, adding that he had advised Brunet "*au commencement*" that the slip should be inspected "*comme il faut pour voir s'il avait du mal lui aussi.*" He made an inspection of the slip on the 6th and wrote out a report on the wharf and slip in the evening which he dated the 7th, because it could not be mailed until the following morning. That report reads as follows:—

Tadoussac, 7 juillet, 1923.

Monsieur A. G. Sabourin,
Ingénieur de district.

Monsieur,—Vous trouverez ci-inclus un croquis des châssis de la shed du quai de L'anse Tadoussac. M. Brunet est venu ici cette semaine et il m'a demandé de bien vouloir lui envoyer ces mesures-là pour faire faire des passes en fer pour portéger les vitres et il m'a demandé aussi de regarder dans le quai si les lambourdes étaient pourries et je n'ai pas pu y aller; il aurait enlevé les pavés.

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J'ai visité le slip et j'ai trouvé qu'il était bien dangereux, le bois parait bien magané. Je vous envois les mesures et si vous préférez en faire faire un autre avant qu'il arrive quelque accident, pour moi je le trouve bien dangereux.

Longueur 36 pds, largeur 8 pds et 10 pouces.

Bien à vous,

(Signé) ARMAND IMBEAU.

This report was not received at Quebec until the 9th of July. Notwithstanding the terms in which he reported, Imbeau insists that he did not regard the slip as in a dangerous condition even after his inspection of the 6th, adding

Si j'avais eu vu le slip bien dangereux, j'aurais pas attendu les ordres de barrer le slip, je l'aurais barré de moi-même; mais je n'ai pas fait demander à monsieur Sabourin qu'il était bien dangereux, le slip et l'appareil. Mais si je l'avais considéré bien dangereux, je l'aurais barré de suite.

He says that when he stated in his report "je le trouve bien dangereux," he had reference to the hoisting apparatus and the winches:—

Q. * * * Vous lui avez dit: je le trouve bien dangereux. Vous lui avez dit ça dans votre lettre?

R. Oui, que je le trouve bien dangereux, en voulant parler de l'appareil de montage et des winches, qu'il était bien dangereux.

It would seem that Imbeau was either incompetent or careless or that his testimony is not dependable. He either made an inadequate examination, or could not appreciate the conditions disclosed. Any sufficient examination must have revealed the imminent danger of collapse of the slip due to the rottenness of the lateral supporting timbers. Brunet vouches for Imbeau's capacity; and I incline to accept his opinion on that point. Was he merely careless, or did he perceive the danger, although now unwilling to admit having done so?

The cause of the collapse was undoubtedly the breaking off of the lateral timbers or beams where they entered the iron eyes and on subsequent examination they were found by numerous witnesses to be very badly decayed, only the outside shell having the appearance of firm wood—"*le dedans (qui) était tout pourri.*" Towards the close of his examination, however, in answer to a question by the trial judge, Imbeau stated that he had examined the lateral timbers at the places where they broke and that while, on looking at the outside, decay was not apparent, on pick-

ing into the wood with a knife it was found rotten inside —that in his opinion at the time it was "magané," but not so much decayed as it appeared to be after it was broken. He adds:—

mais je voyais qu'il fallait qu'il fut renouvellé, le slip, en cas d'accidents, parce que je trouvais qu'il pouvait venir à manquer, d'une fois à l'autre.

Had Imbeau been in the employment of the government, when he inspected the slip on the 6th of July, his failure either to bar access to the slip or, if he had not authority to do that, to advise the department by telegram of the imminent danger, or at least to warn the responsible officers of Canada Steamship Lines against making further use of the slip until it had been put in a safe condition would have amounted to neglect

of an officer or servant of the Crown while acting in the scope of his duties or employment upon a public work.

The evidence, however, does not sufficiently establish that Imbeau was an officer or servant of the Crown within the meaning of s. 20 (*c*) of the Exchequer Court Act.

The case of Brunet is quite different. He was undoubtedly an officer or servant of the Crown. He came to Tadoussac in the discharge of his duties or employment. He saw the use that was being made of the slip which afterwards collapsed and immediately realized that its condition was dubious and had reason, as he says, to "fear" for its safety. He was told by Imbeau that there should be an inspection "*comme il faut*" of the slip because it might be "*endommagé*"—to see if it were not also in bad condition. Instead of clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, he contented himself with asking Imbeau to make an inspection and to report the result in writing to Quebec. In taking the risk of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part as an

officer or servant of the Crown while acting within the scope of his duties or employment upon a public work (*The King* v. *Schrobounst* (1)),

(1) [1925] Can. S.C.R. 458.

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and his neglect entailed liability of the Crown for the consequent injuries in person and property sustained by the passengers in attempting to land on the slip on the 7th of July.

(c) But if there was neglect on the part of the government engineer Brunet in failing to take immediate action for the protection of passengers who he knew would make use of the slip for landing in the immediate future, how should the conduct of the steamship company in imperilling the lives and limbs of its passengers by sending them ashore in crowds over such a slip be regarded? The steamship company's officers knew better than the servants of the Crown for what number of passengers landing facilities would be required at Tadoussac. In landing the passengers the steamboat officers might have restricted the number allowed simultaneously on the slip or they might have landed them by gangway directly on the wharf. Those officers were familiar with the history of the wharf and knew of its practical disuse for over ten years. They knew, or had abundant means of knowing, that the alternate submersion and exposure of the supporting timbers of the slip would leave them in a doubtful state of preservation. The sight of the disembarking crowd on the evening of the 4th of July should have awakened in the minds of those in charge of that operation, had they given any thought to the safety of the landing, the same fear with which the spectacle inspired Brunet—fear for the safety of the slip—suspicion of its capacity to withstand the strain to which it was being subjected. With knowledge that nothing had been done in the way of repairs, without making any inspection of the condition of this almost derelict wharf, without any inquiry as to whether inspection of it had been made by government officers, without even intimating its intention to do so to the government from which it had demanded repairs, that its officers knew had not been made, and would not be made until parliament should provide money therefor, the steamship company proceeded to use the wharf and slip as if assured that they were in good repair and arranged for the landing of passengers, not one by one, or two by two, but in droves—as many as 35 being on the gangway together when the slip collapsed. If Brunet was negligent,

this conduct of the steamship company's officers savours of recklessness.

It seems to follow that we have here a case of "common offence or quasi-offence" of the respondent company and of the appellant resulting in a joint and several obligation on their part to persons who have sustained consequential injury (art. 1106 C.C.), with the result that there must be an apportionment of responsibility between these co-debtors (art. 1117 C.C.) and that one of them, the steamship company, having paid the debt in full (for this purpose the two respondents are identified, the insurance company claiming through and having no other or greater rights than its insured) can recover from the other only the share and portion for which, *inter se*, the other was liable (art. 1118 C.C.). With this right of recovery—and it is the respondents' only right in this action—subrogation has nothing to do. Indeed the limitation of art. 1118 C.C. is imposed

even though he (the claiming co-debtor) be specially subrogated in the rights of the creditor.

The apportionment of responsibility presents some difficulty; it can at best be approximate. Giving to all the circumstances such effect as careful consideration suggests they are entitled to receive, justice will probably be done as nearly as possible if the resultant damages be borne in the proportion of two-thirds and one-third—two-thirds by Canada Steamship Lines, Ltd., and one-third by the Crown.

If the Crown is now prepared to admit that the total recoverable claims of injured persons paid by the suppliants amounted to the sum of $65,744.61, as finally asserted by them at the trial, the reference directed in the judgment of the Exchequer Court will be unnecessary, and judgment may be entered at once in favour of the suppliants for one-third of that amount. Otherwise the judgment will merely declare the rights of the parties and direct the registrar of the Exchequer Court to proceed to enquire and report as to the total amount which should be made the subject of apportionment.

As to the right of the Insurance Company to share in the suppliants' recovery and, if that right exist, to what

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extent, we are not in a position to pronounce judgment. The two companies are joint suppliants. There is no issue between them on the record and they were not separately represented. Unless they can agree upon their respective rights *inter se* as to the monies to be paid by the Crown, upon the total amount due by it being finally ascertained the appellant may pay the same into court to the joint credit of the suppliants; and the Crown will thereupon be fully discharged from liability to each of them. Either suppliant may thereupon proceed, as it may be advised, to obtain payment out to it of its proper share of the money so to be deposited in court.

The appellant will have its costs of the appeal from the respondents, except those of preparing and printing the appeal case, which are disallowed on account of the flagrant disregard of rule 12 requiring exhibits to be printed in chronological order.

*Appeal allowed in part with costs.*

Solicitor for the appellant: *Léon Garneau.*

Solicitor for the respondents: *J. A. Mann.*

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*Dec. 14.

1927

*Jan. 18.

J. GURDITTA .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Criminal law—Perjury—Ground of appeal—No evidence as to accused having been a witness—Motion for leave to appeal to Supreme Court of Canada under s. 1024a Cr. Code—Alleged conflict with decision in Rex v. Drummond (1905) 10 Ont. L.R. 546—Production at the trial of the judgment in the civil action.*

The appellant having been found guilty of perjury committed in the trial of a civil action, one of the grounds of appeal to the appellate court was that there had been no evidence that the appellant was a witness in a judicial proceeding. The conviction having been affirmed, the appellant moved for leave to appeal to this court under s. 1024a Cr. Code, on the ground that the judgment sought to be appealed from conflicts with a judgment of an Ontario appellate court in a like case: *Rex* v. *Drummond* 10 Ont. L.R. 546.

*PRESENT:—Anglin C.J.C. in chambers.

*Held* that the decision in the *Drummond Case* did not conflict with the judgment in this case: in the former case there was no record whatever produced, while in the present case the copy of the pleadings made use of as a record by the trial judge was put in evidence. The application for leave to appeal was dismissed.

*Semble* that, although production, at the trial, of the judgment disposing of the civil action was not necessary, it would have been better practice that it should be put in in order to complete the record.

MOTION for leave to appeal to the Supreme Court of Canada, under section 1024*a* of the Criminal Code, from the judgment of the Court of Appeal for British Columbia (1) upholding the conviction of the appellant for perjury in the trial of a civil action. The material facts of the case are stated in the judgments now reported.

*Smellie K.C.* for the motion.

*Ritchie K.C. contra.*

December 14, 1926.

ANGLIN C.J.C.—Motion for leave to appeal under s. 1024 (*a*) of the Criminal Code on the ground that the judgment sought to be appealed from conflicts with a judgment of the Ontario Appellate Division in a like case. In the case at bar one of the grounds of appeal to the Appellate Division was that

there is no evidence that Gurditta was a witness in a judicial proceeding when he made the assertion which is charged as a perjury.

The alleged perjury was committed in the trial of the civil action of *Brama* v. *Gurditta*. At the trial of the perjury charge the clerk of assize proved from the entries in his court record that Gurditta had been sworn as a witness and had given evidence on the trial of the civil action. The court stenographer proved the evidence given by Gurditta at that trial. Counsel for the Crown put in evidence, as exhibit I, the record prepared for the use of the judge at the trial pursuant to rule 454, consisting of a certified copy of the endorsement upon the writ of summons and of the statement of defence, being the whole of the pleadings. The clerk of assize gave evidence that the case of *Brama* v. *Gurditta*, in which this record was used, was tried at the assize held before Mr. Justice Morrison on the 22nd of February, 1926, on which date the indictment charges the

(1) [1927] 1 W.W.R. 273.

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perjury was committed. The judgment disposing of the civil action does not appear to have been put in evidence.

In the judgment of the Appellate Division in the present proceeding Mr. Justice Martin, delivering the opinion of the court, held, on the authority of *Regina* v. *Scott* (1), that it had been sufficiently established that Gurditta had given the evidence on which the perjury charge rests in a judicial proceeding, i.e., upon the trial before Mr. Justice Morrison of the civil action of *Brama* v. *Gurditta* of which the record was put in evidence.

This conclusion is said to conflict with the decision of the Ontario Appellate Division in *Rex* v. *Drummond* (2), followed in *Rex* v. *Legros* (3); *Rex* v. *Farrell* (4). As is pointed out, however, by Osler J.A., in the *Drummond Case* (2), at page 547, the only evidence there given was that of the clerk of assize for the county of Brant who swore that the defendant Drummond had been called as a witness on Kennedy's trial for murder and had been sworn by him as clerk of assize; and he produced his record book containing entries shewing that the defendant had given evidence at Kennedy's trial at which the alleged perjury was committed. The only other evidence was that of the court stenographer who related the evidence given by the accused at the Kennedy trial.

Neither the indictment on which Drummond had been tried nor any copy, or sworn copy of it, was produced.

The court held that there was no proper evidence of a fact essential to the proof of the crime charged, viz., that there had been a judicial proceeding in which the alleged perjury was committed inasmuch as neither the indictment and formal record of such proceeding or a certificate under s. 691 of the Criminal Code had been produced.

I am unable to find any conflict between the decision in the *Drummond Case* (2) and the case now before me. In the *Drummond Case* (2) there was no record whatever produced. Here the copy of the pleadings made use of as a record by the trial judge was put in evidence. This suffices to dispose of the application for leave under s. 1024 (*a*).

(1) (1877) L.R. 2 Q.B.D. 415; 13 Cox C.C. 594; 36 L.T. 476.
(2) (1905) 10 Ont. L.R. 546.
(3) (1908) 17 Ont. L.R. 427.
(4) (1909) 20 Ont. L.R. 182.

I should perhaps add that, as at present advised, production at the trial of the judgment disposing of the action of *Brama* v. *Gurditta* was not necessary since the perjury was complete when the evidence was given at the trial and prosecution could have been instituted for it and conviction had although no judgment had ever been rendered in the civil action. Doubtless it would be better practice where judgment has been pronounced that it should be put in in order to complete the record.

Leave to appeal will accordingly be refused.

January 18, 1927.

ANGLIN C.J.C.—The defendant renews his application for leave to appeal under s. 1024 (*a*) of the Criminal Code, relying upon other opinions which have been delivered by judges of the Appellate Division since his former motion for leave to appeal was refused. As the case now stands three of the five members of the Appellate Division (Martin, Galliher, and McPhillips JJ.A.) are of the opinion that it was sufficiently proven at the trial that the defendant was a witness in a judicial proceeding when he gave the evidence for the giving of which he has been convicted of perjury. In the view of three members of the Appellate Division (the Chief Justice, M. A. Macdonald and McPhillips JJ.A.), if the proof was technically incomplete because of the omission to adduce evidence of the writ of summons which began the civil action in which the alleged perjury was committed,

no substantial wrong or miscarriage of justice had actually occurred (s. 1014 (2)).

I find nothing in the added opinions now before me to bring this case within the purview of s. 1024 (*a*). The *Drummond Case* (1) is again invoked by the applicant as the judgment of another court of appeal which conflicts with the judgment appealed from. My reasons for not regarding the case of *Rex* v. *Drummond* (1) as "a like case" I have already stated.

The motion will be refused.

*Motion dismissed.*

(1) 10 Ont. L.R. 546.

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*May 19.
*Dec. 15.

THE ONTARIO JOCKEY CLUB LIMITED (DEFENDANT) ..... } APPELLANT;

AND

SAMUEL McBRIDE (PLAINTIFF) .....RESPONDENT.

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

*Company—Transfer of shares—By-law restricting right of transfer—Alleged agreement of shareholder to observe provisions of by-law—The Ontario Companies Act, 1907, ch. 34.*

A company's by-law purporting to disable any shareholder from transferring his shares to anyone not already a shareholder until the company had had an opportunity of finding a purchaser as in the by-law provided, was held not to be within the company's powers under *The Ontario Companies Act*, as it stood in November, 1910, when the by-law was passed. *Canada National Fire Insur. Co.* v. *Hutchings*, [1918] A.C. 451, applied. It was further held that the transfer of the share in question was not shown to be affected by an undertaking to observe the terms of the by-law; and the transferee was entitled to have the share registered in his name. Idington J. dissented.

Judgment of the Appellate Division of the Supreme Court of Ontario (58 Ont. L.R. 97) affirmed in the result, Idington J. dissenting.

*Semble*, had the company established such an undertaking as aforesaid on the part of the registered shareholder in respect of the share in question, the plaintiff, who claimed as transferee from a transferee of such registered shareholder, might not (even apart from the principle of *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*, [1926] A.C. 108) have been able to force the company to register him as the holder of the share.

APPEAL by the defendant company from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, reversing judgment of Lennox J (2), upheld the plaintiff's claim to be registered as a shareholder of the defendant company. The facts of the case are sufficiently stated in the judgments now reported.

*W. Nesbitt K.C.* and *F. W. Fisher* for the appellant.

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

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

(1) (1925) 58 Ont. L.R. 97. Leave to appeal to the Supreme Court of Canada was granted by the Appellate Division. In this connection, see *Ontario Jockey Club* v. *McBride* [1926] S.C.R. 291.

(2) (1924) 26 Ont. W.N. 399.

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

DUFF J.—On the 23rd of June, 1922, one Orpen professed to sell to the plaintiff, who is the respondent in this appeal, a share in the capital stock of the appellant club, The Ontario Jockey Club Limited, which Orpen had previously purchased from Mr. Charles Millar. The respondent having applied to have the share registered in his name, and the right to registration having been denied, this action was brought to establish that right. Registration was refused on the ground that by by-law of the club no. 37, passed on the 24th of November, 1910, Millar, who was the registered owner of eight shares, was disabled from transferring any one of his shares to Orpen or to the respondent, neither of whom was a shareholder, until an opportunity had first been given to the club to find a purchaser for it. Other grounds of justification are now advanced for the action of the club, which will have to be discussed, but it is convenient first to take up the question raised touching this by-law, which, if it was passed in a valid exercise of the club's powers, has unquestionably the effect contended for.

The point seems to be concluded by the judgment of their Lordships of the Judicial Committee delivered by Lord Phillimore in *Canada National Fire Insurance Co.* v. *Hutchings* (1). The provisions of the Canadian *Companies Act* which were there examined and applied (R.S.C. 1906, c. 79, ss. 132 and 138), are not distinguishable from the pertinent provisions of *The Ontario Companies Act* as they stood at the time the by-law was passed; and it seems to follow from their Lordships' observations, at pp. 456 and 457, that s. 48 of *The Ontario Companies Act* of 1907, which was in force in November, 1910, by which the shares of companies governed by it are made

> transferable on the books of the company in such manner and subject to such conditions and restrictions as by this Act, the special Act, the Letters Patent or by-laws of the company may be prescribed,

must be read with s. 87, from which the power to make by-laws in relation to the transfer of shares is derived, and

(1) [1918] A.C., 451.

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which is there defined as a "power to regulate the transfer of shares"; a power which, in their Lordships' view as expressed on the pages mentioned, does not embrace authority to pass "restrictive by-laws." "Regulation does not mean restriction," it is laid down; and a sentence is cited from the judgment of MacMahon J. in *In Re Imperial Starch Co.* (1), and adopted by their Lordships, which is in these words:—

> The statute gives the company power to pass by-laws regulating the transfer of stock, that is, how and in what manner and with what formalities it is to be transferred.

This interpretation of language, almost identical with and differing from that of the Ontario Act only in respects quite immaterial, is, of course, binding on this court.

The appellant, however, advances the defence that Millar had entered into an agreement by which he undertook to observe the provisions of the by-law and by which, it is said, the terms of the by-law became in effect enforceable against him as the terms of a contract with the club. The examination of this point necessitates a word or two upon the history of the shares held by Millar at the time of his agreement with Orpen.

The Jockey Club was originally incorporated on the 20th of April, 1881, with a capital of $20,000, divided into 200 shares at $100 each. In 1910, supplementary Letters Patent were issued, increasing the capital from $20,000 to $200,000, divided into 200 shares at $1,000 each. In December, 1910, Mr. Millar received a stock certificate, no. 37, for 2 shares in the Ontario Jockey Club, and on the receipt of this certificate he signed an acknowledgment in these words:—

> I hereby acknowledge the receipt of Certificate No. 37, for two shares of the Capital Stock of The Ontario Jockey Club, and I hereby agree to accept the said shares, subject to the conditions contained in By-law Number 37 of the Club, passed on the twenty-fourth day of November, 1910; which require that before any Shareholder can transfer a share to any person not already a shareholder of the Club, notice shall first be given to the Club of the desire of such shareholder to sell his share and the Club shall have the right to sell the same to a purchaser at a price to be ascertained according to the provisions of said by-law, or at any less price that may be fixed by the seller.

(1) (1905) 10 Ont. L.R. 22, at p. 25.

Subsequently, in 1916, supplementary Letters Patent were again issued, by which 400 shares of "new stock," of $1,000 each, were created, increasing the capital stock from $200,000 to $600,000. Of these 400 shares, each shareholder received two, for every share of the old stock held by him. Millar, as the holder of two shares, was entitled to, and received, four of the new issue. As affecting these additional four shares, Millar gave no express undertaking to observe the terms of the by-law. The stock certificates were never delivered to him, but the shares were allotted to him, and he became thereby the registered holder of them. At a later period, Millar acquired two additional shares by purchase, but the evidence tells us nothing as to the history of them.

In sum, Millar, when he agreed with Orpen to sell him one share, was the owner of two shares affected by his undertaking above set out, and of four shares affected by no undertaking, and also of two shares in relation to which we are not clearly informed whether any undertaking had or had not been given.

It follows that Millar, when he entered into his agreement with Orpen, had four shares with which he was free to deal, if the view above expressed is correct that the by-law was invalid as such, unless, apart from the express undertaking exacted by the club upon delivery of stock certificates, there was some agreement by conduct of the same or similar character affecting these four shares and binding upon Millar. It is sufficient to say that there is no evidence of facts from which such an agreement can properly be inferred. The shares of the "new stock" created by the supplementary Letters Patent in 1916 allotted to Millar were not created by a sub-division of the existing shares, and there appears to be no satisfactory ground for holding that Millar undertook by implication in accepting, in exercise of his plain rights, the additional shares, to observe, in relation to these shares, the terms of his undertaking as to the existing shares.

This is sufficient to dispose of the appeal. The Appellate Division proceeded on rather different grounds, which it is unnecessary to discuss; but it ought, perhaps, to be observed that, apart altogether from the principle of the

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judgment in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* (1), had the appellant succeeded in establishing the existence of an agreement on the part of Millar, as alleged, the respondent (whose title, acquired from Millar through Orpen, could, before registration, be only an equitable one), would have found himself in difficulties in attempting to force the club to register a share transferred by Millar in violation of his undertaking to the club.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—This is an appeal by the Ontario Jockey Club Limited from a judgment of the Second Divisional Court of the Supreme Court of Ontario, dated 20th November, 1925 (2), and reversing the judgment of the Honourable Mr. Justice Lennox at the trial (3).

By the judgment after the trial the plaintiff's claim for a declaration that he is a shareholder of the defendant, the Ontario Jockey Club, and for other relief, was dismissed.

The appellant, the Ontario Jockey Club, was incorporated by Letters Patent under *The Ontario Companies Act*, bearing date 29th April, 1881, with an authorized capital of $20,000 divided into two hundred shares of $100 each.

On the 10th November, 1910, whilst the original charter was still in force, and before any supplementary patent, above referred to, had issued, by-law no. 37 was passed at a meeting of the appellant's committee, and ratified at the annual general meeting, held 30th November, 1910.

The first two clauses of said by-law are as follows:—

(1) Save as hereinafter provided, no shares or interest in the Club shall at any time be transferred to any person not already a shareholder, until the Club has had an opportunity to find a purchaser for such share or interest as hereinafter provided.

(2) Any shareholder desiring to sell his share or shares (or any portion thereof) shall give notice in writing to the Club that he desires to sell and transfer the same, and such notice shall constitute the Club such shareholder's agent for the sale of such share or shares to any purchaser at a price to be ascertained as hereinafter provided or at any lower price that may be fixed by the shareholder desiring to sell.

The remaining four clauses are directed to specifying how the price is to be determined and the consequential results.

(1) [1926] A.C. 108; 42 T.L.R. 86.
(2) 58 Ont. L.R. 97.
(3) 26 Ont. W.N. 399.

This by-law is claimed to have been within the powers conferred by section 33 of *The Ontario Companies Act* as it stood at the time of its incorporation and substantially in all succeeding amendments of the said Act down to the time of the passing of said by-law.

And I submit that it is also so substantially so as it appears in the first subsection of section 56 of the Revised Statutes of Ontario in 1914, that any slight changes made do not affect its force so far as the questions raised herein are concerned.

And in pursuance thereof Mr. Charles Millar received stock certificate no. 37, dated 13th December, 1910, for two shares of the Ontario Jockey Club stock, and, at that date, attached his signature to the following declaration in the stock certificate book of said club:—

> I hereby acknowledge the receipt of Certificate Number 37, for two shares of the Capital Stock of The Ontario Jockey Club, and I hereby agree to accept the said shares, subject to the conditions contained in By-law Number 37 of the Club, passed on the twenty-fourth day of November, 1910; which require that before any shareholder can transfer a share to any person not already a shareholder of the Club, notice shall first be given to the Club of the desire of such shareholder to sell his share and the Club shall have the right to sell the same to a purchaser at a price to be ascertained according to the provisions of said By-law, or at any less price that may be fixed by the seller.
>
> (Signed) C. MILLAR.

It is in respect of said stock, referred to in said certificate as no. 37, that this suit was instituted by respondent to have an assignment thereof to him registered by the appellant in entire disregard of the said by-law.

I infer that the by-law had been observed ever since its passage, until the respondent had apparently bought or agreed to buy said shares in appellant's club.

The appellant is naturally anxious to know where it stands in light of such pretension unexpectedly set up by the respondent.

The respondent's action was, on the trial, dismissed by Mr. Justice Lennox by reason of failure to prove some step in the case whereby he was not called upon to pass upon the points of law now in question herein.

The Second Appellate Division for Ontario, having heard the case, after an amendment of the pleadings and relying on the authorities cited to them, allowed the appeal.

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The recent decision of the Judicial Committee of the Privy Council in appeal in the case of *Lord Strathcona Steamship Company Limited* v. *Dominion Coal Company Limited* (1), having reversed the decision therein, given a year before in the court appealed from, rather decisively I imagine, disposes of the cases relied upon in the latter part of Mr. Justice Middleton's judgment herein, written on behalf of a unanimous court, from which this appeal is brought.

There is only one feature about which I am now in doubt herein, and that is the different attitude maintained by the respective counsel for appellant and respondent herein, in relation to the question of notice to the respondent of the agreement to which Mr. Millar has subscribed as set out in the copy thereof, above quoted by me, and of the said by-law upon which same is founded.

In the appellant's factum, at page 5 thereof, it is distinctly put forward as an admitted fact—subject to conditions—whatever that may mean.

In respondent's factum counsel stands out for the denial of notice.

I suspect there has been some understanding between counsel, followed by another misunderstanding, as it is of some importance, to the appellant at least, to have this appeal disposed of on the basis of knowledge or notice to respondent of the sort of agreement Mr. Millar signed.

I, therefore, proceed to dispose of this case, so far as I am concerned, upon the assumption of respondent having had notice.

It has been, until I observed this discrepancy, as it were, a matter of some concern to me, for I cannot understand how a purchaser from one who had not only subscribed to the agreement, I quote above, in the records of the appellant, but whose certificate of title to the shares in question has printed across it such absolute notice of assent thereto, and acceptance thereof, can manage to escape notice, unless going it blind.

An investigation of the law relative to constructive notice, might, in that event (but for the assumption I am proceeding upon), have been, in all its bearings on such a case, an unwelcome duty, for the case was not argued on all

(1) [1926] A.C. 108; 42 T.L.R. 86.

its manifold bearings in this respect. As to the effect of subsection 2 of section 3 of the Ontario Act having any bearing on this case I am decidedly of the opinion that it had none.

That subsection, which was a distinct amendment, could not, or, at least in my opinion, should not, be interpreted so as to act retrospectively on transactions which had transpired before the amendment and therefore valid, unless, of course, the by-law was wholly void save so far as made the basis of an agreement as it was in Millar's case.

As I can dispose of this appeal on the grounds taken above without passing on the original validity of said by-law, quite independently of any contract, I do not definitely and finally express a decided opinion.

I may be permitted to say, however, that having, before reaching said conclusion, read and considered the cases cited as bearing on the question of the said validity, I found a wide distinction possible between all of said cases and this.

They all seemed to be by-laws or material which imposed an absolute veto independent of any other consideration given to the protection of the shareholder or his assignee.

This by-law is far from being quite so unreasonable. It seems to have been a well considered scheme for protecting appellant from being invaded with undesirable members, and, at the same time, protecting the shareholder from any loss he would be likely to suffer.

Of course I see two classes of cases impossible to provide for. For example, if a shareholder had a chance to sell at a price giving him more profit than there had been earned, and some gullible fellow was willing to run chances, there would be a loss of that chance.

Another case is that of a shareholder having a desire to give one of his family, or other friend, a gift; he may not do it unless he convinces the appellant that his friend is a good fellow and not to be shut out.

I am only making the various suggestions as to the absolute validity of the by-law without assent thereto on the part of the shareholder at his acquisition of a share, and have come to no definite opinion thereon. I have, however, for the reasons above assigned, come to the con-

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clusion that this appeal should be allowed, but as to the question of costs, perhaps no need to pass thereupon.

There may be cases such as I suggest above in which the by-law might be held restrictive and hence *ultra vires*, but so far as the provision for an option at the price the shareholder wants, I do not think it more than a regulation of which notice must be imputed to the buyer.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Ludwig & Ballantyne.*

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

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*Nov. 9, 10.

1927

*Jan. 4.

ONTARIO GRAVEL FREIGHTING COMPANY, LTD. (DEFENDANT)..... } APPELLANT;

AND

MATTHEWS STEAMSHIP COMPANY, LIMITED (PLAINTIFF)..... } RESPONDENT.

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

*Shipping—Collision in St. Clair River—Vessels approaching each other—Duties as to passing and signalling—Rules of navigation in the Great Lakes—Negligence—Contributory negligence—Last act of negligence cause of collision—Evidence—Written statement used for purpose for which it was not admissible—No substantial miscarriage of justice.*

The steamship *Y.*, owned by plaintiff, while going down the St. Clair river at night, collided with a barge, in tow of a tug, both owned by defendant, going up the river. The barge and tug were going up the south channel formed by Russell Island, and were on the west, or their port, side of the channel. The *Y.*, when approaching the channel, and before perceiving the tug or barge, altered her course somewhat to port. The tug gave one blast indicating her course, and the *Y.* then perceived that the tug was turning northeasterly to cross the channel and the *Y.'s* bow. The signal conflicted with the *Y's* intended course and with the right of way which she had under R. 25 (Rules for the Great Lakes, adopted by Order in Council, 4th February, 1916). The *Y.* gave the danger signal. The tug returned the danger signal and, according to some witnesses, repeated the single blast, and the tug proceeded at full speed across the channel. The *Y.* then manoeuvred to get into starboard swing. It cleared the tug but struck the barge a glancing blow with its port bow on the port quarter. The court

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

could not ascertain, on the evidence, whether the vessels were more or less than half a mile apart when the tug gave its first signal.

*Held:* Under all the circumstances, the neglect of the tug was the sole cause of the collision. Immediately before the tug and tow went to starboard they were either in a position of safety or where a starboard helm would have carried them clear of the *Y's* course which was then capable of perception. If the tug's signal were given before the *Y.* came within half a mile, the *Y.* was relieved of the requirement in R. 25 to signal her intended course; indeed she could not have done so without a breach of the rule forbidding a cross signal. On the other hand, if the *Y.* passed the half mile limit without signalling her course, the tug was confronted with a situation wherein the down-coming ship, which had the right of way, was on a course which would lead her to, or to the eastward of, midchannel, at the meeting place; and if, in the circumstances, the tug were in doubt about the *Y's* course her proper signal was danger under R. 22, and she was not justified in giving the starboard signal, which placed her and her tow, with their broad spread, across the channel and in front of the *Y.* It might be that the *Y.* was not required to signal, as it appeared that, by reason of the confusion of the lights on the tug and tow, she was not aware that they were in the channel until she received the tug's signal; but, assuming the *Y.* passed the half mile limit without notifying her course, and thus broke the rule, that neglect was not only antecedent to, but independent of, the negligence of the tug, which caused the accident. The case was within the class described by Lord Birkenhead's first category in *The Volute* ([1922] 1 A.C. 129 at p. 136). It could not be said that the acts of the navigation of the two ships formed parts of one transaction, or that the second act of negligence, that of the tug and tow in crossing the channel in front of the *Y.*, was consequential upon or involved with the first. *Anglo-Newfoundland Development Co.* v. *Pacific Steam Nav. Co.* ([1924] A.C. 406, at pp. 417, 420, 421, referred to.

Judgment of Hodgins L.J.A. ([1926] Ex. C.R. 210) affirmed.

A witness for the defendant had previously made a statement to an attorney of the plaintiff, which was reduced to writing and signed. The witness was cross-examined thereon, and subsequently the attorney was called to prove the statement and it was put in evidence in reply.

*Held,* referring to a passage in the trial judge's judgment, that if he held that the statement could be used against the defendant as evidence of the facts stated in it, he was clearly wrong; the statement was admissible only by way of contradiction and to affect the witness's credibility (*Ewer* v. *Ambrose,* 3 B. & C. 746; *Wright* v. *Beckett,* 1 M. & Rob. 414); but although the statement might have been used for a purpose for which it was not admissible, it did not, on the whole case, result in any substantial miscarriage of justice or affect the decision.

APPEAL by the defendant from the judgment of the Exchequer Court of Canada, Toronto Admiralty District (Hodgins L.J.A.) (1) in favour of the plaintiff for damages,

(1) [1926] Ex. C.R. 210.

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and dismissing the defendant's counter-claim for damages, in respect to a collision between a ship, owned by the plaintiff, and a barge, owned by the defendant, in tow of a tug owned by the defendant. The facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

*O. S. Tyndale K.C.* for the appellant.

*F. King K.C.* and *H. Dale Harris* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The action was brought by the plaintiff company (respondent), owner of the steamship *Yorkton,* to recover, against the defendant (appellant), damages caused by collision of the steamship with the barge *Badger,* which was at the time in tow of the tug *Thomas E. Tees,* both tug and tow belonging to the defendant company. The defendant denied liability, and pleaded a counter-claim. The action was tried before the local judge in Admiralty at Toronto, who found for the plaintiff, and dismissed the counter-claim. It is from this judgment that the defendant appeals to this court.

The facts may be taken as gathered from the findings of the learned local judge, because, although the evidence is contradictory, and the result unsatisfactory to the appellant, the findings are reasonably supported by the proof, and, giving them their due weight, cannot in my opinion be disturbed. None of the specific faults alleged against the *Yorkton* by the defendant's preliminary act or pleadings is established, and the defendant, having regard to the facts found, must bear the loss occasioned by the collision, unless it can shift liability to the plaintiff by reason of the neglect of the *Yorkton* to signal her course, as required by Rule 25, which I shall quote.

I proceed then to state the material facts which are not in dispute or are found. The collision occurred in the St. Clair river, where the rules governing the navigation are those for the Great Lakes, adopted by Order in Council of 4th February, 1916. On the night of 24th June, 1925, the *Yorkton,* which is a steel steamship of 1,136 tons register, length 250 feet, beam 42 feet 8 inches, and drawing at the time 13 feet, was descending the St. Clair river from

Port Arthur, with a cargo of oats. Opposite the Chenal Ecarté, about a mile and a half above the head of Russell Island, which divides the river into two channels, north and south, the *Yorkton's* engines were checked to half speed, about six knots, and her course was laid on the flashing gas buoy at the upper end of the shoal, which projects, up stream from the head of the island, a distance of half a mile or thereabouts; and here it may be useful to observe that this shoal was being dredged, and that, by reason of the dredging which had been done, the gas buoy had been moved, and was, at the time of these occurrences, stationed 200 feet to the westward of the position which it occupies on the chart used at the trial. When the *Yorkton,* in her course toward the gas buoy, had reached a point about half a mile above it, her course was altered somewhat to port and steadied in a direction down the south channel, between the gas buoy and the lower light of Walpole Island on the opposite side of the channel, these lights bearing about a half point on the starboard and port bows respectively. Up to this time, those in charge of the navigation of the *Yorkton* had not perceived the tug or her tow, with which she subsequently came into contact. These two craft were coming up the south channel, the tug towing the barge astern by a hawser or tow line 150 feet in length. The *Badger* was a sand and gravel scow, having an open hold, with no deck for the greater part of her length. The tug was 86 feet long, beam 16 feet, draft 6 to 9 feet; the *Badger* 140 feet long, beam 36 feet, draft, at the time when she was light, 1½ feet. They were between the head of Russell Island and the gas buoy at the top of the shoal, on the west, or their port, side of the channel. The time was about 11.30, daylight saving, and the night was dark with showers. The tug and tow carried lights in excess of those prescribed by the rules, and, although some of these lights had been perceived by the *Yorkton* previously to her change of course, they were not made out to be running lights, but were mistaken for the lights of a dredge, which had been working on the shoal when the *Yorkton* passed up a few days previously. They had been attentively examined by the master of the *Yorkton* through his marine glasses as he came down, but they did not change bearing, they ranged

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with the flashing light, close to the shoal, and appeared to him, and to his second mate, who was also in the wheel house, as a cluster of fixed lights, such as the dredge would be likely to show; no running lights could be discerned. It was after the *Yorkton* changed her course to bear midway between the gas buoy and the lower Walpole light that the lights of the tug became distinctive, and, at the same time, the tug gave one blast indicating its course; it was then perceived that the tug was turning northeasterly to cross the channel and the bow of the *Yorkton*. The signal conflicted with the intended course of the *Yorkton*, and with the right of way which she had under Rule 25, which provides that:

> When steamers are approaching each other "head and head," or nearly so, it shall be the duty of each steamer to pass on the port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his whistle, and thereupon such steamers shall pass on the port side of each other. But if the courses of such steamers are so far on the starboard of each other as not to be considered by pilots as meeting "head and head," or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his whistle, and they shall pass on the starboard side of each other: Provided, however, that in all narrow channels, where there is current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.
>
> In the night, steamers will be considered as meeting "head and head" so long as both the coloured lights of each are in view of the other.

The master of the *Yorkton* tells us that he was on the point of sounding two blasts the moment he discovered the lights of the tug, but was anticipated by its signal. This placed him in a difficult position. He was forbidden by Rule 23 to give a cross signal, and therefore could not persist in his intention to negotiate the passage on his port side, and he was entering a narrow channel with considerable current setting him on. In the circumstances he took what I have no doubt was a prudent, if not the only proper, course. He gave the danger signal, "five or more short and rapid blasts of the whistle," which, in the circumstances was, I should think, intended by the *Yorkton*, and ought to have been interpreted by the tug, to mean—"you (the tug) are

creating a dangerous situation. Reconsider." The answer from the tug was a return of the danger signal, and, according to some of the witnesses, a repetition of the single blast, and the tug proceeded at full speed across the channel. The master of the *Yorkton* then promptly executed the necessary manoeuvres to bring his ship into starboard swing. He cleared the tug, but struck the barge a glancing blow with his port bow on the port quarter, causing a breach from which the barge filled and sank, but not until it had reached the shoal to which the tug turned when the *Yorkton* passed.

It is impossible to ascertain precisely what the distance was between the *Yorkton* and the tug at the time when the latter gave its first signal. The master of the tug said in his direct examination that, as nearly as he could judge, the *Yorkton* would be within about half a mile. The learned trial judge refers to the evidence upon this point. He says:

> As to when she saw the *Yorkton* change her course, her master says: "When I got within about ½ mile as near as I could judge the *Yorkton* swung sharply to port * * * within about ½ a mile of the *Yorkton*, that is in a direct line, she swung to port." On cross-examination he says: "I would figure that we were about a mile apart when she altered her course to port; or about ½ mile, pardon * * * we would be about 1,300 feet-1,200 feet, I couldn't say just exactly." I have come to the conclusion that these last figures are incorrect and that his distance from the *Yorkton* was further than the quotation indicates.

Different witnesses give different estimates. There is no precise finding. It is possible that the vessels were still upwards of half a mile apart. It is not improbable that they were less than half a mile. The master of the *Yorkton* said in cross-examination "maybe a little bit better than a quarter of a mile." The conditions made it difficult to form an accurate opinion as to the distance. It is noteworthy, however, that the *Yorkton* is not charged, either in the defendant's preliminary act or pleadings, with any fault for not having notified her course. It would look as if the master of the tug did not realize the application of Rule 25. In any case I think it must be taken that immediately before the tug and tow went to starboard they were either in a position of safety, or where a starboard helm would have carried them clear of the *Yorkton's* course, which, in view of her position and line of progress, as dis-

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closed by her lights and the shore lights on either side, was not then incapable of perception. If the tug's signal were given before the *Yorkton* came within half a mile of the tug the *Yorkton* would clearly be relieved of the requirement to signal her intended course; indeed she could not have done so without a breach of the rule forbidding a cross signal. On the other hand, if the *Yorkton* passed the half mile limit without signalling her course, the tug was then confronted with a situation wherein the down-coming ship, which had the right of way, was on a course which would lead her to mid-channel, or to the eastward of mid-channel, at the meeting place; and if, having regard to the circumstances, the tug were in any doubt about the *Yorkton's* course, its proper signal was danger under Rule 22, and there was no justification which I can perceive for the starboard signal which the tug did give, and which placed her and her tow, with their broad spread, across the channel, and in front of the *Yorkton*. It may be that the *Yorkton* was not required to signal, because the findings uphold the claim of her witnesses that, by reason of the confusion of the lights on the tug and tow, they were not aware that the tug and tow were in the channel until the *Yorkton* received the signal from the tug; but, assuming that the *Yorkton* passed the half mile limit without notifying her course, and thus broke the rule, that neglect was not only antecedent to, but in my view independent of, the negligence of the tug, which caused the accident. The case is within the class described by Lord Birkenhead's first category in the House of Lords in *The Volute* (1):

> In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A recovers in full: see among other cases *Spaight* v. *Tedcastle* (2) and *The Margaret* (3).

An inquiry by the tug, which could have been conveyed by a danger signal, would presumably have elicited the information that the *Yorkton* was taking her port side of the channel, a course which perhaps might have been inferred

(1) [1922] 1 A.C. 129, at p. 136. (2) (1881) 6 App. Cas. 217.
(3) (1884) 9 App. Cas. 873.

from the situation in the absence of a signal. The *Yorkton* was coming down with the current, and had to contend with the difficulties of navigation incident to a ship in that position. The channel is said, and appears by the chart to be, about or nearly 800 feet in width. The tug and tow were on the western side where the slack water was, and, if close to the bank, were safe, or, if not, they could have gone closer, and thus have avoided any danger of collision. But the master of the tug, whether because he thought he was on the wrong side of the channel or for some other reason, at the critical moment, chose to port his helm and project across the narrow channel, the unhandy triad with the navigation of which he was charged, measuring in length, tug, hawser and tow, no less than 376 feet, and occupying a very considerable expanse as compared with that which would have been taken up on a course parallel to the bank. It cannot well be said that the acts of the navigation on the two ships formed parts of one transaction, or that the second act of negligence, that of the tug and tow in crossing the channel in front of the *Yorkton,* was consequential upon or involved with the first. One can only conjecture what would have happened if the *Yorkton* had signalled her course before hearing the blast from the tug. It is true that the difference in time between the *Yorkton* passing within the half mile limit and the signal and porting of the tug was not great, but it was long enough to have enabled the master of the tug to reach an obvious conclusion, and to refrain from a course the danger of which was patent. He should have remembered Rules 37 and 38. There is in my view sufficient distinction as to time, place and circumstance to justify the treating of the negligence of the tug as the sole cause of the collision. *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.* (1).

There is one other point that I should mention, because, having accepted the findings of the local judge, I have not thought it necessary to review the evidence in detail. The defendant's leading witness, Capt. Duff, of the ss. *Superior,* was coming up the north channel, between the head of the island and the upper end of the shoal, at the

(1) [1924] A.C. 406, at pp. 417, 420, 421.

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time when the vessels concerned were approaching each other and came into collision opposite to him in the south channel. He was put forward as an independent witness and he gave some testimony favourable to the defence in his direct examination, the effect of which was however considerably shattered when he came to be cross-examined. During his cross-examination it transpired that he had previously been interrogated by an attorney from Cleveland, acting under the plaintiff's instructions, and had made a statement which the attorney reduced to writing, and which Capt. Duff signed. He was cross-examined upon this statement, and subsequently the attorney was called to prove the statement, and it was put in evidence in reply. It served its purpose of course to discredit or to affect the credibility of Capt. Duff, but the learned trial judge made this comment:

> Duff, master of the Superior, called for the defendants, says that when he saw the tug and tow, they were pretty close to Russell Island, as though they intended to cross between the buoy and the island. Though this witness very clearly showed his unreliability, the defendants cannot complain if his early statement to Mr. Theodore Robinson (the attorney), Ex. 3, is used against them, especially as he adduces a reason for his belief which discloses an interest in their position in relation to his ship.

If by this the learned judge mean that the statement which Capt. Duff gave to Mr. Robinson can be used against the defendant, as evidence of the facts stated in it, he is clearly wrong. The statement was admissible only by way of contradiction and to affect the witness's credibility. *Ewer* v. *Ambrose* (1); *Wright* v. *Beckett* (2). I see no reason to believe, however, that the learned judge would or could have arrived at a different conclusion in the case if the statement had not been introduced, and, although it may have been used for a purpose for which it was not admissible, I do not think it has resulted in any substantial miscarriage of justice, or affected the decision.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Rodd, Wigle & Whiteside.*

Solicitors for the respondent: *King & Smythe.*

(1) [1825] 3 B. & C. 746.

(2) (1834) 1 M. & Rob. 414.

MEDERIC DUFORT (PLAINTIFF).....APPELLANT; 1926

*Oct. 18, 19.
*Dec. 15.

AND

DAME Z. DUFORT ET VIR (DEFENDANT)..RESPONDENT;

AND

JOSEPH DUFORT AND OTHERS (MIS-EN-CAUSE).

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

*Marriage contract—Mutual donation—Usufruct—To take effect at death of one consort—Stipulation in favour of heirs "du côté estoc et ligne"—Substitution—Right of "taking back" (droit de retour)—"Biens propres de succession"—Changes effected by the civil code in the law of ab-intestate successions—Arts. 599, 779 C.C.*

A clause in a marriage contract provided for mutual and reciprocal donation between husband and wife of all the property belonging to the consort first dying to be enjoyed by the survivor in usufruct "pour après son extinction retourner les dits biens aux héritiers des dits futurs époux du côté estoc et ligne d'où ils procèderont."

*Held* that this clause did not stipulate a right of "taking back" (*droit de retour*) within the meaning of art. 779 C.C. (or under the law preceding the civil code) in favour of the heirs at law of the line of the deceased consort.

*Held,* also, that a substitution, either vulgar or fiduciary, had not been created by the terms of the clause.

*Held,* further, that the last part of the clause constituted, under the law preceding the civil code, a stipulation of "biens propres de succession," but that as to the succession of the last surviving son of the consorts, who died subsequently to the civil code, the new law of succession applied.

Judgment of the Court of King's Bench, (Q.R. 39 K.B. 56) 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 *en pétition d'hérédité.*

On the 20th of February, 1859, one Raphael Dufort entered into a marriage contract with one Elmire Deslauriers, in which separation as to property was stipulated and a sum of $2,000 was settled by way of dowry upon the future wife, and the following clause appears: "En considération du dit futur mariage les futurs époux se sont fait et

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

(1) (1925) Q.R. 39 K.B. 56.

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se font par ces présentes, l'un à l'autre et au survivant d'eux, ce acceptant, donation viagère, mutuelle, égale et réciproque de tous les dits biens meubles et immeubles généralement quelconques qui se trouveront appartenir au premier mourant d'eux au jour de son décès, de quelque nature et en quelques lieux et endroits qu'ils soient et en quoi qu'ils puissent monter et consister, pour en jouir par le dit survivant en usufruit seulement pendant sa vie à sa caution juratoire en faisant bon et loyal inventaire, tant que le dit survivant ne convolera pas en secondes noces; auquel cas de secondes noces, le dit usufruit sera éteint; pour après son extinction, retourner les dits biens aux héritiers des dits future époux du côté estoc et ligne d'où ils procèderont; cette donation vaudra qu'il y ait enfant ou enfants nés alors ou à naître du dit futur mariage, car ainsi, etc." On the 23rd of February, 1859, the marriage took place. On the 16th of November, 1859, a son was born of the marriage, was baptised and given the name of his father, Raphael. On the 19th of February, 1863, another son was born, was baptised and received the name of Pierre Etienne. Pierre Etienne died on the 28th of September, 1864. His brother, Raphael, died on the 31st of December, 1878. Their father had died on the 30th of May, 1863. It would therefore appear that, after 1878, of the immediate family, there survived only the widow, the donee under the marriage contract. She died on the 17th of October, 1918, without having contracted a second marriage. On the 9th of July, 1912, she made her last will and testament, modified by a first and second codicil, dated respectively the 25th of January, 1914, and the 18th of December, 1914. The only relevant part of her testamentary disposition is the admitted fact that by the will she left to the female respondent, her niece, all the property of which she died possessed. The female respondent accepted the succession of her aunt and entered upon the possession of the property to her bequeathed. It is common ground that among the property taken possession of by respondent was the property owned by her deceased uncle, the husband of the testatrix, on the date of his death, and covered by the clause of the marriage contract. There were living at the date of the death of the

testatrix some fifty-one nephews and nieces, among whom was the respondent. The appellant, a nephew of the deceased Raphael Dufort, brought the present action, in which he alleges the marriage contract, the marriage, the birth and death of the two sons, the death of the widow, the will made by the widow and the taking possession of the estate by respondent; and further alleges that Dame Elmire Deslauriers, by the terms of her marriage contract, was bound to preserve all the property, the usufruct of which only was given to her by her deceased husband, for that at the extinction or termination of the usufruct, the same should be handed over to the heirs at law "du côté estoc et ligne" of her late husband. The appellant further alleges that the usufruct of the properties found in the estate of Raphael Dufort having terminated by the death of Madame Dufort, on the 11th of October, 1918, and inasmuch as the children born of the marriage were then dead, without issue. the property existing at the date of the death of Raphael Dufort, and still existing at the date of the death of Madame Dufort, returned to and became the property of the heirs at law of the " côté estoc et ligne " of the husband, the whole in accordance with the terms of the marriage contract. And the prayer of the action is that the appellant be declared to be the owner of an undivided $\frac{1}{51}$ part of the estate of the late Raphael Dufort, and a partition of the said property be made and the respondent be ordered to render an account of the fruits and revenues of the said property during the period which she illegally held possession of it. The respondent pleads, practically admitting all the facts alleged, that the clause in the marriage contract relied upon by the appellant did not create a substitution; that the clause is null and of no effect; that Madame Dufort inherited from her children the property in question, that she became and was at the date of the making of her last will and testament, and at the date of her death, the absolute owner of the property, and that she possessed the power of disposing of the same by her will; and that the respondent in virtue of the will became vested with the absolute ownership of all the property.

*Eug. Lafleur K.C.* for the appellant.

*Chs. Laurendeau K.C.* for the respondent.

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The judgment of the court was delivered by

MIGNAULT J.—L'appelant, neveu de feu Raphaël Bourget dit Dufort (que je vais appeler Raphaël Dufort), se pourvoit contre l'intimée par voie d'action en pétition d'hérédité et met en cause les autres neveux et nièces de Raphaël Dufort, lesquels, dit-il, sont, avec lui-même et l'intimée, ses plus proches héritiers. Sa part dans cette succession serait d'un cinquante-unième, et il demande le partage des biens qui en dépendent. La Cour Supérieure (DeLormier J.) a accordé ses conclusions, mais ce jugement a été infirmé par la Cour du Banc du Roi. De là l'appel.

Commençons par un rapide exposé des faits saillants de la cause.

Le 23 février 1859, Raphaël Dufort et Elmire Legault dit Deslauriers contractèrent mariage à Montréal, après avoir fait, le 20 février, un contrat de mariage devant L. S. Martin, notaire. Ce contrat stipulait séparation de biens, douaire préfix en la somme de $2,000, affectant un immeuble de l'époux situé au faubourg Saint-Antoine, à Montréal, et il contenait, en outre, la convention suivante qui a donné lieu au procès:

> En considération du dit futur mariage les futurs époux se sont fait et se font par ces présentes, l'un à l'autre et au survivant d'eux, ce acceptant, donation viagère, mutuelle, égale et réciproque de tous les dits biens meubles et immeubles généralement quelconques qui se trouveront appartenir au premier mourant d'eux au jour de son décès de quelque nature et en quelques lieux et endroits qu'ils soient et en quoi qu'ils puissent monter et consister, pour en jouir par le dit survivant en usufruit seulement pendant sa vie à sa caution juratoire en faisant bon et loyal inventaire, tant que le dit survivant ne convolera pas en secondes noces; auquel cas de secondes noces, le dit usufruit sera éteint; pour après son extinction, retourner les dits biens aux héritiers des dits futurs époux du côté estoc et ligne d'où ils procèderont;
>
> Cette donation vaudra qu'il y ait enfant ou enfants nés alors ou à naître du fit futur mariage, car ainsi, &c.

Raphaël Dufort décéda à Montréal le 20 mai 1863, laissant son épouse et deux enfants issus de son mariage avec cette dernière, savoir Denis-Raphaël, né le 15 novembre 1859, et Pierre-Etienne, né le 19 février 1863. Ces deux enfants sont décédés en minorité, le second le 28 septembre 1864, et l'aîné le 28 décembre 1878. Madame Dufort ne convola pas en secondes noces, et mourut à Montréal, le 11 octobre 1918, instituant l'intimée comme sa légataire universelle.

Outre ce qui précède, l'appelant allègue que la veuve de Raphaël Dufort vendit sans droit pour $15,000 deux terres dont elle n'avait que l'usufruit. Il ne conclut cependant pas à l'annulation de la vente, probablement parce qu'on lui aurait opposé la prescription, mais il veut partager dans le prix. Quant aux autres biens laissés par Raphaël Dufort, l'appelant en demande le partage entre lui, l'intimée et les mis-en-cause suivant leurs droits respectifs.

Le code civil est entré en vigueur le 1er août 1866 et l'appelant base ses prétentions sur le droit antérieur au code. Il faut cependant observer que le code ne contient pas véritablement un droit nouveau. Règle générale, ses dispositions sont déclaratoires du droit existant lors de la codification, sauf lorsqu'il innove expressément à ce droit. La matière des successions *ab intestat* est l'une de celles où il y a eu telle innovation, et c'est sous l'empire de l'ancien droit (je vais ainsi désginer le droit antérieur au code) que se sont ouvertes les successions de Raphaël Dufort et de son second fils, décédé en 1864. La succession *ab intestat* de son fils aîné, au contraire, s'est ouverte après la mise en vigueur du code civil, ce qui entraînera à son égard l'application des nouvelles règles adoptées par le code. Je reviendrai sur ce point.

Envisageant maintenant la clause que j'ai rapportée plus haut, il est évident qu'elle renferme une donation à cause de mort ou institution contractuelle, car elle ne porte que sur les biens qui se trouveront appartenir au premier mourant des époux au jour de son décès. Avant comme depuis le code les donations à cause de mort ont toujours été permises dans les contrats de mariage. Les parties envisagent cette clause, soit comme stipulant un droit de retour, soit comme créant une substitution fidéicommissaire, soit enfin comme ne conférant au survivant des époux qu'un simple droit d'usufruit, sans disposition quant à la nue propriété. Dans sa déclaration, l'appelant en parle comme d'une substitution, le jugement de la Cour Supérieure y voit un droit de retour, et la troisième solution est celle que l'intimée préconise et que la Cour du Banc du Roi a acceptée. Il reste toutefois une quatrième alternative, dont il n'a pas été question dans les jugements, de savoir si la partie finale de la clause n'a pas plutôt pour objet de créer des propres

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de succession. Je me propose d'examiner ces alternatives, ce qui entraînera la discussion de règles de droit abrogées par le code. Il est clair, en effet, qu'il faut entendre la clause dans le sens que lui donnait le droit coutumier français, car de même que les actes s'interprètent suivant la loi du lieu où ils sont passés (art. 8, C.C.), de même faut-il consulter la loi en vigueur lors de la passation d'un acte pour en déterminer la portée juridique.

Les parties nous ont cité quatre causes où il a été question d'une clause plus ou moins analogue: *Barras* v. *Lagueux* (1), Andrews J.; *Théoret* v. *Chaurette,* Cour de Revision (2); *Houde* v. *Marchand,* Cour du Banc du Roi (3); *Tassé* v. *Goyer,* Cour de Revision (4).

Dans la première espèce, le contrat de mariage antérieur au code ne stipulait pas le retour en faveur des héritiers de l'époux donateur, mais disait simplement que les biens retourneraient du côté de celui dont ils procédaient, et le juge Andrews a décidé qu'il n'y avait pas et ne pouvait y avoir de substitution. Dans les trois autres causes, les contrats de mariage étaient subséquents au code, et on avait stipulé que les biens retourneraient aux héritiers de l'époux donateur; la Cour du Banc du Roi, dans la cause de *Houde* v. *Marchand* (5), a décidé qu'il y avait substitution, mais la Cour de Revision s'est prononcée en sens contraire dans les deux causes jugées par elle. J'ai lu ces jugements bien attentivement, mais il me semble qu'il faut remonter plus loin pour trouver la solution du problème qui nous occupe.

Comme je l'ai dit, la Cour Supérieure a exprimé l'opinion qu'il y avait ici un droit de retour en faveur de ceux qui, à l'extinction de l'usufruit de Mme Dufort, se trouvaient les plus proches héritiers de feu Raphaël Dufort. La Cour du Banc du Roi, au contraire, a décidé que Mme Dufort n'avait qu'une droit d'usufruit que le contrat de mariage n'avait pas disposé de la nue propriété des biens grevés de l'usufruit, que cette nue propriété était dévolue aux deux enfants de Raphaël Dufort au décès de ce dernier, et que Mme Dufort l'avait recueillie comme héritière de ses enfants.

(1) (1886) 9 L.N. 259.
(2) (1896) 3 R. de J. 182.
(3) (1912) Q.R. 21 K.B. 184.
(4) (1913) Q.R. 47 S.C. 424.
(5) Q.R. 21 K.B. 184.

Aucun des juges n'a vu dans la clause du contrat de mariage une substitution fidéicommissaire. Il est clair, en effet, qu'il ne peut être question de substitution si Mme Dufort n'avait qu'un droit d'usufruit, car en supposant même qu'il y aurait eu disposition de la nue propriété en faveur des héritiers de Raphaël Dufort par voie de retour conventionnel, nous n'aurions pas ici les deux donations portant sur la même chose qui sont de l'essence de la substitution.

Je suis également d'avis que la donation faite au survivant des époux ne porte que sur l'usufruit des biens et que partant il n'y a pas de substitution. Cette donation est dite être une " donation viagère ", c'est-à-dire une donation pour la vie du donataire, et même celui-ci perd ses droits s'il convole en secondes noces. Du reste, il en jouit " en usufruit seulement ", ce qui exclut l'idée d'une donation en pleine propriété à défaut de quoi il ne peut y avoir de substitution avec la charge de rendre qu'elle comporte.

Nous en venons maintenant à la partie finale de la clause,

pour après son extinction (de l'usufruit) retourner les dits biens aux héritiers des futurs époux du côté estoc et ligne d'où ils procèderont.

C'est là que la Cour Supérieure a trouvé qu'il y avait stipulation d'un droit de retour conformément à l'article 779 du code civil.

L'étude de cette question de droit de retour doit être combinée avec celle de la quatrième alternative que j'ai signalée plus haut, savoir si la partie finale de la clause du contrat de mariage ne doit pas être interprétée comme stipulant que les biens provenant de chacun des époux—car il y est question des biens des deux époux—seront propres dans la succession de l'époux dont ils proviennent, et, dans l'espèce, dans la succession de Raphaël Dufort, le premier mourant. Dans l'ancien droit, la convention créant des propres de succession, appelés " propres conventionnels ", et qui ne pouvait se faire que par contrat de mariage, avait un effet considérable dans les successions *ab intestat*.

Parlons d'abord du droit de retour. L'article 779 du code civil—qui n'est pas indiqué comme étant de droit nouveau—

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paraît admettre que ce droit soit stipulé en faveur du donateur ou des tiers. Cet article s'exprime comme suit:

779. Le donateur peut stipuler le droit de retour des choses données, soit pour le cas de prédécès du donataire seul, soit pour le cas du prédécès du donataire et de ses descendants.

La condition résolutoire peut dans tous les cas être stipulée soit au profit du donateur lui-même soit au profit des tiers.

L'exercice du droit de retour ou autre droit résolutoire a lieu en matière de donation de la même manière et avec les mêmes effets que l'exercice du droit de réméré dans le cas de vente.

Le droit de retour est plus étendu dans la province de Québec qu'en France où, par crainte des substitutions, les auteurs du Code Napoléon l'ont restreint au seul donateur (art. 951, C.N.). Le deuxième alinéa de notre article permet de stipuler le droit de retour au profit du donateur ou des tiers, mais la formule qu'il emploie semble envisager la condition résolutoire en général, dont le droit de retour, qui est certainement une condition résolutoire, n'est qu'une espèce. Cette généralité des termes de l'article 779 C.C. a attiré l'attention des Lords du Conseil Privé dans la cause de *Herse* v. *Dufaux* (1). Je ne me propose pas de la discuter ici, car il est certain que le droit de retour peut être stipulé soit en faveur du donateur, soit au profit des tiers, y compris les héritiers du donateur envisagés séparément de celui-ci, et alors, puisqu'il est subordonné au prédécès du donataire, ou du donataire et de ses descendants, il opère comme condition résolutoire et anéantit, lorsqu'il s'accomplit, la donation elle-même. Mais ce qu'il convient de noter, c'est que lorsque le droit de retour est stipulé au profit d'autres personnes que le donateur, il rentre plutôt dans la catégorie des substitutions (Demolombe, t. 18, n$^{os}$ 110 et 111; Aubry & Rau, 5e éd., t. 11, p. 296) car, ainsi que le dit Troplong (*Donations*, t. 3, n° 1267), le droit de retour fait remonter la chose vers sa source, c'est-à-dire au donateur, tandis que la substitution l'en éloigne. Or, ici, il n'y a certainement pas substitution, pas plus qu'il n'y a une condition résolutoire dont l'effet serait d'anéantir la donation. Il n'y a pas même une donation en pleine propriété au survivant, mais seulement un droit de jouissance, et il n'y a rien qui puisse faire retour du donataire aux héritiers

(1) (1872) 4 P.C. App. 468, at p. 491.

du donateur. De quelque manière que j'envisage la clause, je ne puis y voir un droit de retour.

Reste l'hypothèse que la partie finale de la clause du contrat de mariage ne serait que la stipulation que les biens en question seront des propres de succession. La stipulation de propre, que Guyot, dans son Répertoire de Jurisprudence (*vo. Réalisation,* tôme 14, pp. 456 et suiv.), appelait la clause de réalisation, était bien connue dans l'ancien droit où elle a donné lieu à de nombreuses controverses. Elle pouvait avoir pour but de modifier la communauté de biens entre époux, et sous cette modalité elle existe encore dans le droit actuel, ou bien de rendre des biens propres de succession, et dans ce cas elle ne se faisait que par contrat de mariage. On l'exprimait généralement en disant que certains biens, par exemple des meubles, seraient propres à l'un des époux, où lui sortiraient nature d'héritage, et son extension variait suivant qu'elle était stipulée en faveur de l'époux *et des siens,* par quoi on entendait les enfants, *ou des siens et de ceux de son côté et ligne,* et alors elle comprenait les enfants ou descendants et les collatéraux. (Voy., pour l'interprétation de ces expressions, Guyot, vo. Biens, tome 2, p. 348, 2e colonne; Pothier, Traité des Propres, n° 130, tome 8 de l'édition Bugnet.) Quand la clause de propre était stipulée au *profit des siens et de ceux de son côté et ligne,* le Répertoire de Guyot, l'article est de Merlin, l'appelait "la réalisation ou stipulation de propre au traisième degré: vo. Réalisation, parag. III, tome 14, p. 462.

Dire que les biens donnés à l'époux ou par lui *retourneraient* à ceux de son côté et ligne, c'était, dans l'ancien droit, stipuler que ces biens seraient propres de succession. On les appelait des *propres fictifs* pour les distinguer des *propres réels.* Guyot, vo. Réalisation, tome 14, p. 467, 1ère colonne, au bas de la page, cite un arrêt où il s'agissait de la clause suivante d'un contrat de mariage:

> que le survivant (des époux) aurait l'usufruit des biens-fonds du prédécédé, et qu'en cas de non enfants, les biens *retourneraient* au côté et ligne dont ils seraient procédés.

Personne ne s'est avisé de croire que ce n'était pas là une clause de propre.

Du reste, l'article 94 de la Coutume de Paris se servait de la même expression "retourner" pour indiquer des propres

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de succession. Parlant des rentes constituées appartenant à des mineurs, et qui avaient été rachetées pendant leur minorité, cet article s'exprimait ainsi:

> les deniers de rachat ou le remploi d'iceux en autres rentes ou héritages sont censés de même nature et qualité d'immeubles qu'étaient les rentes ainsi rachetées *pour retourner aux parents du côte et ligne dont les rentes étaient procédées.*

Et Pothier, ouvrage cité, n° 119, commentant ces mots " pour retourner, etc.", disait:

> Elle (la coutume) fait assez connaitre par ces termes que ce qu'elle s'est proposé par cette disposition, est que le bien d'une ligne du mineur ne passe point à une autre ligne, et que le bien de chaque famille lui soit conservé.

C'était bien là, dans l'ancien droit, l'effet de la dévolution, par voie de succession *ab intestat,* de biens qui étaient propres de succession. Ils retournaient aux successibles du côté dont ils étaient procédés par application de la règle *paterna paternis, materna maternis.* Dans le contrat de mariage qui nous occupe, les parties n'ont pu envisager que la création de propres de succession, car elles excluaient la communauté de biens entre elles.

Je suis donc d'opinion que la clause dont il s'agit ici est une stipulation de propre. Une telle stipulation au profit des héritiers du côté et ligne de l'un des époux ne constituait pas une substitution en faveur de ceux-ci (Thevenot d'Essaule, éd. Mathieu, n° 239, p. 89). Et nous avons vu que ce n'est pas un droit de retour dans le sens envisagé par l'art. 779, C.C.

J'ai à peine besoin de dire que ces stipulations de propre avaient une portée considérable dans l'ancien droit, mais seulement, comme je l'ai déjà fait remarquer, dans les successions *ab intestat.* On pouvait aliéner les biens stipulés propres, ou en disposer par testament, même en faveur d'un parent d'une autre ligne, car la clause était de droit très étroit (Pothier, ouvrage cité, n° 133; voyez spécialement ce qu'il dit au bas de la page 575).

L'importance de la clause de propre quant aux successions *ab intestat* provenait du fait que l'ancien droit, dans ces successions, considérait la nature d'un bien pour en régler la succession, par application de la règle *paterna paternis, materna maternis.* Ainsi, comme deux des successions *ab intestat* dont il s'agit en cette cause se sont ouvertes avant le code civil, celle de Raphaël Dufort lui-même et

celle du plus jeune de ses fils, Pierre-Etienne, on peut dire qu'on aurait tenu compte de cette clause de propre pour régler la dévolution des biens qui en dépendaient. Mais il faut observer qu'au décès de Raphaël Dufort, ses deux fils, qui étaient ses plus proches héritiers, et qui étaient de sa ligne, ont exclu l'appelant et tous les collatéraux de la ligne paternelle (Guyot, verbis Paterna Paternis, parag. III, première classe, questions 3 et 4, pp. 633 et suiv. du tome 12). La dévolution s'est opérée instantanément suivant la règle: "*le mort saisit le vif son hoir plus proche et habile à succéder*" (art. 318 de la Coutume de Paris.)

De même, quand Pierre-Etienne Dufort est décédé en 1864, sa succession *ab intestat* s'est ouverte sous l'ancien droit, et on peut conclure que les propres dont il s'agit sont dévolus à son frère, Denis-Raphaël, qui était un successible de la ligne paternelle, à l'exclusion de l'appelant et de tous les collatéraux de cette ligne. (Voy. les autorités citées à l'alinéa précédent).

Vient ensuite le code civil qui a radicalement modifié l'ancienne loi des successions. La vieille distinction des propres et des acquets est abolie en matière de succession *ab intestat,* et nous trouvons, au Titre des Successions, l'importante disposition suivante qui est de droit nouveau, et je pourrais probablement dire d'ordre public:

599. La loi ne considère ni l'origine, ni la nature des biens pour en régler la succession. Tous ensemble ils ne forment qu'une seule et unique hérédité qui se transmet et se partage d'après les mêmes règles, ou suivant qu'en a ordonné le propriétaire.

Les mots "ou suivant qu'en a ordonné le propriétaire" se réfèrent évidemment à une disposition testamentaire. On ne peut considérer comme une telle disposition, malgré qu'il s'agisse d'une institution contractuelle, la partie finale de la clause du contrat de mariage, car jamais, dans l'ancien droit, on n'a regardé les mots

pour retourner les dits biens aux héritiers des futurs époux du côté estoc et ligne d'où ils procèderont.

comme étant une disposition ou une substitution en faveur de ces héritiers (Voy. les autorités citées plus haut, et spécialement Thevenot d'Essaule).

Je puis ajouter que si, dans l'ancien droit, le conjoint survivant ne succédait pas à ses enfants morts en minorité quant aux biens stipulés propres fictifs pour le conjoint

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prédécédé et ceux de son côté et ligne, c'est qu'il était de la ligne opposée. La fiction, à son égard, produisait tout son effet.

Il n'est pas nécessaire de se demander pourquoi depuis le code civil on trouve dans les contrats de mariage des clauses comme celle qui nous occupe. Cela s'explique par l'habitude des notaires de se servir de vieilles formules, bien que leur utilité pratique ait pris fin. Du reste, nous interprétons ici un contrat antérieur au code.

Donc, lorsque Denis Raphaël Dufort est décédé en minorité le 28 décembre 1878, sa succession *ab intestat* s'est transmise conformément aux nouvelles règles contenues dans le code. Partant, comme il ne laissait ni frères, ni sœurs, ni neveux, ni nièces, sa succession, comprenant la nue propriété des biens en question, est dévolue pour le tout à sa mère, Mme Dufort (art. 626 et 631, C.C., également de droit nouveau, tels qu'ils se lisaient avant l'amendement de 1915, 5 Geo. V, c. 74).

Il s'ensuit que, devenue propriétaire de ces biens comme héritière de son fils Denis-Raphaël, Mme Dufort pouvait en disposer par son testament en faveur de l'intimée. L'appelant n'a jamais eu la qualité d'héritier dans aucune de ces successions.

Je suis donc d'avis de rejeter l'appel avec dépens.

*Appeal dismissed with costs.*

Solicitor for the appellant: *J. A. Molleur.*

Solicitors for the respondent: *Laurendeau et Laurendeau.*

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*Dec. 15.

EUGENE BIGAOUETTE .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

*Criminal law—Murder—Trial judge—Charge to jury—Indirect comment on failure of accused to testify—Canada Evidence Act, R.S.C. (1906), c. 145, s. 4, subs. 5.*

The appellant was charged with the murder of his mother. The trial judge, in instructing the jury, made the following remarks: "The doctor who made the autopsy has declared that the death must have occurred at

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

seven o'clock in the morning or even before. The accused was at that time in the house according to his own declaration to police officers. The accused was then alone with his mother when she was killed; and if so, the defence should have been able to explain by whom the murder has been committed, because such a brutal murder could not have been committed without the knowledge of the accused."

*Held* that, although the language of the charge might be understood as relating to a failure of the accused to give an explanation to police officers or others, it is also easily and naturally capable of being understood as relating to the failure of the accused to testify upon that subject at the trial; and therefore such language is obnoxious to the imperative direction of subs. 5 of s. 4 of the Canada *Evidence Act* which requires the trial judge to abstain from any comment upon the failure of an accused to take advantage of the privilege which the law gives him to be a witness at the trial in his own behalf. The accused is entitled to a new trial.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, upholding the conviction of the appellant for murder.

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

*Alleyn Taschereau K.C.* and *J. E. Bédard K.C.* for the appellant.

*Arthur Fitzpatrick K.C.* and *V. Bienvenu K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—As a new trial is necessary, and since the crime with which the accused is charged is one of the greatest gravity, it is important to adhere rigorously to the practice of refraining from any comment on the circumstances of the case, beyond that which is strictly necessary in order to elucidate the point upon which the decision of the appeal turns.

It should be said at the outset that the jurisdiction of this court rests upon the dissent of Mr. Justice Allard, and in particular upon his view, in which he was not in agreement with his colleagues, that the learned trial judge, in instructing the jury, had failed to observe the imperative direction of subs. 5 of s. 4 of the Canada *Evidence Act*, which, in effect, requires the trial judge to abstain from any comment upon the failure of the accused to take ad-

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vantage of the privilege which the law gives him to be a witness at the trial in his own behalf.

The learned trial judge said:

> Le docteur Marois a fait l'autopsie à trois heures et quart, et si vous croyez son témoignage (c'est un homme dont le témoignage a du poids), il a déclaré que la mort avait dû arriver à sept heures, ou à six heures et même avant, du matin.
>
> Voilà les circonstances qui enveloppent la mort de la défunte.
>
> Si la mort, mes amis, remonte à six heures ou à sept heures du matin, où était l'accusé à ce moment-là, vers sept heures ou six heures du matin, même plus à bonne heure? A la maison. A la maison. Car, d'après sa propre déclaration, il n'est sorti qu'à huit heures du matin.
>
> Il était donc seul avec sa mère à la maison quand la mort est arrivée et si l'accusé était seul avec sa mère quand elle a été tuée et égorgée, la défense aurait dû être capable d'expliquer par qui ce meurtre a été commis. Car une pareille boucherie n'a pas dû se faire, sans que l'accusé en eut connaissance.

It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment implied in this passage upon the failure of *la défense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood in the other way, that it seems plainly obnoxious to the enactment referred to, subs. 5 of s. 4, R.S.C., c. 145. The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex* v. *Gallagher* (1), in these words:

> * * * it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.

There must be a new trial.

*Appeal allowed.*

(1) (1922) 37 Can. Cr. C. 83.

D. M. SULLIVAN (DEFENDANT).....APPELLANT;

AND

THE HOME BANK OF CANADA (PLAINTIFF).....RESPONDENT.

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*Oct. 6, 7.
*Dec. 15

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Banks and banking—Suspension of payment at head-office—Posterior transactions by local branch—No knowledge of suspension by local officials—Validity.*

Transactions carried on in the ordinary course of business by officials of a local branch after a bank had suspended payment at its head-office, but before the officials of the branch have had knowledge of such suspension, are valid.

Judgment of the Court of Appeal ([1926] 3 W.W.R. 305) aff.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of Gregory J., and maintaining the respondent's action on a cheque.

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

*Geo. F. Henderson K.C.* for the appellant.

*M. H. Ludwig K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—The several rights and liabilities arising out of two transactions which took place in Vancouver (of the 17th of August, 1923), are in question.

By that on which the counter-claim is founded, Harris purchased from Sullivan Dominion bearer bonds of the par value of $17,000, for which Harris gave his cheque on the Vancouver branch of the Home Bank. Of these bonds, Harris deposited in that branch bonds of the par value of $6,000, which sum was placed to his credit. Against this credit, he drew a cheque for a sum slightly in excess of it, had it certified by the bank, and negotiated it.

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

(1) [1926] 3 W.W.R. 305.

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Shortly after Harris received the bank's certification, the Vancouver branch suspended payment, and, Sullivan's bank refusing for this reason to accept cheques on the Home Bank, Sullivan demanded from the Home Bank the return of the bonds he had sold to Harris, and, by his counter-claim, seeks to enforce the demand so advanced.

By the other transaction, Sullivan purchased from Harris Dominion bonds of the par value of $10,000, for which he gave to Harris his cheque on the Standard Bank of Canada for $10,657.70, which cheque Harris deposited to the credit of the account of Harris & Co. in the Home Bank, and, through this deposit and others made on the same day, Harris & Co's. account was put in credit to the amount of $31,496.57; and on the same morning, before the suspension, Harris' cheques were, on the strength of this credit, accepted by the Home Bank and paid, to the amount of $32,000 odd. Sullivan, on learning of the suspension, stopped payment of his cheque, and the bank, by this action, seeks to enforce payment of it.

The head office of the bank in Toronto had suspended payment some hours before the suspension in Vancouver; and it was contended, in support of the appeal, that by reason of this fact the bank became incapacitated from acquiring a title to the Victory bonds in question or to the cheque sued upon.

As to the first mentioned transaction, the bearer Victory bonds were negotiable instruments which the bank acquired for value, and without notice of any defect in Harris' title. It is plain that the bank is entitled to keep the bonds unless there was such a total incapacity to acquire title to them as to make the delivery of them an absolute nullity. As to the last mentioned transaction, Sullivan retains the consideration for which the cheque was given. There again, unless the bank was totally disabled from acquiring a title, the appellant obviously fails.

Accordingly, the appellant rested his appeal upon the proposition that, by force of the suspension, which went into effect in Toronto before these transactions took place, but without the knowledge of the Vancouver officials (who

learned of it after they had taken place), the bank was by law struck with such incapacity.

It seems sufficient to say that there is no warrant for such a proposition in the statutory provisions upon which the appellant relies. The *Bank Act* (s. 117), provides for the appointment of a curator " forthwith " when the bank suspends payment. The curator is then to have supervision over the affairs of the bank, until the bank resumes business or a liquidator is appointed. There is no suggestion in this section that the corporate capacity of the bank to acquire property or to carry on business ceases to exist. It still exists, but is, subject to the provisions of the Act, to be exercised under the supervision of the curator, whose immediate appointment the section contemplates. As to the situation during the period intervening between the suspension and his appointment, the only pertinent provision appears to be that contained in s. 146, which makes it an offence for any officer of the bank to pay any debt of the bank with knowledge of suspension without assent by the curator or liquidator; a provision which implies no declaration of the bank's incapacity to acquire property when that takes place in the ordinary course of business and through the agency of officers having no knowledge of a suspension.

The appeal should be dismissed with costs.

IDINGTON J.—Having perused and considered the judgment of my brother Duff J. herein in regard to the appeal from the Court of Appeal for British Columbia, I agree with the reasoning therein and the conclusion reached that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *MacInnes & Arnold.*

Solicitors for the respondent: *Reid, Wallbridge, Gibson & Co.*

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*May 4.
1927
*Jan. 4.

FREDERICK C. MORTON (PLAINTIFF) ... APPELLANT;

AND

MICHAEL WILKINSON BRIGHOUSE (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Trust—Trustee—Accounting—Moneys received by nephew of deceased—Evidence of intention to make gift to nephew—Applicability of Strong v. Bird (L.R. 18 Eq. 315).*

One S. B. was owner of a large tract of land and other assets and, being a bachelor and having no relatives in this country, brought out in 1888 from England his nephew, the respondent. The latter lived with his uncle, assisted him in his business and eventually was allowed a very large measure of control over his affairs. In 1906, S. B. made his will leaving the bulk of his estate to the respondent; and in 1907 he executed a power of attorney, under which the respondent was formally given powers to act for him in the management of his affairs. In 1908, S. B. went to a hospital, and shortly thereafter left for England where he died in 1913. While there, in 1912, S. B. changed his will in favour of some of his English relatives, but still left a substantial part of his estate to the respondent. In an action by the executor of the will of 1912 to compel the respondent as trustee for the estate of his uncle to account for rentals, profits and moneys received by him during the lifetime of his uncle, for, as alleged, the benefit of the latter, the defence was set up that the deceased evidenced his intention to permit the respondent to retain said moneys free from any condition that he should be regarded as a trustee with respect thereto. The language of the deceased, as reported by the respondent in his evidence, imports a declaration of a then present intention by the deceased to give all his real and personal property to the respondent; and that the respondent was to do as he pleased with it and was to be under no obligation to account for it. The trial judge held the respondent was not accountable on the ground that there had been a gift to him of these moneys, that the intention to give had remained unaltered down to the time of his death and that his judgment must be governed by the decision in *Strong* v. *Bird* (L.R. 18 Eq. 315). The judgment of the trial judge was affirmed, the Court of Appeal being equally divided.

*Held,* that the principle laid down in *Strong* v. *Bird* was not applicable to the circumstances of this case and that the respondent was accountable for all moneys of the deceased received by him since 1907, excepting those in respect of which the intended gift above mentioned was completed within the lifetime of the deceased.

Judgment of the Court of Appeal (36 B.C. Rep. 231) reversed.

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

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming on equal division of the court 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 judgments now reported.

*C. W. Craig K.C.* for the appellant.

*E. P. Davis K.C.* and *E. F. Newcombe* for the respondent.

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

DUFF J.—This is one of those cases in which there is, perhaps, some risk of sympathy with a claimant's disappointment in his legitimate expectations leading one into a departure from the sound application of legal principles. The respondent's claim against the estate of Sam Brighouse is substantially stated in the sixth paragraph of the statement of defence, in these words:—

> In the alternative and in further answer to the whole of the said statement of claim this defendant says that he was told by the said Sam Brighouse at or about the date of the said alleged power of attorney that he this defendant was to consider all the real and personal property of the said Sam Brighouse as his own and that he was to do as he pleased with it and that he was to be under no obligation whatever to account for any moneys collected under the said alleged power of attorney.

and this claim ultimately rests upon this passage in his own evidence given at the trial:—

> The witness: I had been doing his business right along, and he told me to take everything, and use it in any way I pleased, his property, I could sell it if I wanted to for cash, or use it for my own use, and for himself, and even if I wanted to go into business, I could sell his property in order to do that. He said he had given instructions to Chaldecott —I had been up to the office the day previous, and he had read his will to me, this was 1906, and said everything was coming to me, and he said he had given authority to Chaldecott to make out a power of attorney, and the reason he did that was so if I did sell this property, I would have power to put it in the Registry Office, and against other people. It was not as a power of attorney for me to use it, because I had been practically doing that right along.
>
> Mr. Davis: Q. Now had you any conversation with him at this time which you speak of after leaving Chaldecott's office, at the time you say he read the will and so on?—A. Yes, that same conversation which I have just mentioned now.

(1) (1925) 36 B.C. Rep. 231; [1925] 3 W.W.R. 412.

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Q. That was the time?—A. That was the time. Of course that has happened often, but this was more particular, because he said he was giving up everything, he wanted little for himself, just a little to eat, wear and drink, and little of that, and the balance I could do as I liked with. He was giving up all, and leaving the whole thing to me.

We need not concern ourselves with any other part of the evidence. Brighouse made a will in 1906, by which, after leaving annuities of comparatively trifling amount, he bequeathed his residuary estate to the respondent. In 1907, he executed a power of attorney, under which the respondent was formally given most ample powers to act for him in the management of his affairs. The respondent himself says under this power of attorney he managed the property of Brighouse, executed leases of the real property, received the rents and made investments. In all this, he says, he acted as the representative of Brighouse. In passing, there is a remark which, I think, ought not to be omitted. In reading the evidence of the respondent, I have been impressed by his obviously straightforward desire to state the facts as he remembers them.

In 1908, Brighouse had a serious operation, after which, according to the evidence of the respondent, his mental powers suffered a decline, and, as a result of which, he eventually became demented. In 1911, Brighouse executed a codicil to the will of 1906, making unimportant alterations in the particular legacies, but leaving the respondent still the beneficiary of his residuary estate. In 1912, Brighouse left Vancouver for England, and in the same year he executed a new will, the effect of which will be fully stated. In 1913 he died. The question with which this action is immediately concerned is whether the respondent is liable to account, at the suit of the executors and trustees of the will of 1912, for moneys collected by him on behalf of Sam Brighouse from the year 1907 on. The learned trial judge held he was not accountable, on the ground that there had been a gift to him of these moneys, and that the intention to give had remained unaltered down to the time of his death, and that his judgment, therefore, must be governed by the decision in *Strong* v. *Bird* (1). In the Court of Appeal, Mr. Justice Martin accepted the conclusion of the learned trial judge, and

(1) L.R. 18 Eq. 315.

Mr. Justice M. A. Macdonald agreed with him in a judgment based in principle upon the authority which the learned trial judge applied, while the learned Chief Justice and Mr. Justice Galliher thought that the respondent had failed to establish his claim, and that the judgment of the trial judge should be reversed.

It will be convenient first to consider whether the principle of *Strong* v. *Bird* (1) can be applied in this case. In substance, Sir George Jessel, in *Strong* v. *Bird* (1), held that a testator, having manifested an intention in his lifetime to forgive an existing debt, an intention which continued unchanged down to his death, and having appointed the debtor his executor, the debt having by this latter act become extinguished at law, equity would regard the gift as complete. In a later case, the rule was applied to the gift of a specific chattel, it having been proved that the intention to give continued down to the testator's death. Is the principle of these decisions applicable to the circumstances of this case? The claim, as stated in the pleadings, is that the respondent was, by the declaration of Brighouse, to consider the real and personal property of Sam Brighouse as his own, and that he was to do as he pleased with it, and was to be under no obligation to account for it. As the respondent, in his testimony, says, he was to take everything, and more particularly "he," Sam Brighouse,

> was giving up everything, he wanted little for himself, just a little to eat, wear and drink, and little of that, and the balance I could do as I liked with. He was giving up all, and leaving the whole thing to me.

The language of Brighouse thus reported by the respondent imports plainly a declaration of a present intention to give all his real and personal property to the respondent, and that is the basis upon which the claim is rested in the pleadings. The foundation of the claim is a present gift of his real and personal property.

As regards personal property, immediately reduced into possession by the respondent, the gift was no doubt effective. But, in attempting to apply the principle of *Strong* v. *Bird* (1), we encounter difficulties of a most serious nature. First, is there evidence of an intention to give continuing down to the death of Brighouse? This seems

(1) L.R. 18 Eq. 315.

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difficult to maintain, in view of the will of 1912. That will was dated the 13th of November, 1912. By it, Michael Wilkinson, the respondent, is the beneficiary under a specific devise of the farm at Vancouver. That specific piece of property is segregated from the estate, and given to the respondent. All the rest of the property, real and personal, the testator gives to his trustees, to be divided among others. There can be no possible doubt as to the meaning of the testator's language. When he speaks of the "remainder of my real estate," he refers to the real estate still standing in his name, of which he was still in law and in equity the owner, notwithstanding the incomplete gift of 1907. So, with regard to his personal estate. This disposition of his property it is at least difficult to reconcile with the notion that he at that time considered he had divested himself by a gift *inter vivos* of all his property in favour of the respondent; with the intention, that is to say, that the gift of 1907, deposed to by the respondent in the passages above set out, should stand and have effect.

But there are other difficulties. As already mentioned, the gift relied upon is a present gift of everything. It could not legally take effect, except in the limited way I have mentioned. It is at least very questionable whether the language actually imports any intention to give after acquired property, the produce of the property presently given, because that would be logically inconsistent with the assumption that everything was passing *in presenti*. Assuming, however, an intention to give after acquired property to be implied, a gift of after acquired property would, of course, be inoperative. After acquired property can be transferred where the transfer is for valuable consideration—to which equity will give effect as a contract; but a gift of after acquired property cannot have such effect. In principle, *Strong* v. *Bird* (1) would appear to have no application in such a case, and that appears to be in substance the view taken by that great master of law, Mr. Justice Parker, *In re Innes* (2). A gift of after acquired property could have no meaning except as a promise to give on a future occasion, and that, Parker J. says,

(1) L.R. 18 Eq. 315.

(2) [1910] 1 Ch. 188, at pp. 192 and 193.

would be outside the principle of *Strong* v. *Bird* (1). The whole passage is valuable as an exposition of that principle, and I cite it in full:—

That part of my decision turns really upon a question of fact, but another point which is raised is one partly of fact and partly of law. It has been held in the case of *Strong* v. *Bird* (1) that where a testator has attempted to forgive a debt by telling his debtor that the debt is forgiven, though that cannot at law operate as a release, yet there is a present intention of giving, which, if the debt is subsequently released, may be effectual, and that the appointment of the debtor subsequently as an executor is a sufficient release at law to give validity to the gift which was otherwise imperfect. That is a decision of Sir George Jessel in 1874, and it has been acted upon, I think, ever since, and recently has been somewhat extended by a decision of Neville J. in *In re Stewart* (2). The way in which the principle enunciated by Sir George Jessel has been extended is that it had been made, according to Neville J's. decision, applicable not only to the release of a debt, but in order to perfect an imperfect gift of specific property. In the case of *In re Stewart* (2), the testator had given his wife certain bonds and other securities, as to which there was no doubt, and these securities had been enumerated in a document at the foot of which the testator had written, in pencil, "Coming in next year £1,000," and on the evidence Neville J. construed those words as an announcement of the intention to give a further £1,000 to his wife the next year. It appears that one of the bonds which had been handed over was paid off, and £500 came, in respect of it, into the hands of the testator. In reinvesting that next year he added rather over £1,000 to it and bought three further bonds. He took the contract note for those three further bonds to his wife, and he handed it to her in an envelope with the broker's letter announcing the purchase, and he said, "I have bought these for you." Neville J. held that that was a present intention to give which would have operated as a gift but for the fact that certain things remained to be done which were not done, so that the gift was imperfect. But the testator subsequently died, having appointed his wife his executrix, and Neville J. held that the principle of *Strong* v. *Bird* (1) was applicable, and that, there having been an actual attempted gift, imperfect though it might have been, the subsequent appointment of the lady as executrix perfected that gift by vesting in her the legal interest in the property which was the subject of the action.

It is attempted here to extend the doctrine of those cases still further. In the first place it is attempted to extend it to what, if there was a gift at all, was a gift of money without that money being identified, or sufficiently identified to enable it to be separated from the rest of the estate of the testator; and in the second place it is attempted to extend the principle of the earlier cases not only to an actual attempted gift which as a matter of fact is imperfect, and therefore will not take effect unless it is subsequently perfected; but to a mere promise to give on a future occasion.

In my opinion the principle of *Strong* v. *Bird* (1) and *In re Stewart* (2) and other similar cases ought not to be so extended. What is wanted in order to make that principle applicable is certain definite property which a donor has attempted to give to a donee, but has not succeeded.

(1) L.R. 18 Eq. 315. (2) [1908] 2 Ch. 251.

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There must be in every case a present intention of giving, the gift being imperfect for some reason at law, and then a subsequent perfection of that gift by the appointment of the donee to be executor of the donor, so that he takes the legal estate by virtue of the executorship conferred upon him. It seems to me that it would be exceedingly dangerous to try to give effect by the appointment of an executor to what is at most an announcement of what a man intends to do in the future, and is not intended by him as a gift in the present which though falling on technical considerations may be subsequently perfected.

I was at one time inclined to think that up to a certain point the respondent's case might be supported in this way, namely, that the conduct of Brighouse down to the time of his departure for England, if not down to the time of the will of 1912, could be taken as establishing a gift *inter vivos* from time to time of all property reduced into possession by the respondent during that period as and when that may have occurred; but a close examination of the record, I regret to say, convinces me that this view cannot be sustained. In the first place, the claim is not based on any such ground in the pleadings, and a claim of this kind, made against a deceased person's estate, ought to be put forward clearly. In the second place, the notion of a continuous gift by conduct of the proceeds of property, is not easily reconcilable with the fundamental basis of the claim. If Brighouse had really intended, as the respondent and other witnesses as well represent him as saying that he intended, to divest himself at a stroke of all his property, one does not easily think of him applying his mind to the subject from day to day thereafter and intending *de die in diem* a gift of the produce of the property. It is hardly necessary to say that the reduction into possession by the respondent of Brighouse's funds pursuant to a previous gift (which could only operate as regards such funds as an unenforceable promise to give) would confer upon the respondent no title to such funds. Lastly and most important of all there really is no evidence directed to substantiating any such basis of claim; and when one considers the views as to the state of Brighouse's health held by the respondent himself, whose candour and honesty are beyond praise, one understands the difficulty the respondent's advisers must have felt in advancing such a claim. In truth counsel for the respondent

at the trial put his case squarely upon *Strong* v. *Bird* (1), and upon that principle alone, and the appellants were never called upon to meet any other case.

The appeal must therefore be allowed. There should be a declaration that the respondent is accountable for all moneys of the late Sam Brighouse received by him since the 26th day of February, 1907, excepting moneys in respect of which the intended gift mentioned in the pleadings was completed within the lifetime of the said Sam Brighouse. The respondent will, of course, be entitled to all just and proper allowances for expenditures made by him, and for all costs, charges and expenses incurred by him in or in relation to or in connection with the affairs of the said Sam Brighouse. Further directions will be reserved to the Supreme Court of British Columbia. The course of the litigation has been signalized by much difference of judicial opinion, and, having regard to that as well as to the exceptional circumstances, we think this is a case for an exceptional order as to costs. The costs of all parties as between solicitor and client, as well as all other charges and expenses of or incidental to the action or the appeal to the Court of Appeal or to this court, properly incurred, will be paid out of the estate.

IDINGTON J.—This appeal arises out of an action brought by appellant, under the direction of the court, suing, in his capacity as administrator and one of the trustees of the estate of the late Sam Brighouse the respondent Michael Wilkinson Brighouse, for an account of moneys and properties belonging to the said Sam Brighouse and received by said respondent under and by virtue of a power of attorney dated the 6th of February, 1907 under the following circumstances:

Said Sam Brighouse had been born and brought up in England, and migrated to Canada and settled in Lulu Island in British Columbia, where I infer he became a very prosperous farmer and later on acquired valuable properties in Vancouver, all of which on account of his health needed someone to assume the management thereof.

On a trip to England in 1888 he had brought back with him one of his nephews—the said respondent, then a lad

(1) L.R. 18 Eq. 315.

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of twenty-four years of age—who continued to live with him on said farm, and helped him in many ways.

The said Sam Brighouse was a bachelor and had no relatives of his own in this country. Hence, as was quite natural, he became accustomed to rely upon and trust said nephew (now respondent) as if his own son, which resulted in the making of a will on the 7th November, 1906, whereby, in the second paragraph thereof, he appointed said respondent and others as follows:—

I appoint Michael Brighouse Wilkinson, Charles Edward Hope and Joseph Richard Seymour, all of the city of Vancouver (hereinafter called my trustees) to be executors and trustees of this my will.

Then he devised and bequeathed as follows:—

I give all my plate, linen, china, glass, books, pictures, prints, furniture and household effects and all my farming stock, horses, cattle, sheep, pigs and other animal, and all my wagons, carriages, harness, farming machinery, implement and other farming accessories and things to the said Michael Brighouse Wilkinson absolutely. I give to my executors Charles Edward Hope and Joseph Richard Seymour the sum of two hundred dollars each provided they prove my will and act in the trusts hereof. I give Francis Miller Chaldecott the sum of two hundred and fifty dollars. I give Alfred Pearson (half brother of said Michael Brighouse Wilkinson) the house and one acre of land more or less now occupied by him, being part of my farm at Lulu Island, for life, so long as he shall occupy same, and if he shall cease to occupy and reside there, then said house and land shall revert and form part of my farm as dealt with below. I give my farm at Lulu Lsland, being situate between roads numbered two and three containing about seven hundred acres more or less and consisting of sections 5, 6, 7, and 8, block 4, north range 6 west, and section 32, block 5, north, range 6 west being all my farm lands situate as aforesaid and bounded on the south by the right-of-way of the Vancouver and Lulu Island Railway, on the west by no. 2 road, and on the north by the Fraser river and on the east by no. 3 road, in trust for the said Michael Brighouse Wilkinson (subject to all mortgages and existing charges at the time of my decease, and to the above life tenancy of one acre aforesaid to Alfred Pearson) for life, so that he shall not have power to dispose of the same in the way of anticipation but with power nevertheless for the said Michael Brighouse Wilkinson to appoint by deed or will in favour of his issue and in default of appointment and so far as such appointment shall not extend in trust for all the children of the said Michael Brighouse Wilkinson who being sons, shall attain the age of twenty-one years or being daughters shall attain the age of twenty-one years or marry, in equal shares and if there shall be only one such child the whole to be in trust for that one child, but so that no child who or any of whose issue shall take any share under such appointment as aforesaid shall participate in the unappointed part of the said moiety without bringing the share or shares appointed to him or her to his or her issue into hotchpot and accounting for same accordingly unless the said Michael Brighouse Wilkinson shall by such appointment direct to the contrary. Provided always that the above bequest of a life interest in the

said farm with power of appointment to the said Michael Brighouse Wilkinson is conditional upon his adopting the surname of Brighouse in lieu of Wilkinson within the period of two years from my death, and in default of his so doing, I devise and bequeath my said farm to the eldest living son (at the time of such default) of my late brother Radcliffe Brighouse.

I may mention the fact that he gave annuities of $260 each to a brother and two sisters and a friend, and another of $130 to a friend and the residue after paying for all those and the liabilities, to the respondent.

I copy this to make quite clear the actual facts so much in conflict with the statements of others concerned, including the respondent, and his co-called corroborating witnesses.

The said farm made ultimately nearly the half of the whole estate, or, according to the version of the respondent, a third or thereabout.

It will be observed, that so far from the testator having given him everything he had given him absolutely only a small fraction, I imagine, of his personal estate and a life estate in the farm and otherwise as a trustee the power of appointment in favour of his children and all that, only conditionally upon his adopting within two years after the testator's death, the surname of Brighouse instead of Wilkinson.

And that clearly involved the need of respondent surviving the testator before he could acquire anything; and yet the courts below have held that an interpretation and construction must be put upon the conversation, which respondent testifies to, and which I am about to quote, that would give him the absolute right to all the moneys and properties of the testator of which he got possessed meantime.

The conversation I refer to and upon which said courts rest is as follows:—

Direct examination by Mr. Davis:

Q. You live where, Mr. Brighouse?—A. At the present time in Vancouver.

Q. How long have you been in the province?—A. Since 1888.

Q. What relation was the late Sam Brighouse to you?—A. He was my uncle.

Q. Who brought you out here?—A. My uncle.

Q. And how old were you at that time?—A. About 24.

Q. From that time on, with whom did you live, or with whom did he live?—A. With him.

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Q. Was he a married man?—A. No. My mother kept house for him most of the time.

Q. Your mother was his sister?—A. Yes.

Q. So that he had no family. Had he any other relations here outside of yourself and your mother?—A. A brother and a half brother who came later.

Q. In order to get at some of these dates, what was the date when he went to the hospital?—A. Between Christmas and New Year, 1908.

Q. And February, 1907, was the date of the power of attorney from Sam Brighouse to you?—A. Yes.

Q. Why was that power of attorney given, for what purpose and how to be used?

Mr. Smith: Surely the power of attorney speaks for itself.

The court: Why it was given would not appear from the document.

Mr. Smith: The powers that are given in it would show why it was given.

Mr. Davis: I am not referring to the powers given in it.

Mr. Smith: I think that is all my friend is entitled to show.

The witness: He gave me a reason himself, Mr. Smith.

Mr. Davis: What reason did he give you?

Mr. Smith: I object.

The witness: I had been doing his business right along, and he told me to take everything and use it in any way I pleased, his property, I could sell it if I wanted to for cash, or use it for my own use and for himself, and even if I wanted to go into business, I could sell his property in order to do that. He said he had given instructions to Chaldecott—I had been up to the office the day previous, and he had read his will to me, this was 1906, and said everything was coming to me, and he said he had given authority to Chaldecott to make out a power of attorney, and the reason he did that was so if I did sell this property, I would have power to put it in the Registry Office, and against other people. It was not as a power of attorney for me to use it because I had been practically doing that right along.

Mr. Davis: Q. Now had you any conversation with him at this time which you speak of, after leaving Chaldecott's office, at the time you say he read the will and so on?—A. Yes, that same conversation which I have just mentioned now.

Q. That was the time?—A. That was the time. Of course, that has happened often, but this was more particular, because he said he was giving up everything, he wanted little for himself, just a little to eat, wear, and drink, and little of that, and the balance I could do as I liked with. He was giving up all, and leaving the whole thing to me.

Q. Was any one else present at that time?—A. No, only he repeated the same thing in my office when Mr. McPherson was there and I think Mr. Currie. Mr. McPherson is dead.

Q. And you think Mr. Currie. Is that the Mr. Currie who gave evidence here?—A. Yes.

This cheery interpretation of that conversation is sadly in conflict with the actual facts then existent and, if possible, more so with the words of the power of attorney then in contemplation and, I have no doubt at all, in due course of being written according to the literal instructions of the

testator and that he did not in fact change his mind and convey to the respondent any other or different meaning.

That power of attorney accords with common sense and is not limited to mere purposes to be served in cases of registration as respondent and his counsel would have us believe.

The first part of it reads as follows:—

Know all men by these presents, that I, Sam Brighouse of Lulu Island, British Columbia, for divers good causes and considerations, me thereunto moving have nominated, constituted and appointed, and by these presents do nominate, constitute and appoint Michael Brighouse Wilkinson, of Vancouver City, British Columbia, my true and lawful attorney for me and in my name and on my behalf and for my sole and exclusive use and benefit to demand, recover and receive from all and every or any person or persons whomsoever all and every sum or sums of money, goods, chattels, effects and things whatsoever which now is or are, or which shall or may hereafter appear to be due, owing, payable or belonging to me whether for rent or arrears of rent or otherwise in respect of my real estate or for the principal money and interest now or hereafter to become payable to me upon or in respect of any mortgage or other security, or for the interest or dividends to accrue or become payable to me for or in respect of any shares, stock or interest which I may now or hereafter hold in any joint stock or incorporated company or companies or for any moneys or securities for money which are now or hereafter may be due or owing or belonging to me upon any bond, note, bill or bills of exchange, balance of account current, consignment, contract, decree, judgment, order or execution, or upon any other account. Also to examine, state, settle, liquidate and adjust all or any account or accounts depending between me and any person or persons whomsoever. And to sign, draw, make or endorse my name to any cheque or cheques, or orders for the payment of money, bill or bills of exchange, or note or notes of hand, in which I may be interested or concerned, which shall be requisite. And also in my name to draw upon any bank or banks, individual or individuals, for any sum or sums of money that is or are or may be to my credit or which I am or may be entitled to receive, and the same to deposit in any bank or other place, and again at pleasure to draw for from time to time as I could do. And upon the recovery or receipt of all and every or any sum or sums of money, goods, chattels, effects or things due, owing, payable or belonging to me for me and in my name and as my act and deed to sign, execute and deliver such good and sufficient receipts, releases and acquittances, certificates, reconveyances, surrenders, assignments, memorials, or other good and effectual discharges as may be requisite.

This I copy so far not only to shew that the basic element of its entire character was that respondent was to act for and on behalf of the testator, as it expresses

for me in my name and on my behalf and for my sole and exclusive use and benefit to demand, etc.,

but also in a great variety of cases not confined, as pretended, to the needs of registration.

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And the remainder of the said power of attorney continues to specify a great variety of commercial dealings not necessarily needing any registration to become effective.

In fact the necessity for using the power of attorney in case of registration never arose until the testator had left this country in 1911 for England.

In the meantime the testator had himself personally, and not by his said attorney, executed two instruments, being all I can find trace of herein, needing registration, whilst he was in this country.

Indeed the respondent says he never used the power of attorney for registration purposes until the Burns lease which would be on or after 1st August, 1912.

The following evidence was given by the respondent on cross-examination:—

Q. I think you told me on the examination for discovery, that the power of attorney was made to you after the conversation in regard to everything being yours?—A. He instructed Chaldecott to make out the power of attorney—I don't think I saw the power of attorney until I needed it to sign the deed to Burns.

Q. Just to make it clear. I will read your examination. Question 965, " Well, was there ever any one else present with you at any time he spoke to you about it?—A. I don't think so.

Q. The conversation that you referred to, when all those people were present, MacPherson, Currie, Sam Brighouse and yourself, in your office, was prior to the time you got the power of attorney?—A. I don't think I had received the power of attorney then, because I don't think I took the power of attorney out of the office until I needed it to make the Burns lease."—A. That is correct.

Q. It hadn't been delivered to you at that time?—A. No.

Q. Now, there was no one present at that conversation except the two of you?—A. Except when it was reiterated, as I say in my own office.

In this there are incidentally two illustrations of what sort of memory the respondent has, for, in fact the first use made of the power of attorney for registration was not the Burns lease, but a lease of 1st January, 1912, to one Hinton and others—seven months before the Burns lease.

And again Currie, whom he names as present at one of the interviews on which he rests his case, does not seem to have been there. At least Currie does not mention it, as certainly he would have been glad to do if he could have recalled it, for he also goes, it seems to me, very far, as I will presently shew, to help his friend.

The respondent would seem from his story, if believed, never to have bothered his head about the power of attor-

ney, although, as he admits, his uncle the testator had expressly told him that Chaldecott, the solicitor, was preparing it. The absurd nature of the story that he never saw it until five or six years later should, I submit, go far to discredit him.

Are we to credit the memory of such a man when testifying in September, 1925, more than eighteen years later, as against such a written document expressing clearly what the testator intended, and believe that the latter, a very successful business man, expressed himself so very differently to the respondent.

Then it is pretended that such an inherently incredible story was corroborated by Currie and others.

Let us consider the story of Currie presented first. He tells of walking with the testator in November, 1908, when he told him as follows:—

> Mr. Brighouse was with me. We were all together, but we were behind the others; and Mr. Brighouse made the statement to me—we were talking about things in general—and Mr. Brighouse made the statement to me that everything he had was Michael's to use, and do with as he liked, and he had made a will to that effect.
>
> Q. What was the date of that?—A. November, 1908.
>
> Q. No, you mention another occasion, when was that, and where, and what were the circumstances?—A. Another occasion that I remember distinctly was after Mr. Brighouse had returned to his home from the hospital after being there for several months, in his own house at Lulu Island, he made a statement to the same effect.
>
> Q. Who were present at that time?—A. Just himself and me.
>
> Q. Where was he at the time?—A. He was in bed at the time.
>
> Q. What did he say at that time?—A. He said at that time that everything he had was Michael's to use and do with as he liked; that he had kept his estates together, and it was his.

Up to that time no will which we know of, had been made by the testator, except that of November, 1906, which I have dealt with above and submit that its contents absolutely destroy this story.

That however is accepted by the learned trial judge and, I most respectfully submit, that his doing so is a grave error. He refers (apparently as a reason for so finding) to the fact that these and other witnesses were not seriously cross-examined as to their credibility. The most successful way, I have often found, of dealing with preposterous statements, as I submit some of these are in light of the facts, is to leave those uttering them alone or lead such wit-

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nesses on. In doing so herein I submit counsel was well advised.

Jorgenson is the next witness the learned trial judge names, and he testifies as follows:—

Q. You cannot tell what other persons told, but just Sam Brighouse himself.—A. Yes, Brighouse himself told me not once, but told me several times, that Michael Wilkinson had everything and done what he wanted with the money and property, and if it had not been for Michael, he would have lost it anyway.

Q. How often have you had that sort of conversation with him, or heard those statements from him?—A. I can't recall how many times, but quite frequently.

Can this evidence in light of the actual facts be at all corroborative of anything likely to be the truth when we know the actual facts as above recited?

I fail to see how that sort of stuff can form such corroboration of anything which the law requires in such a case as this.

Cocking came next in the list the learned trial judge specifies. The gist of his evidence is as follows:—

Q. What was the substance of what he said to you with respect to Michael, as to how things were carried on between them?—A. The time which is most clear to my mind now is the time I took him to the hospital. He was going to the hospital to be operated on, and, knowing him as I did, I said: "Mr. Brighouse, how have you got things fixed? Have you made a will?" and he told me he had. He told me Mr. Chaldecott, I think it was, made his will. He said, "Anyway, everything I have got is Michael's," and that Michael could use anything he had got as though it was his own. Also, that anything that was transacted, anything that Michael said was all right.

Again the only will made up to that time was the will above dealt with.

How can anyone read the cases deciding what is meant by "corroboration" recognized by the statute in question herein and hold there is anything useful in such stories as witness tells.

The contribution of Saurberg, also called to corroborate but not named by the learned trial judge, is, if possible, illustrated best by the following:—

A. I went to work for him in June, 1908. I was interested in fancy chickens, and I worked up some prize laying hens, and I made up my mind I was going into the business, and buy a few acres on Lulu Island, and raise chickens, so I went to Mr. Brighouse and wanted to buy three acres, and he said, "You had better go and see Michael about it, everything I have belongs to him. He has made everything for me, and kept the estate together. If it had not been for him I would have had hardly anything left.

Burdis, another who witnessed a codicil of the testator on 13th January, 1911, speaks as follows:—

Q. Did you ever have any conversation with Sam Brighouse with reference to the relations between him and his nephew Michael, the defendant?—A. Scores of them.

Q. To what effect?—A. The general situation existing between Mr. Wilkinson Brighouse and himself.

Q. What was the substance of those conversations?—A. Oh, at various interviews over long periods, it is very difficult to define any particular occasion, but it shewed the close association which existed between his nephew and himself.

Q. Well, what was that, as shown by his conversation?—A. He trusted Michael Wilkinson absolutely. He said on many occasions the property would not have been held intact if it had not been for the influence and care of his nephew, Michael Wilkinson.

Q. Anything else?—A. He always called the property "ours." It was very seldom he talked about his property. He always talked about our property, and he refused to deal with business matters, but referred everything to his nephew. He said Michael had authority to do anything he liked, whatever Michael did was right, because he knew when he died—Michael knew and he knew, when he died, everything would go to Michael Wilkinson.

I agree with the reasons assigned by the Chief Justice in the Court of Appeal below, and with Mr. Justice Galliher, but have thought better to quote as I have done rather than act on the condensed abbreviation of the evidence adduced, and relied on.

I fail to find anything in all the said evidence or anything else in this case, which I have read and considered carefully, that can bring it within the authority of the case of *Strong* v. *Bird* (1), or any of the other cases relied upon.

The characteristic of each of such cases in maintaining gifts of one sort or another is that in each of them there happens to be an important circumstance, inherent in each of said cases, maintaining the like claim whereas in the case presented by the respondents herein the circumstances are overwhelmingly against the respondent, in my humble judgment.

Therefore in my opinion this appeal should be allowed with costs throughout and judgment directed giving the relief the appellant prayed for in the action in question.

I may be permitted to add that the last will of the testator, made in England, is in all its essential features such a reasonable disposition and distribution of his pro-

(1) L.R. 18 Eq. 315.

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perty as any reasonable person should expect, in the circumstances in which the testator was placed, and remedies what the first will, I imagine, discloses a seeming want of generosity on the part of the testator, possessed of so large an estate, when dealing with the amounts left to his brother and sisters, unless of course they were each and all wealthy people.

On such assumption the last will, I submit, clearly should not be invaded and nullified by such evidence as respondent gives and produces to help him when he is getting such handsome treatment as it gives him.

Of course I think he is in his accounting to be entitled to any reasonable commission and expenses for work done under the power of attorney as if a stranger doing it thereunder and liable for interest on that he is found accountable for from the date of the testator's death.

*Appeal allowed.*

Solicitor for the appellant: *W. D. Gillespie.*

Solicitor for the respondent: *Ghent Davis.*

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*Dec. 14.

*Dec. 15.

IN THE MATTER OF THE AUTHORIZED ASSIGNMENT OF HOTEL DUNLOP, LTD., ETC.

PAUL C. QUINN (AUTHORIZED TRUSTEE) ....APPELLANT;

AND

HERBERT GUERNSEY (LANDLORD) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION, SITTING IN BANKRUPTCY

*Appeal—Special leave to appeal to Supreme Court of Canada under s. 74 (3) of The Bankruptcy Act (D., 1919, c. 36)—Whether hotelkeeper a "trader" within s. 47 of Act Respecting Landlord and Tenant, N.B. (C.S.N.B., 1903, c. 153, as amended 1924, c. 30)—Extent of landlord's rights of priority in New Brunswick under assignment in bankruptcy.*

*PRESENT:—Anglin C.J.C. in Chambers.

APPLICATION for special leave to appeal under sec. 74 (3) of *The Bankruptcy Act* from a judgment of the Supreme Court of New Brunswick. Application granted.

*H. A. Porter* for the application.

*E. P. Raymond K.C. contra.*

ANGLIN C.J.C.—This is an application for special leave to appeal under s. 74 (3) of *The Bankruptcy Act* from the judgment of the Supreme Court of New Brunswick delivered by Grimmer J., reversing the judgment of Barry C.J.K.B., sitting as a judge in bankruptcy. Barry C.J.K.B. had held the insolvent to be a "trader" within the meaning of s. 47, added to the C.S.N.B., 1903, c. 153, *Respecting Landlords and Tenants,* by c. 30 of the New Brunswick Statutes of 1924. He accordingly restricted the landlord's priority over general creditors to three months' rent. The appellate court, being of the opinion that the insolvent was not a "trader" within the meaning of the New Brunswick statute, held that the landlord was entitled to priority for his entire claim for rent amounting to upwards of $3,000, but, inasmuch as the estate of the bankrupt was inadequate to meet that claim, directed that the trustee should pay over to the landlord all the moneys in his hands received from the sale of the estate less the sheriff's costs of a seizure under execution, amounting to $243.31, the balance payable to the landlord being $2,256.69, "without deducting therefrom any costs or charges of the sale or otherwise"; and no costs of the appeal were allowed.

The questions as to whether an hotel-keeper is a "trader" and as to the extent of the landlord's rights in New Brunswick under an assignment in bankruptcy seem to me to be of sufficient general importance and open to sufficient doubt in view of the conflicting judgments below, to warrant the granting of special leave to appeal.

Such leave will accordingly be granted; and the costs of this application will be costs in the appeal.

*Application granted.*

Solicitors for the applicant: *Porter & Ritchie.*

Solicitor for the respondent: *Edward P. Raymond.*

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IN THE MATTER OF "THE TRUSTEE ACT," BEING CHAPTER 220 OF THE REVISED STATUTES OF ALBERTA AND AMENDMENTS THERETO.

AND

IN THE MATTER OF THE ESTATES OF JOHN WUDWUD, DECEASED, ZADAI MALESKO, DECEASED, AND DAVID STEVENSON, DECEASED.

THE ATTORNEY GENERAL OF CANADA (INTERVENANT) ..... } APPELLANT;

AND

THE ATTORNEY GENERAL OF ALBERTA (INTERVENANT) ..... } RESPONDENT.

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

*Constitutional Law—Escheats—Bona vacantia—Rights as between Dominion and province of Alberta—The Alberta Act (D., 1905, c. 3) ss. 3, 21—The B.N.A. Act, ss. 109, 102, 126, 92—The Ultimate Heir Act, Alta., 1921, c. 11.*

Lands in the province of Alberta, granted by the Crown since 1st September, 1905, when *The Alberta Act* came into force, which have escheated for want of heirs or next of kin, escheat to the Crown in the right of the Dominion. *Trusts and Guarantee Co.* v. *The King* (54 Can. S.C.R. 107) followed.

Lands in Alberta granted by the Crown prior to 1st September, 1905, which have escheated subsequent to that date, also escheat to the Crown in the right of the Dominion. By s. 21 of *The Alberta Act* "All Crown lands, mines and minerals and royalties incident thereto" are retained by the Dominion. The phrase "Crown lands, mines and minerals" does not necessarily import lands, etc., held by the Crown in sole proprietorship; it should be read as including all interests of the Crown in lands, etc.; reading it thus, "lands, mines and minerals" may be regarded as the antecedent of the phrase "incident thereto"; accordingly the Dominion retains all interests of the Crown in lands within the province, together with all royalties incident to such lands; any royalty affecting lands, such as the right to escheat, might properly be described as a royalty "incident to" lands. The above construction is supported, when the section is compared with s. 109 of *The B.N.A. Act,* and read in light of the judgments in *Atty. Gen. of Ontario* v. *Mercer* (8 App. Cas. 767) and *Atty. Gen. of British Columbia* v. *Atty. Gen. of Canada* (14 App. Cas. 295 at pp. 304, 305).

Personal property situated in Alberta of persons domiciled in Alberta and dying intestate since 1st September, 1905, without next of kin, go to the Crown as *bona vacantia* in the right of the province. The

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ. Idington J. did not take part in the judgment.

effect of s. 3 of *The Alberta Act* was to give the newly created province "power of appropriation" (s. 102 of *The B.N.A. Act;* and see s. 126, and *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* ([1892] A.C. 437 at p. 144) over revenues belonging to the same classes as those over which the original provinces had such power before Confederation, and which, under *The B.N.A. Act,* they still possess; subject, of course, to the enactments of *The Alberta Act.*

*The Ultimate Heir Act,* Alta., 1921, c. 11, in so far as it purports to affect real property, is *ultra vires;* it is legislation disposing of assets designated as belonging to the Dominion by the statute which brought the province into existence and defines its powers and rights, rather than truly an exercise of the provincial legislative authority in relation to the law of inheritance.

Judgment of the Appellate Division of the Supreme Court of Alberta (22 Alta. L.R. 186) reversed in part.

APPEAL by the Attorney General of Canada from the judgment of the Appellate Division of the Supreme Court of Alberta (1) in so far as it upheld the contentions of the province of Alberta on certain questions in dispute, under a special case submitted to that court. The case came before it as a consolidation of three separate applications by the administrators, made by way of originating notices, for advice and directions in respect of questions arising in the administration of certain estates of deceased persons, which applications, as to the claims advanced by the respective intervenants, were referred to the Appellate Division.

The estates in question were those of John Wudwud, deceased, Zadai Malesco, deceased, and David Stevenson, deceased. In each case the deceased died in Alberta, domiciled in Alberta, intestate, and without heirs or next of kin (other than as provided in *The Ultimate Heir Act* hereinafter referred to, in the case of Malesco who was the only one who died after that Act came into force) and leaving both real and personal property.

Wudwud died on June 24, 1918. The patent to the realty was granted (to the deceased's predecessor in title) by the Department of the Interior at Ottawa on August 15, 1910.

Malesko died on April 24, 1921. The patent to the realty was granted by the Department of the Interior at Ottawa on December 28, 1920.

(1) 22 Alta. L.R. 186; [1926] 1 W.W.R. 337; [1926] 1 D.L.R. 924.

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Stevenson died on November 8, 1919. The real estate was patented prior to the creation of the province of Alberta. The patent to the deceased's predecessor in title was issued in 1884, and the transfer to deceased was dated and registered in 1904.

The questions dealt with by the Appellate Division and its holdings thereon were as follows:

(1) Do lands situated in Alberta granted by the Crown since September 1, 1905, when *The Alberta Act,* 4 and 5 Edw. VII, c. 3, came into force, which have escheated for want of heirs or next of kin, escheat to the Crown in the right of the Dominion of Canada or in the right of the province of Alberta?

The Appellate Division answered this question in favour of the Dominion of Canada, following *Trusts and Guarantee Co.* v. *The King* (1).

(2) Do escheated lands in the province of Alberta granted by the Crown prior to September 1, 1905, which have not become Crown lands by escheat or otherwise prior to that date, escheat to the Crown in the right of the Dominion of Canada or of the province of Alberta?

The Appellate Division answered this question in favour of the province.

(3) Does personal property situated in Alberta of persons domiciled in Alberta and dying intestate since September 1, 1905, without next of kin, go to the Crown as *bona vacantia* in the right of the Dominion of Canada or of the province of Alberta?

The Appellate Division answered this question in favour of the province.

(4) Is c. 11, 1921 (Alberta) entitled *An Act to Provide for an Ultimate Heir of Lands and Next of Kin of Intestate Persons* (now R.S.A., 1922, c. 144, *The Ultimate Heir Act*) *intra vires* in whole or in part? (By the said Act a person dying intestate and without heirs or next of kin, is deemed to have made a will in favour of the University of Alberta, and the university is made the ultimate heir and next of kin of any such person).

The Appellate Division answered this question in favour of the province, holding the statute to be *intra vires.*

(1) (1916) 54 Can. S.C.R. 107.

*N. D. MacLean K.C.* and *E. Miall* for the appellant: Alberta, which never owned lands, mines and minerals, or royalties such as escheats and *bona vacantia*, is not in the same position as Ontario and British Columbia, which had owned them previous to becoming part of the Dominion. The words "All lands, mines, minerals, and royalties," as used in s. 109 of *The B.N.A. Act*, are limited and controlled by the words "belonging to the several provinces" in the same section. See *The King* v. *Atty. Gen. of British Columbia* (1). If, as submitted, s. 109 is not applicable to the province of Alberta, its case fails, as nowhere in *The Alberta Act* is there any grant to the province of royalties such as escheat and *bona vacantia*.

Should this court hold that said words in s. 109 are not limited as aforesaid, it is submitted that said s. 109 is subject to s. 21 of *The Alberta Act*. S. 21 is not a reservation from a grant of certain lands, etc., but is a declaration. The words in s. 21 are "All Crown lands, mines and minerals and royalties incident thereto." Clear distinction must be drawn between the meaning of Crown lands and, for instance, unpatented lands or ungranted lands, as used in the Manitoba Act. The true meaning of Crown lands is the estate of the Crown in lands. This includes its allodial estate in lands granted or ungranted.

Crown prerogatives of the Dominion could not be transferred to the province by implication, particularly in view of s. 16 of *The Interpretation Act* (R.S.C., 1906, c. 1.). Such could only be done by express words. See Maxwell on Statutes, 5th Ed., p. 220; *Théberge* v. *Landry* (2); *Cushing* v. *Dupuy* (3); *Atty. Gen. of British Columbia* v. *Atty. Gen. of Canada* (4); *Atty. Gen. of Canada* v. *Atty. Gen. of Ontario* (5).

*The Ultimate Heir Act*, Alta., 1921, c. 11, is colourable legislation and *ultra vires*. If escheat and *bona vacantia* fall to the Dominion, this Act is a direct appropriation of Dominion rights. Admitting the province's right to deal with succession, and property and civil rights, there is a

(1) [1924] A.C. 213 at p. 219.
(2) (1876) 2 App. Cas. 102, at p. 106.
(3) (1880) 5 App. Cas. 409, at p. 419.
(4) (1889) 14 App. Cas. 295, at p. 303.
(5) [1898] A.C. 700, at p. 709.

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difference between an incidental infringement of Dominion rights, as was the action of Saskatchewan in allowing illegitimates to inherit—*Atty. Gen. of Canada* v. *Stone* (1) —and the entire appropriation of Dominion rights as here attempted. *The Ultimate Heir Act* is entirely new, remedied no existing wrong, and is contrary to what has always been our law. It was enacted from the province's desire to secure the revenues which it tried to get by its Act of 1915 (c. 5), which, so far as that Act purported to deal with escheat of land, was held in *Trusts and Guarantee Co.* v. *The King* (2) to be *ultra vires*. The contention that the University of Alberta is a corporate entity, entirely distinct from the province, while true in letter, is not true in fact, as the bulk of the money required for the university's support is provided by the province (R.S.A., 1922, c. 56, s. 80). Receipt of revenues by the university under *The Ultimate Heir Act* would relieve the province *pro tanto*. The "true nature and character of the Act," its "pith and substance" shows it to be in reality an attempt to appropriate the Dominion prerogatives of escheat and *bona vacantia* under the guise of legislation as to inheritance, and therefore *ultra vires*. *Atty. Gen. for Ontario* v. *Reciprocal Insurers* (3) and cases cited therein.

*W. S. Gray* and *J. J. Frawley* for the respondent: The relation between the Crown and the province is the same as that which subsists between the Crown and the Dominion in respect of such of the public property and revenues as are vested in them respectively. *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (4).

It is finally settled that escheats and *bona vacantia* are "royalties" within the meaning of s. 109 of *The B.N.A. Act*, and go to the Crown in the right of the province in so far as the four original provinces are concerned, and in so far as British Columbia, subsequently admitted, is concerned. *Atty. Gen. of Ontario* v. *Mercer* (5); *The King* v. *Atty. Gen. of British Columbia* (6). Ss. 102 and 109 of

(1) [1924] S.C.R. 682.
(2) (1916) 54 Can. S.C.R. 107.
(3) [1924] A.C. 328.
(4) [1892] A.C. 437, particularly at pp. 441, 443.
(5) (1883) 8 App. Cas. 767.
(6) [1924] A.C. 213.

*The B.N.A. Act* apply to Alberta, under s. 3 of *The Alberta Act* (except in so far as varied), and, therefore, on authority of above cases, escheats and *bona vacantia* go to the province of Alberta, except as *The Alberta Act* changes that disposition. It may be contended that s. 109 cannot apply to Alberta because it did not own lands, etc., at the Union, as it only came into existence then as a province. But said s. 3 makes it clear that s. 109 applies just as if the province had a previous existence. There might be no lands, mines or minerals to which it could apply, but the royalties or *jura regalia* and the right to them came into existence contemporaneously with the creation of the province, and its right arises immediately just as if it had a previous existence. By s. 109 lands, etc., and royalties were declared to belong to the several provinces in which the same "are situate or arise." "Royalties," including in that term the right to escheats and *bona vacantia,* were rights arising in the future; the right to them arose from time to time after the province was established, and the provision as to them in s. 109 applied. See *The King* v. *Atty. Gen. of British Columbia* (1), and the same case in the Supreme Court of Canada (2).

Reading ss. 3 and 21 of *The Alberta Act* together, it is obvious that ss. 102 and 109 of *The B.N.A. Act* apply to Alberta, except as modified by said s. 21. S. 21 defines what royalties are reserved to the Dominion, the rest going to the province by virtue of said s. 109. From one point of view this is something in the nature of a grant and a reservation. S. 21 limits the reservation to royalties incident to Crown lands, mines and minerals. As to escheats, the reservation limits them to Crown lands, that is, land which at the time the Act came into force was still in the Crown, so that the right to escheats of land patented before that time is in the province. There is no reservation whatever as to *bona vacantia.*

Practically the same language is used in admitting Alberta and Saskatchewan as was used in admitting Manitoba, British Columbia and Prince Edward Island, as to making applicable the provisions of *The B.N.A. Act.* S. 109

(1) [1924] A.C. 213, particularly at p. 220.

(2) (1922) 63 Can. S.C.R. 622, particularly at pp. 635, 633.

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was applied in favour of British Columbia in *The King* v. *Atty. Gen. of British Columbia* (1), and it is beyond doubt that the intention in each case of new provinces entering or being established was that they were to be put on exactly the same footing as the original provinces, except in the minor respects enumerated in the different Acts and Orders in Council.

The contention that, as the Crown in the right of the Dominion had the title to the land before it was granted, it must go back to the Crown in the right of the Dominion in the event of escheat arising, overlooks two things: (1) That when Alberta was established, the distribution of property and powers between the Dominion and the provinces was made "as if * * * Alberta had been one of the provinces originally united," and to give full effect to these words, it must be conceded that Alberta commenced its existence (so far as possible) with all the property and powers which the original provinces had "excepting so far as varied," etc. This clearly covers the case of royalties such as escheats and *bona vacantia,* which are abstract rights arising after the creation of the province. (2) That the Crown is one and indivisible; the Crown in the right of the province is the Crown to the same extent as the Crown in the right of the Dominion, and an escheat to the Crown in the right of the province is an escheat to the Crown, or the lord from whom the land was held.

If royalties are not disposed of as above contended, they go to the Crown in the right of the province by reason of the exclusive jurisdiction as to "property and civil rights."

Even if nothing were said about royalties in *The B.N.A. Act* or *The Alberta Act,* the right to *bona vacantia* would belong to the province. The right does not arise like escheat, but simply because there are goods without an owner or any one who can claim through the deceased, and the Crown steps in and takes. In this connection, see *In Re Barnett's Trusts* (2), Halsbury's Laws of England, vol. 7, para. 442.

(1) [1924] A.C. 213.

(2) [1902] 1 Ch. 847, at p. 857.

As to lands unpatented when the province was formed it was decided in *Trusts and Guarantee Co.* v. *The King* (1) that the right of escheat is in the Dominion. (To preserve rights in event of further appeal it is submitted such decision was wrong). As to lands patented before the province was formed, escheats go to the province by virtue of ss. 3 and 21 of *The Alberta Act*. See last mentioned case at p. 124, and *Atty. Gen. of Canada* v. *Stone* (4) at p. 689.

*The Ultimate Heir Act* is *intra vires*. It provides an heir and prevents escheat arising. It comes within the province's jurisdiction over property and civil rights. See *Trusts and Guarantee Co.* v. *The King* (2); *Atty. Gen. for British Columbia* v. *The King* (3); *Atty. Gen. of Canada* v. *Stone* (4); and same case below (5); *Atty. Gen. for Quebec* v. *Atty. Gen. for Canada* (6). Escheat has been prevented from arising by legitimation Acts, and by Acts creating heirs for such illegitimate persons, by Acts enabling aliens to hold lands, by Acts abolishing forfeitures consequent on attainder, felony, etc., also by adoption Acts under which rights of inheritance and succession are conferred on legally adopted children. *The Ultimate Heir Act* is legislation of a similar kind and clearly within provincial powers.

The history of the law relating to escheats shows that from the beginning the right to escheat has been whittled away, the whole tendency being in favour of preventing escheats. See *Burgess* v. *Wheate* (7).

The judgment of the court was delivered by

DUFF J.—The answer to the first question is dictated by the judgment of this court in *The Trusts and Guarantee Co.* v. *The King* (1), and is to the effect that such lands escheat to the Dominion.

As to the second question, it is convenient first to limit ourselves to the case of lands granted by the Crown in

(1) (1916) 54 Can. S.C.R. 107.

(2) 54 Can. S.C.R. 107, at p. 110.

(3) (1922) 63 Can. S.C.R. 622. Idington J. at p. 631. On appeal [1924] A.C. 213.

(4) [1924] S.C.R. 682 at p. 688.

(5) [1920] 1 W.W.R. 563 at pp. 570-571, 576.

(6) (1883) 3 Cartwright's Cases 100, at pp. 104, 101.

(7) (1759) 1 Eden 177 at pp. 191, 201. (28 E.R. 652, at pp. 657, 661).

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right of the Dominion, the absolute title to which was vested in the Dominion at the time of the grant.

Did the right of escheat in respect of such lands, which, prior to the enactment of *The Alberta Act,* was a "royalty" belonging to the Crown in right of the Dominion, pass to the province by force of that statute? S. 21 of *The Alberta Act* is in these words:

> All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the Province under The North-West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said Province with the substitution therein of the said Province for the North-West Territories.

The observations of Lord Selborne in *Attorney General of Ontario* v. *Mercer* (1), are sufficient warrant for saying that it is at least doubtful whether such royalties can properly be described as interests in land and whether they would fall within the scope of the expression "Crown lands," standing alone.

According to the narrowest construction, "royalties incident thereto" may be treated as royalties incidental to the Crown title to lands, mines and minerals withheld by force of the section from the province. But there is a more liberal construction which must be considered: the phrase "Crown lands, mines and minerals" does not necessarily import "lands, mines and minerals" held by the Crown in full proprietorship. It may be read as including all interests of the Crown in lands, mines and minerals within the province. And reading it thus, "lands, mines and minerals" may be regarded as the antecedent of the phrase "incident thereto." According to this reading, the Dominion retains all interests of the Crown in lands, mines and minerals within the province, together with all royalties incident to such lands, mines and minerals. Any royalty affecting lands, mines and minerals (such, for example, as the right of escheat, according to which lands held in fee simple by a subject are liable to return to the Crown upon a failure of heirs) might not improperly be described as a

(1) (1883) 8 App. Cas. 767, at p. 777.

royalty "incident to" lands, mines and minerals, and this reading seems the more probable one.

The consequences of the narrow construction might, indeed, be startling. In view of the judgment of Lord Watson in *Attorney General of British Columbia* v. *Attorney General of Canada* (1) (the Precious Metals case), it is at least doubtful whether the "precious metals" are comprehended within the expression "lands, mines and minerals" in s. 21. For the right to them, the Dominion must rely upon the reservation of royalties. And this right, as Lord Watson points out, is in no way accessory to any title of the Crown to land, or to mines and minerals in the sense in which, according to the views expressed in the passage referred to above, those words are used in s. 109 of *The British North America Act* and, presumably, in s. 21 of *The Alberta Act*. The consequence, therefore, of reading the words "incident thereto," as comprising only royalties incidental or accessory to the the Crown's title in lands, mines and minerals, in the sense in which those words are here used, would be to exclude the precious metals or, rather, the *jus regale* touching the precious metals, from the reservation.

The effect of the section, by this construction, is to reserve the territorial revenues of the Crown to the Dominion, and when the language of this section is compared with that of s. 109 of *The British North America Act,* and read in light of the judgments in *Attorney General of Ontario* v. *Mercer* (2), and the *Precious Metals case* (3), there seem to be solid grounds for the view that such was the intent with which it was enacted. There is the highest and most weighty authority for construing this enactment in a broad and liberal spirit. *Attorney General of Ontario* v. *Mercer* (2), at pp. 778 and 779. The answer to the second question will therefore be that such lands escheat to the Dominion.

As touching the question of the right to *bona vacantia,* a different set of considerations must be examined. This right is not one of those reserved by s. 21, and, as respects

(1) (1889) 14 App. Cas. 295, at pp. 304 and 305.

(2) (1883) 8 App. Cas. 767.

(3) (1889) 14 App. Cas. 295.

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it, the answer to this question must turn upon the effect of s. 3, which is in these terms:

> The provisions of *The British North America Acts*, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

The Dominion advances the view that those provisions of *The British North America Act*, which deal with the allotment of the public property and revenues, have for their subject matter property and revenues which, at the time the Act took effect (or was to take effect), were or might be at the disposition of a colony having a legislature or government independent of the Dominion; and that subsequently they can have no application to (or even a meaning as applied to) provinces newly created under the authority of *The British North America Act, 1871*, such as Saskatchewan and Alberta.

There are, no doubt, many provisions of *The British North America Act* which, according to the strict letter, are not capable of application to the case of such a province. But, in so far as such provisions are in substance fairly applicable in a manner consonant with the general intendment of *The Alberta Act*, there seems to be no good reason for refusing to give effect to them accordingly.

The pertinent provisions of the Act are found in sections 102, 109 and 126. These provisions deal with property in the narrow sense, and with revenues derived from the exercise of *jura regalia*, over which the provinces, at the time of the union, possessed "power of appropriation." It is this power of appropriation which is reserved to the provinces. See s. 126, and *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (1).

If we consider the substance of the matter, there appears to be no very cogent reason against ascribing to these provisions, under the authority of s. 3 (in their application to Alberta), the only meaning according to which they are not insensible in relation to a newly created pro-

(1) [1892] A.C. 437, at p. 444.

vince, that is to say, as giving to such a province "power of appropriation" over revenues belonging to the same classes as those over which the original provinces had such power before Confederation, and which, by force of these provisions, they still possess; subject always, of course, to the enactments of *The Alberta Act* itself, and in particular to s. 21.

There is great force in the argument advanced by the province that sections 20 and 21 are most naturally read as presupposing the existence of some such general disposition in favour of the province; and the observations of Lord Selborne in *Attorney General of Ontario* v. *Mercer* (1) already alluded to, as to the spirit in which these enactments should be construed, cannot be insisted upon with too much emphasis.

There remains the question touching the validity of the Alberta statute. That the province of Alberta has plenary authority, under s. 92, to lay down the rules governing the devolution of both real and personal property at the death of the owner is, of course, past question. The real subject of controversy is whether or not the impeached statute is legislation in relation to rights of inheritance.

It must first be observed, as regards lands, that the second section of the statute, which is the section in question, comes into operation only when the events have happened under which, if the statute had not been passed, lands to which it relates would (assuming rights of escheat affecting lands acquired through The Hudson's Bay Company are not within s. 21) have vested in the province; or, by force of s. 21, would have vested in the Dominion. S. 2 of *The Ultimate Heir Act* declares that, in respect of such lands, the owner, dying intestate, shall be deemed to have made a valid will, devising them to the University of Alberta, and that the University of Alberta shall be deemed to be the heir and the next of kin of any person "so dying as aforesaid."

The direct effect and aim of this statute are, by means of a legal fiction, to dispose of, *inter alia,* real property which, by *The Alberta Act,* is reserved to the Dominion.

(1) (1883) 8 App. Cas. 767.

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S. 21, which must be read as a qualification of s. 109 of *The British North America Act* (see *Attorney General of British Columbia* v. *Attorney General of Canada* (1) ), vests exclusively in the Dominion the power of appropriation over the property and rights to which it relates. The impugned enactment assumes to appropriate such property. Neither is it wholly without significance that the beneficiary of this legislative effort of the Alberta Legislature is to be an institution that, as regards finances, is mainly dependent upon that legislature for its support, and is very largely under the control of the Crown in right of the province.

This is legislation disposing of assets designated as belonging to the Dominion by the statute which brought the province into existence and defines its powers and rights; rather than truly an exercise of the provincial legislative authority in relation to the law of inheritance; and, being thus repugnant to the enactments of that statute, it is in law inoperative.

*Appeal allowed with costs.*

Solicitor for the appellant: *Neil D. MacLean.*

Solicitor for the respondent: *W. S. Gray.*

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BRUCE W. CLARKE AND LORNE H CLARKE (DEFENDANTS) ..... } APPELLANTS;

AND

RICHARD C. BABBITT (PLAINTIFF) .....RESPONDENT.

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

*Real property—Title by possession—The Limitations Act, Ont. (R.S.O., 1914, c. 75) s. 5—Nature of use and occupation—Nature and extent of enclosure—Evidence as to length of time—Trial judge's estimate of witnesses—Reversal of findings.*

It was held that plaintiff had acquired title by possession to a strip of land covered by the paper title of defendants, adjoining land owners; that the planting and care of a hedge which, for a part of its length, encroached on defendants' land, the construction and main-

(1) (1889) 14 App. Cas. 295, at p. 304.

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

tenance of a walk on plaintiff's side of the hedge and partly on said strip, the cultivating with flowers, lawn and terracing up to the hedge, and the continuous general use and enjoyment, by plaintiff or his predecessor in title, of said strip along with the other land occupied by him, there being no fence or other construction (except the hedge) to indicate a boundary, constituted a use and occupation which, if exclusive and continued for the statutory period, established a right by possession under s. 5 of *The Limitations Act*, R.S.O., 1914, c. 75 (*Marshall* v. *Taylor* [1895] 1 Ch. 641 at p. 646); that the user in question could not be deemed an exercise of a mere right of way; and that, on the evidence, continuous exclusive actual occupation by plaintiff or his predecessor in title, for over ten years, was established.

Possession may be none the less sufficient to warrant the application of s. 5 of *The Limitations Act*, even though there is no real enclosure (*Seddon* v. *Smith* 36 L.T.R. 168 at p. 169). The hedge in question, though not continued to the rear boundary of the land, had the strongest evidential value as marking the extent or area of occupation and showing adverse possession.

The trial judge's estimate of witnesses loses much of its weight when he gives for such estimate reasons which, upon examination, are found unconvincing and unsatisfactory.

Judgment of the Appellate Division of the Supreme Court of Ontario (57 Ont. L.R. 60), reversing judgment of Widdifield Co.C.J. affirmed, Duff and Newcombe JJ. dissenting.

*Per* Duff and Newcombe JJ. (dissenting):—The hedge was not intended to be definitive of any line, or to mark the limit of any occupation; it included nothing and excluded nothing; it had an obvious purpose explaining its existence and use, namely, to buttress a walk along a side hill; in the circumstances it was meaningless as evidence of exclusive possession of the soil; the evidence as to the beginning of construction of the improvements relied on was not clear or definite, and was unsafe to be regarded as initiating a period of prescription for the title; there was nothing pointing to an intention to exclude, within the principle stated in *Littledale* v. *Liverpool College* ([1900] 1 Ch. 19 at p. 23). The time of the existence of the hedge was not satisfactorily established, and the trial judge's findings thereon, his estimate of the witnesses forming a substantial part of his reasons, should not have been set aside (SS. *Hontestroom* v. SS. *Sagaporack et al*, 136 L.T. 33 at p. 37 *et seq.*).

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of His Honour, Judge Widdifield, of the County Court of the county of York, dismissing the plaintiff's action.

The action involved the question of title to a strip of land which formed part of lot 40 on the north side of Roxborough St. East, Toronto, as shown on registered plan no. 528. The paper title to lot 40 was in the defendants, but

(1) (1925) 57 Ont. L.R. 60.

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the plaintiff, who owned lot 41, lying immediately to the west of lot 40, claimed title to the strip in question by virtue of *The Limitations Act,* R.S.O., 1914, c. 75, s. 5.

The formal judgment of the Appellate Division declared that the plaintiff was the owner in fee simple, as against the defendants, of the strip in question, and vested the same in the plaintiff, and ordered the defendants to remove so much of a stone wall as they had erected thereon, and enjoined them from interfering with or lessening the plaintiff's lateral support, and ordered them to restore the same so far as they had disturbed it, and also awarded damages, to be ascertained by a reference.

The material facts of the case are sufficiently stated in the judgments now reported. The appeal was dismissed with costs, Duff and Newcombe JJ. dissenting.

*W. N. Tilley K.C.* and *G. T. Walsh* for the appellants.

*J. Jennings 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

RINFRET J.—The issue involved is the title to a strip of land on lot 40 on the north side of Roxborough street east, in the city of Toronto.

In 1909, Arthur Bollard purchased lot 41 adjoining lot 40 on the west. He erected thereon a residence which was completed and into which he and his family moved in October, 1911. Bollard having died, his widow sold and conveyed the property to the respondent. The deed is dated the 30th September, 1919.

The appellants acquired lot 40 on the 15th May, 1923.

The lands comprised in lot 41 rise very rapidly from the street line to the rear of the lot. In order to gain access to the residence, the owner terraced the lands between the street and the front of the house and erected two flights of steps separated by a little plateau, from which at the top a pathway curved off to the house. This was at first a wooden walk and later a flagstone walk. Alongside it was planted a hedge beginning about 50 feet north of the street line and extending in a curved line to a point about 18 feet south of the northerly boundary of the lots.

Such was the layout, in 1923, when the appellants purchased. The hedge was then more than three feet high, about a foot and a half wide, and fairly thick. There was nothing to distinguish from the residential property of the respondent the strip of land lying immediately next to the hedge and which is now in dispute. It was occupied, used and enjoyed as one property. "It was terraced right out: a flower bed along the verandah and then terraces and the walk laid along the lower terrace beside the hedge." There was no "sign of any boundary or break between the house and the hedge." The adjoining lot 40 was vacant, rough and uncultivated. Mr. Speight, an Ontario Land Surveyor, described it as being "in a state of nature." Looking upon the property one would naturally infer that the strip in question and the hedge belonged to lot 41. The dividing line between this and lot 40 does not run at right angles to Roxborough street. The ground was very uneven and contained no indication of the true boundary. These additional features helped to induce the belief undoubtedly entertained by respondent Babbitt and apparently by his predecessor, that the "hedge was well within the line."

The first act of the appellants, after their purchase of lot 40, was to have a survey made. Then only was it discovered that the respondent's occupation encroached beyond the true line. To this the attention of the respondent was drawn and he was given the opportunity of purchasing the land, but he insisted that he owned it by right of possession. The appellants then informed him by letter, dated 28th November, 1923, that "unless the encroaching hedge (was) removed," they intended "to cut it down." This threat was later carried out and the appellants excavated part of the lands claimed by the respondent, destroyed about 60 feet of the hedge and tore up the flagstone walk throughout the whole distance from where it crossed the line.

Thereupon the respondent brought this action claiming a declaration that he was "the owner of the lands and premises within and to the west of the hedge," an injunction restraining the appellants from entering upon and excavating these lands, a mandatory order directing them to restore them to their previous condition, and damages.

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Whether these remedies should have been granted—as they were by the Appellate Division—must be determined from the character and length of the occupation by the respondent and his predecessor in title. It is not disputed that the possession was continuous and without any interruption between Bollard, the first owner, and Babbitt, the present respondent.

Now if the character of the occupation be first examined, it will be found that a general use was shown of the disputed strip of land by the owners of lot 41. The following is the description given by the witnesses:

*Thomas B. Speight*

Q. Then inside the flag stones and between it and the true boundary line what was there?—A. Between the flags, there was—it was sodded.

Q. Trimmed and cared for?—A. Oh, yes.

Q. Was that evident that had been part of the land pertinent to house?—A. Every indication it had been, yes.

Mr. WHITE: Now, now.

The WITNESS: Indication it had been used, I suppose.

Mr. JENNINGS: Q. Did anything divide that sod to the east of the true boundary line and between it and the flag stones walk from the rest of the land belonging to house 256?—A. How do you mean?

Q. Was there anything at all to separate the land within and to the west of the true boundary line from the land to the east of the true boundary line up to the flags?—A. No, nothing.

Q. All one lawn?—A. Yes.

The COURT: Q. That is, the lawn between the verandah and the flag stones was continued?—A. Yes, oh yes.

* * *

It was good hedge, there is no doubt about that.

Q. Did it very clearly limit the lawn?—A. Yes.

*Mrs. Mary Bollard*

Q. Well then, between your verandah and the flag stone walk what did you have?—A. Flowers, wide bed of flowers.

Q. And then?—A. Sidewalk and then the hedge.

Q. Now, flowers and the sidewalk; did the flower bed come right up to the sidewalk or——A. Well, alongside the verandah.

Q. And then between the flower bed and the walk was there——A. This was long since.

Q. Well then, what about the space between the verandah and the walk, what did you do with it?—A. What did we do with it?

Q. Yes?—A. I do not quite understand.

Q. Did you leave it alone or did you trim it?—A. Hedge was always trimmed.

Q. And the ground between the walk and the verandah and the hedge?—A. We attended to our own, we did not go outside the hedge.

Q. But between the verandah and the hedge, did you have it attended to?—A. Yes.

Q. Clipped and cut and cultivated with flowers?—A. Yes.

* * *

Q. If you think this is wrong, stop me—do not answer this for a moment. Am I right in saying that the land within the hedge was used and cultivated and enjoyed by you with the rest of your property?—A. Inside of the hedge?

Q. Yes?—A. Yes, sir.

*Mrs. McPherson, daughter of first owner:*

Q. What was the means of access to 256 in the fall of 1911?—A. Steps going up the front, then little plateau, and then up again.

Q. And from the top of these steps?—A. Then the sidewalk.

Q. Wooden walk?—A. Yes, wooden walk.

Q. Where was it?—A. It was next to the—well, there was terrace between that and the verandah and then flower bed afterwards and then of course verandah.

Q. Where was that wooden walk with regard to the location of the flag stone walk that was there last year?—A. Last year?

Q. I mean the flag stone walk that was subsequently put down?—A. Well, it was next to the hedge.

Q. But was there any difference between the location of the flag stone walk and the original wooden walk?—A. No, not that I know of.

* * *

Q. Then between the walk, first wooden and then flag stone, and the verandah in the rear of the house, what was there?—A. There was grass there.

Q. There was no boundary, no indication between the walk and the verandah, from the house?—A. Just where do you mean?

Q. Here is your walk as shown on exhibit two?—A. Yes.

Q. And here is verandah, and the back part of your house?—A. Yes.

Q. Was there any obstacle or obstruction or boundary between?—A. No, not at all.

The COURT: Supposing we get at it shorter.

Q. Was there ever at any time anything indicating the boundary between 40 and 41?—A. Just the hedge.

Q. Here, this red line shows what is really on the survey, true line between the two lots; was there ever anything in the way of fence or anything to show that true line there?—A. Just hedge.

Q. Nothing but the hedge?—A. No.

Mr. JENNINGS: Q. Nothing in the shape of a fence?—A. No, nothing at all.

*Richard C. Babbitt*

Q. Then what was the nature of the land within and to the west of this hedge?—A. It was terraced right out, flower bed along the verandah and then terraces and the walk laid along the lower terrace beside the hedge.

Q. Any sign of any boundary or break between the house and the hedge?—A. None whatever.

* * *

Q. Was there any cultivation of the land west of the hedge?—A. There is lawn kept cut and flower beds.

Q. And?—A. Terraces kept trimmed.

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The above acts must be considered in addition to the construction and maintenance of the flagstone walk and the planting of the hedge. Such a user cannot be treated as the exercise of a mere right of way. It constitutes an assertion of ownership. Laying flagstones across another's land may sometimes be regarded as done for the mere purpose of a passageway; but, in this instance, when we consider the continuity of the lawn and the general use made of the strip within the hedge, when we come to see that there was in fact nothing to distinguish the enjoyment of that strip of land from that of the balance of the residential property, we are constrained to the conclusion that any occupation the respondent and his predecessor in title had of part of lot 40 was not " for the sole purpose of going to and coming from the dwelling house on lot 41," which was the view held by the learned trial judge.

In a very similar case (*Marshall* v. *Taylor* (1) ), Lord Halsbury, after referring to the setting out of rose beds and the laying down of a cinder walk and of cobble stones, and treating the disputed lands as part of the adjoining garden, stated:

It seems to me about as strong an aggregate of acts of ownership as you can well imagine for the purpose of excluding possession of anybody else.

In holding a contrary view, the learned trial judge appeared to have been rather impressed by the fact that, at the rear of the property, the hedge did not curve back so that an opening was left between it and the dividing line of the lots; and he referred to *Griffith* v. *Brown* (2), where, he said,

the judgment in appeal proceeds largely on the ground that the plaintiffs did not have exclusive possession of the way, that there, as here, there was no gate or bar to prevent the defendant or any one else, from travelling over it. In short, it was not an exclusive possession.

Possession may be none the less sufficient to warrant the application of *The Limitations Act* (R.S.O., 1914, c. 75, s. 5) even although there is no real enclosure (*Seddon* v. *Smith* (3) ). The hedge, in this case, though not continued to the boundary at the rear, has the strongest evidential value as marking the extent or area of occupation and

(1) [1895] 1 Ch. 641, at p. 646. (2) (1880) 5 Ont. A.R. 303.
(3) (1877) 36 L.T.R. 168, at p. 169.

showing adverse possession. In fact, there was not on behalf of the appellants the slightest attempt to prove that they, at any time, had made use of the strip in question, even by crawling through the hedge (*Littledale* v. *Liverpool Coolege* (1) ). The respondent and his predecessor actually had a peaceful, exclusive and unquestioned enjoyment. Although the hedge was a " very marked feature of the property," wide, thick " very clearly limiting the lawn " and there was no other indication of a boundary, Mrs. Bollard says she never heard of any difficulty about it.

This is not therefore, as was thought by the learned trial judge, a " claim. . . to any way or other easement " falling under section 35 of the Act, but a case for the application of section 5 and the ten years' limitation. Whether the respondent is otherwise within the section in respect of the continuity of his possession and the statutory period of occupation remains to be examined.

We must first ascertain the date when the hedge was planted by Bollard, for the evidence shows that, from that time on, the lay-out of the strip remained pretty much the same throughout, or, at least, was not so different as to change the mode of occupation and the nature of the use made by the owner. Mrs. Bollard, when shown the sketch (exhibit two) made by the surveyor Speight, on the 17th December, 1923, said it represented the property " exactly as it was since 1912." The condition remained the same as she described it during the time she and her husband occupied it " from 1912 to 1919." Mrs. McPherson said there was no " time, to (her) knowledge, when that hedge was not there in this same position." Mr. Speight did not show it on his plan made in 1917, but this is satisfactorily explained by the fact that he was not then concerned with Bollard's property. He had received his instructions on behalf of Mr. McPherson for the survey of the property east of Bollard's. He did not likewise show the flights of steps, which everybody agrees were built before Bollard moved into his house in 1911.

The critical question, however, is whether the respondent has established ten years' pedal possession. The answer

(1) [1900] 1 Ch. 19, at p. 25.

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is found in the evidence of Mrs. Bollard and her daughter, Mrs. McPherson. Mrs. Bollard is an elderly woman and her memory proved to be defective in some minor particulars. However, the trial judge thought that she "was giving her evidence to the best of her recollection," and some discrepancies upon unimportant matters are not sufficient to discredit her entire testimony. Asked about the date when the terracing was done and the hedge was started, she answered: "It was either one or the other, I could not say for sure, it was either 1912 or 1913."

The year when this work was done is undoubtedly very material in this case. Evidence of that character is clearly indecisive and would, if it did not go beyond that, leave the question undetermined. But, while Mrs. Bollard hesitates between 1912 and 1913, she is most positive in saying that the terracing was done and the hedge was started "in the year following (our) entering the house."

Now the record establishes beyond the shadow of a doubt that Mr. Bollard and his family moved into their house in October, 1911.

The effect of Mrs. Bollard's evidence is that the hedge and terracing were made in 1912. This is further strengthened by her recollection of an incident in connection with the death of her grandchild, Mrs. McPherson's daughter. It is common ground that the death occurred in July, 1913, and Mrs. Bollard recalls having picked some white flowers from the hedge and put them on the coffin. She adds: "That is what brings it to my memory." She is quite sure the hedge had then been planted for some time.

Later in her testimony, she is asked whether she looked up any records about these dates or whether she had to rely entirely on memory. In her reply, she refers again to the same incident. Her answer is: "On my memory and what occurred that year."

The learned trial judge discarded altogether the evidence of Mrs. McPherson, which agrees on all material points with that of Mrs. Bollard. His ground was that "she has been discussing the matter with her mother and relies on her mother's memory for dates." That can only refer to

two passages of Mrs. McPherson's testimony, where she says:

Q. Did you look up any records that you might have?—A. No, not at all.

Q. So that you just talked it over with your mother, I suppose?—A. Yes.

Q. And you agreed with her, or who was it put it at 1912, would it be you or your mother?—A. I think we both put it because we both knew.

Q. Well, you both knew; you agreed that was the date?—A. Absolutely.

* * *

Q. You did not speak about that at all with your mother, it was just question of the putting out of the hedge and this walk up here that you and your mother discussed?—A. Yes, we discussed that.

Q. And you cannot tell us who it was, which one of you first fixed date of 1912? Your mother says 1912 or 1913, she won't be sure which one it was?—A. Well, I am just going by what I told you, the circumstances.

Q. You are quite clear—I do not want to be unfair—you are quite clear that flowers, white flowers were picked from that hedge?—A. No, I am not clear about that, my mother believed that she picked them but I know hedge was there.

Q. Your mother told you?—A. I know hedge was there.

Like the Appellate Division, we are unable to find in the above passages and upon the ground put forward by the learned trial judge any justification for disregarding the evidence of Mrs. McPherson. The trial judge's estimate of the witnesses must of necessity lose much of its weight when, as here, he gives for such estimate reasons which, upon examination, are found unconvincing and unsatisfactory. Mrs. McPherson makes it distinctly clear that she speaks from her own recollection. Earlier in her deposition she had so stated:

Q. Then when was the hedge set out?—A. I should say 1912.

Q. Do you remember your father doing the terracing?—A. Yes.

Q. What year was that with relation to the year you went into the house?—A. Well, I should say year after.

Q. And were the hedge and the terracing done in different years or the same year?—A. I should say same year, one may have been started in the spring and the other in the fall, I do not know about that, but I should say it was 1912.

* * *

Q. And would you say—why did you say it was 1912?—A. Well, I could say it was 1912 because my little girl died in 1913 and it was put in before that.

Q. You have distinct recollection of that, have you?—A. Yes.

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Unexpected corroboration of Mrs. Bollard and of Mrs. McPherson comes from the appellant's expert witness Brown. The grandmother testified that she plucked from the hedge white strays of spiraea to lay them on the coffin of the little girl. Brown stated that normally spiraea finished blooming by the end of June, but that the year 1913 was abnormally backward and it was possible for Mrs. Bollard to have picked those flowers in July, 1913.

If, therefore, as the learned trial judge rightly remarked, the respondent's possessory title "rests entirely on the evidence of Mrs. Bollard and her daughter, Mrs. McPherson," it follows that actual occupation by the respondent and his predecessor in title was conclusively established for more than ten years, for we do not find in the record any reason why their evidence should not be given its full weight on this point. The opinion of Brown, the expert nursery man, as to the age of the hedge, cannot overcome the evidential value of the testimony of eye-witnesses, otherwise unimpeachable, and who deposed to actual facts, as to which they were in no wise contradicted.

We are for these reasons, in accord with the Appellate Division. We find in the circumstances of this case the conditions which call for the application of s. 5 of *The Limitations Act*. Throughout the statutory period, the strip of land in dispute was continuously occupied by Bollard and his successor, the respondent, and, during that period, there was a discontinuance of possession by the predecessors in title of the appellants. Before the appellants purchased lot 40, the possession of the respondent, open and visible, unequivocal and exclusive, had already ripened into a possessory title.

The judgment appealed from should be confirmed with costs.

The judgment of Duff and Newcombe JJ. (dissenting), was delivered by

NEWCOMBE J.—The action was begun on 7th December, 1923, claiming a declaration that the plaintiff (respondent) was the owner of the land in question, also an injunction and damages. The land consists of the narrow edge or strip, lying between the east line of the plaintiff's lot, no. 41

on Roxborough Street East, Toronto, and that part of a hedge planted by Mr. Bollard, the plaintiff's predecessor in title, which is on no. 40, the adjoining lot to the eastward; the plaintiff claiming merely what he describes as a squatter's title.

Mr. Bollard built his house on lot 41 in 1910 and 1911. At that time the owners of lot 40 did not use it, either by themselves or by any person claiming under them. The possession in law, of course, was theirs, but it was not active or visible possession, and there is no evidence that the owners were in the neighbourhood. The land was in a rough condition; it is said to have been in a state of nature; there were surveyors' marks from which the lines could be traced, but there were and are no fences on either lot, except to the eastward of lot 40. The paper title, both of Bollard and the plaintiff, is confined to lot 41 as described in the survey, and does not include the land in dispute, or anything beyond the boundaries of the lot. When Mr. Bollard built, he had to provide access to his house from Roxborough Street on the south, that being the only highway contiguous to the property. The ground is steep, and, going northward from Roxborough Street, the grade increases. The house was located on the northeastern part of the lot, not far from the eastern line, and there were two entrances, one, the front, on the easterly, and the other, the rear, on the northerly, side of the house, from which the ground slopes gradually to the southeast. In constructing the approach, Mr. Bollard surmounted the grades at the foot by a flight of steps laid on the ground and leading up from the street, and, to avoid the steeper acclivity, which would otherwise have been encountered, he directed the path from the head of the steps at an abrupt angle to the northeast, crossing the line of lot 41, and, continuing northerly on lot 41, for a distance somewhat in excess of the length of the house, in a curve diverging slightly to the eastward as it advanced northward, whence, opposite the entrances to the house, he constructed two flights of steps, leading to the westward, whereby to reach the entrances, and he laid some boards on the path to provide better footing, which, after the plaintiff acquired the property he replaced by flags. The whole purpose and appearance of the

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structure was that of a footway of access and egress from and to the street. Later, at a time which is not definitely fixed by the proof, Mr. Bollard set out a hedge, of the variety known as bridal wreath, close to the path on its lower side, extending from a point on lot 41, below where the path intersected the line of the lot, northward, to the end of the path, somewhat beyond the steps leading to the rear entrance. The practical purpose of this hedge was protection to the path which ran along the face of a declivity; it served as a sort of baluster, and perhaps to stiffen and uphold the soil. It was moreover ornamental. The south end of the path was on the plaintiff's lot, the north on the defendants'. It did not terminate at any boundary, and made no enclosure. The hedge is described by the plaintiff's surveyor as "thick shrubbery—quite thick; I should say it would be about two or three feet high, * * * about a foot and a half wide at the top when it was clipped off."

As to the time when the hedge was planted, there is the evidence of Mrs. Bollard, who lived in the house from October, 1911, to 1917, when her husband died, and continued to live there until 1919, when she sold to the plaintiff, and of her daughter, Mrs. McPherson, who lived in the house, with her mother, for the first four or five months, or until January or February, 1912, when she moved into her own house, which had been built on the same lot to the westward, and where she resided until 1919. These two ladies were called to prove the possession. Mrs. Bollard had looked for documents or records by which to refresh her memory, but could find none, and she says that she did not know what her husband or Mr. McPherson, her son-in-law, did. Mrs. McPherson says that she did not look for any records, but talked the matter over with her mother. In the conclusion, Mrs. Bollard thinks the hedge was planted in 1912 or 1913. Mrs. McPherson thinks it was planted in 1912. The reason influencing this conclusion, as given by Mrs. Bollard, is that the shrubs of the hedge bore a small white flower; that a child of Mrs. McPherson died in July, 1913, and that she, Mrs. Bollard, picked some white flowers and put them on the coffin. Therefore she concludes that the hedge was there before July, 1913. Mrs.

McPherson also fixes the date by reference to the death of her child, but when asked, in cross-examination, if she were quite clear that the flowers were picked from the hedge she answered " No, I am not quite clear about that. My mother believed that she picked them, but I know the hedge was there." There is evidence that terracing was done somewhere between the wooden walk and the verandah, and that there were flowers growing by the verandah. At the time of the trial the boards on the path had been replaced by the flags. Mrs. Bollard thinks these were put down two or three years after the laying of the boards. She says that " the wooden sidewalk went sagging and my husband thought he would rather have the other (meaning the flagstones), and he put it here in this place exactly where the wooden sidewalk had been." Mrs. McPherson, in her direct examination, referring to the flagstone walk, says that it was in the same location as the wooden walk; that between the walk, first wooden and then flagstone, and the verandah, there was grass, and that there was nothing to indicate the boundary between lots 40 and 41, except the hedge. In her cross-examination she says she thinks the boards were there when her mother sold to the plaintiff in 1919, but does not know anything about that. In fact, as already told, the boards were taken up, and the flags put in their place, by the plaintiff, after he bought the place, in 1919.

As illustrating the manner in which the evidence of these ladies was elicited at the trial, the following conversation took place on the re-examination of Mrs. Bollard; Mr. Jennings for the plaintiff, Mr. White for the defendants:

Mr. JENNINGS: Q. Then following the entry in the house on October, 1911, when was it your husband began to terrace up the property?—A. In 1912, I think, they started.

Q. Then was the hedge set out in the year of the terracing?—A. Yes, I think they did the whole work, as far as I can remember, I think the terrace started first.

Q. And then in what year was the hedge, with reference to the terracing of the property?—A. Well, 1912 or 1913, I can not just exactly say.

Q. Terracing was done in the year following your entering the house?—A. Yes, was started.

Q. And I think you said—I want you to be quite accurate—the hedge was put out in the same year?—A. Yes.

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Mr. WHITE: My learned friend should be fair with the witness, the witness said she could not say, 1912 or 1913, and the witness is perfectly fair and my learned friend is trying to pin her down to 1912.

The COURT: She said before it was in '13.

Mr. JENNINGS: No, Your Honour, she said it was same year in which the terracing was done, year following their occupation of the house. Perhaps Your Honour would ask her?

The COURT: Oh, no.

Mr. WHITE: I just want to ask a question about the terracing. Q. You will not say, will you, whether the terracing was done in 1912 or 1913?—A. It was either one or the other, I could not say for sure, it was either '12 or '13.

On the other hand the plaintiff's surveyor, who made a survey and plan of the locality for the purposes of the action, and had previously, in 1917, also made a survey and plan of lot 41 for Mrs. Bollard's son-in-law, McPherson, did not show the hedge on the latter plan, although he says he thinks it likely that he would have shown it if it were there. His impression is that the hedge was not there. It is observable however, as affecting the inference to be drawn from this circumstance, that the plan of 1917 did not show the steps or the path, although these evidently were there when that survey was made. Mr. Brown, a landscape gardener, connected with the nursery business, in which he had had twenty-three years experience, examined the hedge in June, 1924, and produced a sample of it at the trial; he says that, having regard to the nature of the soil, the number of clippings and the condition and size of the wood, he considered the hedge to be about six years of age, if, according to the usual practice, it had been planted at three years growth. The learned County Judge was much impressed by the evidence of this witness, whom he found both capable and honest.

But assuming the hedge to have been planted in 1912 or 1913, what follows? The hedge is not, and was not, intended to be definitive of any line, or to mark the limit of any occupation. It runs diagonally across the surveyor's line, part of it is on the plaintiff's land, though the greater part of it is on the defendants' land. It includes nothing and it excludes nothing. It is, as I see it, of even less value to prove possession of a part of the defendants' land than a single tree would have been, if planted there by the plaintiff and allowed to grow for ten years, because the hedge had an obvious purpose explaining its existence and use.

It was made to buttress the walk along the side hill, and that was the useful purpose for which it was maintained. It is, in the circumstances attendant upon its situation and use, meaningless as evidence of exclusive possession of the soil.

To the west of the footpath there was still a narrow margin belonging to lot 40. The evidence is to the effect that there was grass growing there, and that Mr. Bollard used to trim it and also the hedge, but the time is not fixed. The surface must have been in a somewhat rough condition during 1912 and 1913 when, according to the case, the terracing and improvements were going on. The evidence is not clear or definite, and it would, I think, be unsafe to regard it as initiating a period of prescription for the title during either of those years. What Lord Lindley said in *Littledale* v. *Liverpool College* (1), may fairly be repeated with respect to the owners of lot 40.

They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involved an *animus possidendi* —i.e., occupation with the intention of excluding the owner as well as other people.

There is nothing which points to an intent to exclude.

The learned County Judge, who delivered a carefully considered judgment, found that the time of the planting of the hedge had not been established to his satisfaction; that Mrs. Bollard's memory was defective, and that Mrs. McPherson, who had been discussing the matter with her mother, had relied upon the latter for her dates; that the hedge was not planted as a boundary line, but, in his view, for ornamental purposes only, and that Mr. Bollard must have known that he was a trespasser; that the use of the footpath was evidence only of prescription for a right of way, and that the user had not been sufficiently prolonged to establish it. He accordingly dismissed the action.

The Appellate Division reversed this judgment upon a review of the evidence, and held that the plaintiff had obtained title to the land lying to the west of the centre of the hedge by possession; relying upon the evidence of Mrs. Bollard and Mrs. McPherson with regard to the picking of the flowers as conclusively establishing the existence of the hedge prior to that date. But, with all due respect, I am unable to accept this view. It would be natural, and

(1) [1900] 1 Ch. 19, at p. 23.

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I do not doubt, that Mrs. Bollard picked some white flowers for her granddaughter's funeral, but that she picked these from the hedge is nowhere stated in the evidence, although perhaps she thought she did, and not improbably she would have said so if she had been asked; but there were flowers growing on the premises nearer to the house, and I do not think that Mrs. Bollard's memory as to the plucking of the flowers ought to be accepted as proving the existence of the hedge at that time. It is as little conclusive as the rest of her evidence. The old lady's recollection was admittedly at fault, and the trial judge gained the impression that her daughter, having less opportunity to know or to observe, was influenced by what her mother told her. It cannot be denied that the learned judge's estimate of the witnesses forms a substantial part of his reasons for judgment, and, if so, the observations of Lord Sumner in the House of Lords in the recent case of *SS. Hontestroom v. SS. Sagaporack and SS. Durham Castle* (1), become very apposite to the case. His Lordship, in addressing the House, said:

> What then is the real effect on the hearing in a court of appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute; Order LXVIII, r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone.

In the result, I do not think a case has been made out to justify the setting aside of the findings.

*Appeal dismissed with costs.*

Solicitor for the appellants: *George T. Walsh.*

Solicitors for the respondent: *Jennings & Clute.*

(1) (1926) 136 L.T. 33, at pp. 37 *et seq.*; [1927] A.C. 37.

THE LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

THE CITY OF HALIFAX (PLAINTIFF) ... RESPONDENT.

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*Oct. 14.
1927
*Feb. 1.

ON APPEAL (PER SALTUM) FROM THE SUPREME COURT OF NOVA SCOTIA

*Guarantee—Bond against embezzlement or theft by city employee—Bond limited to cover only embezzlement or theft committed within 12 months prior to notice of discovery—Employee's falsification of books to cover previous defalcations—Time of embezzlement or theft—Onus of proof—Particulars of claim—Amendment—Terms of bond—Renewal—Offence committed before, but discovered after, renewal—Complaint as to city's answers to questions in regard to proposed guarantee—Employee's failure to fulfil, and city's neglect to enforce, statutory requirements—Alleged failure by city to notify discovery of judgment against employee.*

Defendant, by bond dated 20th June, 1907, agreed to make good to plaintiff city, to the extent of $10,000, pecuniary loss sustained through embezzlement or theft of money by its tax collector in connection with his duties. The bond was renewed yearly, the last renewal being for the year beginning 1st October, 1922. The collector received payment of taxes in currency or cheques. From time to time, usually daily, he handed to a clerk or placed in the cash books for entry such of the receipted tax bills as he desired to account for at that time. These were in due course entered in the cash books. The total amount of the bills so entered was made up, and the collector then gave the clerk a corresponding amount in cheques and currency, for which the clerk made out a deposit slip, which, with the cheques and currency, was handed to the city treasurer whose duty it was to make the bank deposits. From the collector's cash books the payments thus recorded were credited in the ledger accounts of the various taxpayers in payment of whose accounts they had been attributed. On 19th September, 1922, R., a taxpayer, paid two cheques which were deposited by or on behalf of the collector with the treasurer on 21st and 28th September. On 26th January, 1923, B., a taxpayer, paid a cheque which was deposited with the treasurer on 30th January. Except as to a portion of B.'s cheque, the collector did not give credit in his books to R. and B. for these payments, but appropriated the cheques in payment of other taxes which had already been paid, and for which he had issued receipted bills; but the taxpayers' money which the collector received in payment of these other taxes was not credited to their accounts in his cash books; instead, R.'s cheque, and B.'s cheque in part, were deposited so that it was made to appear that taxes other than those of R. and B. had been paid by their cheques, the collector suppressing the evidence that their taxes had

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

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been paid. The city claimed against defendant (up to the amount guaranteed) for misappropriations by the collector to the amount of the cheques of R. and B. not properly credited. Notice had been given defendant of the embezzlements or thefts, on 2nd June, 1923. The bond provided that no more than one claim, and that only in respect of acts of embezzlement or theft committed within 12 months prior to notice to defendant of discovery thereof should be made.

*Held,* as to the contention that there was no evidence of embezzlement or theft within said twelve months period, that it should be found or inferred that there was embezzlement or theft of the sums misappropriated on the dates when the cheques of R. and B. were by the collector's direction used and deposited with the treasurer to make up the credits for which they were not intended; that, in the absence of proof to the contrary, it should be found that the city then sustained pecuniary loss to the amount so misappropriated, by reason of embezzlement or theft by the collector in connection with his duties; there was *prima facie,* if not conclusive, proof of misappropriation at the time of the false accounting; if defendant relied upon an earlier date for the offence than that *prima facie* proved, it should have adduced evidence of it.

It was the appropriation of the cheques of R. and B. to the payment of the accounts which the collector knew had been otherwise satisfied by money in his hands, that constituted the commission of the crime, and its proof. *Rex* v. *Hodgson* (3 C. & P. 422 at p. 424) and other cases, referred to.

*Held* further, as to the contention that the R. and B. cheques, having been actually delivered to the treasurer and deposited in the city's bank account, thus reaching their intended and proper destination, were not misappropriated, and that, therefore, any charges of default or loss alleged by the particulars of the statement of claim failed, that, although the particulars were lacking in some allegations necessary fully to explain the nature of the case, yet in view of a previous explanatory letter by the city's solicitor to defendant, and the evidence and the course of the trial, the contention should not prevail; an amendment, if necessary, should be allowed.

*Held* further, that, in view of the terms of the bond, the provision to indemnify as to embezzlement or theft "committed during the continuance of this agreement, and discovered during the continuance of this agreement," covered embezzlement or theft committed before, but discovered after, the renewal of the bond on 1st October, 1922.

*Held* further, as to complaint respecting certain answers by the city to questions submitted with regard to the proposed guaranty, which answers, along with others, were to be taken as "the basis of the contract," that, taking into consideration that, although the questions were not fully answered, the answers were accepted by defendant, and taking into consideration all the questions and answers made, including some made later, in 1918, relative to a renewal of the bond, and under all the circumstances and evidence, the answers complained of, when given a reasonable interpretation, could not be relied on to prevent recovery under the bond.

*Held* further, as to defendant's contention that it was discharged because the city had dispensed with certain duties of office with which the

collector was charged by statute, that the contention failed for lack of proof; that, although there was great neglect in enforcing the statutory requirement of a monthly return, the evidence did not satisfy the condition to the discharge of a surety affirmed in *Black* v. *Ottoman Bank* (6 L.T.N.S. 763) that there must be some positive act done by the employer to the surety's prejudice, or such degree of negligence as to imply connivance and amount to fraud; moreover, on the evidence, the statutory requirements did not influence the making of the agreement; and under it their performance was neither represented nor expressly or impliedly undertaken by the city; there was no evidence of fraudulent concealment, or of suppression of any fact which the city was bound to communicate. *Davis* v. *London and Provincial Marine & Ins.* Co. (8 Ch. D. 469) referred to.

*Held* further, as to a clause in the bond avoiding it if the city should fail to notify defendant "of the discovery of any writ of attachment, execution issued, or judgment obtained against the salary or property of the employee" as soon as it became known to the city, that the judgment in question did not appear to have been one "obtained against the salary or property of the employee", moreover doubt was expressed that the city could be held to have discovered a judgment merely because the city auditor in the course of business heard of it.

*Held,* generally, as to the effect of the city's conduct on defendant's liability, the principle affirmed in *MacTaggart* v. *Watson* (3 Cl. & F. 525 at pp. 542, 543) should be applied.

Judgment of Chisholm J., of the Supreme Court of Nova Scotia, in favour of the city, affirmed.

Anglin C.J.C. dissented, on the ground that, certainly no moneys received from the R. and B. cheques mentioned in the city's particulars of claim were embezzled or stolen or lost to the city; and even on amendment of the particulars to accord with the statements in the city solicitor's previous letter to defendant, the claim so amended being regarded as based upon the embezzlements or thefts which the false entries in the books as to the proceeds of said cheques were designed to cover up, yet the actual embezzlements or thefts should not be taken *prima facie* to have occurred when said falsification of the books took place, nor did the proof of such falsification cast the burden on defendant to show that the actual embezzlements or thefts occurred at earlier dates; the city was required to establish loss within the terms of the guarantee; and without evidence warranting a finding that the moneys were actually embezzled or stolen within the 12 months period prior to notice of discovery, according to the limitation in the bond, the city could not recover.

APPEAL, *per saltum,* from the judgment of Chisholm J., of the Supreme Court of Nova Scotia, holding the plaintiff city entitled to recover against the defendant under a bond or agreement to indemnify the city against pecuniary loss (to the extent of $10,000), sustained by reason of embezzlement or theft of money on the part of a collector

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of taxes employed by the city. The material facts of the case and questions dealt with are sufficiently stated in the judgments now reported, and are indicated in the above head-note. The appeal was dismissed with costs, Anglin C.J.C. dissenting.

*W. N. Tilley K.C.* for the appellant.

*F. H. Bell K.C.* for the respondent.

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

NEWCOMBE J.—The London Guarantee & Accident Company, Limited, agreed in writing with the city of Halifax to make good and reimburse to the city, to the extent of $10,000, such pecuniary loss, if any, as might be sustained by the city by reason of embezzlement or theft of money by the collector of taxes in connection with his duties. Losses, due to embezzlement or theft on the part of the collector, were alleged by the city, in excess of the amount for which the company had become surety; the liability was denied, and the city recovered judgment at the trial, in the Supreme Court of Nova Scotia, against the company, in the sum of $10,000. The company now appeals, *per saltum*, to this court.

The agreement, or bond, as it is called, upon which the action is brought, is dated 20th June, 1907, and is described as replacing bond no. 10855. It recites that Robert Theakston has been appointed collector of taxes in the service of the city, and has applied to the company "for a grant by them of this agreement." Two other recitals follow, namely:

> And whereas the employer has delivered to the company certain statements and a declaration, setting forth, among other things, the duties, responsibilities and remuneration of the employee, the moneys to be entrusted to him, and the safeguards and checks kept and to be kept upon his accounts, and has consented that such declaration and each and every other of the statements therein referred to or contained, so far as the same are material to the contract, shall form the basis of the contract hereinafter expressed to be made.
>
> And whereas the employer warrants the statements and declaration aforesaid, so far as the same are material to this contract, to be true, and agrees that the method of conducting the business, so far as the said statements and declaration are concerned, shall be in accordance therewith during the currency of this agreement (except as to such changes therein as may be agreed to by the company as hereinafter provided).

Then it is stipulated as follows:

It is hereby agreed and declared that from the date hereof, up to the first day of October, 1907, at 12 o'clock noon, and during any year thereafter, in respect of which the company shall consent to renew this agreement by accepting the aforesaid annual premium, and issuing a renewal receipt as hereinafter provided subject to the provisions of the memorandum and articles of association of the said company, and to the conditions and provisoes herein contained (which shall be conditions precedent to the right on the part of the employer to recover under this agreement), the company shall, at the expiration of three months next after proof satisfactory to the directors of the loss hereinafter mentioned has been given to the company, make good and reimburse to the employer to the extent of the sum of ten thousand dollars, and no further, such pecuniary loss, if any, as may be sustained by the employer by reason of embezzlement or theft of money on the part of the employee in connection with the duties hereinbefore referred to, committed during the continuance of this agreement, and discovered during the continuance of this agreement, in the case of the death, dismissal, or retirements of the employee discovered, within three months from the death, dismissal or retirement. And no more than one claim, and that only in respect of acts of embezzlement or theft of money committed within twelve months prior to the receipt by the company of the notice of discovery thereof, to be given as is hereinafter provided, shall be made under this agreement, which upon the making of such claim, as to any further or other liability hereunder, wholly cease and determine, and upon the payment of such claim this agreement shall be delivered up to be cancelled; * * * Provided that on discovery of any embezzlement or theft of money by the employee as aforesaid, the employer shall immediately give notice in writing thereof to the company, and that full particulars of any claim made under this agreement shall be given in writing addressed to the manager of the company, for the Dominion of Canada, Toronto, Ontario, within three months after such discovery as aforesaid: * * * This agreement is entered into on the condition that the business of the employer shall continue to be conducted and the duties and (except that it may be increased) the remuneration of the employee and the method of examining and checking his accounts shall remain in every particular in accordance with the statements and declaration hereinbefore referred to, and if during the continuance of this agreement any circumstance shall occur or change be made, either temporarily or otherwise, which shall have the effect of making the actual facts materially differ from such statements or any of them, without notice in writing thereof being given to the company at its chief office for Canada and the consent or approval in writing of the company being obtained, or if any suppression or misstatement of any material fact affecting the risk of the company be made at the time of the payment of the first or of any subsequent premium, or if the employer shall continue to entrust the employee with money or valuable property after having discovered any act of dishonesty on his part, or shall fail to notify the company of the discovery of any such act as hereinbefore provided (for which the company would be liable under the terms of this agreement) or of any writ of attachment execution issued or judgment obtained against the salary or property of the employee as soon as it shall have come to the knowledge of the employer, or if the employer make any settlement with the employee for any loss hereunder without the consent in writing of the company having first

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been obtained, then, and in every such case, this agreement shall be void and of no effect from the beginning, and all premiums paid thereon shall be forfeited to the company.

There is also this further provision:

Provided that if the company shall renew this agreement beyond the time herein limited and shall issue a renewal receipt to that effect this agreement shall be continued for the time therein specified and the statements, warranties and conditions made as aforesaid shall, except as materially varied by any statement, in writing, made at the time of such renewal and endorsed thereon or hereon, be deemed to be continued and of full force and effect as herein provided during the continuance of this agreement so renewed as aforesaid and together with such variations as aforesaid to form the basis of such renewal which shall be deemed to have been made upon the faith of such statements, warranties and conditions so varied as aforesaid.

The agreement was renewed from year to year, the last renewal being for the year beginning 1st October, 1922. The loss is alleged in the statement of claim, by the 6th paragraph, as follows:

6. During the period covered by such renewals the plaintiff city has suffered loss by the defalcation or theft of moneys by the said Robert Theakston to an amount exceeding the sum of $10,000 the particulars of which said loss are as follows:

(1) The sum of $7,398 which was paid to the said Robert Theakston, as such collector, on the 19th day of September, 1922, by one James E. Roy, a taxpayer of the plaintiff city, as and for taxes due by him to the the plaintiff city and was misappropriated and stolen by the said Robert Theakston.

(2) The sum of $4,303.54 which was paid to the said Robert Theakston, as such collector, on the 26th day of January, 1923, by one Charles Brister, a taxpayer of the plaintiff city, as and for taxes due by him to the plaintiff city and was misappropriated and stolen by the said Robert Theakston.

The facts brought out under these particulars had been stated substantially in a letter of 1st August, 1923, written by the city solicitor to the company's manager at Toronto. In this letter Mr. Bell states:

In compliance with the requirements of your bond to the city of Halifax, No. 70275, guaranteeing Mr. Robert Theakston, collector of the city, I beg herewith to submit a claim for an amount exceeding the sum guaranteed, namely, ten thousand dollars ($10,000) misappropriated by him during the twelve months preceding the date of the discovery of his defalcations, namely, the 2nd of June, 1923. I may say that the total amount of the defalcations already known to have been committed by him is greatly in excess of this amount. We have now proof of about seventy-five thousand dollars ($75,000) taken by him and further amounts are being discovered almost daily, as the work of auditing proceeds.

The amounts making up the sum above mentioned are:

| | | |
|---|---|---|
| (1) Amount of payment made by J. E. Roy on Sept. 19, 1922 for taxes for civic year 1921-22, paid by two cheques of that date, one for four thousand dollars ($4,000) and one for three thousand three hundred and ninety-eight dollars ($3,398) | $7,398 00 | |
| (2) Amount of part payment made by Charles Brister on January 26, 1923, for taxes. Payment was made by a cheque of that date for six thousand one hundred thirty-seven dollars and twenty-three cents ($6,137.23) of which only one thousand eight hundred thirty-three dollars and sixty-nine cents ($1,833.69) was credited and paid to the treasurer, the balance being misappropriated | $4,303 54 | |
| | | $11,701 54 |

It will be noted that what is claimed is the amount indicated by the cheques. This is to avoid confusion. The cheques themselves were passed over by the collector to the treasurer. But, as only the amounts shown by the collector's cash book were ever paid to the treasurer and as with the exception of the amount credited to Mr. Brister, as above stated, neither the amounts covered by the cheques nor the persons by whom they were paid were entered in the cash book, it is clear that the collector misappropriated currency to the amount of the cheques, and substituted for it the cheques, which he was compelled to do in order to pass them through the bank, with the endorsation of the city upon them.

I enclose copies of these cheques referred to; Mr. Roy has also his receipts in the usual form, Mr. Brister has no receipt and states that the collector at the time of payment said none was necessary. Both Mr. Brister and Mr. Roy are here and well known and are available at any time to any representative of your company.

If you require anything further, we shall be pleased to furnish it if in our power.

The action was brought on 9th November, 1923, and was tried before Chisholm J. The first objection to his findings is that the plaintiff failed to prove any pecuniary loss by reason of embezzlement or theft by the employee. It appears that the city collector, according to the course of business in his office, received payment of the taxes levied by the city for various purposes; that these taxes were paid, sometimes in money, sometimes by taxpayers' cheques; that the collector himself had the custody of the money and the cheques; that from time to time, usually every day, the collector handed out to one of his clerks or assistants, or placed in the cash books for entry, such of the receipted tax bills as he desired to account for at that time; that these were in due course entered in the appro-

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priate cash books; that the total amount of the bills so entered was made up, and that the collector then gave to the clerk a corresponding amount in cheques and money. Thereupon the clerk made out a deposit slip, specifying the amount of the cheques and the currency, and this deposit slip, with the cheques and currency, was handed over to the city treasurer, whose duty it was to make the bank deposits. From the cash books in the collector's office the payments thus recorded were credited in the ledger accounts of the various taxpayers in payment of whose accounts they had been attributed. What happened with regard to the cheques in question was this: James E. Roy, a large taxpayer, paid his taxes by two cheques, the one of $4,000, the other of $3,398, on 19th September, 1922, and these cheques were deposited by or on behalf of the collector with the treasurer on the 21st and 28th of that month. Charles Brister, also a large taxpayer, paid his taxes by his cheque for $6,137.23 on 26th January, 1923, which was in like manner deposited with the treasurer, four days later. These cheques were paid in discharge of taxes of various kinds, and divers amounts; but Mr. Roy received no credit; and while, as to an amount of $1,833.69, part of Mr. Brister's cheque, the payment was attributed to the account of the latter in the collector's books, he did not receive credit for the balance of $4,303.54. Therefore, except as to the $1,833.69, none of these cheques was used by the collector for the purposes for which it had been paid in. On the contrary, the collector appropriated the cheques in payment of other taxes which had already been paid, and for which he had regularly issued receipted bills; but the taxpayers' money which was received by the collector in payment of these other taxes was not credited to their accounts in any of the cash books. Instead, Roy's cheque, and that of Brister in part, were deposited so that it was made to appear that taxes other than those of Roy and Brister had been paid by their cheques, the collector suppressing the evidence that their taxes had been paid. It is urged against the findings that, while these facts constitute proof of embezzlement, there is no evidence of the time when the offence took place; but from the foregoing facts I think it may be found or inferred that there was embezzle-

ment, or, having regard to the provisions of the *Criminal Code*, theft, of the sums misappropriated by the collector, on the dates when these cheques were by his direction used and deposited with the treasurer to make up the credits for which they were not intended; and I think it may be found moreover, in the absence of proof to the contrary, that the city then sustained pecuniary loss, to the amount so misappropriated, by reason of embezzlement or theft of money on the part of the collector in connection with his duties. The failure to account for the money which the taxpayers had paid in discharge of their tax bills; the appropriation of the Roy and Brister cheques to the payment of these bills, and the omission to give credit to Roy and Brister for the cheques which they had paid, save as to $1,833.69, part of Brister's cheque, afford the necessary evidence. It is said that the time of the defalcation is, by the terms of the guaranty, material, and that the use of the cheques does not fix the time. There is however no evidence to fix the collector with criminal responsibility at any time earlier than the dates of deposit of the cheques with the treasurer; that was the act upon which the court could find with certainty an intention to misappropriate. It showed that the cheques paid in by Roy and Brister were applied by the collector in payment of taxes which had already been paid, the money which actually went to pay those taxes not having been accounted for, and therefore a falsification of the accounts. There was thus, *prima facie,* if not conclusive, proof of misappropriation at the time of the false accounting. When, therefore, the defendant company relies upon an earlier date for the offence than that which is *prima facie* proved, I think it must adduce evidence of it, but it has not done so.

There is a well known series of decisions with regard to venue in prosecutions for embezzlement, which includes such cases as *Rex* v. *Taylor* (1); *Reg.* v. *Murdock* (2), and *Reg.* v. *Rogers* (3), where it is held that the act of embezzlement is completed at the place where the representation is made which makes out the offence. When an agent collects money for his principal and fails promptly

(1) (1803) 3 B. & P. 596. (2) (1851) 2 Den. 298.
(3) (1877) 3 Q.B.D. 28.

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to account or remit, that fact does not establish the charge against him. But his innocence is incompatible with a false account, and, in this case, it was the appropriation of Roy and Brister's cheques to the payment of the accounts which the collector knew had been otherwise satisfied by money in his hands that constituted the commission of the crime, and its proof. *Rex* v. *Hodgson* (1).

Therefore I shall proceed upon the view that on 21st September, 1922, the collector misappropriated $4,000; on 28th September, 1922, $3,398; and on 30th January, 1923, $4,303.54, and that the city had, when the action was brought, sustained the loss of these several amounts.

It is said that, inasmuch as the cheques of Roy and Brister were actually delivered to the city treasurer, who deposited them to the credit of the city in its bank account, these cheques, having reached their intended and proper destination, were not misappropriated, and therefore that the only charges of default and loss alleged by the particulars of the statement of claim fail. It is true that the particulars are lacking in some allegations which are necessary fully to explain the nature of the case, but these are supplied by the letter of 1st August, 1923, which I have quoted, and which preceded the delivery of the particulars by several months, and, in view of the explanation made by the letter, I can see no ground to suppose that the defendant was misled by the plaintiff's pleading or particulars. The case as stated by the letter, was proved at the trial, so far as necessary for the purposes of this action, and the witnesses were cross-examined upon it, and, if it be necessary to expand the particulars in order to state the additional facts comprised in the letter, I would see no injustice in allowing an amendment for the purpose of making the pleading correspond with the facts in proof. But, in view of the course of the trial, I am disposed to think that such an amendment is unnecessary.

Attention is directed to the fact that the Roy cheques were deposited with the treasurer on 21st and 28th September, 1922, and that, under the terms of the agreement, the company is to indemnify the city only with respect to

(1) (1828) 3 C. & P. 422, at p. 424.

embezzlement or theft of money on the part of the employee

committed during the continuance of this agreement, and discovered during the continuance of this agreement,

and it is urged that since the agreement, which was in force during the year 1921-22, terminated on 30th September, 1922, before which date the embezzlement or theft, as to the Roy cheques, had taken place though not discovered until later, the agreement was not continuing, notwithstanding the fact that it was renewed for the year beginning 1st October, 1922. That contention is not, however, consistent with the fair interpretation of the agreement, which, by its express terms, provides for renewal by consent, and the issuing of renewal receipts. The phrase

committed during the continuance of this agreement and discovered during the continuance of this agreement

obviously must refer, not only to the original term of the agreement, but also to the subsequent years for which it was renewed in manner provided for by the agreement. In one of the subsequent provisions, which I have quoted, there is a clause providing

that if the company shall renew this agreement beyond the time herein limited, and shall issue a renewal receipt to that effect this agreement shall be continued for the time therein specified.

This describes expressly the condition which existed with relation to the agreement during the year beginning 1st October, 1922, and nothing could more clearly evince an intention that the continuance of the agreement extended to that year.

Reference is also made to the questions submitted on behalf of the company with regard to the proposed guaranty. There are two sets of these, the first bearing date 7th October, 1902, signed by Mr. Crosby, the mayor. The acting manager of the company had submitted a printed form requesting a reply to questions which were listed, and stating that

your answers and the declaration hereto will form the basis of the contract between you and this company.

Among the questions were the following, and the answers quoted were returned:

D. How often do you require him to pay over to you and is he then allowed to retain a balance in hand? If so, how much? And do you see that he has that amount in his possession?—Ans. Daily.

E. How often do you inspect the office and balance your cash book, and check the entries with vouchers and bank pass book?—Ans. Daily.

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F. How often do you balance your books and what are your checks to discover any irregularity on the part of the proposer?—Ans. Daily.

At the foot of the list is a statement in the following words, which I take to constitute the declaration referred to in the printed form with which the questions were submitted:

The above answers are to be taken as the basis of the contract between the employer and the London Guarantee & Accident Company, Limited.

It will be perceived that these questions are not fully answered, but the answers were accepted by the company; and, interpreting D. as a statement that the collector is required to pay over to the city daily; E. that the cash book is balanced and the entries checked with vouchers daily, and F. that the books are balanced daily, the evidence is sufficient to establish a practice to that effect. As to inspecting the office however, which is one of the subjects of inquiry in E., if this refer to inspection by the city auditor, or an individual not employed in the collector's office, there is no proof of any, except the inspection which was carried out monthly by the city auditor. Now it would seem that question E. taken by itself, with the answer "daily," may involve an assurance that there is a daily inspection of the office, but it is necessary to read all the questions and answers together; and G., question and answer, reads thus:

When was the office last inspected and were matters all satisfactory then?—Ans.: 30th September. Yes.

The whole list is dated, as appears at the foot of it, 7th October, 1902. Afterwards, during the year 1918, further questions were submitted relative to renewal of the guaranty. The last two of these bear upon the point now under consideration. They are, with their answers:

When were his books or stock last checked and audited and up to what date?—Ans.: 1st May, 1918.

Were all things found correct?—Ans.: Yes.

This statement is dated 27th May, 1918, showing a lapse of 26 days since any check and audit had been made. Moreover there is in evidence a letter of 22nd September, 1921, from A. M. Jack & Son, the general agents of the company at Halifax, to Mr. Weir, its general manager at Toronto, reading as follows:

We duly received your favour of the 12th instant in connection with Mr. Robert Theakston, City Collector, insured under guarantee bond No. 702075, and in reply thereto beg to state that Mr. Theakston is still able

to perform his duties satisfactorily and to all appearances enjoys the full confidence of the city officials. We are advised that Mr. Theakston's accounts are audited every month by the City Auditor and we do not know of any reason why you should not continue this bond. We might say that although Mr. Theakston is, as you state, over seventy years of age, still he is very active indeed and in full possession of his faculties.

Mr. Weir's letter, which is acknowledged in the opening line, is not produced; but, when it was written, the time for renewal of the Theakston guaranty was close at hand. It may be inferred that the general manager was inquiring, having regard to the collector's age, as to the expediency of renewing the agreement, and as to the auditing of accounts. He is informed that the accounts are audited every month by the city auditor. It was in these circumstances, and upon the information to which I have alluded, that the company renewed the agreement for the years beginning 1st October, 1921, and 1922. The question is, how are these inquiries and answers, which by the stipulations of the agreement are, so far as material, warranted true, to be construed? It appears to me not supposable that the mayor, in his answers of 7th October, 1902, using the verb in the same sense, intended to say that the city inspected the office daily, and also that it had not been inspected for a week. Moreover it seems difficult to imagine that the company was relying upon daily inspection, when told that, between 30th September and 7th October, 1902, there had been no inspection, and later, when informed, on 27th May, 1918, that the books had been last checked and audited on and up to 1st May. One must endeavour to reach a reasonable interpretation, realizing that the questions were framed by the company; that they are in some cases not very applicable to a municipality, and that the company has, without demur, accepted the answers, such as they are, returned by the city. In considering the question,

How often do you inspect the office and balance your cash book and check the entries with vouchers and bank pass book?

it may be observed, by the way, that the bank pass book affords no check for the collector's office, as the collector deposited with the treasurer, and it was the latter who carried on the banking business; the collector had no bank pass book. The word "inspect" is used in connection with the balancing of the cash book and the checking of the entries with

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vouchers, and it may not improbably have been considered that, when the cash book entries were balanced and checked, the office was inspected. There is an independent question, G., which is confined to inspection, and which evidently was answered upon the understanding that it referred to inspection by the city auditor, which took place at the end of the month, and which, as required by City Ordinance, No. 3, sec. 2, was to be made monthly. I think it reasonable to suppose that "inspect," in E., was regarded on both sides as affording a general description of which the particulars are stated in what follows, namely "balance your cash book and check the entries with vouchers." In any case, reading E. and G. together, it is plain that if "inspect" in E. and "inspected" in G., with relation to the office, refer to the same operation, the office was not, upon fair construction, represented to have been inspected daily, unless in the manner which I have indicated; and, having regard to the subsequent information which the company obtained from the city, it seems apparent that the company either so understood, or did not attach materiality to the use of the word "inspect" in E. It did not allege any inconsistency between the two questions, nor did it call for any explanation in order to reconcile them. In these circumstances, I do not find it necessary further to consider the effect of the renewals of 1921 and 1922, as based upon the information, which the company had obtained by special inquiry, that the collector's accounts were audited monthly by the city auditor; but, it seems unlikely that, when the company accepted the premiums and renewed the contract upon the representation that the inspection was monthly, it intended to tolerate the inequitable contention that the policy was void for neglect of daily inspection.

Another point arises in this way. Theakston had been tried and convicted of theft upon indictment, and, by agreement of counsel at the trial of the present action, the defendant introduced some extracts from the notes of the evidence taken in the criminal cause; among others the following from Mr. Foster, the city auditor:

Q. Section 321, page 94 (cap. 67, 1913, of Nova Scotia) says in connection with the duties of the collector: "He shall every month make a return to the council: (*a*) of the amount of rates and taxes, including

water rates, collected by him, specifying the name of each ratepayer or taxpayer with the amounts paid by him, and (*b*) of the aggregate amount of rates and taxes and of such water rates respectively remaining uncollected."

Q. Do you as city auditor, and with reference to the term you have served as such, remember any such statement as that having been made to the council by the collector?—A. Away back when I first went in it was done.

Q. And subsequently to that it was not done?—A. Instead of getting help he was eased of that amount of work by the council.

Q. The board of control had office during that period, too?—A. I will not be sure about the time the easement was given.

and, from Mr. Murphy, the mayor:

Q. Was it within your time as a member of the city council either as alderman, controller or mayor, that the rendering of the city collector's statement as called for by the Charter was dispensed with?—A. Before my time, during my eleven or twelve years in the council there has never been such a statement presented; it has been asked for by resolution on more than one occasion.

Q. And the reply has been that the work cannot be done with the staff that is there?—A. I don't know the reply but the request was never complied with. That would be a reasonable assumption that would be the reply.

Q. Will you say as a matter of fact you never heard that reply made?—A. I would not say; probably I have heard it made; it would be the most reasonable reply that would be expected.

Q. You say all the time you have been there such a statement has never been presented?—A. No.

Q. Was the advisability considered of giving the collector sufficient clerical force to enable that statement to be made?—A. I don't think the question of lacking sufficient help entered into it except the last two or three years; I think the requests were entirely ignored.

Q. When were they first made?—A. I think on one occasion I myself, and I think on a second occasion Alderman Godwin, presented resolutions asking for information called for under certain sections of the Charter, to be rendered by the collector. I cannot say just when it was. In Alderman Godwin's case I think it was four or five years ago, not more.

And it is said that here is evidence of dispensation by the city of duties of office with which the collector was charged by statute; that the surety was entitled to rely upon the performance by the city authorities of their statutory duties, and that, by the license or connivance of the city council in the neglect of the collector to make monthly returns to the council, the surety was discharged. In support of this argument the appellant relies upon the Scotch case of *Mein* v. *Hardie* (1). That, however, as stated in the leading judgment, was not a case of mere omission, but of employment of a trustee in a way not sanctioned by the

(1) (1830) 8 Shaw, Court of Session, 346.

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statute. There are also other distinctions, and reasons why this case does not apply, which might be mentioned, but the point must fail for lack of proof, and the other grounds which I am going to mention. Mr. Foster had stated that he was city auditor in 1922, and for a long time previously. He speaks of the occurrence as "away back when I first went in." He cannot fix the time. Mr. Murphy had been in the service of the city, as alderman, controller or mayor, for 11 or 12 years, and, if the council ever had dispensed with the monthly statement, it was before his time. Indeed during that period, the council had been endeavouring unsuccessfully to obtain such a statement. If, as said by Mr. Foster, the collector, at an indefinite though remote time, was eased of the work connected with the monthly return by the council, one would like to see the evidence of it. It is unlikely that the council would attempt to sanction the breach of a statutory requirement. The presumption is against it. If the council did commit itself, the decision should have been mentioned in the minutes, but nothing was produced. Moreover when Mr. Foster gave the evidence, he was speaking in the criminal case, where the present issue was not involved, and what he said does not amount to proof that the council consented to dispense with the monthly statement. It was amply proved that there was great neglect in enforcing the provision which required the monthly return, but I see no evidence to satisfy the condition to the discharge of a surety affirmed by Lord Kingsdown in the Privy Council, in *Black* v. *Ottoman Bank* (1):

> that there must be some positive act done by him (the employer) to the prejudice of the surety, or such degree of negligence as in the language of Wood V.C. in *Dawson* v. *Lawes* (2), to imply connivance, and amount to fraud.

It remains to be said upon this point that there is no evidence that the incident which Mr. Foster had in mind occurred after the giving of the guaranty, and that Mr. Weir, who had been manager of the defendant company for 10 or 11 years, and who had previously been assistant for four years, disclaims any knowledge of the requirements of the legislation relating to the city of Halifax. Evidently, in fact, these did not influence the making of the agree-

(1) (1862) 6 L.T.N.S. 763. (2) (1854) Kay 280.

ment. The suretyship agreement is not conditioned for the due performance of the collector's duties of office. The indemnity is promised only for embezzlement or theft in connection with the duties referred to in the recitals, but these do not mention or include the statutory duties, and, according to my interpretation of the agreement, the performance of these is neither represented not expressly or impliedly undertaken by the city. Moreover the questions and answers in the proposals for the policy entirely ignore the requirements of the statute.

It is suggested that there was suppression of material facts with relation to the statutory requirements and the manner in which they were performed; but, although the city kept silence as to some facts which I have no doubt would have been communicated if attention had been directed to them, I find no evidence of fraudulent concealment, or of the suppression of any fact which the city was bound to communicate. *Davies* v. *London and Provincial Marine Insurance Co.* (1).

There is one other clause in the agreement upon which the appellant relies. It is provided that if the city shall fail to notify the company

> of the discovery of any writ of attachment, execution issued, or judgment obtained against the salary or property of the employee, as soon as it shall have come to the knowledge of the employer, * * * this agreement shall be void and of no effect from the beginning, and all premiums paid thereon shall be forfeited to the company.

It is admitted that a judgment was entered on 4th February, 1922, at the suit of Colin C. Tyrer & Co., Ltd., against the Eureka Lumber Company, Ltd., Robt. Theakston and Arthur C. Theakston for $42,373.28. Evidently the Robert Theakston here mentioned was the collector. Mr. Foster, the city auditor, called by the appellant, gave this evidence:

> Q. There was a judgment entered by Mr. Tyrer against Robert Theakston and others on February 4, 1922; when did you first know about that judgment?—A. Within a month or so we will say probably that is as near as I can come to it; in the course of business I heard of it.
>
> Q. You knew about the judgment?—A. I knew about the judgment; the circumstances was told to me.
>
> Q. Within a month or so?—A. Yes.

(1) (1878) 8 Ch. Div. 469.

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Mr. Murphy, the mayor, who was called for the plaintiff, gave the following evidence in his cross-examination:

Q. When did you know that there was a judgment entered against Theakston and others for a large amount?—A. That did not come to my knowledge I doubt very much until after the break and it then did not come to me in the form of any acknowledgment of a judgment, but my recollection in (*sic*) a statement to the effect that Theakston had paid some money, if I recollect perhaps $20,000 to adjust some old judgment, but the information as to the judgment itself I had not heard of at the time.

Q. This judgment was entered in February, 1922; did not Mr. Foster the auditor tell you about it?—A. No sir, he never exchanged a word with me respecting it.

And, upon this groundwork, the contention is raised that the agreement became void under the clause quoted. I am not satisfied however that the city can be held to have discovered the judgment merely because the city auditor in the course of business heard of it; in any case, it does not appear to have been a judgment obtained against the salary or property of the employee, and is therefore not of the description specified in the agreement.

In the conclusion, I am in agreement with the learned trial judge, and I think the case should be disposed of upon the principle affirmed by Lord Brougham in the House of Lords in *MacTaggart* v. *Watson* (1), an authority which, as said by the Divisional Court in *Durham* v. *Fowler* (2), had been regarded as the leading authority for years. Lord Brougham said, in addressing the house:

> The error, however, in the present case arises in supposing that any want of care on the commissioners' side, in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities, or diminution of his rights at law.
>
> However, we need not discuss such questions in this case, nor deal with the English decision in *Mountague* v. *Tidcombe* (3), which was that of a positive and express covenant given to the surety by the obligee. Neither are we called upon to dispute the doctrine of the court below, laid down here, and in *Mein* v. *Hardie* (4), that where any one gives security for the conduct of another, in a certain office which brings him in contact with persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law and discharge their duties. All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented

(1) (1835) 3 Cl. & F. 525, at pp. 542, 543.
(2) (1889) 22 Q.B.D. 394, at p. 419.
(3) (1705) 2 Vern. 518.
(4) (1830) 8 Shaw, Court of Sess. 346.

the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened. The present is not such a case; the facts are not here to govern any such conclusion.

I would dismiss the appeal with costs.

ANGLIN C.J.C. (dissenting).—The material facts are sufficiently stated in the opinion of my brother Newcombe, which I have had the advantage of reading. While I agree with his disposition of most of the points raised by the appellant, there is one matter on which I find myself unable to accept my learned brother's view—and that is so fundamental that the contrary opinion which I entertain upon it leads to the conclusion that this appeal should be allowed and the action dismissed.

It is quite certain that no part of the moneys received from the three cheques mentioned in the plaintiff's particulars, aggregating $13,445.23, was embezzled or stolen by the city collector Theakston, or was lost to the city of Halifax. Every cent of the proceeds of those three cheques went to the city's credit in its bank account. That fact would suffice to dispose of the plaintiff's case upon the record as it stands before us, because the embezzlement and loss alleged is in respect of the proceeds of these three cheques.

I agree, however, with my brother Newcombe that the particulars should, if necessary, be amended so as to make them broad enough to cover the defalcations pointed to in the solicitor's letter of the 1st of August to the appellant company, which states the nature of the city's claim. So amended, the claim may be regarded as based upon the defalcations, embezzlements or thefts in an effort to conceal which the collector's books were falsified in regard to the proceeds of the three cheques specified in the particulars.

By more or less adroit manipulation in the collector's book-keeping, the proceeds of these cheques (except $1,833.69 credited to Mr. Brister) were credited to other taxpayers whose cheques had already been similarly dealt with, or (perhaps) whose cash payments the collector had appropriated to his own use, i.e., embezzled or stolen. It may well be that evidence or proof of the embezzlements or thefts was available to the city only when the three cheques were so dealt with in Theakston's books, but the actual

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Anglin C.J.C.

embezzlements or thefts, which the false entries in his books were designed to cover up, may have occurred at some earlier date or dates. Nothing definite as to this is shewn. I am, with respect, unable to accept the view that the actual embezzlements or thefts should *prima facie* be taken to have occurred when the falsification of the books took place in respect of the three cheques, or that the proof of such falsification cast any burden on the defendant company to show that the actual embezzlements or thefts had occurred at some earlier date or dates. The plaintiff was required to establish loss to it by embezzlement or theft within the terms of the defendant's guarantee.

One of the stipulations of the bond sued on is that

> no more than one claim, and that only in respect of acts of embezzlement or theft of money committed within twelve months prior to the receipt by the company of the notice of discovery thereof, to be given as is hereinafter provided, shall be made under this agreement * * *

The required notice was given to the company of the embezzlements or thefts in a letter from the mayor of the 2nd of June, 1923. To come within the guarantee the embezzlements or thefts claimed for must be shewn to have taken place not earlier than the 2nd of June, 1922. Assuming the particulars to be amended as already indicated, there is no evidence in the record to show at what time or times the moneys, the theft or embezzlement of which by Theakston the manipulation of his book-keeping entries in regard to the three cheques was meant to cover up, were actually misappropriated or stolen. Nothing appears which is inconsistent with the idea that the moneys had all been stolen or embezzled prior to the 2nd of June, 1922. It is that the embezzlement or theft shall have been committed within 12 months prior to the notice of discovery thereof, and not that the doing or omission of some act shall have made possible the proof thereof, that the condition of the bond requires. Without evidence warranting a finding that the moneys in question were stolen after the 2nd of June, 1922, the plaintiff, in my opinion, does not bring its loss within the terms of the defendant company's guarantee and, therefore, cannot recover in this action.

*Appeal dismissed with costs.*

Solicitor for the appellant: *L. A. Lovett.*
Solicitor for the respondent: *F. H. Bell.*

THE ATTORNEY GENERAL OF BRITISH COLUMBIA (PLAINTIFF)..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... RESPONDENT.

1926
*Oct. 5, 6.
1927
*Feb. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Constitutional law—Taxation—Direct or indirect—"First purchaser"—Validity of Fuel-oil Tax Act, 1923, c. 71—B.N.A. Act, 1867, s. 92 (2).*

The British Columbia *Fuel-oil Tax Act*, 1923, c. 71, which imposes a certain tax per gallon on purchasers of fuel oil and defines "purchaser" as meaning "any person who within the province purchases fuel oil when sold for the first time after its manufacture in or importation into the province", is *ultra vires*. Idington J. dissenting.

Such tax is not a direct tax within s. 92 (2) of the B.N.A. Act, since at the time of payment its ultimate incidence is uncertain. Idington J. dissenting.

Apart from some special circumstances the presumable incidence and the general tendency of a tax imposed on the "first purchaser" in a province of a commodity susceptible of general use is that it will be passed on to the consumer, who may or may not—and in ordinary cases will not—be its "first purchaser", who is required by section 3 of the Act to pay the tax.

Judgment of the Court of Appeal ([1926] 3 W.W.R. 154) aff Idington J. dissenting.

APPEAL from the decision of the Court of Appeal from British Columbia (1), affirming the judgment of Morrison J. (2) and dismissing the appellant's action for taxes under the *Fuel-oil Tax Act*, (B.C.) 1923, c. 71.

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

*J. W. de B. Farris K.C.* for the appellant.

*E. P. Davis K.C.* and *J. E. McMullen* for the respondent.

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

(1) [1926] 3 W.W.R. 154.

(2) (1926) 36 B.C. Rep. 551; [1926] 1 W.W.R. 537.

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ATTORNEY GENERAL FOR B.C. v. C.P. RY. CO.

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 by the Attorney General for British Columbia, on behalf of His Majesty the King, for the recovery of taxes on fuel oil from the defendant as "first purchaser" and also as holder thereof for consumption. To the claim made upon it as first purchaser the defendant offers two defences: (*a*) that it is not in fact "first purchaser" of the oil; (*b*) that the provincial legislation imposing the taxation is *ultra vires*.

It is perhaps difficult, on the evidence in the record, to say that the Canadian Pacific Railway Co. was the "first purchaser" of the fuel oil for which it is sought to collect the taxes; but that it was may, for present purposes, be assumed against it. That the railway company bought and held the fuel oil for consumption in its own operations and not for re-sale seems, however, to be abundantly clear.

The material provisions of the British Columbia *Fuel-oil Tax Act*, 1923, c. 71, read as follows:

2. In this Act, unless the context otherwise requires:—

* * *

"Purchaser" means any person who within the province purchases fuel-oil when sold for the first time after its manufacture in or importation into the province:

* * *

3. Every purchaser shall pay to His Majesty for the raising of a revenue for provincial purposes a tax equal to one-half cent per gallon of all fuel-oil purchased by him, which tax shall be levied and collected in the manner provided in this Act.

4. Every vendor at the time of the sale of any fuel-oil shall levy and collect the tax imposed by this Act in respect of the fuel-oil and shall on or before the fifteenth day of the month next following that in which the sale takes place pay over to the collector of the assessment district in which the sale takes place the full amount of the tax.

5. Every vendor shall, with each monthly payment, furnish to the collector a return showing all sales of fuel-oil made by him to purchasers during the preceding month, which return shall be in the form and verified in the manner prescribed by the regulations.

6. (1) Subject to subsection (3) after the expiration of one month from the commencement of this Act, every person who keeps or has in his possession or under his control for use or consumption by himself, his family, agent, or employee, or in any business or occupation in which he is interested or employed, any fuel-oil respecting which no tax has been paid under this Act shall, prior to the use or consumption of the fuel-oil, or any part thereof, pay to His Majesty for the raising of a

revenue for provincial purposes a tax equal to one-half cent per gallon of the fuel-oil.

(2) Subject to subsection (3), after the expiration of one month from the commencement of this Act, no person shall use or consume any fuel-oil unless a tax has been paid in respect thereof under this Act.

(3) No tax shall be payable under this section in respect of fuel-oil imported into the province for use in and which is used in the operation of vessels plying between ports in the province and ports outside of the dominion.

(4) Every person who uses or consumes any fuel-oil in violation of the provisions of this section shall be guilty of an offence against this Act.

(5) In any prosecution for failure to pay the tax imposed by this section, the burden of proving that a tax has been paid in respect of the fuel-oil used or consumed shall be upon the defendant.

Had section 6 been the only provision imposing the tax it would probably be difficult for the respondent to maintain its inapplicability to the fuel-oil in its possession from time to time, or successfully to challenge its validity. But it was common ground at bar that s. 6 assumes the validity of s. 3 and was meant to be operative only if the fuel-oil in respect of which it is sought to collect the tax was subject to taxation, under s. 3, in the hands of the "first purchaser"; and we are, in effect, asked to dispose of the appeal before us on that assumption and on the footing that its outcome should be dependent upon our view as to the validity or invalidity of s. 3. We accede to this request.

One ground of objection to the validity of s. 3 pressed at bar is that this section imposes an excise tax and that its enactment by the provincial legislature therefore contravenes s. 122 of the B.N.A. Act and s. 7 of the Terms of Union of British Columbia with Canada. This objection, however, involves considerations so far-reaching in their application and effect that they should be approached only in the event of the failure of the other ground of attack on s. 3, namely, that the tax which it imposes is not a direct tax within s. 92 (2) of the B.N.A. Act.

It may be that under some circumstances it would be a proper inference that in its common incidence, and under the normal operation in ordinary cases of its general tendency, such a tax as that imposed by s. 3 would in reality be borne by the very persons who are required to pay it and that it would, therefore, be proper to ascribe to the

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legislature the intention that its incidence should be so confined. But, apart from such special circumstances, the presumable incidence and the general tendency of a tax imposed on the "first purchaser" in a province of a commodity susceptible of general use is that it will be passed on to the consumer, who may or may not—and in ordinary cases will not—be its "first purchaser" who is required by s. 3 to pay the tax. The evidence in our opinion falls short of disclosing such special circumstances as might suffice to take this tax out of the category of taxes imposed on marketable commodities, such as customs and excise duties, which, according to their general incidence, it may be expected will ultimately be borne by persons other than those required by the taxing statute to pay them and are, therefore, indirect. It may sufficiently clearly appear that in the particular case of the respondent company all fuel-oil purchased by it is consumed in its own operations and that none of it is re-sold. But whether a provincial tax is direct or indirect, valid, or invalid, cannot depend upon its actual results in particular cases (*Bank of Toronto* v. *Lambe* (1)), or upon special events which may vary (*Attorney General for Quebec* v. *Reed* (2)).

The evidence discloses that there is already a very considerable use made of fuel-oil in British Columbia, many public and private buildings in the city of Vancouver being heated by it and public and private enterprises established in the province using it to generate power, etc. No doubt comparatively few cases of re-sale in British Columbia by purchasers from the two large vending corporations—the Union Oil Co. of Canada and Imperial Oil Co., Ltd.—were shown at the trial. But the evidence does disclose re-sales by the Union Steamship Co.—a purchaser from the Union Oil Co. of Canada—to the British Columbia Canneries when called upon to supply oil for a few isolated points along the coast. Apparently the Union Steamship Company's boats make a practice of selling fuel-oil to persons who may require it at their points of call up and down the coast. Such persons it is said have no other source of supply. Moreover, the evidence seems to make it reasonably clear that the Imperial Oil Co. "pur-

(1) (1887) 12 A.C. 575, at p. 582. (2) (1884) 10 A.C. 141, at p. 144.

chases " its fuel-oil " in the ordinary way," when it can get it, from the Imperial Oil Co. refineries plant at Ioco, B.C., and, when the refineries plant cannot supply its requirements, in the open market " from any person from whom it can buy."

There is also evidence of the prevalence in the United States of purchases and re-sales of fuel-oil by middle-men, and that, as the use of fuel-oil increases in British Columbia, there will be a tendency in that province towards such re-sales of this commodity becoming more prevalent. It cannot in our opinion be said that a case has been made out of such special circumstances existing in regard to the fuel oil business in British Columbia as would justify the courts in considering that, notwithstanding " the normal effect and tendency of (a) tax " on such a marketable commodity, the tax imposed by s. 3 is demanded from the very persons who it is intended or desired should pay it—" who are ultimately to bear the burden of it." That this is the test of a direct tax within s. 92 (2) of the B.N.A. Act does not now admit of question: *Attorney General for Manitoba* v. *Attorney General for Canada* (1). In the absence of proof of special circumstances establishing that, unless in very exceptional conditions, the actual normal operation of the tax on fuel-oil, as the legislature may be assumed to know it, would not prevail, that test must determine its validity.

Not only does the evidence fall short of establishing the existence of special circumstances which might negative an expectation on the part of the legislature that the tax paid under s. 3 would be passed on, but it rather lends support to the view implied in its imposition on the " first purchaser " that there will, or at least may, be subsequent purchasers on whom the burden of it would according to normal tendencies actually fall.

We are of the opinion that the judgment *a quo* should be affirmed.

IDINGTON J. (dissenting).—This appeal arises out of an action brought by appellant to recover from the respondent taxes imposed by virtue of the *Fuel-oil Tax Act* enacted by the legislature of British Columbia in 1923, being c. 71.

(1) [1925] A.C. 561, at p. 566.

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Idington J.

Section 6, subsection 1, thereof, is as follows:

6. (1) Subject to subsection (3), every person who keeps or has in his possession or under his control for use or consumption by himself, his family, agent, or employee, or in any business or occupation in which he is interested or employed, any fuel-oil respecting which no tax has been paid under this Act shall, prior to the use or consumption of the fuel-oil, or any part thereof, pay to His Majesty for the raising of a revenue for provincial purposes a tax equal to one-half cent per gallon of the fuel-oil.

That shews clearly upon what class of purchasing thereof it is intended to impose the tax.

Subsections (2), (3), (4) and (5), which read as follows:

(2) Subject to subsection (3), no person shall use or consume any fuel-oil unless a tax has been paid in respect thereof under this Act.

(3) No tax shall be payable under this section in respect of fuel-oil imported into the province for use in and which is used in the operation of vessels plying between ports in the province and ports outside of the dominion.

(4) Every person who uses or consumes any fuel-oil in violation of the provisions of this section shall be guilty of an offence against this Act.

(5) In any prosecution for failure to pay the tax imposed by this section, the burden of proving that a tax has been paid in respect of the fuel-oil used or consumed shall be upon the defendant.

make it, if possible, more abundantly clear that it is only fuel-oil intended for use or consumption in that part of British Columbia which is not travellable upon by vessels adapted to sailing outside thereof, and that it is only such other purchasers thereof as intended to so use the fuel-oil for consumption that are liable to pay the tax.

The reason for exempting the users of fuel-oil mentioned in said subsection (3), is, I apprehend, to avoid any possible conflict with, or overstepping the limitations of the powers of a province to extend any taxation beyond its own boundaries.

There is, I submit, not a shadow of doubt but that the claim herein is against the respondent company for the tax imposed herein upon what it used within the province.

The purview of the entire Act is, I submit, quite clear that its operation is to be confined within the province, and to fuel-oil bought with the intention of using it therein for fuel.

It is, I submit, conclusively proven that it is only an occasional, accidental sale, as it were, that is made to anyone else than a large consumer, or by anyone outside the

control of one or other of the two separate sets of business concerns each consisting of two or more separate legal entities co-operating to produce and sell fuel-oil to consumers thereof and both sets directly or indirectly involved in this litigation.

It is alleged that substantially the same situation had existed for thirteen years before the passing of the Act, although an increased amount of business has been produced. This increase has been proven to shew that there may be hereafter a different situation created and a change brought about that would render the tax in question an indirect, instead of a direct tax.

I submit there is no basis for such fears. Indeed I strongly suspect they are conjured up to try by some means to frighten the courts into such a conclusion.

The chief asset the respondent has in support of that contention is the peculiar frame of the Act in question, which begins with an interpretive clause that gives to the words "purchaser" and "vendor" respectively, the following meanings:—

"Purchaser" means any person who within the province purchases fuel-oil when sold for the first time after its manufacture in or importation into the province.

"Vendor" means any person who within the province sells fuel-oil for the first time after its manufacture in or importation into the province.

That is followed by three sections which can be read with the effect of dominating the whole of the rest of the Act. Doing so would so obliterate the clear meaning of the rest of the Act as to come sadly in conflict with that due consideration of the entire purview of the Act, which, in such cases, it is, I respectfully submit, our duty to appreciate and observe in reaching our conclusion.

The "first purchaser" referred to above and in question, is to my mind, the above party respondent, as three of the learned judges of the Court of Appeal below find.

The facts upon which Mr. Justice MacDonald relies in his reasons for so maintaining, I agree with. And furthermore I cannot see how the California company and the Canadian subsidiary thereof can be, though in a corporate sense separate legal entities, properly held, in light of the

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whole evidence, other than one and the same party operating together; solely directed from California, and the Canadian entity not the first purchaser, but the vendor, on behalf of its parent company to respondent.

If the appellant had brought the action against the said Canadian subsidiary, I submit he would have hopelessly failed to prove his case.

As to the other question raised of the said tax being an indirect tax, I cannot agree. It is to my mind clearly a direct tax, if read, as I have pointed out above, it should be.

The decisions referred to by counsel for respondent here, where not familiarly known to me long ago, I have read.

The weight of authority is surely against the respondent if the Act is interpreted and construed as I have done above.

The argument drawn from and founded upon section 122 of the B.N.A. Act by counsel for the respondent, I respectfully submit, is quite untenable.

The said section was simply needed temporarily for use at the crossing of each province, from being an independent province to forming part of the new dominion. And the British Columbia provision the counsel refer to is of same nature.

The attempt to form an argument on the word "excise" therein seems to me answered by the decision of the Privy Council in the *Brewers & Malsters Association of Ontario* v. *The Attorney General of Ontario* (1), and many other cases since.

I agree in the main with the respective reasonings of Mr. Justice Martin and Mr. Justice McPhillips in the court appealed from, dealing with leading authorities and the results they reach, and hence find no necessity for repeating same herein.

I should, therefore, allow this appeal with costs throughout, and reverse the judgments of the learned trial judge and the court appealed from.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Farris, Farris, Stultz & Sloan.*
Solicitor for the respondent: *J. E. McMullen.*

(1) [1897] A.C. 231.

LÉON LAFRAMBOISE (DEFENDANT).....APPELLANT;

AND

DAME VITALINE VALLIÈRES (PLAINTIFF)....RESPONDENT.

1926
*Oct. 18.
1927
*Feb. 1.

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

*Marriage—Marriage contract—Registration—Rights of the wife after death of husband—Renunciation by the wife—Validity—Arts. 1265, 1301 C.C.*

When in a marriage contract duly registered rights of habitation and usufruct of an immovable belonging to the husband have been granted to the wife to be exercised after the death of the husband, the renunciation by the wife to her rights, contained in a deed of sale of the immovable by the husband, is valid, not being in contravention of article 1265 C.C.

Such a renunciation is not void as being prohibited by the terms of article 1301 C.C., the wife by her act not having bound herself either with or for her husband.

A married woman may validly renounce, in favour of a third party, the hypothec granted by her husband in their marriage contract to assure the payment of a gift *inter vivos* of money and other advantages contained in the said contract.

Provided the personal liability of the husband remains, such a renunciation by the wife to her hypothec is not in contravention of article 1265 C.C.

Neither is it, by itself and in the absence of special circumstances to the contrary, void as prohibited by article 1301 C.C.

The husband who, in a marriage contract, by what is in fact a gift in contemplation of death, has donated to his wife the enjoyment and usufruct of a certain specific property, may nevertheless dispose of it by onerous title and for his own benefit, and in such a case the donation is rendered ineffective (art. 823 C.C.).

Judgment of the Court of King's Bench (Q.R. 40 K.B. 525) rev.

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, Weir J., and maintaining the respondent's action.

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

*Eug. Lafleur K.C.* and *Alph. Décary K.C.* for the appellant.

*G. A. Marsan K.C.* for the respondent.

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

(1) (1926) Q.R. 40 K.B. 525.

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LAFRAMBOISE v. VALLIÈRES

The judgment of the court was delivered by

RINFRET J.—Le 14 juillet 1911, Michel Desjardins vendit à Léon Laframboise, l'appelant, avec garantie légale et libre de toutes dettes et hypothèques généralement quelconques, le lot de terre connu sous le numéro 1157 du cadastre de la paroisse de Montréal; et son épouse, l'intimée, agissant avec son autorisation, intervint à l'acte de vente où elle a déclaré

qu'elle renonce spécialement à tous droits qu'elle a sur ledit immeuble, y compris ceux pouvant lui résulter de son contrat de mariage avec le vendeur passé devant Z. N. Raymond, N.P., le vingt-deux novembre mil neuf cent sept et enregistré, etc.

Plus de treize ans après, le 23 septembre 1924, l'épouse du vendeur institua une action contre son mari et l'acheteur concluant

à ce que le susdit acte de vente ainsi fait et passé entre les défendeurs soit résilié, annulé et déclaré nul et de nul effet à toutes fins que de droit; à ce que la radiation et l'annulation de l'enregistrement du susdit acte de vente soient en conséquence ordonnées.

Dans la déclaration où elle prend les conclusions qui précèdent, elle commence par invoquer certaines clauses de son contrat de mariage; et, comme il est essentiel d'avoir sous les yeux le texte de ces stipulations, il vaut autant les reproduire ici, dès le début, en nous limitant, pour le moment, à celles que l'intimée a citées:—

Article 1er. Il y aura séparation de biens entre les futurs époux et ils ne seront pas tenus des dettes l'un de l'autre, créées avant ou pendant leur mariage.

Article 2ème. La future épouse aura l'entière administration de ses biens meubles et immeubles, avec le droit de disposer de son mobilier et de l'aliéner comme bon lui semblera; et faire tous actes que la loi lui confère sous le régime de séparation de biens en vertu de l'article 1422 et suivants du code civil.

Article 3ème. Les dépenses du mariage seront à la charge du futur époux.

Article 4ème. En considération dudit mariage, le futur époux fait donation entrevifs et irrévocable à la future épouse, ce acceptant, à savoir:

1. D'une somme de mil huit cents piastres ($1,800), qui sera payable à la future épouse, ses hoirs et ayants cause, à même les plus clairs et apparents biens de la succession du futur époux, au décès de ce dernier. Le futur époux devra cependant en payer l'intérêt annuel au taux de trois pour cent, à la future épouse; et ce jusqu'à ce que la future épouse ait retiré le capital de ladite donation tel que ci-dessus prévu;

2. Au décès du futur époux, la future épouse aura la jouissance et usufruit sa vie durant en par elle gardant viduité, d'un emplacement situé dans la cité de Saint-Henri, sur la rue Agnès, connu et désigné sous le nº 1157, aux plan et livre de renvoi officiels de la paroisse de Montréal et contenant quarante pieds de largeur par quatre-vingt-douze pieds de pro-

fondeur, mesure anglaise, avec une maison et autres bâtisses dessus construites, ainsi que la jouissance et usufruit sa vie durant, en par elle gardant viduité, de tous les meubles meublants, couvertures de lits, lingeries, ustensiles de cuisine, etc., en un mot de tout ce qui garnira la susdite maison, au décès du futur époux. Le futur époux exemptant la future épouse de faire inventaire et de donner caution.

3. Le futur époux s'engage à recevoir à sa demeure et à sa table les enfants actuels de la future épouse, quand cette dernière manifestera le désir d'avoir avec elle sesdits enfants.

En considération des susdites donations et avantages, la future épouse renonce pour elle et ses enfants à tout douaire.

Après avoir ainsi référé à son contrat de mariage, l'intimée, dans sa déclaration, relata l'acte de vente du 14 juillet 1911 entre son mari et l'appelant et exposa d'abord comme suit la raison pour laquelle elle conclut à la résiliation de cet acte de vente:—

6. Cette vente a été faite en fraude des droits de la demanderesse et est illégale, frauduleuse et doit être annulée.

L'appelant fit motion pour qu'il fut ordonné à l'intimée de déclarer

en quoi et pourquoi cette vente était faite en fraude de ses droits et était illégale et frauduleuse

et pourquoi elle devait être annulée. Cette motion fut accordée, et un ordre de la cour intervint en conséquence. L'intimée s'y conforma en modifiant le paragraphe 6 de sa déclaration qui, dès lors, se lut ainsi:—

6. Cette vente a été faite en fraude des droits de la demanderesse et est illégale, frauduleuse et doit être annulée parce que la demanderesse a été amenée à signer ledit acte sous le coup de l'erreur, et par suite du dol et des fausses représentations des défendeurs qui lui représentèrent là et alors qu'en signant ledit acte de vente elle n'en éprouverait aucun préjudice, mais qu'au contraire cet acte avait pour effet de protéger ses droits et avantages matrimoniaux.

Lesdits défendeurs profitant, dans les circonstances, du mauvais état de santé de la demanderesse pour l'inciter à signer l'acte de vente du 14 juillet 1911 qui la dépouillait de la seule garantie de l'exécution de ses avantages matrimoniaux, ce dont la demanderesse n'était pas alors en état de se rendre compte à cause de l'état délabré de santé qui l'a maintenue dans une grande faiblesse, santé qui depuis lors ne s'est pas améliorée.

Ce paragraphe constitue l'unique motif allégué par l'intimée pour justifier les conclusions de son action.

On était donc en présence d'une demande, par voie d'action directe, de l'annulation d'une acte reçu devant notaire pour cause d'erreur de la part de la partie qui se plaint et de dol ou fraude de la part de l'autre partie.

Le procès-verbal des procédures faites à l'audience relate que " la demanderesse déclara ne pas avoir de preuve à faire ".

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L'appelant offrit son témoignage pour établir certains faits qui s'étaient passés lors de la réception de l'acte par le notaire. Ce témoignage fut donné sous réserve des objections de l'intimée. Le procès-verbal établit que l'enquête fut ensuite déclarée close et que la cause fut prise en délibéré.

La Cour Supérieure annula dans son entier l'acte de vente entre Laframboise et Desjardins. Le jugement s'appuie sur les articles 1265 et 1301 du code civil et quelques arrêts que nous aurons à examiner par la suite. Il est motivé comme suit:—

Considering that the renunciation by a wife of a mortgage granted by her husband in the marriage contract, to assure the payment of a sum of money and other advantages, is a derogation of their marriage covenants, prohibited by law; and is void and of no effect, especially as under the circumstances of this case, both the defendants knew that the husband of the plaintiff benefitted by the said renunciation.

La Cour du Banc du Roi fut d'avis que la renonciation de l'intimée aux droits et avantages qui lui sont conférés par son contrat de mariage n'affectait en aucune façon la validité de la vente entre le vendeur et l'acheteur. En conséquence, le jugement de la Cour Supérieure fut infirmé et la vente fut maintenue. La cour ne vit, non plus, dans la renonciation de l'intimée aucune infraction à l'article 1301 C.C.; mais elle considéra toutefois que cette renonciation était contraire aux dispositions de l'article 1265 C.C.

La cour se demanda cependant si, dans l'espèce, l'intimée (qui avait pris l'initiative de demander à la cour la résiliation de l'acte en alléguant uniquement que le consentement qu'elle y avait donné avait été vicié par une erreur de sa part et par les fausses représentations, le dol et la fraude de la part des défendeurs) pouvait réussir à faire maintenir son action pour une autre cause que celle qu'elle avait alléguée.

M. le juge Tellier était d'avis que non. Suivant lui, il n'était pas possible

de donner au jugement une autre base que celle sur laquelle reposait l'action. Une telle action ne peut être maintenue que s'il y a preuve d'erreur, de dol ou de fraude.

Une action est comme un syllogisme et l'on ne peut arriver à la conclusion qu'en établissant les prémisses.

Si les prémisses manquent, le demandeur n'a pas droit à ses conclusions.

Permettre ainsi de substituer d'autres prémisses à celles qui servaient de fondement à la demande, c'est " ouvrir la

porte à toutes sortes de surprises et d'abus." Il aurait donc fait droit à l'appel, et il aurait rejeté l'action.

Mais la majorité de la cour opina dans le sens contraire. Voici les raisons qu'en donne M. le juge Allard:—

> Les conclusions qu'elle (l'intimée) a prises demandant la nullité dudit acte de vente comportent certainement des conclusions à l'effet que la renonciation qu'elle a faite à sesdits droits soit annulée. Le plus comporte le moins. De sorte que, dans mon opinion, l'action de la demanderesse, si elle est fondée en droit, peut être maintenue quant à ce qui a rapport à la renonciation de ses droits.

Ce raisonnement nous paraît juste, mais il ne répond pas à l'objection soulevée par l'appelant, et adoptée par M. le juge Tellier. On pouvait dire, en effet, qu'il n'y avait plus d'allégations pour justifier les conclusions; qu'il ne suffit pas de conclure: il faut alléguer; et que l'illégalité résultant des articles 1265 et 1301 C.C. n'était pas seulement un moyen nouveau, c'était une demande nouvelle.

Cette objection, nous l'avouons, nous paraît avoir beaucoup de force et aurait mérité la plus sérieuse considération; mais nous croyons qu'il n'y a pas lieu de la discuter, à cause de notre façon de voir sur la question principale de l'appel qu'il nous reste à examiner.

La Cour du Banc du Roi n'a vu dans l'intervention de l'intimée aucune violation de l'article 1301 du code civil. L'on est d'accord, en effet, pour interpréter cet article comme une prohibition à la femme mariée de cautionner, de garantir, de s'engager pour l'avenir " avec ou pour son mari "; et il est admis que l'acte juridique ainsi proscrit par le législateur est le contrat de garantie ou de sûreté. Le mot " s'obliger ", dans cet article, doit s'entendre comme indiquant seulement le contrat de cautionnement. (*Lebel* v. *Bradin*; Cour du Banc du Roi (1). C'est là l'esprit du droit romain et c'est le sens de l'ancien droit auquel les codificateurs n'ont pas entendu innover. On ne veut pas que la femme mariée puisse engager ses biens; mais elle conserve le droit de les aliéner. La raison de cette distinction, qui peut paraître subtile, est donnée par Pothier, à la suite de Ulpien: c'est qu'il est plus facile d'obtenir de la femme une promesse qu'une donation. Nous sommes d'accord sur ce point avec la Cour du Banc du Roi: il n'y a pas eu, dans la renonciation dont il s'agit, un acte par lequel

(1) (1913) 19 R.L. n.s. 16.

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l'intimée s'est obligée avec ou pour son mari. L'article 1301 C.C. n'a donc pas d'application.

Mais la renonciation de l'intimée est-elle contraire aux dispositions de l'article 1265 C.C.? Il se lit comme suit:—

1265. Après le mariage, il ne peut être fait aux conventions matrimoniales contenues au contrat, aucun changement pas même par don mutuel d'usufruit, lequel est aboli.

Les époux ne peuvent non plus s'avantager entrevifs si ce n'est conformément aux dispositions de la loi qui permettent au mari, sous certaines restrictions et conditions, d'assurer sa vie pour le bénéfice de sa femme et de ses enfants.

Par le contrat de mariage, dont une partie était alléguée par l'intimée, le futur époux a fait donation, 1° d'une somme de mille huit cents piastres ($1,800); 2° de la jouissance et usufruit de l'emplacement situé dans la cité de Saint-Henri et portant le numéro 1157 du cadastre de la paroisse de Montréal.

C'est l'emplacement qui a fait l'objet de l'acte de vente entre le mari et l'appelant.

En considération de ces donations et avantages, la future épouse a renoncé, pour elle et ses enfants, à tout douaire. En outre, par une clause également contenue au contrat de mariage, mais que l'intimée n'avait pas invoquée dans sa déclaration (ce qui souligne davantage le fait qu'elle n'avait pas l'intention d'alléguer la violation de l'article 1265 C.C.), l'emplacement portant le numéro 1157 du cadastre de la paroisse de Montréal est déclaré affecté et hypothéqué

pour garantir la fidèle exécution des susdites charges et obligations par le futur époux.

Au moyen de son intervention dans la vente à l'appelant, l'intimée

renonce spécialement à tous droits qu'elle a sur ledit immeuble, y compris ceux pouvant lui résulter de son contrat de mariage avec le vendeur (son mari).

Sa renonciation, il est important de le noter, se borne donc aux droits qu'elle a sur l'immeuble. Elle n'abandonne rien à son mari. Elle renonce seulement en faveur d'un tiers. La donation de la jouissance et usufruit de l'emplacement connu sous le numéro 1157 est une donation à cause de mort. L'acte dit:—

Au décès du futur époux, la future épouse aura la jouissance et usufruit sa vie durant en par elle gardant viduité, d'un emplacement, etc.

Il n'y a pas de désaisissement actuel. C'est un gain de survie. La future épouse n'en sera saisie qu'advenant la mort

de son mari avant la sienne. (XV Laurent, n° 309). Les donations à cause de mort ou les donations de biens à venir sont permises dans les contrats de mariage. Elles peuvent être faites par les parents, en général, et même par les étrangers. Les futurs époux peuvent également, par leur contrat de mariage, se faire respectivement de pareilles donations; et ces dernières sont sujettes aux mêmes règles que celles qui sont faites par les parents ou par des étrangers (art. 819 C.C.).

Mais il y a cette distinction à faire entre la donation ordinaire de biens présents par contrat de mariage et la donation à cause de mort que la première ne peut être révoquée

si ce n'est pour cause de droit ou par suite d'une condition résolutoire validement stipulée;

tandis que la seconde, tout en défendant au donateur de disposer des biens donnés par donation entrevifs ou par testament

si ce n'est pour sommes modiques, à titre de récompense ou autrement, le laisse

libre d'aliéner à titre onéreux et pour son propre avantage les biens ainsi donnés (art. 823 C.C.)

Il va de soi qu'il n'appartient pas aux parties, par la qualification qu'elles lui auraient donnée, de modifier le caractère de leur donation (20 Demolombe, n° 405; *Robitaille* v. *Lemieux* (1) (Cour Supérieure). Ce n'est donc pas parce que le contrat de mariage dont nous nous occupons aurait attribué à la donation d'usufruit dont il s'agit la fausse appellation de "donation entrevifs" que le caractère de cette donation serait pour cela changé.

Une donation de biens déterminés n'empêche pas qu'elle soit faite à cause de mort. Elle peut comprendre les biens que le donateur laissera à son décès, l'universalité ou une partie de ces biens, mais elle peut être également de

biens particuliers individuellement désignés, des corps certains ou des quantités, comme, par exemple, tels chevaux, telle maison, etc.

23 Demolombe, n° 279; 15 Laurent, n° 193. Laurent exprime même l'avis (vol. 15, n° 309) qu'entre époux on pourrait plutôt poser la règle qu'ils sont censés avoir voulu faire une donation de biens à venir;

ils n'ont pas de raison de se faire une donation actuelle puisque régulièrement ils jouissent en commun de leurs biens.

(1) (1905) Beaubien, Chronique Judiciaire, 153.

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Dans la donation à cause de mort, le donataire n'a aucun droit actuel sur les biens donnés, pas même un droit conditionnel. Laurent enseigne (vol. 15, n° 319) que si les créanciers provoquent la vente, le donataire ne peut pas s'y opposer; à la rigueur, il ne peut pas même faire d'actes conservatoires. C'est également la doctrine de Demolombe, vol. 23, n° 323.

L'article 823 C.C. déclare que le donataire à cause de mort demeure propriétaire à tous égards, sauf qu'il ne peut disposer des biens donnés à titre gratuit.

A ce sujet, il est intéressant de référer à l'arrêt de *Boissy* v. *Daignault* (1) où, dans son contrat de mariage, la future épouse avait donné au futur époux la jouissance, sa vie durant, d'une terre qui y était décrite ainsi que des meubles et agrès d'agriculture qui la garnissaient et qui étaient désignés dans une liste annexée. Le tribunal, voyant dans la donation une institution contractuelle, ou donation à cause de mort, fit application de l'article 823 C.C. et annula une saisie conservatoire par laquelle l'époux donataire voulait empêcher sa femme de vendre les biens sujets à son usufruit.

Cette interprétation d'un article du code civil, dont les termes d'ailleurs paraissent clairs, s'est développée dans la province de Québec, où il ne semble plus discuté que la donation à cause de mort n'entrave pas la liberté du donateur. *Proulx* v. *Klineberg & Sheffer* (2); *Dorval* v. *Préfontaine* (3).

La donation de biens faite à la femme par contrat de mariage comme gain de survie ne prend effet qu'au décès du mari. Du vivant de ce dernier, la femme n'a aucun droit sur ces biens. Elle n'a pas qualité pour former opposition à la saisie et vente qui est faite par le créancier du mari.

Quant au donateur, il a pleine liberté de faire des actes à titre onéreux en vendant ou en hypothéquant. Il peut rendre la donation inefficace, car il n'a conféré qu'un droit de succession; et le donataire prend cette succession dans l'état où elle se trouvera à la mort du disposant (Mignault, vol. 4, p. 216).

(1) (1896) Q.R. 10 S.C. 33. (2) (1906) Q.R. 30 S.C. 1.
(3) (1905) Q.R. 14 K.B. 80.

Vainement l'intimée prétendrait-elle que cette donation était irrévocable. Les auteurs enseignent (9 Duranton, n° 713; 23 Demolombe, n° 314; 15 Laurent n° 215) que le donateur à cause de mort peut vendre nonobstant toute convention contraire. Il ne pourrait même renoncer d'avance, dans le contrat de mariage, à son droit d'aliéner à titre onéreux.

Il en résulte que l'intimée en la présente cause ne peut se plaindre de la vente faite par son mari à l'appelant de la propriété portant le numéro 1157 du cadastre de la paroisse de Montréal. L'institution contractuelle ou donation à cause de mort de la jouissance ou usufruit de cette propriété ne faisait pas obstacle à cette vente par le mari, qui était demeuré propriétaire et libre d'aliéner à titre onéreux et pour son propre avantage. L'intervention de la femme sur ce point n'a rien ajouté au titre que le mari a conféré à l'appelant.

Cependant, par sa renonciation, l'intimée a en plus abandonné l'hypothèque qui garantissait à la fois son usufruit ainsi que le paiement de la somme de dix-huit cents dollars ($1,800) stipulée au contrat de mariage.

Cette dernière libéralité est bien une donation entrevifs. Le contrat de mariage la rend payable à la future épouse, ses hoirs et ayants cause. L'époque où le capital de la somme devra lui être remis est fixée à la date du décès du mari. Dans l'intervalle, cependant, ce dernier doit en payer l'intérêt annuel au taux de 3 pour 100 à la future épouse. Il ne s'agit plus donc là, comme dans la stipulation d'usufruit, d'une simple expectative de créance sur les biens de la succession du donateur, mais de la donation irrévocable d'une chose présente dont toutes les circonstances sont de nature à imprimer à l'acte le caractère d'une donation actuelle. 20 Demolombe, n° 405; 7 Aubry et Rau, 4e éd., pp. 150-151.

L'intimée n'a pas renoncé à cette somme. Son mari est demeuré débiteur de l'obligation personnelle. Il reste à considérer si, comme l'ont décidé la Cour Supérieure et la Cour du Banc du Roi, la renonciation à l'hypothèque qui garantissait l'usufruit et cette somme de dix-huit cents dollars ($1,800) constitue un changement aux conventions matrimoniales contenues au contrat de mariage entre les époux, ou un avantage entrevifs contraire aux dispositions

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de l'article 1265 C.C. Il s'agit ici, bien entendu, d'une renonciation en faveur d'un tiers et non pas d'une renonciation en faveur du mari.

Pour décider que la renonciation de l'intimée en faveur de l'appelant était illégale, les jugements qui nous sont maintenant soumis se sont principalement appuyés sur l'arrêt de la Cour d'Appel dans la cause de *La Banque de Montréal* v. *Roy* (1). Les faits étaient assez semblables à ceux de la présente cause. Le contrat de mariage stipulait séparation de biens et renonciation au douaire. En considération du mariage, il y avait donation d'une somme de $2,000 à prendre sur les plus clairs et apparents biens du futur époux. Le contrat de mariage renfermait, en outre, la donation à la future épouse de la jouissance et usufruit, sa vie durant, d'une propriété dont la désignation était contenue au contrat. Enfin cette même propriété, ainsi donnée en usufruit à la future épouse, était affectée hypothécairement au paiement de la somme de $2,000 qui faisait l'objet de la donation, entrevifs.

Trois ans plus tard, le mari vendit la propriété ainsi hypothéquée. Il déclara ne savoir signer, en présence de son épouse qui signa avec l'acquéreur. Six mois après, l'épouse renonça, en faveur du même acquéreur, à ses droits d'usufruit sur la propriété en déclarant que cette renonciation était faite dans le but de donner effet à la vente antérieure.

En considération de cette renonciation de la part de l'épouse et pour remplacer l'usufruit auquel elle renonçait, son mari lui céda et abandonna la jouissance d'une autre propriété.

Le litige surgit lorsque l'immeuble affecté hypothécairement au paiement de la somme de $2,000 donnée à l'épouse par le contrat de mariage fut vendu en justice. Un projet de distribution fut préparé par le protonotaire, où l'épouse fut colloquée en vertu de cette donation. Ce projet de distribution fut contesté par la Banque de Montréal, à qui le mari avait transporté tous les droits qu'il pouvait avoir sur l'immeuble en question, ainsi que la balance du prix de vente qui lui était due par l'acquéreur. Les moyens de contestation de la Banque de Montréal furent que la dona-

(1) (1917) Q.R. 26 K.B. 549.

tion de la somme de $2,000 était une donation à cause de mort et que le mari, en disposant à titre onéreux de l'immeuble hypothéqué, avait, par là, fait disparaître la garantie donnée; que, dans tous les cas, l'épouse avait renoncé validement à son hypothèque. Il convient de noter immédiatement que la renonciation à l'usufruit, gain de survie de l'épouse, ne fut nullement discutée dans cette affaire.

Le jugement de la cour fut que la donation de la somme de $2,000 était une donation entrevifs. Il s'ensuivait que l'article 823 C.C. ne pouvait pas lui être appliqué. Passant ensuite à l'examen de la question subsidiaire, Sir Horace Archambault, juge-en-chef, parlant au nom de la cour, déclare que les actes auxquels l'épouse avait participé ne contenaient de renonciation, ni formelle, ni présumée, à l'hypothèque qui lui était garantie par son contrat de mariage. La présence de l'intimée à ces actes s'expliquait autrement. Dans l'acte de vente, elle était intervenue pour attester la marque de son mari, qui ne savait pas signer; dans l'acte subséquent, elle avait renoncé à son usufruit. Il n'y avait nulle part de renonciation à l'hypothèque.

L'interprétation donnée par la cour aux contrats auxquels avait participé l'épouse mettait fin à la contestation de la Banque de Montréal. Il n'était plus nécessaire de décider si la renonciation à l'hypothèque était contraire à l'article 1265 C.C., puisque la cour décidait qu'il n'y avait pas eu telle renonciation.

Sans doute, le jugement ajoute que cette renonciation, si elle avait eu lieu, n'aurait eu aucune valeur en droit parce qu'elle aurait constitué un changement aux conventions matrimoniales. Mais il reste qu'il n'était pas nécessaire de se prononcer sur cette question pour décider le litige. A ce titre, cette partie du jugement peut être traitée comme *obiter dictum* et n'a pas la même force et la même autorité comme interprétation de l'article 1265 C.C. En outre, elle s'appuie sur un passage de Laurent (n° 78 du vol. 21) qui est cité en entier. Le même auteur, dans un article subséquent du même volume, atténue la rigueur du principe général qu'il pose dans l'article 78 cité par le jugement. Il convient d'y référer pour mieux comprendre l'ensemble de son opinion:—

83. Les époux peuvent-ils disposer des biens qui leur ont été donnés par contrat de mariage? On suppose que le contrat de mariage ne prohibe

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pas la disposition des biens dotaux dans l'intérêt de la femme dotale. Ainsi posée, la question n'en est réellement pas une; les biens donnés entrent dans le patrimoine propre des époux ou dans le patrimoine commun s'il y a communauté; ces biens restent dans le commerce, donc les époux donataires en peuvent disposer sans que l'on puisse dire qu'il en résulte un changement aux conventions matrimoniales: exécuter ces conventions, ce n'est certes pas les changer.

La jurisprudence est en ce sens. Des époux se donnent par contrat de mariage l'usufruit de tous leurs biens au profit du survivant. Lors du mariage de leurs enfants, la mère renonce à cet usufuit en faveur de son fils. Cette renonciation à un avantage stipulé par contrat de mariage était-elle un changement aux conventions matrimoniales? La cour de cassation répond que la renonciation est plutôt une exécution du contrat de mariage qu'une convention qui y déroge. Cela est très juridique, quoique, au premier abord, la décision paraisse contraire au principe que nous avons posé aux renonciations (nº 78). La renonciation à un avantage que les conjoints se font par contrat de mariage est nulle; tel est le principe admis par la doctrine et par la jurisprudence. Or, dans l'espèce, la mère renonce à un usufruit stipulé à titre d'avantage. Pourquoi la cour de cassation déclare-t-elle cette renonciation valable? La renonciation est nulle quand elle contient l'abdication d'un droit; dans ce cas, elle abroge une clause du contrat de mariage, donc elle est nulle. La renonciation que la mère fait à son usufruit en faveur de son fils est une libéralité, la mère dispose donc de son droit; or, disposer de son droit, ce n'est pas y renoncer; c'est, au contraire, l'exercer, et il est permis à toute personne de disposer d'un droit qui lui appartient.

Par contrat de mariage, le futur donne à son épouse un domaine à titre de gain de survie. Lors du mariage de sa fille, le père lui donne la nue propriété de ce domaine, et la mère renonce à l'usufruit éventuel, contre l'engagement de son mari de lui assurer une pension viagère de 800 francs. Cette renonciation fut attaquée comme constituant un changement aux conventions matrimoniales. La cour d'Agen décida que la renonciation de la femme, loin de présenter aucun changement à la clause de gain de survie stipulée dans son contrat de mariage, en était, au contraire, l'exécution anticipée. Pourvoi en cassation; la cour se borne à dire que l'arrêt attaqué a fait une juste appréciation de la renonciation litigieuse. On prétendait que la renonciation contenait un pacte successoire; la cour répond que la femme n'étant pas héritière de son mari, on ne pouvait pas dire qu'elle eût fait un traité sur sa succession future. Ici encore il y a des nuances; il y a des cas où la renonciation constitue un pacte successoire (nº 78); dans d'autres cas, il n'y a pas de pacte successoire; nous avons examiné ailleurs ces questions difficiles.

Si, cependant, malgré les réserves que nous venons de faire, il nous fallait considérer l'arrêt *re La Banque de Montréal* v. *Roy* (1) comme ayant l'autorité d'un précédent sur la question qui nous occupe, nous ne saurions éviter la remarque qu'il ne tient aucun compte de toute la jurisprudence antérieure, à laquelle d'ailleurs il ne fait aucune allusion. A cette époque (1917) elle était cependant solidement éta-

(1) Q.R. 26 K.B. 549.

blie. C'était au point que le juge-en-chef actuel de la province de Québec, M. le juge Lafontaine, qui n'a pas siégé dans la présente cause, disait, dans un arrêt très étudié rendu en 1916 *re Joubert et Turcotte, Allan & Company* v. *Kieffer* (1):—

> Il ne fait plus de doute, aujourd'hui, non plus, le point ayant été souvent décidé dans le même sens par une longue suite de décisions qui datent des premiers temps de la loi 4 Vict., c. 30, s. 36, d'où a été tiré notre article 1301, comme aussi depuis le code, qu'une femme peut renoncer aux droits d'hypothèque et privilège qu'elle possède pour la garantie de ses créances contre son mari ou de ses droits matrimoniaux, et céder une priorité d'hypothèque à un créancier de son mari. Voir *Boudria* v. *McLean* (Cour du Banc de la Reine) (2); *Hamel* v. *Panet* (Conseil Privé) (3); *In re Hogue; Dupuis* v. *Cousineau* (M. le juge Jetté) (4). La même règle et les mêmes décisions s'appliqueraient pareillement au cas de la remise d'un gage par une femme créancière, comme le dit la loi romaine et les auteurs qui l'ont commentée.

L'arrêt de *Boudria* v. *McLean* (2), mentionné par M. le juge Lafontaine, fut rendu par la Cour du Banc de la Reine le 4 mars 1862. Les appelants avaient contracté mariage sous le régime de la communauté par contrat reçu devant notaire. L'intimé était en possession d'un immeuble hypothéqué pour reprises matrimoniales de l'épouse et qui avait été vendu par le mari durant l'existence de la communauté. L'épouse avait un droit d'hypothèque aussi étendu que le conférait l'ancien droit à tout porteur d'acte notarié. Par acte de ratification, elle avait confirmé en tout son contenu et suivant sa formule et teneur la vente faite par son mari. Le jugement de première instance affirma qu'en ratifiant l'acte de son mari elle avait renoncé à son hypothèque. La majorité de la Cour du Banc de la Reine décida que cette renonciation était valide.

Il s'agissait bien là de la validité d'une renonciation aux droits assurés par le contrat de mariage. Les appelants exposaient ainsi leur prétention:—

> La première question consiste donc à savoir si ces termes contiennent une renonciation de la part de l'appelante aux droits personnels que lui assurait son contrat de mariage.

Ce jugement fut rendu avant la mise en force du code civil; mais on ne prétend pas que le code ait innové sur la loi antérieure.

(1) (1916) Q.R. 51 S.C. 152, at p. 155.
(2) (1862) 6 L.C.J. 65.
(3) (1876) 2 App. Cas. 121.
(4) (1879) 23 L.C.J. 276.

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En 1871, dans la cause de *Lagorgendière* v. *Thibaudeau* (1), la Cour du Banc de la Reine se prononça de nouveau dans le même sens. Par le contrat de mariage, les époux avaient convenu qu'ils seraient communs en biens et qu'il serait loisible à l'épouse d'accepter la communauté ou d'y renoncer. En cas de renonciation, elle devait reprendre franchement et quittement, tout ce qu'elle pouvait avoir apporté en mariage à la communauté et tout ce qui, pendant le mariage, lui écherrait par succession, donation, legs ou autrement,

dont elle serait garantie et indemnisée par reprises et hypothèques sur tous les biens présents et futurs du futur époux.

Un immeuble dont le mari était propriétaire et en possession lors de la passation et de l'enregistrement du contrat de mariage fut subséquemment vendu par le shérif, et l'épouse fit une opposition afin de conserver ses droits fondés sur son contrat de mariage comme créancière hypothécaire, et en préférence à tous les autres créanciers de son mari dont les créances étaient postérieures à l'enregistrement de ce contrat de mariage. On lui opposa que dans un acte notarié antérieur elle avait

volontairement renoncé formellement et solennellement à son douaire et à tous droits aux douaire, avantages et réclamations généralement quelconques, présents et futurs, voulant et consentant que ladite terre sushypothéquée soit dès ce jour purgée et déchargée de tous et tels douaires, hypothèques et autres réclamations généralement quelconques pour et en faveur dudit sieur créancier, ses hoirs et ayants cause.

L'appelant répondit en invoquant la nullité absolue de cette renonciation de sa part.

La Cour Supérieure (2) avait décidé que rien dans la loi n'empêchait la femme de renoncer à l'exercice de ses droits hypothécaires pour reprises matrimoniales sur les biens aliénés par son mari. Les appelants, devant la Cour du Banc de la Reine, posèrent la question suivante:—

A quoi bon permettre à la femme de stipuler en son contrat de mariage, qu'en cas de renonciation à la communauté elle reprendra franchement et quittement ce qu'elle aura apporté en mariage et ce qu'elle aura reçu depuis, si on lui permet d'un autre côté de renoncer à son hypothèque légale pour ses reprises, à la demande de son mari et pour lui?

Ils ajoutaient:—

On permettrait ainsi à la femme de faire indirectement ce que la loi lui défend de faire directement, cautionner son mari et l'avantager pendant le

(1) (1871) 1 Rev. Crit., 478; 2 Q. L.R. 163.

(2) 3 Q.L.R. 71.

mariage, deux choses également prohibées par le code civil (art. 1265 C.C.).

Le jugement de la Cour Supérieure, qui avait déclaré la renonciation valide, fut confirmé.

Les causes de *Boudria* v. *McLean* (1) et de *Lagorgendière* v. *Thibaudeau* (2) furent débattues principalement sur l'effet de l'article 1301 C.C. ou de la loi 4 Vict. c. 30, s. 36, d'où cet article tire son origine; mais l'on voit, par le résumé que nous venons d'en faire, que l'on n'a pas manqué, au sujet de cette renonciation par la femme, d'en envisager les conséquences possibles à l'encontre des prohibitions contenues dans l'article 1265 C.C. L'on ne saurait d'ailleurs supposer que ces conséquences auraient échappé à la perspicacité des avocats qui ont préparé ces causes, ou des tribunaux qui les ont décidées; et il n'est pas à présumer que, dans ces deux espèces, les renonciations de la femme mariée eussent été déclarées valables et légales si on les eût considérées susceptibles de contestation en vertu de l'article 1265 C.C.

Dans la cause de *Lagorgendière* v. *Thibaudeau* (2), il s'agissait clairement d'une hypothèque consentie par le contrat de mariage. D'ailleurs, l'on ne s'est pas mépris sur la porté de ces deux jugements. A la suite de celui de *Boudria* v. *McLean* (1), M. le juge Smith, *re Armstrong* v. *Rolston* (3), eut à décider d'une opposition à une saisie d'immeubles où l'épouse avait renoncé

à son douaire coutumier, avantages et réclamations qu'elle peut ou pourrait avoir par sondit mariage sur l'immeuble mentionné.

L'opposante prétendait qu'elle n'avait pu en loi et n'avait de fait renoncé par cet acte

q'uau douaire coutumier qu'elle avait ou pouvait avoir sur l'immeuble vendu en cette cause et non à tous avantages et réclamations qu'elle avait ou pouvait avoir lui résultant de son mariage... que telle renonciation ne pourrait valoir en loi vu qu'elle comporterait un avantage en faveur de sondit époux durant le mariage et que tel avantage durant le mariage est réprouvé par la loi.

Le jugement avait tenu la renonciation pour valide en s'appuyant sur plusieurs autorités françaises et sur l'arrêt de *Boudria* v. *McLean* (1). Il admettait, entre autres propositions:—

The renunciation of her hypothec is not an indirect advantage, since the personal liability remains.

(1) 6 L.C.J. 65. (2) 2 Q.L.R. 163.
(3) (1864) 9 L.C.J. 16.

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Et dans la cause de *Hogue* v. *Cousineau* (1), l'épouse apportait en mariage une somme de 5,000 francs qu'elle stipulait propre. Pour lui assurer le remboursement de cette somme, son mari lui donna, par le contrat de mariage passé entre eux, une hypothèque sur un immeuble situé sur la rue Beaudry, à Montréal. Il vendit cet immeuble. Sa femme donna mainlevée de l'hypothèque qu'elle avait pour garantir le remboursement des cinq mille francs; mais, pour remplacer cette hypothèque sur l'immeuble vendu, il affecta un autre emplacement acquis par lui à Mascouche. Plus tard, le mari vendit cet emplacement et son épouse intervint de nouveau pour donner mainlevée de cette nouvelle hypothèque. Par la suite, l'épouse réclama ses droits hypothécaires sur ces immeubles en prétendant que ces renonciations étaient nulles. On contesta cette prétention et l'on ajouta que, quant à la seconde hypothèque substituée à la première stipulée par le contrat de mariage, elle n'avait aucune existence parce que le mari n'avait pas le droit de la créer au profit de sa femme.

M. le juge Jetté, en rendant le jugement, pose carrément la question:—

C'est un principe parfaitement admis que la femme ne peut avantager son mari en quoi que ce soit. Or, ici, il y a renonciation non seulement au douaire mais aux droits hypothécaires de la femme sur l'immeuble du mari, c'est-à-dire à ses droits hypothécaires qui lui avaient été accordés pour lui garantir ses deniers dotaux. Cette renonciation est-elle valable? Si oui, n'est-il pas clair qu'elle confère ainsi un avantage évident à son mari?

Il réfère alors à l'arrêt de *Boudria* v. *McLean* (2), et il dit que la doctrine consacrée par ce jugement est que la femme mariée peut faire les actes qui n'exigent ou ne contiennent de sa part aucune obligation.

C'est pourquoi (ajoute-t-il) les empereurs Philippe disent dans un rescrit adressé à une femme au sujet du sénatus-consulte Velléien qui défendait aux femmes de s'obliger pour autrui: Il est constant en jurisprudence que, même durant le mariage, les droits d'hypothèque et de gage peuvent être remis au mari. (6 Pandectes de Pothier, p. 251).

Il dit ensuite que cette doctrine a été consacrée de nouveau en 1871, par la Cour du Banc de la Reine, dans la cause de *Lagorgendière* v. *Thibaudeau* (3); et il en conclut que si la femme ne peut s'obliger à payer autrement que comme commune en biens et non au delà,

(1) (1879 23 L.C.J. 276. (2) 6 L.C.J. 65.
(3) 2 Q.L.R. 163.

sa renonciation à ses droits hypothécaires, comme nous l'avons vu, est légale et valable.

Ce jugement fut confirmé par la Cour du Banc de la Reine (1), composée des honorables juges Dorion, Monk, Ramsay, Tessier et Cross.

De nouveau, en 1880, *re Homier* v. *Renaud* (2), le même juge est saisi d'une question semblable. En vertu de son contrat de mariage, l'épouse avait une hypothèque sur un immeuble pour garantir le paiement d'une rente annuelle et pour la jouissance d'un appartement dans la bâtisse construite sur cet immeuble. L'immeuble était saisi par le créancier d'une obligation; et, dans l'acte créant cette obligation, l'épouse avait cédé priorité d'hypothèque pour le paiement de cette créance. Le rapport fait voir que les droits hypothécaires de la femme garantissaient

le remboursement de ses deniers dotaux et autres avantages stipulés à son contrat de mariage.

On chercha à établir une distinction entre cette cause et les espèces précédentes parce que dans ces dernières

la femme était commune en biens avec son mari, tandis qu'ici elle est séparée de biens.

Le jugement déclare qu'il n'y a pas lieu de faire cette distinction et maintient la doctrine déjà exposée par le même juge dans la cause de *Hogue* v. *Cousineau* (3).

Nous avons tenu à mentionner ces différents jugements de la Cour Supérieure pour indiquer le sens que les tribunaux donnaient alors aux arrêts de la Cour du Banc de la Reine *re Boudria* v. *McLean* (4) et *Lagorgendière* v. *Thibaudeau* (5). Or, le Conseil Privé fut saisi de ces questions dans la cause de *Hamel* v. *Panet* (6). Le mari, pour assurer et garantir le paiement d'une somme de £930, avait hypothéqué spécialement des terrains décrits dans l'acte notarié. Son épouse intervint à l'acte pour l'approuver, le confirmer et le ratifier, et consentit

à décharger, comme par ces présentes elle décharge, les droits et hypothèques qu'elle a et peut avoir sur les immeubles ci-dessus désignés et spécialement hypothéqués par son mari (et) à renoncer, comme elle renonce par les présentes, à l'exercice d'aucuns droits soit réels de propriété, soit hypothécaires, et tous autres qu'elle aurait droit d'exercer sur les biens de son mari, et sur lesquels elle accorde priorité et rang antérieur à elle et auxdits créanciers.

(1) (1880) 3 L.N. 329.
(2) (1880) 24 L.C.J. 253.
(3) 23 L.C.J. 276.
(4) 6 L.C.J. 65.
(5) 2 Q.L.R. 163.
(6) (1876) 2 App. Cas. 181.

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La convention contenue dans leur contrat de mariage était que, arrivant la dissolution de la communauté, la future épouse serait libre de l'accepter ou de la refuser; puis, dans le cas de renonciation, de reprendre "franchement et quittement" tout ce qu'elle justifiera avoir apporté à la communauté, et

elle en sera garantie et indemnisée par et sur les biens dudit futur époux qui y sont de ce jour hypothéqués.

Dans la déclaration qui accompagnait son action, l'épouse invoqua son contrat de mariage et prétendit que, nonobstant son intervention à l'acte, vu qu'elle avait renoncé à la communauté de biens, elle avait droit de reprendre l'immeuble libre de l'hypothèque à laquelle elle avait accordé priorité et rang antérieur.

A l'argument devant le Conseil Privé, M. Benjamin, qui représentait les appelants, invoqua les arrêts de la Cour du Banc de la Reine pour soumettre la proposition que la femme mariée pouvait renoncer à son hypothèque sur les propriétés de son mari.

Le jugement du Comité Judiciaire fut prononcé par Lord Selborne et contient le passage suivant:—

The other authorities also go to the effect that, although there may be in a deed an ineffectual attempt to bind a married woman by words of obligation, yet a renunciation of this kind in the same deed is perfectly good. Two decisions of the Courts of Lower Canada are referred to in the record; both of which determined that the renunciation and the consent of the wife to her husband's act, as against such rights as she might have under a marriage contract, whether of hypothec or of *reprise*, may be good, although she could not bind herself by a direct contract, which she had attempted to do in the same deed. Their Lordships see no reason to differ from those decisions.

Enfin, Sir A. A. Dorion, *re The Bank of Toronto* v. *Perkins* (1), fut amené à considérer cette question et dit au cours de son jugement où il exprime l'opinion unanime de la Cour du Banc de la Reine:—

I am of opinion that a married woman separated as to property could give to a creditor of her husband priority over her own claims on his property. This is not a liability which she contracts for the debt of her husband, and which is prohibited by article 1301 C.C. There is nothing in the law to prevent her from paying the debts of her husband or from disposing of her property to do so. Here she has merely relinquished a right of preference which she had and this is not prohibited by law.

Et il réfère à la jurisprudence que nous venons de résumer.

On peut ajouter à ce qui précède l'arrêt *re Donnelly* v. *Cooper* (2).

(1) (1881) 1 D.C.A 357, at p. 363.

(2) (1895) Q.R. 8 S.C. 488, at p. 491.

Tous ces jugements pouvaient d'ailleurs se réclamer de l'autorité de Pothier, dans son Traité des donations entre mari et femme (Bugnet, 3e éd., vol. 7, n° 31):—

La remise qu'une femme fait à son mari d'un droit d'hypothèque qu'elle a sur un héritage de son mari, en consentant à la vente qu'il en fait, est valable, et n'est point regardée comme une donation prohibée entre mari et femme: *Si pignus vir uxori vel uxor marito remiserit, verior sententia est nullam fieri donationem existimantium;* L. 18, ff. *quæ in fraud.* La raison est que la remise qui est faite au conjoint de ce droit d'hypothèque, n'apportant aucune diminution à sa dette, ne le rend pas plus riche qu'il ne l'était auparavant. Or, c'est un principe de droit romain, qu'il n'y a de donations prohibées, entre homme et femme, que celles par lesquelles l'un s'enrichit aux dépens de l'autre: *Ubicumque non deminuit de facultatibus suis qui donavit; vel etiam si deminuat, locupletior tamen non sit qui accepit, donatio valet: L. 5, parag. 16, ff de Donat. inter vir. et ux.*

Nous croyons donc que l'intimée pouvait, sans violer l'article 1265 du code civil, valablement renoncer, dans l'acte de vente de son mari à l'appelant, à l'hypothèque qui lui avait été consentie par son contrat de mariage. Cela résulte d'une jurisprudence établie depuis au delà de cinquante ans et confirmée par le Conseil Privé. Cela s'accorde d'ailleurs avec le principe de la libre disposition des biens qui tend à interpréter strictement les articles de la loi prescrivant l'inaliénabilité.

Comme le dit Laurent (vol. 21, n° 73, 2e alinéa):—

L'irrévocabilité de ce qui est convenu par contrat de mariage n'est pas l'incapacité de contracter, en laissant ces conventions intactes. Sinon on aboutirait à immobiliser la condition des biens, tels qu'ils existent lors de la célébration du mariage: les époux ne pourraient vendre, ni donner à bail, ni faire aucune espèce de convention relative à ces biens, parce que toute nouvelle convention apporte une innovation à l'état de choses qui existait lors du contrat de mariage. La cour de Bruxelles l'a jugé ainsi en principe, et la chose n'est pas douteuse. (Bruxelles, 9 mars 1853. Pasicrisie, 1853, 2, 186.)

Et nous pourrons terminer en citant ce passage de Baudry-Lacantinerie:—

En posant la règle générale qui domine tout notre sujet, nous avons eu soin de faire remarquer que, si le donataire ne peut pas abdiquer ni compromettre son droit, il lui est au contraire permis de l'exercer et de le transférer.

Les actes à titre onéreux ou à titre gratuit, passés pendant la durée du mariage, non avec le donateur mais avec des tiers par l'époux donataire, ne sont donc pas contraires à l'article 1395. Ces actes seront, le plus souvent, l'exercice normal du droit du donataire, et cela, alors même qu'ils affecteraient la forme d'une renonciation. Renoncer au profit d'un tiers ne constitue point une simple abdication, mais bien un acte de disposition. En effet, pour en assurer le bénéfice à d'autres qu'à ceux qui devraient en profiter si la renonciation était pure et simple, ou même pour le répartir

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entre eux autrement, le prétendu renonçant doit d'abord accepter le droit, puis en faire donation. Il y a là, comme l'a dit la cour de cassation, " un acte personnel de libéralité qui n'est que l'exercice même du droit qui en est l'objet ". (Civ. cass., 1 juill. 1889, S. 91. 1. 101, D. 90. 1. 123). Traité de Droit Civil, vol. 16. Du contrat de mariage, tome 1er, nº 113.

Nous n'avons pas parlé de la prétention de l'appelant que les avantages conférés à l'intimée par son mari dans le contrat de mariage avaient été stipulés pour tenir lieu de douaire, d'où l'appelant tirait la conclusion que la renonciation à ces avantages pouvait se justifier par l'article 1444 du code civil.

Le contrat de mariage en l'espèce ne dit pas que par les donations conférées par le mari à sa femme les époux ont entendu constituer un douaire préfix. Au contraire, le contrat dit que,

en considération des susdits donations et avantages, la future épouse renonce pour elle et ses enfants à tout douaire.

Admettre la prétention de l'appelant sur ce point équivaudrait à dire que chaque fois que les conventions matrimoniales confèrent un avantage à la femme en considération de sa renonciation à son douaire, on a entendu par là accorder un douaire préfix. Nous croyons qu'il faut une clause expresse. En l'absence d'une indication spéciale, même si les avantages matrimoniaux sont considérables, ils ne peuvent faire présumer que l'on a voulu exclure le douaire coutumier. (Guyot, Répertoire, *verbo* Douaire, pp. 282, 283 et 284.)

De la même façon, il est nécessaire de mentionner dans le contrat de mariage, lorsque le mari confère des avantages et des libéralités à sa femme, qu'il entend par là constituer un douaire préfix (*Vallières* v. *Villeneuve* (1).)

Mais l'appelant doit réussir pour les autres raisons que nous avons exposées dans ces notes; et nous sommes donc d'avis de faire droit à l'appel et de renvoyer l'action avec dépens tant devant la Cour Supérieure que devant cette cour. Les frais devant la Cour du Banc du Roi ont déjà été accordés à l'appelant et il n'y a donc pas lieu de modifier le jugement de cette cour sur ce point.

*Appeal allowed with costs.*

Solicitors for the appellant: *Décary & Décary.*
Solicitor for the respondent: *G. A. Marsan.*

(1) (1910) 17 R.L.n.s. 72.

CHARLES J. LEWIS (DEFENDANT).....APPELLANT;

AND

THE CITY OF MONTREAL (PLAINTIFF), RESPONDENT.

1926
*Oct. 21.
1927
*Jan. 4.

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

*Municipal corporation—Action en bornage—Right to exercise—Boundary line between street and contiguous lot—Homologated line not equivalent to bornage—Art. 504 C.C.*

*Held* that, in the absence of special statutory provisions derogating from the general terms of article 504 of the civil code, a municipal corporation can exercise the *action en bornage* in order to settle the boundaries between a street and a contiguous private land.

*Held* also that, when a line shown on a plan approved by a municipal council and duly homologated by the court, fixes the limits between a street and the adjoining lots, even although such plan be declared by the legislature final and binding upon the owners of the lots and the municipal corporation, the latter is not precluded from instituting an *action en bornage* and is also liable to be sued in a similar action, as the general powers of homologation are not inconsistent with the terms of article 504 of the civil code.

The city of Montreal, under the authority of the statute 1 Geo. V (2nd s.) 1911, c. 60, passed by-law no. 436 which provides that "it shall be the duty of the city surveyor to establish and fix the alignment and level of the streets * * *" and that "every person desiring to erect a building in any street * * * must previously obtain from the city surveyor the alignment and level of such street * * *."

*Held* that the terms of this by-law do not constitute a special method to settle the boundary line between the streets and the contiguous lots in the city of Montreal, so as to deprive the latter of its right to exercise the *action en bornage* which is an action accessory to its rights of ownership. This by-law is a purely administrative regulation passed in favour of those who intend to build on these lots and does not possess the essential features of a legal "bornage."

Judgment of the Court of King's Bench (Q.R. 40 K.B. 205) 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 maintaining the respondent's action *en bornage*.

The city of Montreal as owner of subdivision lot 807 of lot 168 and subdivision lot 787 of lot 169 of the official plan and book of reference of the parish of Montreal, these subdivision lots forming part of Notre Dame de Grâce Avenue

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

(1) (1926) Q.R. 40 K.B. 205.

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(formerly Church Avenue), demanded a bornage of the appellant who is the owner of subdivision lots 809,906 and 854 of lot 168 and subdivision 887 of lot 169. These subdivision lots front on Notre Dame de Grâce Avenue adjoining the city's lots 807 and 787, which latter lots form the street at that point.

The city alleged that it had been troubled by the appellant in its possession and enjoyment; that its land and the land of the appellant had never been bounded and, complaining of an encroachment by Lewis, claimed that it was entitled to demand a bornage of the properties according to law and the respective rights of the parties.

The conclusions of the declaration pray that the land of the city and of the appellant be bounded according to law and the titles and possession of the parties and that, to this end, the parties be held to immediately appoint a surveyor or surveyors to draw and fix the lines of division between their respective properties and to place bornes according to law and that, failing the nomination by the appellant of a surveyor, one be appointed by the court to proceed to this bornage.

The issues raised by the appellant were:

First: That the legislature has given the city power to fix the line and level of streets and to compel every person building to obtain such line and level;

Second: That the legislature gave the former municipality of Notre Dame de Grâce the power to have a plan of the streets of the municipality made, which plan, after being homologated and confirmed by the Superior Court, should be final, decisive and binding on the corporation and proprietors and all other persons; that under the authority of this statute the municipality caused a plan to be made, which was duly homologated and confirmed by judgment of the Superior Court. The municipality of Notre Dame de Grâce became part of the city of Montreal in 1910 and the city was substituted for the town of Notre Dame de Grâce in all its rights and obligations.

Third: That before building he obtained from the city of Montreal lines and levels, which were indicated by pickets placed by the proper officials of the city.

The Superior Court found that there was a special procedure provided to fix and determine street lines and that the line which the city asked the court to have determined had already been legally determined and was final, decisive and binding upon the city and the proprietors interested and upon all other persons.

The Court of King's Bench reversed this judgment on the ground that neither the homologated plan nor the lines and levels given by the city were equivalent to a bornage.

*H. N. Chauvin K.C.* and *John T. Hackett K.C.* for the appellant.

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

The judgment of the court was delivered by

RINFRET J.—A la date du 13 octobre 1920, lorsqu'elle institua son action, la cité de Montréal était propriétaire de l'avenue Notre-Dame-de-Grâces, une rue située dans un des quartiers de la ville. L'appelant était propriétaire de certains lots de terre contigus au côté nord-ouest de cette avenue et il y avait érigé des maisons. La cité prétendait que certaines de ces maisons empiétaient sur l'avenue et, alléguant que les propriétés respectives des parties n'avaient jamais été bornées, prit contre l'appelant les conclusions ordinaires d'une action en bornage.

La défense fut qu'à l'époque où l'appelant construisit ces maisons, c'est-à-dire en 1914 et 1915, les officiers de la cité de Montréal avaient, à sa demande, fixé l'alignement et le niveau de l'avenue Notre-Dame-de-Grâces conformément à la charte et aux règlements. L'appelant s'était conformé aux indications ainsi fournies. Cette opération, selon lui, constituait un bornage à l'amiable, et il n'y avait pas lieu à l'intervention judiciaire.

La question ainsi soulevée est nouvelle. Elle est intéressante et elle est d'importance générale.

En vertu de l'article 504 du code civil de la province de Québec,

tout propriétaire peut obliger son voisin au bornage de leurs propriétés contiguës.

Le précepte est absolu et paraît être général. C'est, comme l'enseigne Demolombe, un droit inhérent à la propriété

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même et qui est né en même temps qu'elle:

il est fondé non-seulement sur l'intérêt privé des parties, mais sur l'intérêt général de la société.

Le texte ne fait ni distinction, ni exception. Habituellement, dans le droit de la province de Québec, le terrain occupé par un chemin municipal ou par une rue appartient à la corporation sous la direction de laquelle il est placé. Il en est ainsi dans l'espèce. Par conséquent, à défaut d'une loi dérogeant aux termes généraux de l'article 504 C.C., rien ne paraît empêcher une corporation municipale d'exercer, suivant les règles du droit commun, cette action accessoire à son droit de propriété.

L'intimée a affirmé devant cette cour que cette question n'avait jamais fait l'objet d'un arrêt de nos tribunaux; et cette affirmation nous paraît exacte.

Cependant, dans une poursuite intentée par l'Honorable G. Irvine, procureur général, contre le maire et le conseil de la ville d'Iberville (1), où l'on reprochait à cette municipalité des actes faits en violation de sa charte, l'on se plaignait que la ville avait fait planter des bornes entre les rues et les terrains des particuliers qui les avoisinaient, de manière à déterminer par là la limite de chaque rue sans avoir obtenu le consentement des particuliers à ce bornage, et, à défaut de tel consentement, sans avoir pris les procédures ordinaires en bornage devant les tribunaux.

Monsieur le juge Chagnon, en déclarant illégale la résolution du conseil à l'effet d'autoriser un délégué à aller planter les bornes en compagnie d'un arpenteur, s'exprima comme suit:—

Il faut avouer que le conseil a adopté un moyen sommaire de parvenir au bornage de ses rues. Le bornage entre des propriétés constate la limite des héritages des deux voisins, et non pas seulement d'un seul. Si les deux voisins ne s'accordent pas sur l'endroit où doit être placée la borne, il faut donc qu'une autorité intervienne pour fixer cet endroit. L'autorité en cette circonstance n'est autre que la cour, qui sur une action en bornage, entend les deux parties, et fixe définitivement la limite, après avoir pris en considération les prétentions et les titres de chaque partie. Il n'y a pas de bornage possible suivant la loi, que le bornage volontaire entre les deux voisins, et le bornage judiciaire sur action en bornage. Une corporation est-elle plus privilégiée que les particuliers, et peut-elle se soustraire à ces règles, qui sont de toute justice? La loi n'en fait pas d'exception, on conçoit d'ailleurs jusqu'à quel point une loi qui permettrait à une corporation d'aller planter des bornes sur les terrains des particuliers,

(1) (1874) 6 R.L. 241.

sans aucune notification aux parties et sans le consentement de ces dernières, serait arbitraire. Le droit sacré de la propriété ne serait plus alors respecté, et les corporations seraient les seules maîtresses, et pourraient à leur gré, par leurs bornages faits purement *ex parte*, envahir la propriété privée.

Monsieur le juge Charbonneau fut d'avis contraire dans la cause de *La corporation de la paroisse de Sainte-Victoire* v. *Paul Hus* (1). La demanderesse concluait à ce que le défendeur fut condamné à enlever une dépendance de sa fromagerie parce qu'elle empiétait sur la route. Le défendeur, par voie d'inscription en droit, prétendit que la corporation municipale pouvait se servir de ses pouvoirs administratifs pour faire disparaître l'empiétement à titre de nuisance, si c'en était une; qu'elle pouvait avoir recours à l'action en bornage; mais qu'elle n'avait pas droit à l'action possessoire dans l'an et jour, vu que ce remède était prescrit à la face même des procédures. L'inscription en droit fut rejetée pour la raison

qu'en matière de voirie, le bornage se trouve fait définitivement par la localisation actuelle du chemin fait par l'autorité municipale, dans l'espèce les sous-voyers, localisation qui est faite contradictoirement avec les propriétaires des immeubles riverains, et que, par conséquent, il ne peut y avoir lieu au bornage comme entre particuliers.

En prononçant sur le fond du litige, monsieur le juge Charbonneau revient sur la question et dit:

Cette route a été dûment localisée par les fossés et les clôtures de chaque côté, ce que l'on doit présumer avoir été fait sous l'autorité compétente de l'époque et sans contestation, et équivaloir à légitime bornage entre la route et la propriété du défendeur.

D'autre part, la Cour de Revision, dans deux instances postérieures au jugement précédent (*La corporation de la paroisse de Saint-François-Xavier de Brompton* v. *Salois* (2); *Morrissette* v. *The Corporation of the Parish of St. François-Xavier de Brompton* (3) ) a été amenée à considérer cette question.

Dans la première cause, Salois était accusé d'empiéter sur le terrain du chemin. Pour les raisons particulières à cette espèce et qui sont exposées dans le jugement, la cour fut d'avis qu'une action possessoire de la part de la corporation avait été intentée mal à propos; mais elle ajoute " qu'une action en bornage eût été la procédure con-

(1) (1905) 13 R. de J. 506. (2) (1908) 14 R. de J. 436.
(3) (1911) Q.R. 40 S.C. 224.

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venable." C'était donc reconnaître qu'il y avait ouverture à l'action en bornage pour marquer les bornes entre un chemin et un terrain privé contigu.

La cause de Morissette doit être mentionnée parce qu'elle fait voir qu'il y avait eu antérieurement entre les parties une action en bornage au sujet de la ligne séparative entre le chemin du village et le terrain appartenant à Morissette. Un jugement final avait été rendu délimitant cette ligne séparative et fixant l'endroit où les bornes devaient être plantées. La preuve démontrait que le jugement avait été exécuté et les bornes placées. La Cour de Revision reconnut la validité de ce bornage sans que personne ne songeât à soulever l'inapplicabilité des règles du droit commun aux rapports de voisinage entre les chemins et les fonds riverains.

On ne peut, pour la solution du problème, avoir recours à l'interprétation des commentateurs français, source ordinaire où l'on puise tant d'éclaircissements sur le texte du code civil. Le régime de la voirie y est différent. Les objets qui font partie du domaine public ou communal y sont subordonnés aux règles du droit public et administratif (Pardessus, Traité des servitudes, tome I, n° 118; Demolombe, Des servitudes, tome I, page 305). Le bornage proprement dit y est référé à la compétence des juges de paix et soustrait à la juridiction ordinaire des tribunaux.

Toutefois, même avec l'organisation d'un système qui n'est pas semblable à celui du Québec, le bornage opéré par les autorités administratives ne fait pas obstacle à ce que les tribunaux statuent sur la propriété du domaine national ou municipal (Fuzier-Herman, Répertoire, verbo Bornage, n° 394; Baudry-Lacantinerie, 3e éd., vol. 6, n° 907); et l'autorité judiciaire y est compétente pour connaître des actions en bornage formulées par les communes contre les propriétés contiguës au chemin vicinal, et réciproquement, lorsque le droit de propriété est mis en question.

Dans l'affaire *Larché* v. *La Commune de Beyre-le-Chatel* (1), la commune avait demandé devant le tribunal civil de Dijon qu'il fût procédé au bornage et à la délimitation du chemin avec la propriété de Larché. A cette fin, elle con-

(1) S. 32.1.13.

cluait à la nomination d'experts qui recevraient instruction de procéder tout comme il est pourvu aux articles 1059 et suivants du code de procédure civile de la province de Québec et qui détermineraient l'étendue des usurpations faites sur le chemin par Larché. Larché opposa à la demande proposée contre lui une fin de non-recevoir prise d'une loi qui chargeait l'administration de faire rechercher et reconnaître les anciennes limites du chemin vicinal.

La Cour de Cassation reconnut qu'il n'appartenait qu'à l'autorité ou à la juridiction administrative de rechercher et de fixer les limites de ces chemins

et de réprimer toutes contraventions aux actes de l'administration en cette matière.

Elle décida cependant qu'il n'en restait pas moins

dans les attributions exclusives des tribunaux, de connaître de toutes les questions de propriété ou dérivant de la propriété qui peuvent s'élever relativement à ces chemins, soit que leur vicinalité ait été déclarée ou non par l'autorité administrative; (et que) c'est aux tribunaux seuls qu'il appartient de connaître d'une action en bornage intentée par une commune contre un propriétaire riverain d'un chemin de cette commune, encore que cette action n'ait été introduite qu'à raison d'une prétendue usurpation de partie de ce chemin.

S'il en est ainsi même en France où l'on a confié à l'administration seule le pouvoir de fixer la limite des objets qui dépendent du domaine public, à plus forte raison nous faudrait-il ici (où le droit municipal n'a pas sur ce point dérogé au droit privé) découvrir une loi spéciale et exceptionnelle pour décider qu'une corporation municipale est privée des avantages et soustraite aux obligations de l'article 504 du code civil. C'est cette loi que l'appelant nous invite à trouver dans le statut de Québec, 40 Vict., c. 39, qui a conféré à la municipalité du village de Notre-Dame-de-Grâces Ouest le droit de préparer un plan de ses rues, chemins, parcs, etc., en y désignant leur alignement, et de le faire homologuer par la Cour Supérieure.

L'avenue Notre-Dame-de-Grâces était originairement dans ce village et fait maintenant partie de la cité de Montréal par suite d'une annexion. Avant l'annexion, le village s'était prévalu du pouvoir conféré par le statut 40 Vict., et avait fait préparer un plan par monsieur J.-P.-B. Casgrain, arpenteur juré de la province de Québec. Son conseil l'avait approuvé, et ce plan avait été homologué par un jugement de la cour en date du 21 septembre 1896.

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Le statut déclare que ce plan ainsi confirmé par la Cour Supérieure

sera final, décisif et obligatoire pour la dite corporation et pour les propriétaires qui y sont intéressés et pour toutes les autres personnes.

La corporation y est munie de tous les pouvoirs nécessaires pour ouvrir, lorsqu'elle jugera avantageux de le faire, les rues, chemins ou places ainsi indiqués sur le plan. L'appelant voit dans ce statut une procédure spéciale incompatible avec les articles 504 C.C. et 1059 C.P.C.

Il n'y a dans cette loi particulière rien de différent des pouvoirs qui sont conférés à toutes les cités et villes de la province de Québec par la loi générale qui les concerne (S.R.Q. (1925), c. 102, arts. 430 et suiv.; S.R.Q. (1909), arts. 5642 et suiv.) Le statut spécial de Notre-Dame-de-Grâces, de même que la loi des cités et villes, permet de " tracer et localiser " les rues, les chemins, routes, avenues, places publiques, etc. Il a surtout pour but de limiter à la date de la confirmation du plan l'indemnité et les dommages qui pourront être réclamés par les propriétaires par suite de la construction des rues et places publiques indiquées dans ce plan. Mais le statut est silencieux sur la question du droit au bornage, surtout sur l'opération matérielle et physique du bornage. A ce point de vue, il n'y a pas de divergence essentielle entre l'autorisation qui est par là donnée aux cités et villes ou au village de Notre-Dame-de-Grâces de fixer d'avance sur un plan le tracé et l'emplacement des rues, etc., et celle qui confère à tout propriétaire le droit de subdiviser son terrain et d'en déposer, d'abord au bureau du commissaire des terres de la Couronne, puis au bureau du régistrateur de la division, un plan et livre de renvoi par lui certifiés, avec des numéros et désignations particulières de manière à distinguer les nouveaux lots des lots primitifs (art. 2175 C.C.)

La délimitation sur ce plan de chacun de ces lots de subdivision ne constitue évidemment pas un bornage et ne soustrait pas leur propriétaire aux obligations de l'article 504 du code civil.

Il en serait de même de toute municipalité rurale qui, en vertu du code municipal, déciderait la construction et l'ouverture d'un nouveau chemin au moyen d'un règlement auquel serait annexé un plan contenant le tracé et la des-

cription du chemin. L'indication des lignes du chemin sur le plan ne pourrait constituer un bornage. Comme le dit M. le juge Tellier,

ce n'est pas sur le papier, mais sur le terrain, que se fait un bornage.

Mais l'appelant ne s'en tient pas là. Par la loi I Geo. V (2e session), 1911, c. 60, la législature a inséré dans la charte de la cité de Montréal le pouvoir par le conseil de la cité de faire un règlement:—

9 1a. Pour faire établir et fixer par (les officiers de la ville) l'alignement et le niveau de toute rue, ruelle et place publique; pour obliger quiconque construit sur une rue, ruelle ou place publique à obtenir de la cité l'alignement et le niveau de telle rue, ruelle ou place publique, et à signer un procès-verbal à cet effet dont une copie lui sera livrée, s'il en fait la demande, sur paiement d'une somme n'excédant pas deux piastres.

A la suite de cet amendement à sa charte, la cité de Montréal a adopté le règlement n° 436, par lequel il fut ordonné comme suit:—

Sect. 1. It shall be the duty of the city surveyor to establish and fix the alignment and level of the streets, lanes and public squares in the city.

Sect. 2. Every person desiring to erect a building in any street, lane or public place, in the city, must previously obtain from the city surveyor the alignment and level of such street, land or public place and sign a minute to that effect, a copy whereof shall be delivered to him, at his request, on payment of an amount of two dollars.

Le règlement contient, en outre, une section 3 qui pourvoit à la sanction.

L'appelant soumet, et le savant juge de première instance a considéré, que ce règlement établissait une méthode spéciale pour fixer et délimiter la ligne séparative entre les rues et les fonds riverains dans la cité de Montréal; par suite de quoi la Cour Supérieure a décidé qu'il n'y avait plus ouverture à l'action en bornage en pareil cas.

La Cour du Banc du Roi en appel a été unanimement d'avis contraire, et nous partageons son opinion.

En fait, dans l'espèce qui nous occupe, la procédure prévue par l'amendement n° 91a et le règlement n° 436 n'a pas été suivie, et l'appelant ne saurait s'en réclamer. Il est prouvé qu'il n'a pas demandé à la cité l'alignement et le niveau de l'avenue Notre-Dame-de-Grâces. Monsieur Campbell, employé au département des lignes et niveaux, au printemps de 1914, paraît avoir placé deux piquets sur l'avenue Notre-Dame-de-Grâces; et le jugement de la Cour Supérieure déclare que par là il a voulu indiquer aux

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représentants de l'appelant l'alignement de cette avenue.

Nous ne croyons pas nécessaire de trancher cette question de fait et nous entendons indiquer simplement qu'il n'y aura pas chose jugée entre les parties sur ce point. Pour le moment, nous avons seulement à décider s'il y a lieu au bornage. Si le bornage établit l'empiétement dont la cité se plaint, il se peut que l'appelant ait des droits ou des réclamations contre cette dernière. Il vaut mieux ne rien dire ici qui puisse affecter ces droits et ces réclamations, puisqu'ils ne sont pas du ressort de la présente cause. Par conséquent, notre jugement ne prétend pas décider si Campbell a accompli les actes qu'on lui attribue, ni s'il était autorisé par la ville, ou s'il agissait dans les limites de ses fonctions, non plus que s'il a procédé conformément à la charte et aux règlements.

Il y a un fait qui est constant, et c'est qu'il n'a été dressé aucun procès-verbal.

Mais, pour nous, le sort de cette cause dépend de la solution d'une question de droit.

La sous-section 91a de la charte et le règlement n° 436 ne sont pas substitués à l'article 504 du code civil. Ils édictent une mesure administrative adoptée pour aider les propriétaires qui se proposent de construire, mais à laquelle manquent les caractéristiques essentielles du bornage légal.

L'objet du bornage (enseigne Pothier, v. Bugnet, vol. 4, p. 329, n° 233) est de déterminer, dans les endroits où les héritages voisins se touchent, quel est celui où l'un des héritages finit et l'autre commence et d'y planter une borne qui se puisse apercevoir.

Cette opération matérielle de la " plantation de bornes " se retrouve, en général, dans toutes les définitions du bornage données par les auteurs (Lalaure, Servitudes, sur article 646 C.N.; Toullier, n° 172 et n° 174; Solon, Servitudes, n° 78; Laurent, vol. 7, n° 419). La loi (S.R.Q. 1909, s. 5194; 1925, c. 219, s. 71) dit ce qu'est une borne dans la province. Sans nous prononcer sur l'obligation de poser une pareille borne chaque fois qu'il y a bornage, comme, par exemple, lorsqu'il existe des bornes naturelles apparentes (voir *La compagnie des chars urbains de Montréal* v. *Les commissaires du havre de Montréal* (1) ou encore lorsqu'il est impossible d'enfoncer en terre une pierre-borne (S.R.Q., 1925, s. 71, 3e alinéa) nous croyons que la règle c'est que la

(1) (1910) Q.R. 24 K.B. 503.

délimitation soit marquée par les " bornes régulièrement et légalement posées ". (Rapport des Codificateurs, I, 386).

L'appelant a soumis que cette opération était impossible dans les cités et villes parce que les bornes nuiraient à la circulation. Mais cette objection a été prévue par la loi de Québec (S.R.Q., 1909, s. 5205; 1925, c. 219, s. 82) qui, lorsque les circonstances locales empêchent de poser des bornes ou marques en pierre, permet à l'arpenteur de mentionner le fait dans le procès-verbal et l'oblige alors à établir les limites et à décrire ses opérations

en désignant les rues, propriétés voisines et autres objets fixes, de manière que tout autre arpenteur puisse, à l'aide de tel procès-verbal, répéter les opérations et constater les limites, points, lignes et autres particularités y désignées.

Un autre caractère du bornage légal, c'est qu'il y faut l'intervention d'un arpenteur juré. Cette exigence déjà mentionnée par Pothier (Du voisinage, n° 233) est sanctionnée par la jurisprudence (*Larocque* v. *Taylor* (1); *Courtemanche* v. *Girouard* (2); *Clarke* v. *Lacombe* (3).

On ne peut interpréter autrement la loi des arpenteurs et des arpentages (statuts de 1925, c. 219). Toutes les opérations du bornage y sont mentionnées parmi les attributions de l'arpenteur. Aucune des opérations qui entrent dans les attributions d'un arpenteur n'est valide à moins qu'elle n'ait été exécutée " par un arpenteur autorisé à pratiquer dans la province " (art. 56) et personne autre qu'un arpenteur géomètre n'a qualité pour poser ou planter les bornes décrites par la loi (art. 73). Les voisins peuvent bien indiquer la ligne séparative de leurs héritages en la manière qu'ils le désirent. Toute méthode de délimitation vaut entre eux tant qu'ils s'en accommodent; mais il ne s'agit pas alors du bornage légal; et quoique le bornage puisse, d'après l'article 504a C.C., s'effectuer " de concert entre voisins et par leur fait," cela doit s'entendre dans le sens indiqué par l'article 1059 du code de procédure civile qu'ils peuvent entre eux " convenir d'un arpenteur pour procéder au bornage ".

(1) (1902) 8 R. de J. 497.
(2) (1914) 20 R.L. n.s. 329, at p. 333.
(3) (1914) Q.R. 23 K.B. 466, at p. 468.

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Cela veut dire que les lois générales confient la fonction d'assurer la permanence de l'intégrité des héritages à des experts, choisis à raison de leur compétence spéciale en la matière. Ces experts sont indépendants des parties, puisque, pour rappeler le mot de Demolombe, il ne s'agit pas seulement de l'intérêt privé, mais de " l'intérêt général de la société ".

Il faudrait vraiment un texte bien explicite pour supposer que le parlement aurait voulu conférer à la cité de Montréal le privilège exceptionnel de faire borner ses rues par des officiers, de qui la charte n'exige aucune qualification professionnelle, et de trancher ainsi des questions relatives à la propriété entre elle et ses contribuables par le ministère de ses propres fonctionnaires.

Le contribuable ne peut être tenu d'accepter la ligne que le fonctionnaire lui indique; et, s'ils ne peuvent s'entendre, il faut l'action en bornage. De même, elle est nécessaire lorsque, comme dans l'espèce, le contribuable a omis, avant de construire, de requérir l'alignement de la rue. Il faut, en effet, en vertu du règlement et de la charte, que le propriétaire demande cet alignement. C'est à lui qu'appartient l'initiative. Et s'il construit sans avoir, de cette façon, provoqué entre lui-même et la cité l'accord nécessaire sur l'emplacement de la ligne séparative, la cité n'a plus d'autre remède que celui auquel elle a eu recours dans la cause actuelle, car il est essentiel au bornage légal qu'il y ait un accord entre les parties, sauf, bien entendu, le cas de l'intervention judiciaire (Lalaure, Servitudes, sur art. 646 C.N.; Toullier, n° 172; *Larocque* v. *Taylor* (1); *Morel* v. *Bilodeau* (2).

Il faut (dit Laurent, vol. 7, n° 419) que les marques aient été plantées de commun accord par les parties intéressées.

L'essentiel est que l'accord des parties soit constaté et, à moins

d'une convention ou d'un jugement, il faut décider que légalement il n'y a pas de bornes, et partant l'action en bornage sera recevable. v.*Bilodeau* (2).

Après ce qui vient d'être dit, il est impossible de reconnaître à l'acte administratif prévu par le règlement n° 436 de la cité de Montréal le caractère du bornage requis par l'article 504 C.C. L'appelant ne saurait prétendre que cet

(1) 8 R. de J. 497. (2) (1917) Q.R. 51 S.C. 406.

acte peut avoir pour effet de constituer le domaine municipal, avec la conséquence que, sous prétexte de délimiter ce domaine, l'officier de la cité pourrait empiéter arbitrairement sur la propriété privée.

Le statut fédéral (57-58 Vict., c. 48) qu'avait à interpréter la Cour du Banc du Roi dans la cause de *La compagnie des chars urbains de Montréal* v. *Les commissaires du havre de Montréal* (1) était tout différent. Il contenait une disposition spéciale quant au bornage du port de Montréal. L'article 7 de l'acte édictait:—

The commissioners may erect landmarks to indicate the said boundaries of the port of Montreal and of the harbour of Montreal, which landmarks shall be held to determine the said boundaries.

Comme le fait remarquer M. le juge Carroll en prononçant le jugement de la cour,

Cet article autorise les commissaires à borner eux-mêmes la propriété du havre, sans être obligés de recourir aux procédures ordinaires.

Cependant, même dans ce sens, la Cour du Banc du Roi a exprimé l'opinion que cette disposition n'enlevait

aucun des droits des propriétaires riverains quant au bornage, car s'ils ne sont pas satisfaits des bornes posées par les commissaires, ils ont toujours leur action en rectification de bornes.

Dans l'état actuel de la loi de Québec, la servitude du bornage affecte toute propriété, sans distinction du domaine municipal ou privé. Si toutefois le législateur trouve opportun d'accorder aux officiers municipaux le pouvoir de borner les rues et les chemins publics, il ne l'a pas encore décrété.

Pour ces motifs, l'appel est rejeté avec dépens.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Foster, Mann, Place, Mackinnon, Hackett and Mulvena.*

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

(1) Q.R. 24 K.B. 507.

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KARL NYBERG (PLAINTIFF) ..... APPELLANT;

AND

PROVOST MUNICIPAL HOSPITAL BOARD (DEFENDANT) ..... } RESPONDENT.

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

*Negligence—Hospital—Public institutions—Injury to patient—Negligence of nurses—Liability of board created by Municipal Hospitals Act, R.S.A., 1922, c. 116—Regulation as to non-liability—Validity—Notice to patient.*

The respondent is an hospital board organized under *The Municipal Hospitals Act*, R.S.A., 1922, c. 116. Late in the night of April 8th, 1924, the appellant was brought to the hospital by his family physician to be operated on for a ruptured appendix. The latter assisted his partner who performed the operation, the anaesthetic being administered by a third physician. Two qualified nurses were in attendance, Mrs. T. the matron of the hospital and Miss S. As a part of the treatment and to combat the shock of the operation, the bed in which the appellant was to be placed after the operation required to be heated, and for that purpose two rubber hot water bottles, placed inside flannelette bags, were filled in the kitchen by Mrs. T., the water according to her statement being "quite hot." The appellant was removed from the operating table and put in the bed which was placed in the hall outside. The next morning, when he recovered consciousness, it was discovered that his left leg had been severely burned near the ankle by one of these hot water bottles which was found lying next to his skin and inside the blanket which was still tucked around his legs and feet and apparently had not been disturbed during the night. The appellant sued for damages. The trial judge gave judgment for $5,182, finding that the proximate cause of the accident was the filling of the bottle with water that was much too hot without any testing of it and the failure to investigate and see if any adjustment was necessary. The appellate court reversed this judgment, holding on the authority of *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, that the respondent hospital was not liable in damages.

*Held* that the respondent hospital cannot claim exemption from liability on the ground that it was "a government agency not liable for the negligence of its servants" or "a public body carrying on work not for profit but for the benefit of the residents of the district." *Mersey Docks and Harbour Board Trustees* v. *Gibb* (1 Eng. & Gr. App. 93) foll. *The Sanitary Commissioners of Gibraltar v. Orfila* ( (1890) 15 A.C. 400) dist.

*Held*, also, Idington and Mignault JJ. dissenting, that the decision in *Hillyer* v. *St. Bartholomew's Hospital* ([1909] 2 K.B. 820) was not

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

applicable to the circumstances of this case. That decision is not authority for non-responsibility of an hospital corporation for neglect by a nurse occurring after the patient has left the operating room and in regard to matters which fall within the scope of her ordinary duties as the heating of a patient's bed and the placing of hot water bottles in it. Even assuming that the placing of the hot water bottle which burned the appellant took place while the appellant was still in the operating room under the orders and control of the operating surgeon and his assistants, it is in evidence that, some time after the appellant had been removed to the hall, the nurse S. noticed a marked reddening of the skin about his chest where another hot water bottle had been placed; and the failure of the nurse to make sure that the other hot water bottle against the leg was not a source of danger is inexcusable and amounts to negligence in her capacity as a servant of the hospital in a matter of ministerial ward duty which entailed responsibility of that body for its consequences. The obligation undertaken by the hospital was not merely to supply properly qualified nurses but to nurse the appellant; and it was the negligence of its servant in the discharge of that contractual obligation that caused the severe injury of which the appellant complains.

*Per* Idington and Mignault JJ. dissenting.—The present case falls within the *ratio decidendi* of the *Hillyer Case*. The respondent hospital cannot be held liable for the result of a treatment professionally administered to a patient by physicians and nurses placed under the orders of the physicians when the hospital board have exercised proper care in the employment of the physicians and nurses.

Amongst the regulations enacted for the government of the respondent hospital was regulation no. 9 which provided that "patients accepting such service or treatment, personally assume all risk and responsibility for any accident, injury or casualty of any kind which may happen to befall any patient, visitor or other person, in the exigencies of such an institution, whether caused by the acts of any of the employees, staff or otherwise."

*Held,* that the regulation no. 9 invoked by the respondent as relieving it from responsibility to the appellant is ineffectual for that purpose, both because as a regulation it transcends any power of regulation and management conferred by s. 49 of the statute (R.S., Alta. (1922), c. 116), and because such notice to the plaintiff of its existence as might, under some circumstances, make it an implied term of a contract between the respondent and a patient, has not been shewn. Idington and Mignault JJ. expressing no opinion.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of the trial judge, Ives J., and dismissing the appellant's action for damages for injuries sustained by him while a patient in the respondent hospital.

(1) (1926) 22 Alta. L.R. 1; [1926] 1 W.W.R. 890.

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NYBERG v. PROVOST MUNICIPAL HOSPITAL BOARD.

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.

*Eug. Lafleur K.C.* and *H. A. Friedman* for the appellant.

*A. A. McGillivray K.C.* for the respondent.

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

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Mignault.

His statement of the material facts of the case as disclosed by the evidence before us is complete. There is no need to repeat it, or to comment upon it. The hot water bottle, which burned the plaintiff's leg, was found on the morning following the operation lying next to his skin and inside the blanket which was still tucked around his legs and feet and apparently had not been disturbed during the night. These circumstances exclude any suggestion that this admittedly wrong and dangerous position of the bottle might be accounted for by any movement, voluntary or involuntary, of the patient. They afford strong *prima facie*, if not conclusive, proof that the bottle had been placed as it was found either when the unconscious patient was wrapped in the blanket in the operating room or immediately afterwards when he was covered up in bed and that it had been allowed to remain there during the night. There is nothing to cast the slightest doubt on the correctness of these inferences of fact and the case must be disposed of on the assumption that they are correct.

The learned trial judge found that:

> The proximate cause of this accident was, as I say, in the first place the filling of the bottle with water that was much too hot without any testing of it; then the failure to investigate and see if any adjustment was necessary.

The evidence fully justifies these findings and also the finding that the latter fault—the failure to investigate—was attributable to the nurse Switzer. The sole question is whether for that neglect and its consequences the defendant is legally responsible.

I fully agree with my learned brother's rejection of the respondent's claim to exemption from liability on the ground that it was "a government agency" or

> a public body carrying on work not for profit but for the benefit of the residents of the district,

and with his opinion of the inapplicability of the decision in *The Sanitary Commissioners of Gibraltar* v. *Orfila et al* (1). As put by Farwell L.J., in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2):

> It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be under similar circumstances, notwithstanding that it is acting in the performance of public duties, like a local board of health, or of eleemosynary and charitable functions, like a public hospital.

I am also satisfied that the regulation no. 9 invoked by the defendant as relieving it from responsibility to the plaintiff is ineffectual for that purpose, both because as a regulation it transcends any power of regulation and management conferred by s. 49 of the statute (R.S.A. (1922) c. 116), and because such notice to the plaintiff of its existence as might, under some circumstances, make it an implied term of a contract between the defendant and a patient has not been shewn. The plaintiff entered the hospital for an operation without any special contract, but as a paying patient at the special rates to which, as a municipal ratepayer, he was entitled. Nothing else appears as to the footing on which he was received.

I am, however, unable to accede to the view of my learned brother that the present action is concluded against the plaintiff by the decision of the English Court of Appeal in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2). That case is authority for the propositions (*a*) that the relation of master and servant does not exist between a hospital board and the surgeons and physicians whom it may supply for the treatment of patients in the hospital; (*b*) that the nurses on the staff of the hospital while they are actually engaged in assisting a surgeon during an operation (in the *Hillyer Case* (2) it was a physical examination under an anaesthetic) are so immediately subject to his orders and control that they are for the time being not to be regarded as servants of the hospital authority; and (*c*) that in regard to them while so engaged, as in regard to the

(1) (1890) 15 A.C. 400. (2) [1909] 2 K.B. 820, at p. 825.

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surgeon himself whom they are assisting (should he also be supplied by the hospital management), the only undertaking of the hospital authority is that they are qualified for the duties assigned to them and not that they will not be negligent in their performance. But, as Farwell L.J., says, in the *Hillyer Case* (1), at p. 826,

> so long as they (the nurses) are bound to obey the orders of the defendants (the Board of Governors) it may well be that they are their servants;

and as Kennedy L.J. says (in the same case), at p. 829:

> It may be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of (*sic*) the servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendance of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like.

In *Hillyer's Case* (1) the injuries complained of, so far as appeared, were in fact sustained during the physical examination. In the case at bar the burning of the plaintiff occurred after the operation had been completed and he had been removed from the operating room to the adjoining hall, then in actual use as a ward owing to the regular wards being crowded.

The *Hillyer Case* (1) is not authority for non-responsibility of the hospital corporation for neglect by a nurse occurring after the patient has left the operating room and in regard to matters which fall within the scope of her ordinary duties, as admittedly does the heating of a patient's bed and the placing of hot water bottles in it to ward off danger from shock and chill. On the contrary, the learned judges in that case are careful to exclude from the application of their decision such duties of nurses as

> their attendance in the wards * * * the supplying of proper food, and the like.

For matters such as these—for matters in regard to which

> the management of a hospital ought to make and does make its own regulations * * * it is in my judgment (says Kennedy L.J., at p. 829), legally responsible to the patients for their sufficiency, their propriety, and observance of them by their servants.

The judgments in *Hillyer's Case* (1) were carefully considered and their effect was, I think, correctly appreciated by the Ontario Appellate Division in *Lavere* v. *Smith's Falls Public Hospital* (2), and I am unable to distinguish,

(1) [1909] 2 K.B. 820.

(2) (1915) 35 Ont. L.R. 98.

in principle, between the Ontario case and that now before us.

It was the admitted duty of the nurse to see that hot water bottles were safely placed in the patient's bed, not as a matter of special instruction for the occasion, but as a matter of routine duty under a "standing order." It is common ground that an elementary rule of nursing required that the hot water bottles should have been placed outside the blanket and should not have been in contact with the patient's skin. That rule is of special importance when the patient is under the influence of an anaesthetic and its neglect is an unpardonable fault.

Assuming, in favour of the defendants, that the placing of the hot water bottle which burned the plaintiff took place while he was still in the operating room and at a time when the nurse might be regarded as so much under the orders and control of the operating surgeon that negligence on her part would not entail responsibility of the hospital authority, the evidence clearly establishes that some time (one-half or three-quarters of an hour) after the plaintiff had been removed from the operating room to the ward (the hall) the nurse Switzer (then a "circulating nurse") noticed a marked reddening of the skin about his chest, where another hot water bottle had been placed. Both bottles had been filled at the same time, from the same source, and their temperature had not been tested. The nurse thus had distinct warning that the bottles were dangerously hot; it then became her immediate and imperative duty to make sure that the second bottle, which was concealed by the bed covering, was so placed that it could do no harm. That duty she admittely did not discharge. She attempts to excuse herself by stating that she had some casual assurance from Dr. York, the plaintiff's physician, who was standing by, that "they (the hot water bottles) were now all right." Dr. York, who was examined at length, was not asked to corroborate or to deny this particular statement. He had, however, said, referring to this occasion, that he

> didn't see the nurse because there was no nurse with the doctor (Sarvis) when I came down there.

But, assuming that some such observation was made to the

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nurse, that, I agree with the learned trial judge, would not suffice to excuse her failure, under the circumstances, to investigate personally the situation in regard to the hot water bottle under the bed covering and to assure herself, as was her admitted duty, that it was not so placed that it might burn the patient.

Dr. York also said that he left no instructions whatever with the nurse in regard to hot water bottles and he added on cross-examination, that it is always customary in all operations to have the bed warmed—we never give any orders—it is a standing order—it is always done. Dr. Sarvis gave similar testimony.

I regard the failure of the nurse, after the appearance of the skin on the patient's chest had aroused her suspicions, to make sure that the hot water bottle against his leg was not a source of danger, as inexcusable and as negligence in her capacity as a servant of the hospital corporation in a matter of ministerial ward duty, if not of mere routine, which entailed responsibility on that body for its consequences. The obligation undertaken by the hospital authority (apart from the operation itself and the services of surgeons and nurses in the operating room) was not merely to supply properly qualified nurses, but to nurse the plaintiff. *Hull* v. *Lees* (1). It was negligence of their servant in the discharge of that contractual obligation that caused the severe injury of which the plaintiff complains.

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

The amendment of the style of cause giving the defendant its correct name " Provost Municipal Hospital District, No. 12 " should be made before the judgment issues.

IDINGTON J. (dissenting).—This is an appeal from the Appellate Division of the Supreme Court of Alberta, which reversed the judgment of the learned trial judge which held the plaintiff (now appellant) entitled to recover. Having considered fully the judgment of my brother Mignault J., I entirely agree with his reasoning and his conclusion that the appeal herein should be dismissed with costs.

(1) [1904] 2 K.B. 602 at p. 615.

MIGNAULT J. (dissenting).—The appellant obtained a judgment against the respondent in the Supreme Court of Alberta for $5,182, damages resulting from a burn suffered by him after an operation for appendicitis in the defendant's hospital. This decision was reversed by the appellate divisional court, Mr. Justice Walsh dissenting, and the appellant now seeks to have the judgment of the trial court restored.

Late in the night of April 8, 1924, the appellant was brought to this hospital by his family physician, Dr. W. O. York, to be operated for a ruptured appendix. The operation was performed by Dr. York's partner, Dr. Ewart Sarvis, assisted by Dr. York, the anaesthetic being administered by Dr. Knoll. The nurses in attendance, and they were duly qualified nurses, were the matron of the hospital, Mrs. Mary W. Taylor, and Miss Elizabeth Switzer, now Mrs. Hale. As a part of the treatment, and to combat the shock of the operation, the bed in which the appellant was to be placed after the operation required to be heated, and for that purpose two rubber hot water bottles, placed inside flannelette bags, were filled in the kitchen by Mrs. Taylor, the water, according to her statement, being "quite hot." The appellant was removed from the operating table and put in the bed which was placed in the hall outside. The next morning, when he recovered consciousness, it was discovered that his left leg had been severely burned near the ankle by one of these hot water bottles.

The appellant alleges that he was received as a patient in the hospital by the respondent which undertook for reward to furnish him all necessary and proper hospital treatment, nursing and appliances, and that the application of the hot water bottle was carelessly and negligently made by the respondent, in that the bottle was at an excessively high temperature and its application was continued for an excessive length of time. He further states that the respondent was negligent in failing to supply him, while he was in the hospital, proper, careful and sufficient attention, nursing and care, but this last ground, irrespective of the application to the appellant of the hot water bottle, was not entertained by any of the judgments.

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In substance, the plea of the respondent is that the hot water bottle was applied by or under the direction of Doctors Sarvis and York, they being qualified medical practitioners employed by the appellant, that the treatment of the appellant was under the direction and supervision of these physicians, who were solely responsible for the results, and that the respondent fulfilled its obligations by furnishing the appellant with the services of duly qualified and certificated nurses and supplying the requisite apparatus.

The trial judge found the respondent liable for the appellant's injuries, holding that the heating of the bed was no more than the daily making of beds.

This judgment was reversed by the Appellate Divisional Court. Mr. Justice Hyndman, with whom the other judges, with the exception of Mr. Justice Walsh, agreed, expressed the opinion that the hospital was created and existed purely for governmental purposes, and that the board was not liable unless it had failed to discharge its statutory duty to employ competent and qualified nurses. He also considered that, independently of this ground, the action failed on the authority of the decision of the English Court of Appeal in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1), to which further reference will be made.

The first ground of the judgment appealed from rests on the statute under which the respondent operated its hospital, *The Municipal Hospitals Act,* chapter 116 of the Revised Statutes of Alberta, 1922.

This statute authorizes the Minister of Health to divide the province into hospital districts upon petition of a contributing council or of twenty-five ratepayers and to fix the number of members of the hospital board for the district. These members are elected by the ratepayers at the next municipal election and they hold office for two years. Upon organization, the board prepares a hospital scheme, which is duly advertised, and submitted for ratification to a vote of the municipal voters. This scheme may be referred by the Minister, before its adoption, to the Board of Public Utility Commissioners. If two-thirds of those voting approve the scheme, it is held to be adopted. The

(1) [1909] 2 K.B. 820.

statute provides for the levying of a tax to defray the necessary expenditure, called the hospital tax, which is in addition to all rates levied for municipal purposes, and all moneys so raised by a municipality in respect of the hospital tax are forwarded by it to the secretary-treasurer of the hospital district. The board is also authorized to borrow by debentures an amount equal to the capital expenditure involved. Upon the ratification of the scheme, the board of the hospital district becomes a body corporate, and at its first meeting chooses a name and a corporate seal. It is empowered to make such rules and regulations for the maintenance and management of its hospital as it deems fit, and in addition to the usual staff it may employ one or more district nurses. The Lieutenant-Governor in Council may also make regulations not inconsistent with the Act covering *inter alia* the equipment, control and management of the hospital, and it is the duty of the Minister to see that every hospital is always in a high state of efficiency, failing which it is within his power to dismiss the members of the board and appoint an official administrator in their stead, who holds office until a new board is elected upon the order of the Minister at the next municipal election. The hospital is supported by means of the taxes imposed on the ratepayers and moneys paid by them or other persons other than hospital supporters for hospital treatment, the hospital supporters being entitled to a minimum rate calculated at an amount which equals, with the taxes paid by them, the amount fixed for persons who are not hospital supporters. There is no provision in this statute for the support of the hospital by means of the public funds of the province, save that the board of any hospital may make an agreement with the Government as to cost and methods of specially training any number of nurses so as to better fit them to become superintendents of the hospital district, by which agreement the Government may assume a proportion of such cost.

I do not think that the provisions of this statute warrant the conclusion that the municipal hospital or the hospital board is a government agency not liable for the negligence of its servants. Nor can it be contended, in my opinion, that, as a public body carrying on work not for

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profit but for the benefit of the residents of the district, the board is free from such liability. Such a contention seems hopeless in view of the decision of the House of Lords in *Mersey Docks and Harbour Board Trustees* v. *Gibbs and Penhallow* (1). The judgment of the Privy Council in *Sanitary Commissioners of Gibraltar* v. *Orfila* (2), relied on in the Appellate Divisional Court, does not support the claim of immunity of a board such as this respondent, for the only question there was whether the Sanitary Commissioners were liable for mere nonfeasance.

I will therefore approach the consideration of this case upon the basis that this respondent comes within the general rule of liability of masters for the negligence of their servants within the scope of their employment. The whole question, to my mind, is whether the relation of master and servant existed between the respondent and the physicians and nurses who treated the appellant at the time of his operation and of the burn suffered by him. For it is clear, in the words of Baron Parke, in *Quarman* v. *Burnett* (3) that

> liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist.

In order to determine whether this relation existed at the time of the appellant's injuries, it now becomes necessary to refer in some detail to what took place during the operation, especially with regard to the application to the appellant of the hot water bottles. There were present at the operation the three physicians, Drs. Sarvis, York and Knoll, and the two nurses, Mrs. Taylor, who was what is called a circulating nurse, and Miss Switzer, who was the "scrub nurse," that is to say she wore a sterilized gown and gloves and assisted the operating surgeon. The operation began about 12.30 a.m., and lasted an hour. When it was over, Dr. Sarvis and Mrs. Taylor went out into the hall to bring in the appellant's bed which had been already prepared, but they discovered that it was made up wrongly. There was on the bed a special frame, which was used in similar cases, but it was found that "it was on wrong end to and the bed had to be remade." In remaking the

(1) (1864) 1 Eng. & Ir. App. 93. (2) (1890) 15 A.C. 400.
(3) (1840) 6 M. & W. 499.

bed Dr. Sarvis assisted Mrs. Taylor, and the bed clothes were thrown on the floor while the gatch frame was being properly set. It may be here mentioned that Mrs. Taylor had already placed the two hot water bottles in the bed, while the operation was going on. When Dr. Sarvis first noticed these bottles, they were on the floor of the hall with the bed clothes. The bed was remade, the covers being folded back, and the bed was pushed into the operating room by Dr. Sarvis and Mrs. Taylor. Dr. Sarvis—and Mrs. Taylor says the same thing—testifies that when the bed was brought in he saw the hot water bottles lying in the centre of the bed. Dr. Sarvis and Dr. Knoll, with the assistance of Miss Switzer, then proceeded to transfer the patient from the operating table to the bed, which had been placed alongside the table. While the bed was being prepared, Miss Switzer put a binder, a pneumonia jacket and a gown on the patient, and then covered him with a blanket wrapped close to his chin and extending entirely over his feet and down under his side where it was tucked in as much as it was possible to do. Thus dressed and covered with the blanket from head to feet, the patient was carried from the operating table to the bed, the coverings of which were then lifted up from the foot of the bed and placed over him. The bed with the patient was afterwards wheeled into the hall where it remained the rest of the night, there being then no available room elsewhere. Dr. Sarvis states that the hot water bottles, which he had seen in the centre of the bed when it was being brought into the operating room, were either left there when the patient was moved over into the bed, or placed back there immediately afterwards while he and Dr. Knoll were present. No witness however can say that he or she put back the bottles in the bed after the patient was placed there. Their proper place was in the bed, but outside the blanket which had been tucked around the patient.

After the patient's bed was moved into the hall, Dr. Sarvis assisted by Miss Switzer proceeded to administer to the patient what is known as an interstitial, that is to say a saline solution which had been prepared and heated by Mrs. Taylor. The interstitial was injected into the breasts of the patient on both sides from a needle attached to a

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tube, and its object, as well as the object of the heating of the bed, Dr. Sarvis says, is to combat the shock of the operation. This took about half an hour, for, after making the injection, Dr. Sarvis waited to see that the saline solution was fully absorbed by the patient, and while the interstitial was being administered, or near the close of this operation, Dr. York, who had gone upstairs to see a maternity patient, came down and stood by the bed.

It was a part of the nurse's duty to see to the hot water bottles, and Miss Switzer testifies that she went to see where they were. Dr. Sarvis was standing by the bed and she said to him: "How about the bottles?" Dr. Sarvis answered: "They are all right, they have been on the floor long enough to cool off." She then considered that she was relieved from responsibility with regard to the hot water bottles. Dr. Sarvis was called in rebuttal and would not deny that this conversation took place, although he said he had no recollection of it.

Miss Switzer further states that while Dr. York was standing near the bed, she noticed one of these bottles next to the patient's skin on the left side. The skin was getting red. She said to Dr. York: "What about the bottles, this one is getting red," and he answered "Now they are all right." She did not again bother about the bottles during the night, and apparently this one did no harm, for the patient's chest was not burnt. The next morning the only bottle she noticed was the one which burned the patient's leg; it was inside the blanket, and next to his skin.

I have given as complete an account as possible of what took place during the operation and subsequent treatment of the appellant according to the statements of the physicians and nurses. Dr. Knoll, who administered the anaesthetic, was not called. The learned trial judge was satisfied that each and every one of the witnesses gave to the best of his or her ability the best recollection he or she had of the occurrences. Nevertheless all possible explanations of the accident were not investigated. For instance, none of the physicians were asked whether the patient could have moved his leg while under the anaesthetic, and thus bring it into contact with a properly placed hot water bottle. Nor do we know what length of time of contact

with the bottle would have caused the burn. From the way the patient was wrapped up and covered with the blanket, it does not seem probable that the bottle was placed inside the blanket in the operating room when the patient was moved to the bed. Nevertheless it is clear on the evidence that the hot water bottle which caused the burn was put into the bed, we cannot say by whom, in the operating room and in the presence of the physicians, unless the two bottles remained in the centre of the bed where Dr. Sarvis saw them and the patient was placed on top of them, which is unlikely. The physicians were afraid that the patient might develop pneumonia, for he was in a chilly condition when he was brought to the hospital, and it was a necessary part of the treatment that his bed should be thoroughly warmed. The important fact for the decision of this case is that all this was done within the operating room, while the nurse in attendance was under the orders of the surgeon, and when she afterwards inquired as to the bottles, she was assured by both Dr. Sarvis and Dr. York that they were all right. This would naturally lead her to believe that she did not have to remove the bed clothes to see whether the bottles were properly placed.

After full consideration, my opinion is that this case comes well within the *ratio decidendi* of *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1). The plaintiff there was admitted into the hospital for the purposes of an examination under anaesthetics by an eminent surgeon, Dr. Lockwood. While he was on the operating table and unconscious, one of his arms was bruised and the other burnt. His action claiming damages was dismissed and the judgment of the trial court was affirmed by the Court of Appeal.

In his reasons for judgment, Farwell L.J., said at page 825:—

> The first question then is, were any of the persons present at the examination servants of the defendants? It is, in my opinion, impossible to contend that Mr. Lockwood, the surgeon, or the acting assistant surgeon, or the acting house surgeon, or the administrator of the anaesthetics, or any of them, were servants in the proper sense of the word; they are all professional men, employed by the defendants to exercise their profession to the best of their abilities according to their own discretion;

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but in exercising it they are in no way under the orders or bound to obey the directions of the defendants. * * * The only duty undertaken by the defendants is to use due care and skill in selecting their medical staff. * * * The three nurses and the two carriers stand on a somewhat different footing, and I will assume that they are the servants of the defendants. But although they are such servants for general purposes, they are not so for the purposes of operations and examinations by the medical officers. If and so long as they are bound to obey the orders of the defendants, it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon), they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished; the surgeon is for the time being supreme, and the defendants cannot interfere or gainsay his orders. * * * The nurses and carriers, therefore, assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders from the operating surgeon alone, and not from the hospital authorities.

Cozens-Hardy M.R., agreed in the dismissal of the appeal for the reasons contained in the judgments of Farwell L.J., and Kennedy L.J. The latter said, p. 829:

In my view, the duty which the law implies in the relation of the hospital authority to a patient and the corresponding liability are limited. The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves; and, further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances. But I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal.

In the *Hillyer Case* (1), the patient was treated gratuitously. But although Kennedy L.J., referred to the gratuitous benefit of the hospital's care, I do not think, in regard to an action based on negligence, that the duty and corresponding liability of the governing board of a hospital differ according as a fee is or is not charged to the patient. In either case they cannot be held liable for the result of the treatment professionally administered to the patient by the physicians and the nurses placed under the orders of the physicians, provided of course that they have

(1) [1909] 2 K.B. 820

exercised proper care in the employment of the physicians and nurses. Here the appellant employed his own physician Dr. York, and the latter no doubt chose the surgeon, Dr. Sarvis, who was his partner. The nurses were properly qualified and certificated nurses, and their competence is in no wise questioned. The hot water bottles were placed in the bed in the operating room in presence of Dr. Sarvis and Dr. Knoll, the nurses then being subject to the orders of the physicians, and when the nurse in charge inquired as to the bottles, both Drs. Sarvis and York, she testifies, assured her that they were all right. In my opinion, if there was negligence in placing the hot water bottle, the person who committed the negligence was not at the time the servant of the hospital board.

But the appellant contends that he made a contract with the respondent for hospital treatment and nursing, and that the latter is liable for breach of this contract. The respondent paid the minimum rate of one dollar per day to which as a hospital supporter he was entitled, others than hospital supporters being charged four dollars and a half per day.

There was no express contract, and if an implied contract can be inferred, it would involve, in my opinion, no liability of the hospital board for what was done by the physicians acting in the discharge of their professional duties or by the nurses when placed under the orders of the physicians, both selected with due regard to their competence and capacity. I do not think the case need rest on the regulations of this hospital board, duly posted and published, by one of which the patient assumed all risk of injury through the acts of the employees of the hospital. The board, in my opinion, discharged any obligation imposed on it by law or by any implied contract resulting from the admission of a paying patient into the hospital. There is no room for liability in the circumstances.

I have not failed to consider the Ontario case of *Lavere* v. *Smith's Falls Public Hospital* (1), strongly relied on by the appellant. There the patient, who entered the hospital under an express contract, had her heel burned by a hot brick placed by a nurse in her bed for heating purposes

(1) 35 Ont. L.R. 98.

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after an operation. The circumstances of that case may have justified a judgment against the hospital, a point on which it is unnecessary to express any opinion, but the Ontario decision certainly cannot prevail against the rules laid down in the *Hillyer Case* (1), which, in my opinion, should be applied here.

I would dismiss the appeal with costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Friedman, Lieberman & Gallaway.*

Solicitors for the respondent: *Milner, Matheson, Carr & Dafoe.*

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*Nov. 17.
*Dec. 1.

THOMAS HOLLAND (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT)..... } RESPONDENT.

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

*Negligence—Municipal corporation—Highway—Icy condition of sidewalk—Injury to pedestrian—Liability of municipality—"Gross negligence"—Consolidated Municipal Act, 1922, Ont., c. 72, s. 460 (3)—Reversal of concurrent findings of fact.*

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (2) affirming judgment of Mowat J. dismissing the plaintiff's action to recover damages from the defendant city for personal injury sustained in a fall on an alleged icy sidewalk on Doel Avenue in the city of Toronto.

The main question involved was whether, on the evidence, there was "gross negligence" within s. 460 (3) of *The Consolidated Municipal Act, 1922,* c. 72, for which the city was responsible.

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

(1) [1909] 2 K.B. 820.

(2) (1925) 59 Ont. L.R. 628.

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HOLLAND v. CITY OF TORONTO.

The judgment of the Supreme Court of Canada, delivered (on 1st December, 1926) by the Chief Justice, after referring to an apparent misapprehension in the minds of the majority of the judges of the Appellate Division as to the basis (with regard to credibility of evidence) of the judgment of Mowat J., and pointing out that in view thereof there is not presented the formidable obstacle to the success of the present appeal which usually arises from concurrent adverse findings on a question of fact, discusses the factors to be considered in determining whether the fault (if any) attributable to a municipal corporation is so much more than merely ordinary neglect that it should be held to be very great or "gross" negligence, within s. 460 (3), reviews the evidence in the case, and concludes that there is established "gross negligence" of defendant city's sectionman in not taking steps for the remedying of the condition of the sidewalk, which the judgment finds to have been highly dangerous.

The judgment of the Supreme Court of Canada is reported in full in 59 Ont. L.R. 628, at pp. 631-637.

*Appeal allowed with costs.*

*Gideon Grant K.C.* for the appellant.

*G. H. Kilmer K.C.* and *W. G. Angus* for the respondent.

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*Oct. 19.

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*Feb. 1.

J. R. BOOTH LIMITED (DEFENDANT).....APPELLANT;

AND

W. K. McLEAN (PLAINTIFF).....RESPONDENT.

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

*Sale—Right of redemption—Contre-lettre—Transfer—Pledge—Collateral security for advances—Construction of agreement. Arts. 1014, 1025, 1550, 1966, 1970 C.C.*

On the 23rd of September, 1920, the respondent and the appellant's auteur, J. R. B., entered into an agreement, by which the respondent undertook to raise out of the water and salve certain logs known as "deadheads" belonging to J. R. B., which might be found in a certain

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

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definite area on the Ottawa river. The respondent undertook to erect a sawmill at a place called Dow's Bay for the purpose of sawing the logs by him raised and salved. In order to carry out the undertaking the respondent required financial assistance and the appellant consented to lend it. The respondent performed his operations under the contract and the appellant continued to make advances. On the 8th of September, 1921, the amount advanced by the appellant reached the sum of $26,090 and, on that date, an agreement was entered into by which the respondent "hereby bargains, sells, conveys, assigns and makes over unto the (appellant) * * * the following property." The concluding clause of the agreement was as follows: "The present bargain and sale is so made for and in consideration of the price and sum of $26,090 in hand paid by the (appellant) * * *." On the same date the appellant wrote a letter to the respondent as follows: "Upon payment by you to the J. R. Booth Limited of the amount of your indebtedness to it the company will reassign and make over to you the property assigned this day by you to it, provided the contract between you and the company is still in force."

*Held,* Duff and Newcombe JJ. dissenting, that the above agreement was a sale vesting in the appellant the ownership of the property with a right of redemption stipulated in favour of the respondent upon payment by him of the amount of his indebtedness to the appellant.

*Per* Duff and Newcombe JJ. (dissenting). The agreement between the parties was a transfer or assignment of the property by way of collateral security for the advances made by the appellant to the respondent in the carrying out of the contract.

Judgment of the Court of King's Bench (Q.R. 40 K.B. 331) aff., Duff and Newcombe JJ. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, at Hull, Trahan J. 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.

*H. Aylen K.C.* and *J. A. Aylen* for the appellant.

*J. N. Beauchamp* for the respondent.

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

MIGNAULT J.—The appellant's contention is that the agreement of September 8, 1921, while made in the form of a sale, was only intended by the parties to operate as a transfer by way of security for the advances made by the

(1) (1926) Q.R. 40 K.B. 331.

appellant to the respondent in the carrying out of the contract, and which advances at that date, the appellant alleges, amounted to about $26,090, the price for which the sale was made.

But if we assume that that was the intention of the parties, there could have been no valid pledge of the movables, without giving possession to the appellant or to a third party agreed upon (arts. 1966, 1970 C.C.). This was not done and the respondent retained possession of the movables which he used in carrying out the contract. So that if the parties intended what the appellant says they intended, the whole contract was void.

If, on the contrary, they intended to make a sale of the movables to the appellant, coupled with a promise to reconvey them to the respondent (which is the effect of what is called the counter-letter), then possession could remain with the respondent and the sale would nevertheless be perfect (art. 1025 C.C.).

Construing therefore the contract according to the rule of art. 1014 C.C., that is to say so that it may have some effect rather than none at all, *magis ut valeat quam ut pereat,* it must be held to have been a sale with right of redemption. To such a sale the decision of this court in *Salvas* v. *Vassal* (1) fully applies, and the respondent not having exercised the right to redeem, the appellant remained absolute owner of the movables (art. 1550 C.C.). The obvious consequence is that it cannot now set up the amount of its advances for which the sale was made, in answer to the respondent's action.

While, at first blush, the word "indebtedness" in the counter-letter presents some difficulty, it is more apparent than real. The sale extinguished the indebtednes theretofore subsisting. But when we remember that the sale and the promise to reconvey really formed but one transaction, the indebtedness referred to in the counter-letter so called must be that which formed the consideration for the sale, and only ceased to exist upon its becoming effective.

Moreover, it is abundantly clear from the record before us that the dominant purpose of the parties in the making of the deed in question was to protect the property covered

(1) (1896) 27 Can. S.C.R. 68.

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by it against the pressing claims of the respondent's other creditors. Both appellant and respondent were ready to give the transaction whatever form was best adapted to ensure that result. The appellant was prepared to accept the transfer without restriction or qualification; the counter-letter was given at the instance of the respondent. Both parties may have expected that the respondent would exercise the *droit de réméré* and that the transfer of the property would thus operate as a security. But they must be taken to have known the legal effect of the transaction as it was carried out and must be assumed to have intended that effect. J. R. Booth Ltd. took the transfer in the only form in which it could be effective (if at all) to prevent McLean's other creditors from seizing the property transferred; it took, in order to secure that benefit, a deed the legal effect of which was to extinguish the indebtedness in consideration of which it was given. Having taken the chance of McLean's failing to redeem within the period stipulated, it cannot now be allowed to set up that the transfer—absolute in form—was meant to operate merely as a pledge—as such invalid—and that the indebtedness, the extinction of which was the consideration for which such transfer *ex facie* purports to be made, still subsists and is available by way of set-off or counter-claim against the plaintiff's demand.

As to the amount of the respondent's recovery, the two courts are in agreement, and I would not disturb their finding on this point.

I would dismiss the appeal with costs.

The judgment of Duff and Newcombe JJ. (dissenting) was delivered by

DUFF J.—In September, 1920, the respondent entered into an agreement with J. R. Booth, the predecessor of the appellant, by which the respondent undertook to take a quantity of logs from the water in a certain part of the Ottawa river, to erect a sawmill at a place called Dow's Bay, and there to saw into lumber the logs salved by him under the contract. Shortly afterwards, the

respondent applied to Booth for financial assistance to enable him to execute his contract, and received an advance of $5,000, which was secured by an assignment by one Lusk of a portable sawmill, together with some horses, wagons and other movables; an assignment which, it may be observed though absolute in form, was admittedly given as security only. The respondent proceeded with the execution of his contract, and in December, 1920, he acknowledged, by letter, that the steam mill he was then engaged in building, pursuant to the contract, and its appurtenances, were to be held by Booth as security for advances. Further advances having been made in the early part of 1921, on the 1st of April of that year the respondent, in an informal document, declared that certain specified property, comprising the sawmill and machinery and other articles connected with it, as well as horses, wagons, sleighs and other movables (including those which had been previously transferred by Lusk), were held by Booth as security for advances.

In the summer of 1921, the respondent obtained still further advances, and on the 8th of September, 1921, two additional documents were executed; and the crucial question on this appeal concerns the effect of these documents. The respondent's interpretation of them is this: There was a sale, he says, or, rather, a giving of property (comprised in a transfer from the respondent to the appellant) in payment of the respondent's indebtedness, to the amount of the consideration mentioned in the transfer, with a right of repurchase by the respondent for the same amount declared in a *contre-lettre* attached to the transfer. The appellant, on the other hand, avers, in substance, that there was merely a formal transfer to the appellant as security of property which, by existing arrangements informally expressed, was already held by him as security. Parol evidence was offered as to declarations of the parties touching the understanding between them, and rejected. There appear, however, to be good grounds, quite apart from this extrinsic evidence, for holding that the appellant's version of the transaction is the right one.

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The *contre-lettre* is in these words:

OTTAWA, 8th Septr., 1921.

MR. WALTER K. MCLEAN,
Breckenridge.

Dear Sir,—Upon payment by you to the J. R. Booth Limited of the amount of your indebtedness to it, the company will re-assign and make over to you the property assigned this day by you to it, provided the contract between you and the company is still in force.

Yours truly,

(Sgd.) J. R. BOOTH LIMITED,
Per JOHN BLACK,
Secretary.

And the material part of the transfer is as follows:

The present bargain and sale is so made for and in consideration of the price and sum of twenty-six thousand and ninety dollars ($26,090) in hand paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged which said sum of money has been used by the party of the first part for the purchase, acquisition and construction of the foregoing property.

When the whole of the facts in evidence are considered, those anterior to these documents of the 8th September, as well as those subsequent, the fair interpretation of them seems to be that accepted by Mr. Justice Dorion, upon whose dissenting judgment the appellant largely relies.

The critical point is: Did the parties intend a *pro tanto* payment and extinguishment of the respondent's debt to the appellant?

First it should be observed that the consideration for the transfer is in that document expressed in language which is far from apt to describe a consideration which consists merely in the satisfaction of a debt. The instrument records a bargain and sale, but a bargain and sale in consideration of moneys paid by the appellant which had previously been expended by the respondent in acquiring and constructing the property transferred. This does not suggest the extinction of a debt, as the true consideration. Indeed, the statement of the consideration itself is strictly consistent with the idea of a transfer—a " bargain and sale " —made in consideration of moneys "paid" by way of loan; and this is, in substance, the form of words (" in consideration of advances ") used in one at least of the earlier documents, when admittedly the transfer was intended to be by way of security only.

Then, when we come to the *contre-lettre*, we find it expressed in terms which could hardly have been employed by parties intending by these documents to effect the extinguishment of any part of the respondent's debt. The respondent himself deposed that the sum mentioned in the transfer as the consideration for it was arrived at by ascertaining the value of the property transferred, and in his factum he points out that this sum was considerably less than the amount that had been advanced in cash prior to the 8th of September. It is difficult, if not impossible, to reconcile with this the contention that "indebtedness" in the *contre-lettre* means the sum mentioned in the transfer. Moreover, after the date of the transfer advances were made to a considerable amount, and it is impossible to suppose that this was not in contemplation when these documents were drawn up. Having regard to these considerations, the better view seems to be that the proper construction of the *contre-lettre* is that which ascribes to the word "indebtedness" its natural and ordinary meaning, and that the parties intended a retransfer upon payment by the respondent of the amount owing by him, whatever it might be at the time of payment; in other words, that the property was to be held as security for that indebtedness.

Then it must be remembered that the respondent retained possession of the property for some time after the execution of the documents, treating it as his own, and employing it as he had always done, in manufacturing lumber from the appellant's logs.

All these considerations, taken collectively, seem to afford a satisfactory ground for the conclusion reached by Mr. Justice Dorion in the court below.

In this view it is unnecessary to examine the question so much discussed in the courts below, whether the evidence offered by the appellant and rejected by the trial judge, of contemporaneous oral declarations by the parties as to their intention in executing the documents, was properly rejected as being excluded by art. 1234 of the Civil Code. That article is derived from the law of England; but we are not now concerned with any question as to the propriety of consulting the established principles of that law, governing the interpretation and application of the rule

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embodied in the article. Nevertheless (learned judges in the court below, the majority of whom considered the evidence inadmissible, having intimated views as to the pertinent rule of English law) it is perhaps desirable to say this: Had such a question arisen in a similar case before a tribunal administering law according to the principles of the law of England, there never could have been a doubt concerning the disposition of it. As a rule, where a debtor transfers property to his creditor, by a conveyance absolute in form, and a question arises whether or not the debt has been extinguished, parol evidence is technically admissible to shew that the conveyance, notwithstanding its absolute form was intended to take effect as a security only. The practice of the courts in dealing with such questions is admirably illustrated by the judgment of Lord Watson, speaking for the Judicial Committee, in *Barton* v. *The Bank of New South Wales* (1).

It follows from this view that the respondent's action should be dismissed. It results also that the appellant is entitled to recover the amount of his cross demand, $24,010.42. The appellant should have his costs of the action and of the cross demand, as well as those of both appeals.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Aylen & Aylen.*

Solicitors for the respondent: *J. N. Beauchamp.*

(1) (1890) 15 A.C. 379.

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MAHLON WICKWAY BEACH AND OTHERS, EXECUTORS OF THE ESTATE OF MAHLON FORD BEACH (PLAINTIFFS).... APPELLANTS;

*Nov. 3, 4.
*Dec. 1.

AND

THE HYDRO ELECTRIC POWER COMMISSION OF ONTARIO (DEFENDANT) ..... RESPONDENT;

AND

IN THE MATTER OF A CERTAIN ACTION WHEREIN MAHLON WICKWAY BEACH AND OTHERS ARE PLAINTIFFS, AND THE HYDRO ELECTRIC POWER COMMISSION OF ONTARIO ARE DEFENDANTS;

AND

IN THE MATTER OF AN ARBITRATION BETWEEN THE SAID PARTIES PURSUANT TO AN AGREEMENT TO REFER THE MATTERS IN QUESTION IN SAID ACTION TO J. M. ROBERTSON, ESQUIRE.

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

*Electric power—Power supplied to Hydro Electric Power Commission of Ontario—Dispute as to price—Suit against Commission—Attorney General's consent—Power Commission Act, R.S.O., 1914, c. 39, s. 16—Agreement by counsel to refer to arbitration—Counsel's authority—Resulting award not authorized by a reference to which counsel empowered to consent.*

Plaintiffs supplied power to defendant, the Hydro Electric Power Commission of Ontario, the price not being fixed. Plaintiffs claimed at the rate of $16 per h.p. Defendant paid at the rate of $12. Plaintiffs sued for $8,190.78, as the balance due, at the $16 rate, having obtained, on 30th January, 1922, the Attorney General's consent, pursuant to s. 16 of *The Power Commission Act* (R.S.O., 1914, c. 39), to bring an action "to recover the sum of $8,190.78, being the balance alleged to be due * * * for electric power supplied * * *." Before trial counsel agreed to refer the matters in question to an arbitrator, the plaintiffs not to be prejudiced "by any claim made by them in the writ of summons or pleadings in this action." The arbitrator awarded plaintiffs $51,861.75, taking into consideration an alleged element of compulsion, and basing his award on his estimate of cost to plaintiffs plus reasonable profit. Defendant moved to set aside the award, and

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

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plaintiffs sued on the award, having obtained the Attorney General's consent, dated 20th April, 1923, to bring an action "to recover the sum alleged to be due * * * for electric power supplied. * * * This consent is to be deemed to have been given as of the 30th day of January, 1922."

*Held,* having regard to s. 16 of *The Power Commission Act* and the terms of the Attorney General's consent to the first action, defendant's counsel had not authority to compromise by imposing on defendant, directly or indirectly, any liability greater than $8,190.78, or any liability to be determined otherwise than by ascertaining what a fair price would be on the basis (as contemplated by the consent and presented in the pleadings) of a legal right arising from the supply and acceptance of power under a voluntary agreement; and the award could not be supported as authorized by a reference to which counsel was empowered to consent; the Attorney General's consent to the second action did not enlarge retrospectively the scope of the first action and counsel's authority therein.

Judgment of the Appellate Division of the Supreme Court of Ontario (57 Ont. L.R. 603) and of Wright J. (56 Ont. L.R. 35) affirmed in the result.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming in the result the judgment of Wright J. (2) allowing the defendant's motion to set aside an arbitrator's award, and dismissing the plaintiff's action upon the award.

The proceedings taken by the defendant by way of motion to set aside the award and by the plaintiffs by way of action to enforce the award were, by order of the Appellate Division, consolidated.

In 1915 Mahlon Ford Beach, deceased, the owner of a power plant, had a contract with the Rapids Power Co., Ltd., for the supply by Beach of electric power for one year, which expired on 31st March, 1916. The Rapids Power Co., Ltd., transferred its rights under this contract to the Hydro Electric Power Commission of Ontario, the defendant. At the expiration of the contract, negotiations were entered into for continuing the supply of power, but these negotiations failed to result in an agreement. It would appear that Beach desired a ten year contract at $16 per h.p., but the defendant was unwilling to pay more than $12. Without any definite agreement Beach, and after his death his executors, the plaintiffs, continued to

(1) (1925) 57 Ont. L.R. 603. (2) (1924) 56 Ont. L.R. 35.

supply power to 1st May, 1919. The defendant was from time to time billed at $16 per h.p., but paid only at the rate of $12 without admitting further liability, nor, on the other hand, was there any admission of the sufficiency of the payments. Negotiations to settle the price failed, and the plaintiffs determined to enforce the claim by action. Faced with the provisions of *The Power Commission Act*, R.S.O., 1914, c. 39, s. 16, which reads

> Without the consent of the Attorney General no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office.

they applied to the Attorney General for his consent, and a written consent, dated 30th January, 1922, was given, headed "In the Supreme Court of Ontario—In the matter of a proposed action" between the plaintiffs and the defendant, and reading as follows:

> Pursuant to the provisions of the Revised Statutes of Ontario, 1914, chapter 39, section 16, I hereby consent to Mahlon Wickway Beach, Benson Clothier Beach and Charles Asa Beach, executors of the estate of M. F. Beach of * * * bringing an action against the Hydro Electric Power Commission to recover the sum of $8,190.78, being the balance alleged to be due said estate for electric power supplied by said estate to The Hydro Electric Power Commission of Ontario.

Thereupon the plaintiffs issued a writ against the Commission claiming a balance due of $8,190.78, calculated at the rate of $16 per h.p. (It would appear that plaintiffs' counsel intended to move to amend by claiming a larger sum).

Before the trial of the action, an agreement was made between counsel for plaintiffs and defendant as follows:

> The parties hereto agree to settle and compromise this action upon the following terms and conditions.
>
> 1. The parties have agreed that the matters in question in this action shall be referred to J. M. Robertson of the city of Montreal, engineer, to determine what reasonable and just price shall be paid to the plaintiffs for the power furnished by them to the defendants from April 1, 1916, to May 1, 1919, and to fix the amount due the plaintiffs by the defendants after deducting the sum already paid the plaintiffs by the defendants.
>
> 2. It is understood and agreed between the parties hereto that in determination of these matters the plaintiffs shall not be prejudiced by any claim made by them in the writ of summons or pleadings in this action.
>
> * * *
>
> 4. It is understood between the parties that the provisions of the Ontario Arbitration Act, R.S.O., 1914, chapter 65, do not apply herein and the said arbitrator herein may proceed informally and if he so desires is not required to take evidence under oath.

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5. The decision of the said arbitrator shall be final and binding upon both parties.

An arbitration was accordingly had, and an award was made, dated February 15, 1923, for the payment by defendant to plaintiffs of $42,249.70 and interest, making in all $51,861.75. The arbitrator took into consideration an alleged element of compulsion in the supply of power, and held that the basis of Beach's remuneration should be the cost to him plus a reasonable profit, and based his award accordingly, taking into account what he considered to be the various elements, and the amounts in regard thereto, that should be included in estimating the cost of the supply of power.

The defendant disputed the validity of the award and moved to set it aside, and the plaintiffs, having procured a consent of the Attorney General, brought this action to recover the amount of the award. The Attorney General's consent just mentioned was dated 20th April, 1923, it was headed "In the Supreme Court of Ontario—In the matter of a proposed action" between the plaintiffs and the defendant, and read as follows:

> Pursuant to the provisions of the Revised Statutes of Ontario, 1914, chapter 39, section 16, I hereby consent to Mahlon Wickway Beach, Benson Clothier Beach and Charles Asa Beach, executors of the estate of M. F. Beach, of * * * bringing an action against the Hydro Electric Power Commission of Ontario to recover the sum alleged to be due said estate for electric power supplied by said estate to the Hydro Electric Power Commission of Ontario.
>
> This consent is to be deemed to have been given as of the 30th day of January, 1922.

Both the motion to set aside the award and the action upon it came on before Wright J., who allowed the defendant's motion, and dismissed the plaintiffs' action, on the ground that the arbitrator erred both in fact and in law, and that such error appeared upon the face of the award (1). An appeal from his judgment was dismissed by the Appellate Division (2) on the grounds that the consent given by the Attorney General dated 30th January, 1922, would not justify an action for a larger sum than that therein mentioned; that there was no power to settle the action by agreeing to a proceeding which might in the result

(1) 56 Ont. L.R. 35.

(2) 57 Ont. L.R. 603.

compel the payment of a much larger sum; that the reference to arbitration was *ultra vires* and the award a nullity *ab initio;* that this nullity was not given life by the terms of the Attorney General's consent of 20th April, 1923; that, even were the submission to arbitration valid and the arbitrator allowed by law to make a valid award, the award could not stand, for, without deciding whether or not the arbitrator based his award upon a mistake of fact, it was obvious that he "approached the consideration of the questions to be decided from a wrong angle * * *."

The plaintiffs appealed to the Supreme Court of Canada.

*G. F. Henderson K.C., J. M. Godfrey K.C.* and *L. W. Mulloy* for the appellants.

*W. N. Tilley K.C.* and *Sir W. H. Hearst K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—This appeal seems to fail upon a ground which can be stated at no great length.

The authority of counsel for the Commission to compromise the first action cannot be ascertained without reference to s. 16 of *The Power Commission Act* and the terms of the consent given under that enactment. By the enactment, the consent of the Attorney General was a necessary condition of the right to bring the action. The consent given was strictly limited, first, as to amount; and secondly, as to the character of the claim. The claim contemplated was a claim of a sum "alleged to be due said estate for electric power supplied by said estate" to the Commission, and it was a claim for the sum of $8,190.78.

Obviously, the claim authorized to be put in suit was one based upon a legal right arising from the supply and acceptance of power. As presented in the pleadings, the actual claim was for the sum mentioned, and it was based upon an alleged agreement to pay $16 per h.p. for power supplied; the defendants denying that there was any express agreement as to the price, and alleging that a fair price was $12 per h.p. Admittedly, the issue on the plead-

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Duff J.

ings was what price (limited by the maximum of $16) was a fair price to pay for power supplied under an agreement between the parties, the price for which was not fixed. It seems too clear for argument that in these circumstances counsel for the Commission (regard being had to s. 16 of *The Power Commission Act* and to the terms of the Attorney General's consent) was not endowed with authority to compromise by imposing on the Commission, directly or indirectly, any liability greater than the sum named, or any liability to be determined otherwise than by ascertaining what a fair price would be on the footing mentioned. He could have no authority, for example, to consent to the determination of that liability on the footing that the purchase was a compulsory purchase, or to the enhancement of the liability by reference to some circumstance of coercion or intimidation supposed to have the effect of bringing into play rules and principles inapplicable in the case of a sale by voluntary agreement.

Yet this is precisely what is done by the award, which proceeds professedly upon the reference to arbitration to which counsel agreed by way of compromise of the action. The award, therefore, cannot be supported as authorized by a reference to which counsel was empowered to consent.

Nor does there appear to be any basis for a finding of ratification. The subsequent consent of the Attorney General (of April 20, 1923) has been invoked as a consent to the present action, and necessarily so; otherwise the action must have failed for want of compliance with s. 16. It cannot at the same time serve to enlarge retrospectively the scope of the earlier action and the authority of counsel engaged in that action.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Godfrey, Lawson & Corcoran.*

Solicitors for the respondent: *Hearst & Hearst.*

CALEDONIAN COLLIERIES, LIMITED (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING, IN THE RIGHT OF THE PROVINCE OF ALBERTA, AS REPRESENTED HEREIN BY THE PROVINCIAL SECRETARY IN AND FOR THE PROVINCE OF ALBERTA (PLAINTIFF) ..... RESPONDENT.

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*Oct. 13, 14.
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*Feb. 1.

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

*Constitutional law—The Mine Owners Tax Act, 1923, c. 33, Alta.—Indirect taxation—Ultra vires.*

The tax imposed by *The Mine Owners Tax Act, 1923*, Alta. (c. 33), upon the gross revenue received by every coal-mine owner from his mine, is an indirect tax, and, therefore, *ultra vires*.

Judgment of the Appellate Division of the Supreme Court of Alberta (22 Alta. L.R. 245) reversed.

APPEAL by the defendant company from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming (Clarke J.A. dissenting) the judgment of Simmons C.J. (2) in favour of the plaintiff.

The action was brought to recover from the defendant, under *The Mine Owners Tax Act, 1923*, Alta. (c. 33), and an Order in Council of 14th August, 1925, a tax of 2 per cent. of the gross revenue received by the defendant from its mine. The defendant alleged that the tax imposed was an indirect tax and therefore *ultra vires* of the province, under *The B.N.A. Act*.

S. 3 of *The Mine Owners Tax Act, 1923*, provides that every mine owner shall from the last day of May, 1918, be subject to a tax upon the gross revenue received by him from his mine. S. 4 provides that the tax shall not be more than 2 per cent. of the said revenue and as determined by the Lieutenant-Governor in Council under the provisions of the Act. By s. 2 "mine" is, in effect, defined as a coal

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

(1) 22 Alta. L.R. 245; [1926] 2 W.W.R. 280.

(2) [1926] 1 W.W.R. 96.

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mine, and "mine owner" is, in effect, defined as the immediate proprietor, lessee, licensee or occupier of any mine, as distinguished from an owner not actually operating the mine.

The Order in Council fixed the rate at 2 per cent.

*H. S. Patterson* for the appellant.

*J. J. Frawley* for the respondent.

The judgment of the court was delivered by

DUFF J.—It is not disputed that, as a rule, the "gross revenue" upon which the impeached tax is levied is merely the aggregate of sums received from sales of coal. In substance, the tax does not differ from a tax levied upon every sum received from the sale of coal. In the ordinary course there could be no doubt that allowance would be made for it in the price charged, and that it would, almost in its entirety, be borne by the purchasers of coal. To label the tax as an income tax does not affect the substance of the matter. We are constrained by a long series of well known decisions to hold that the legislation is *ultra vires*.

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

*Appeal allowed with costs.*

Solicitor for the appellant: *H. S. Patterson.*

Solicitor for the respondent: *J. J. Frawley.*

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*Feb. 24.

HIS MAJESTY THE KING.....APPELLANT;

AND

ARTHUR BELLOS .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Criminal law—Evidence—Statements by accused at time of arrest—Admissibility in evidence*

At a trial on a charge of committing assault occasioning actual bodily harm, the constable who arrested accused gave evidence for the Crown to the effect that, at the time of the arrest, having cautioned accused,

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

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and accused having stated that he had not been out since twelve o'clock that night, he called accused's attention to the condition of his hat, and accused said he had not worn that hat the night the offence was committed; the constable also called accused's attention to a scrape on his arm, and accused said it was an old mark, whereas the constable testified that it was fresh.

*Held,* reversing judgment of the Court of Appeal for British Columbia ([1927] 1 W.W.R. 471), that the evidence was admissible; the Crown discharged its burden of establishing the voluntary character of the statements of accused, who had been given the customary warning; the mere asking of a question by the constable subsequently, or his directing accused's attention to the subject of one of such statements, did not amount to an inducement or persuasion such as would render the statements inadmissible. *Prosko* v. *The King* (63 Can. S.C.R. 226) referred to.

APPEAL by the Attorney General of the province of British Columbia from the judgment of the Court of Appeal for the said province (1) setting aside the conviction of, and granting a new trial to, the respondent who had been convicted, on trial before Murphy J. and a jury, of committing an assault occasioning actual bodily harm. The ground upon which the Court of Appeal proceeded was that of error in wrongfully admitting evidence.

The evidence of which wrongful admission was claimed was that of a constable of the municipal police of the said province, who arrested the respondent, and who was called at the trial as a witness for the Crown. He testified that on making the arrest he cautioned the respondent and told him that he (the respondent) was not bound to say anything, but that if he did say anything it might be used in evidence against him; the respondent made a statement that he was in bed since twelve o'clock and that he had not been out since twelve o'clock that night; the constable called the attention of the respondent to the condition of the respondent's hat, and the respondent said he had not worn that hat the night the offence was committed, but that he had worn another; the constable also at the same time called the respondent's attention to a scrape on respondent's arm; the constable in his evidence said as to this

* * * There was a scrape on his arm here about one-half inch wide and I would say about two or three inches long as if it had been pushed against something.

(1) [1927] 1 W.W.R. 471.

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Q. Was it recent?—A. Yes. I drew his attention to it and he said that was an old mark, that it had been there a long time, but as a matter of fact it was fresh. It was wet, and there was blood oozing through; it was not cut far enough to let the blood come freely but it was a fresh bruise.

The judgments of the Court of Appeal were delivered orally. In his judgment Macdonald C.J.A. said:

I found my judgment entirely upon the wrongful admission of the evidence which appears at page 99 in the appeal book, where it appears that while the police sergeant said that he warned this man at the time of his arrest yet it further appears that later on, apparently, he called the accused's attention to his hat and to the condition it was in, eliciting a statement with regard to it, but the most serious thing of all was his calling attention to a mark or wound in accused's arm. He says this, "there was a scrape on his arm here about one-half an inch wide and I would say about two or three inches long, as if it had been pushed against something." The accused, according to the Crown's case, had been in a fracas in the rooming house and naturally one would look for wounds and the sergeant did look for wounds and found this "scrape on his arm." And then he says, "Yes, I drew his attention to it and he said it was an old mark that had been there a long time but as a matter of fact it was fresh." What was the probable effect of that? It was practically intimating to the jury that the man had told a direct falsehood to him when he had questioned him at the time of his arrest. That would affect the prisoner's testimony in the witness box, it would affect the credence to be attached to it and it might very well have influenced the jury in finding the verdict which they did find. Therefore, in my opinion, there was a substantial wrong which amounts to a miscarriage of justice and the conviction must be set aside and a new trial ordered.

Martin J.A. agreed upon the ground that what the constable did at the time of the arrest amounted to improper extraction of information, by questions, from the accused, which tended to destroy his defence, which was an alibi. Galliher, McPhillips and Macdonald J.J.A. agreed that there should be a new trial.

Application was made for leave to appeal to the Supreme Court of Canada, on the ground that the judgment of the Court of Appeal conflicted with the judgments of other courts of appeal in like cases. Leave to appeal was granted by Newcombe J. under s. 1024A of the *Criminal Code*.

*J. A. Ritchie K.C.* for the appellant.

No one appeared for the respondent.

Without hearing argument by Mr. Ritchie, the Chief Justice orally delivered the judgment of the court as follows:

"We have all had an opportunity of considering this case, and we are satisfied that the order appealed from is wrong. The evidence in question was properly received at

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the trial. The matter was fully considered here in *Prosko* v. *The King* (1). The Crown discharged its burden of establishing the voluntary character of the statements made by the accused who had been given the customary warning. The mere asking of a question by the officer subsequently, or his directing the accused's attention to the subject of one of such statements, did not amount to an inducement or persuasion such as would render the statements inadmissible. The appeal is allowed and the conviction is reinstated."

*Appeal allowed.*

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

Solicitor for the respondent: *H. Castillon.*

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*Feb. 16.
*Mar. 8.

DAME M. A. GARNEAU (PLAINTIFF).....APPELLANT;

AND

DAME A. DIOTTE (DEFENDANT).....RESPONDENT.

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

*Grant—Seigniory—Ownership of lake non-navigable and non-floatable—Banks—Droits de grève—Right of way—Art. 540 C.C.*

A lake non-navigable and non-floatable may constitute a separate physical subject of possession independently of the lands which surround it; but ownership of the lake so separated does not include *ipso facto* the right of ownership or of enjoyment of the banks (*grèves*) or a right of way over them at all events without paying an indemnity proportionate to any damage caused in exercising it. (Art. 540 C.C.).

The description of a property in a deed of sale as "une terre" does not exclude from it a small lake comprised totally or in part within the limits of the property sold.

Under the law in force in 1752 in the province of Quebec, then known as New France, the grant or cession of a *fief* by the King of France to the *seigneur* invested him with the ownership of all the lakes non-navigable and non-floatable, situated within the ceded territory; but, in this case, the appellant is not entitled to the ownership of the lake claimed by her under a deed of sale executed in 1911 by the representative in succession of the original *seigneur* because that lake had ceased to form part of the seigniory before 1848 when the lands including it had been ceded by the *seigneur*.

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*PRESENT:—Anglin C.J.C. and Duff, Newcombe and Rinfret JJ. and Howard J. *ad hoc*.

(1) (1922) 63 Can. S.C.R. 226.

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By force of the *arrêt* of July 6, 1711, the *seigneurs* were bound to concede lots out of their *fief*, under the system of *cens et rentes*, to those who requested such concessions. Any prohibition or substitution contained in a will having the effect of defeating such obligation was illegal and should be "considered as not written."

APPEAL from the decision of the Court of Kings' Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Surveyer J. and dismissing the appellant's action.

The action brought by the appellant is a petitory action, whereby she asks that she be declared the owner of lac Guindon, its dependencies and shores, with the exclusive right of hunting, fishing, boating and access in and to said lake; that it be declared free from all servitudes in favour of the respondent and her property; and that the respondent be ordered to abandon said lake and pay to the appellant $4,500, for real and exemplary damages.

*Eug. Lafleur K.C. and J. C. Lamothe K.C.* for the appellant.

*Chs. Laurendeau K.C. and C. M. Cotton* for the respondent.

The judgment of the court was delivered by

RINFRET J.—Le lac Guindon, qui fait l'objet de ce litige, est situé dans la paroisse de Saint-Sauveur, comté de Terrebonne, province de Québec. C'est un lac de peu d'étendue: environ quinze arpents de longueur et cinq arpents de largeur. Les parties se sont accordées pour admettre que, au sens de la loi, il n'est ni navigable, ni flottable. Il était connu auparavant sous le nom de lac Bisson et était compris dans l'Augmentation de la seigneurie des Mille-Isles, concédée le 20 janvier 1752 au sieur Dumont, capitaine réformé des troupes de la marine.

L'appelante, se prétendant maintenant propriétaire de ce lac en vertu d'une ligne de titres qu'elle fait remonter à l'octroi primordial du fief, s'est pourvue contre l'intimée par voie d'action négatoire et a conclu que le lac fût "déclaré franc et clair de toute servitude à l'égard de la défenderesse" et, en particulier, des droits "de grève, chasse et pêche, canotage et accès", dont elle réclame pour elle-même le privilège exclusif.

Ce sont des droits dont l'intimée et ses auteurs, en commun avec les autres propriétaires de fermes autour du lac ainsi que leurs prédécesseurs, paraissent avoir joui sans contestation depuis une époque même antérieure à l'Acte seigneurial de 1854. Il convient donc de scruter avec soin et prudence les contrats sur lesquels l'appelante déclare appuyer ses prétentions; car si elle ne peut démontrer qu'elle possède un titre valable, elle ne saurait discuter celui de l'intimée. (*City of Montreal* v. *Ferguson.*) (1).

L'acte de vente dont se réclame l'appelante ne date que du 2 juin 1911. Elle aurait alors acquis de Dame Elizabeth Globensky, épouse de J. A. Sauvé, divers " lacs sis et situés en la paroisse de Saint-Sauveur " avec leurs " îles et îlets ". Quelques-uns y sont désignés par leurs noms et. entre autres, le lac Guindon. L'acte poursuit:

tous les lacs ci-dessus avec droits de chasse et pêche, pouvoirs d'eau, etc., s'y trouvant et non encore vendus; mais ce, sans autre garantie que celle de leurs faits et promesses, ainsi que le tout se trouve présentement avec les servitudes actives et passives, apparentes ou occultes, attachées auxdits immeubles. * * * L'acquéreur, se déclarant satisfait des titres fournis par la venderesse, s'engage à ne jamais exiger plus de garantie à la propriété des lacs et terrains vendus que n'en a reçue ladite venderesse des héritiers de feu C. A. M. Globensky et il promet ne jamais troubler ladite venderesse ainsi que lesdits héritiers de feu C. A. M. Globensky relativement aux titres de propriété desdits lacs et desdits terrains et du tout susvendu. De plus l'acquéreur s'engage de soutenir à ses frais et dépens toutes procédures ou contestations que des tiers pourraient soulever concernant le droit de propriété de ce que présentement vendu.

Naturellement, l'appelante a produit, en outre, la suite des titres de ses auteurs, mais c'est uniquement dans son contrat à elle qu'il faut chercher les droits qui lui ont été cédés. Elle a donc acquis le lac Guindon (N.B. Il n'apparaît nulle part qu'il s'y trouve des " îles et îlets " ou des " pouvoirs d'eau ") avec droits de chasse et de pêche. Cela veut dire: le lac à son niveau ordinaire (art. 422 C.C.). L'appelante n'a, en vertu de son titre, acquis aucun terrain autour du lac Guindon, ni droit de grève, ni droit d'accès.

Un lac non navigable et non flottable comme celui-ci, seul et considéré comme entité distincte de ses rives, peut faire partie du domaine privé d'un particulier; il peut être l'objet d'un droit de propriété indépendant des terrains qui l'environnent; mais cela n'emporte pas par le fait même la

(1) (1925) S.C.R. 224, at p. 232.

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propriété ou l'usage des grèves, non plus que le droit d'accès. Même si le propriétaire peut se prévaloir de la servitude résultant de l'enclave, il ne pourra exiger un passage qu'à " la charge d'une indemnité proportionnée au dommage qu'il peut causer " (art. 540 C.C.). C'est dire que l'appelante ne peut, en vertu d'un contrat qui la déclare propriétaire du seul lac Guindon, nier aux riverains le droit de grève ou le droit d'accès. C'est plutôt la proposition contraire qui serait vraie.

Ce contrat, cependant, dans ses termes, lui confère la propriété du lac. Il lui accorde, en plus, expressément les droits de chasse et de pêche. Cette mention spéciale n'était pas nécessaire. Le droit de chasse, le droit de pêche et le droit de canotage sont des attributs de la propriété (Picard, Traité des Eaux, vol. 4, p. 205; *Fraser* v. *Fraser* (1). Le Conseil Privé a décidé que le droit de pêche pouvait faire l'objet d'une concession séparée (" a separate physical subject of possession "). *Matamajaw Salmon Club* v. *Duchaîne* (2). Mais le principe général, en dehors des lois spéciales ou des conventions distinctes, veut que tous ces droits (pêche, chasse, canotage) appartiennent à celui qui a la jouissance du domaine: terre, lac ou cours d'eau.

L'acte que lui a consenti Dame Elizabeth Globensky justifierait donc l'appelante de réclamer des droits exclusifs de chasse, de pêche et de canotage sur le lac Guindon si, au moment de la convention, ces droits étaient, suivant le langage même de l'acte, " non encore vendus ".

Or, le 21 novembre 1848, Dame Marie Elmire Lambert Dumont (Madame Pierre Laviolette), seigneuresse de la Seigneurie de l'Augmentation des Mille-Isles, a concédé à titre de cens et rentes fonciers à Martin Paquette, cultivateur de Saint-Jérôme, une propriété ainsi décrite:—

Une terre située au nord-ouest de la rivière du Nord, en ladite seigneurie de l'Augmentation des Mille-Iles, en la susdite paroisse de Saint-Jérôme, de forme irrégulière, enclavée dans la largeur de six terres ladite rivière du Nord. Savoir par les no—quarante-six quarante-sept quarante-huit quarante-neuf cinquante cinquante et un où elle tient par devant et par derrière au cordon de compensation qui sépare le surplus de terrain compris entre ledit cordon le lac Bisson et les six terres ci-haut mentionnées d'un côté au nord, tenant dix arpents et neuf perches à nº 52 et de

(1) 1893) Q.R. 2 K.B. 215, at p. 219.

(2) (1921) 2 A.C. 426.

l'autre côté environ trois arpents au flanc lac Germain, mais il faut comprendre que la plus grande partie du lac Bisson s'étend sur le terrain.

Cette dite terre contient une superficie de cent arpents plus ou moins, conformément au procès-verbal de bornage d'icelle par Mtre Emery Féré, arpenteur juré, en date du trois avril dernier à l'instant remis au preneur.

Le procès-verbal de bornage de M. Féré avait été requis par Dame Marie Elmire Lambert Dumont, par le tuteur de Demoiselle Virginie Lambert Dumont et par Martin Paquette " aux fins de mesurer et borner " la propriété qu'il s'agissait de concéder. La désignation insérée à l'acte est en termes identiques à ceux du procès-verbal, sauf que la ponctuation la rend plus claire:—

une concession de forme irrégulière, enclavée dans la largeur de six terres de la rivière du Nord savoir: par les nos 46, 47, 48, 49, 50 et 51 où elle tient par devant, par derrière au cordon de compensation qui sépare le surplus de terrain compris entre ledit cordon, le lac Bisson et les six terres mentionnées, d'un côté au nord tenant dix arpents et neuf perches au no 52 et de l'autre côté environ trois arpents au flanc du lac Germain, mais il faut comprendre que la plus grande partie du lac Bisson s'étend sur le terrain. Or, ladite concession ainsi désignée forme par les lignes qui fixent son contour à part de l'entrée du lac Bisson sur le terrain une superficie de cent arpents plus ou moins.

La description de la propriété dans l'acte comme étant " une terre " n'a pas pour effet d'éliminer le lac Bisson. Le mot " terre " n'est pas employé ici par opposition au mot " eaux ". Il n'a pas pour but d'exclure les eaux. Il veut dire " concession ", et c'est d'ailleurs le terme dont se sert à deux reprises le procès-verbal. L'acte lui donne ce même sens un peu plus bas dans la description lorsqu'il réfère aux " six terres de ladite rivière du Nord ". Encore à l'époque actuelle, dans le langage usuel de la province de Québec, on parle d'un lot ou d'une ferme comme étant une *terre*.

Cela n'empêche pas (comme le dit M. le juge Dorion) qu'un lac de peu d'étendue peut parfaitement être compris dans les bornes d'un lot et en former partie sans même qu'il soit nécessaire de le mentionner expressément.

C'est là d'ailleurs ce qui s'est produit pour la concession primordiale du fief lui-même à M. Dumont. Ce document ne contient aucune référence aux lacs, aux rivières ou aux cours d'eau. Il résulte cependant de la réponse de la Cour Seigneuriale à la vingt-huitième question que celles de ces eaux qui étaient non navigables ni flottables et qui traversaient le fief ou qui s'y trouvaient totalement ou partiellement situées " appartenaient au fief et en faisaient partie " à moins qu'elles ne fussent exclues par le titre. Par l'ac-

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censement, le censitaire devenait de la même manière propriétaire des eaux non navigables ni flottables qui se trouvaient dans sa concession et il acquérait " la possession et les profits de ces eaux dans les limites de cette concession " (Cour Seigneuriale, Réponses aux questions 29 et 32, Lower Canada Reports, vol. A, pp. 72a et 74a).

La propriété vendue à Martin Paquette, même sous la désignation " une terre ", comprenait donc les eaux non navigables ni flottables " qui s'y trouvaient totalement ou partiellement situées " à moins d'exclusion dans le titre.

Or, l'arpenteur, dans son procès-verbal, et les parties, dans l'acte de vente, ont donné les lignes qui fixent le contour de la concession; elle est enclavée entre les six terres de la rivière du Nord portant les numéros 46, 47, 48, 49, 50 et 51, " où elle tient par devant ", le cordon de compensation qui la borne par derrière, le numéro 52 qui la limite au nord et le flanc du lac Germain qui la borne de l'autre côté. La description ne mentionne le lac Bisson qu'en rapport avec le surplus de terrain qui aboutit au cordon de compensation. Elle ne réfère pas au lac Bisson pour délimiter la concession. Elle dit, au contraire, " que la plus grande partie du lac Bisson s'étend sur le terrain ".

Comme le fait remarquer M. le juge Dorion en Cour du Banc du Roi:—

> La concession comprend donc une partie du lac Guindon, puisque la plus grande partie de ce lac s'étend sur le terrain. Mais l'acte dit que la terre concédée contient cent arpents conformément au procès-verbal, et le procès-verbal dit qu'elle forme cette superficie de cent arpents à part de l'entrée du lac sur le terrain. Le lac est donc exclu de la mesure des cent arpents qui sont concédés, mais il n'est pas exclu du terrain concédé * * * il y est expressément compris puisqu'il s'y étend.

Cependant, pour les fins de ce litige, ce qu'il faut surtout remarquer, c'est que le procès-verbal et l'acte déclarent tous deux que la terre ou concession à Martin Paquette " tient pardevant " à des lots de terre de la rivière du Nord qui avaient déjà été concédés par le seigneur et qui sont désignés sous les numéros 46, 47, 48, 49, 50 et 51. Or, l'appelante a versé au dossier le

> plan de la nouvelle concession dans la partie de l'augmentation de la seigneurie des Mille-Isles appartenant aux héritiers Dumont,

signé par M. Godfroi Laviolette. Si l'on examine ce plan, l'on voit que le lac Bisson est complètement encerclé par le terrain de la concession faite à Martin Paquette et celui des

lots numéros 47, 48 et 49. Une partie des numéros 47 et 49 se rend jusqu'au terrain de la concession Paquette; mais le numéro 48 ne s'y rend pas. Le lac sépare tout le terrain du numéro 48 du terrain de la concession faite à Paquette.

Cependant le procès-verbal et l'acte disent que la concession Paquette " tient pardevant " entre autres aux numéros 47, 48 et 49. Elle s'étend jusqu'à la ligne de ces numéros; aucun territoire intermédiaire n'est retenu par la seigneurie. Il est donc impossible de donner effet à cette description sans comprendre tout le lac Bisson dans la concession à Paquette et les autres concessions antérieures des lots numéros 47, 48 et 49.

La description pourrait laisser entendre que le lac Bisson tout entier est compris dans la concession Paquette (puisque cette dernière s'étend jusqu'à la ligne des terres déjà concédées et qui portent les numéros 47, 48 et 49), si le procès-verbal et l'acte ne disaient pas que le lac Bisson ne s'étend qu'en partie (" la plus grande partie ") sur le terrain. Il résulte de cette indication que les lignes de division de la concession Paquette d'une part et des numéros 47, 48 et 49 d'autre part doivent se rencontrer sous le lac Bisson ou Guindon. Entre la terre vendue à Paquette et les terres de la rivière du Nord qui, d'après la désignation tant dans le procès-verbal que dans l'acte, se rejoignent, il ne subsiste aucun territoire résiduaire pour la seigneuresse; or, si le territoire dont il s'agit avait été alors concédé, il s'ensuit que les droits qui sont les attributs de la propriété l'avaient été également.

On peut donc conclure que, dès le 21 novembre 1848, le lac Bisson ou Guindon, ainsi que les droits de chasse, de pêche et de canotage sur ce lac, étaient sortis du domaine utile des seigneurs de l'Augmentation des Mille-Isles, et que, par conséquent, l'appelante, qui prétend tenir son titre des héritiers descendants de ces seigneurs, n'a pu acquérir valablement ni le lac Guindon, ni les droits qu'elle réclame sur ce lac. Martin Paquette et les propriétaires des terres 47, 48 et 49 détiennent du même auteur par concession antérieure, et la question de priorité d'enregistrement ne se pose même pas (arts. 1027 et 2098 C.C.).

C'est bien ainsi d'ailleurs que, en 1848, et dans les années qui suivirent, les parties ont compris leurs titres. On a

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l'habitude de dire, et il est de jurisprudence, que la façon dont les parties exécutent elles-mêmes les obligations d'un acte est l'un des moyens les plus sûrs d'en saisir la portée et l'intention. Toute la preuve démontre qu'après la concession faite à Martin Paquette, ce dernier et ses successeurs ont eu, sans être molestés par les seigneurs ou par qui que ce soit, la jouissance sur le lac Guindon de tous les droits que l'appelante entendait leur nier par les procédures qu'elle a intentées.

L'objection soulevée contre la validité de l'acte de vente à Martin Paquette nous paraît avoir trouvé sa juste solution dans le jugement de la Cour du Banc du Roi.

Le testament de Louis-Eustache-Lambert Dumont, en date du 11 octobre 1805, léguait la propriété de sa seigneurie aux petits-enfants de ses enfants mineurs, Nicolas-Eustache-Lambert Dumont et Marie-Louise-Angélique-Lambert Dumont. Il défendait à ses légataires de vendre, engager, ni aliéner aucune partie de sa seigneurie. Ses enfants et ses petits-enfants ne devaient avoir que la jouissance de leurs parts et portions héréditaires, avec substitution en faveur des arrières petits-enfants.

A la date de la concession Paquette, la seigneurie était en la possession de Marie-Elmire-Lambert Dumont (Madame Laviolette) et Virginie Lambert Dumont, alors mineure, était appelée au deuxième degré comme arrière petite-fille de Louis-Eustache-Lambert Dumont.

Le tuteur de cette dernière est mentionné par l'arpenteur Féré dans son procès-verbal comme ayant participé à la réquisition du bornage.

La défense d'aliéner et la substitution créée par le testament peuvent s'interpréter comme s'appliquant seulement au domaine direct de la seigneurie, abstraction faite du domaine utile. Mais si elle avait pour but d'empêcher les successeurs et héritiers de Louis-Eustache-Lambert Dumont de faire des concessions du domaine utile " quand de ce requis " cette prohibition eut été alors illégale et considérée comme non écrite (art. 760 C.C.).

La concession des terres en fiefs et seigneurie au Canada a, par l'arrêt du 6 juillet 1711,

rendu obligatoire pour les seigneurs la concession de ces terres à des habitants pour les mettre en culture. Les anciennes lois de pays, antérieures à la cession à la Grande-Bretagne, imposaient aux propriétaires de fiefs et seigneuries l'obligation de concéder leurs terres à titre de redevances,

quand ils en étaient requis, et cette obligation limitait l'exercice de leurs droits dans la disposition de ces terres.

C'est là le texte des réponses de la Cour Seigneuriale aux questions 7 et 9 qui lui furent posées. (Lower Canada Reports, vol. A, pp. 54 (a) et 56 (a).). La Cour Seigneuriale a décidé que ces lois étaient d'ordre public (Réponses aux questions 18, 19 et 20; *loc. cit.* pp. 63a et 64a). Les réponses de la Cour Seigneuriale sont décisives et ont la force de chose jugée par un tribunal de dernier ressort sur le point soulevé par cette question dans des cas semblables, quoique entre des parties différentes (22 Vic., c. 3, s. 16, par. 9).

Il y a, cependant, pour maintenir la validité des droits de Martin Paquette, une raison additionnelle. L'acte seigneurial de 1854 pourvoit à la confection du cadastre des seigneuries par un commissaire nommé par le gouverneur. Le propriétaire ou possesseur de la seigneurie pouvait paraître soit en personne, soit par son agent, devant le commissaire afin de faire corriger toute erreur qui pourrait se glisser dans ce cadastre. Ce cadastre était fait en triplicata; et, après qu'il était complété, un exemplaire était transmis au Receveur-Général de la province, un autre était déposé au greffe de la Cour Supérieure du district, et le troisième restait sous le contrôle du commissaire. Avis public de tel dépôt était alors donné, après quoi, dit la loi (art. 14):—

tout censitaire de ladite seigneurie possédera, en vertu d'icelui (le cadastre) son fonds en franc alleu roturier, libre et franc de tous cens, lods et ventes, droits de banalité, droits de retrait et autres droits * * * de quelque espèce qu'ils soient, excepté la rente constituée qui sera substituée à tous droits et charges seigneuriaux.

Puis est venu l'acte de 1855 (18 Vic., c. 103), qui a amendé l'Acte Seigneurial de 1854, et dont l'article 11 s'exprime comme suit:—

Pour les fins dudit acte, toute personne qui occupe ou possède une terre dans une seigneurie avec la permission du seigneur, ou de qui le seigneur aura reçu des rentes ou autres redevances seigneuriales à raison de cette terre, sera censée en être propriétaire comme censitaire.

En 1854 et 1855, Martin Paquette occupait encore et possédait, avec la permission du seigneur, la terre qui lui avait été concédée en 1848. Son nom est entré au cadastre de la partie de l'Augmentation de la seigneurie des Mille-Isles qui fut confirmé et maintenu par la Cour de Revision des Cadastres en vertu de l'Acte Seigneurial et de ses amendements. Il avait toujours payé jusque-là ses redevances

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seigneuriales à raison de cette terre; et quels que fussent les défauts de son titre, il est donc censé en avoir été dès lors le propriétaire comme censitaire en vertu des lois de 1854 et 1855.

D'ailleurs, l'appelante a produit au dossier le livre terrier des seigneurs de l'Augmentation des Mille-Isles; et, au numéro 508 (correspondant à celui du cadastre seigneurial) les seigneurs successeurs de Dame Marie-Elmire-Lambert Dumont (Madame Laviolette) et de Demoiselle Virginie Lambert Dumont (l'appelée à la substitution lors de la vente à Paquette), et les auteurs de qui l'appelante prétend tenir son titre, ont reconnu la qualité de propriétaire des successeurs de Martin Paquette et ont entré dans ce livre successivement le nom de Eugène Paquette et celui de Elie Guindon. Le livre terrier fait voir en même temps que la rente a été ponctuellement payée aux seigneurs.

Martin Paquette a donc bien été reconnu, tant par la loi de 1855 que par les seigneurs successifs, comme étant le propriétaire indiscutable de la concession qui lui fut faite par l'acte du 21 novembre 1848. Et comme nous avons conclu, en outre, que cette concession jointe à celle des terres numéros 47, 48 et 49 de la rivière du Nord avait fait sortir le lac Bisson ou Guindon du domaine utile de la seigneurie de l'Augmentation des Mille-Isles, il s'ensuit que ce lac n'a pu être cédé et transmis à l'appelante par l'acte qu'elle a obtenu de Dame Elizabeth Globensky le 2 juin 1911 et que le jugement de la Cour du Banc du Roi, qui l'a déboutée des conclusions de son action, doit être confirmé avec dépens.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Lamothe, Gadbois & Charbonneau.*

Solicitor for the respondent: *Chas. M. Colton.*

JACK PONG (DEFENDANT).....APPELLANT; 1927

AND *Feb. 23, 24.

LUM QUONG AND LUM CHONG (PLAINTIFFS) ..... } RESPONDENTS;

AND

MRS. W. J. THOMSON (DEFENDANT).....RESPONDENT.

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

*Trust—Procuring of new lease by former partner—Assignment thereof to those continuing the business on the premises—Covenants in assignment—Rights between the parties as to acquisition of further lease—Implied trust—Question of estoppel by res judicata—Effect of judgment in overholding tenants proceedings—Jurisdiction of judge in such proceedings—The Landlord and Tenant Act, R.S.O., 1914, c. 155.*

P. and others had, as partners, conducted a laundry business on leased premises. The partnership was dissolved, the others continuing the business on the premises. P. procured from the landlord a new lease dating from the expiry of the existing one. As a result of litigation, P., for a certain sum, assigned to the others the new lease, covenanting that the assignees might "hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor." The lease had no provision for renewal. Before its expiry P. procured from the landlord a further lease dated from the expiry of the existing one. Plaintiffs, the aforesaid assignees or their successors in interest, sued for a declaration that P., the defendant, was a trustee of the lease for them, and for other relief.

*Held,* affirming judgment of the Appellate Division, Ont. (56 Ont. L.R. 616) that P. held the lease as trustee for plaintiffs; his obtaining it was a breach of good faith and contravened an implied obligation with regard to renewals; the allusion to renewal in the assignment must be taken to refer to the reasonable expectation of the tenants in possession to obtain a renewal; *Griffith* v. *Owen* ([1907] 1 Ch. 195) applied.

*Held* further, that plaintiffs were not estopped by *res judicata* by reason of certain overholding tenants proceedings (under *The Landlord and Tenant Act,* R.S.O., 1914, c. 155) and judgment therein; in such proceedings the judge had no jurisdiction to adjudicate as to the relations between Pong and plaintiffs.

APPEAL by the defendant Pong from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which (reversing order of Mowat J.) declared that said

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

(1) (1925) 56 Ont. L.R. 616.

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defendant was trustee for the plaintiffs of a certain lease, and ordered that he assign it to the plaintiffs.

The plaintiff Quong and the defendant Pong were members of a firm carrying on a laundry business on premises leased from the defendant Mrs. Thomson. Mrs. Thomson had leased the premises to Pong in his own name for a term of three years from 1st March, 1916. Before the expiry of this lease, the partnership was dissolved (in November, 1917). Pong, in June, 1918, acquired a lease of the property in his own name for a period of five years, commencing on 1st March, 1919 (at the expiry of the first term). Litigation followed. A judgment of Winchester Co. C.J. contained an alternative direction that Pong should assign the lease to Quong and his co-partner in consideration of $600 to be paid to him. The lease was accordingly assigned, and in the assignment it was provided that the assignees might

> hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor.

The lease did not contain any provision for renewal. Before the expiry of the lease, Pong procured from Mrs. Thomson a further lease of the premises for six years from 1st March, 1924 (the date of expiry of the existing lease). The plaintiffs, Quong and his co-partner Chong (who was the successor in interest of Quong's former co-partner Lum Lin), remained in possession after 1st March, 1924, being willing to assume the burden of the new lease (which was at an increased rental), and claiming the right to the benefit of it. They continued to pay rent which was taken by Mrs. Thomson without prejudice. The latter took proceedings under the overholding tenants provisions of *The Landlord and Tenant Act,* R.S.O., 1914, c. 155. The proceedings came on before His Honour, Judge Denton, of the County Court of the County of York. It was apparently agreed that the hearing should proceed on the basis of the assumption that rent from the plaintiffs had not been accepted by Mrs. Thomson; in other words, that, if Quong and Chong were not entitled to the benefit of the lease made to Pong, she should not be prejudiced in the proceedings by having taken rent from Quong and Chong. It appeared that the real dispute was between Pong on the one hand, and Quong

and Chong on the other, as to the right to the lease. There was some discussion, and, apparently, misunderstanding, as to the question of jurisdiction, and consent in regard thereto, which is referred to in the judgment now reported.

His Honour, Judge Denton, held that the lease acquired by Pong was not a renewal, in any sense, of the former lease, and made an order for possession against the present plaintiffs. The latter appealed to the Appellate Division of the Supreme Court of Ontario, which dismissed the appeal without written reasons. See the reference to this appeal in the judgment now reported.

The plaintiffs then brought the present action in the Supreme Court of Ontario, claiming a declaration that the defendant Pong was a trustee for the plaintiffs of the lease, and that it should be assigned to them, and for an injunction restraining him from assigning the lease to any person other than the plaintiffs, and for an injunction restraining the defendant Mrs. Thomson from evicting them.

The plaintiffs' motion for an interlocutory injunction was dismissed by Mowat J. The plaintiffs appealed to the Appellate Division of the Supreme Court of Ontario. By consent of counsel, the motion was turned into a motion for judgment and the case was heard upon the merits. The Appellate Division allowed the appeal, holding that the defendant Pong was a trustee of the lease for the plaintiffs, and that the lease should be assigned by Pong to the plaintiffs, who should covenant to indemnify him against the lessee's covenants contained therein (1).

The defendant Pong appealed to the Supreme Court of Canada. His two main grounds of appeal were: (1) That plaintiffs were estopped by *res judicata* by reason of the overholding tenants proceedings above mentioned and the judgment of Denton Co. C.J. therein, sustained by the Appellate Division; and (2) That, on the merits, the Appellate Division was wrong in holding that Pong should be deemed a trustee of the lease for the plaintiffs.

*Norman Sommerville K.C.* for the appellant.

*Fraser Raney* for the plaintiffs, respondents.

No one appeared for the defendant (respondent) Mrs. Thomson.

(1) (1925) 56 Ont. L.R. 616.

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At the conclusion of the argument for the appellant, the Chief Justice orally delivered the judgment of the court as follows:

"It is not necessary to call on you, Mr. Raney.

"We have all had an opportunity of considering this case over night, and the position seems to us quite clear.

"The first ground of appeal is that the respondent is estopped from bringing this action by reason of the judgment given in the overholding tenancy proceedings by His Honour, Judge Denton, nominally affirmed on appeal. I say "nominally" for reasons presently to appear.

"Judge Denton's only jurisdiction under the overholding tenants provisions was to determine the right of the landlord to possession. He himself states that in order that he should proceed it was necessary that there must be an admission before him that the rent had not been paid. His jurisdiction was to determine whether or not the landlord was entitled to possession. It was apparently desired that he should deal with issues as to the relationship of Pong and Quong, and determine the rights between them. Mr. Raney consented in some sort of form to that being done, but it would appear that his consent was given on the understanding and basis that the judge should deal with the matter as one within his jurisdiction under the overholding tenants provisions. It is perfectly manifest that he had no jurisdiction to do so—no jurisdiction subject to appeal; that he could entertain such collateral matter only either as *persona designata* or as arbitrator. That being so, the Appellate Division, when the case came before it on appeal from Judge Denton, must have taken the view, as Mr. Raney states, and as the subsequent proceedings bear out, that the judge had assumed a jurisdiction he did not possess under the overholding tenants provisions, and that as to the relations between Pong and Quong the matter was *coram non judice*. Mr. Raney's consent had been given subject to a condition which could not be fulfilled; in other words, he consented upon the condition that he would retain an effective right of appeal. On the appeal in the present action, the Appellate Division must have taken the view that the former proceeding was not binding as to the obligations of Pong; that the only thing judici-

ally determined by it was the landlord's right to possession, the order in this respect, assuming non-payment of rent, being within the jurisdiction of the judge who made it. Taking that view,—and they of course knew what had been their appreciation of the former proceeding—it was open to the Appellate Division to deal with the appeal from the judgment of Mowat J. in this action, as they did.

"The other branch of the appeal is directed to the merits. It is claimed by the plaintiffs that the lease obtained by Pong is held by him as trustee for them. The Appellate Division gave effect to that contention, and, in our opinion, upon the whole case, rightly gave effect to it. It is manifest to us that the transaction carried out by Pong was in breach of good faith and contravened his obligation with regard to renewals, which was implied in the whole arrangement between him and Quong. While there is no express right of renewal in the lease, the assignment of it does deal with renewal, and the allusion must be taken to refer to the reasonable expectation of the tenant in possession to obtain a renewal. The case is fairly within the principle stated by Mr. Justice Parker in *Griffith* v. *Owen* (1). That principle was properly applied in the judgment now appealed from. That judgment is affirmed, and the appeal is dismissed with costs."

*Appeal dismissed with costs.*

Solicitors for the appellant: *Norman Sommerville & Co.*
Solicitors for the respondents, plaintiffs: *Raney & Raney.*
Solicitors for the respondent, Mrs. Thomson: *Grant & Grant.*

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ARMAND BOILY (DEBTOR).....APPELLANT;

AND

J. W. McNULTY (PETITIONER).....RESPONDENT.

1927
*Mar. 19.
*Mar. 23.

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

*Appeal—Leave to appeal to Supreme Court of Canada—Bankruptcy Act (D) 1919, c. 36.*

The competency of the Supreme Court of Canada in bankruptcy proceedings is to be looked for exclusively in the *Bankruptcy Act* and is not

*PRESENT:—Rinfret J. in chambers.

(1) [1907] 1 Ch. 195.

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controlled by the sections of the *Supreme Court Act* dealing with its ordinary jurisdiction.

Leave to appeal to the Supreme Court of Canada will be granted from a judgment of an appellate court in proceedings under the Bankruptcy Act, when that judgment, affecting the jurisdiction of the courts under that Act, is of great importance and of general interest and there does not appear to be any jurisprudence on the question.

The question to be decided in the present appeal is one of jurisdiction as to whether the Superior Court of the province of Quebec, sitting in Montreal, is competent to hear and decide a petition for receiving order under the *Bankruptcy Act* made by a resident of Montreal against a debtor residing and carrying on business in the town of Roberval, thus involving the interpretation of par. (*b*) of subs. 4 of s. 4 of the *Bankruptcy Act*.

MOTION for leave to appeal from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, sitting in bankruptcy at Montreal, Delormier J., and upholding its jurisdiction to hear the respondent's petition for a receiving order against the appellant under the *Bankruptcy Act*.

The facts are stated in the judgment of Mr. Justice Rinfret on the application for leave.

*W. Chipman K.C.* for motion.

*Oscar P. Dorais K.C. contra.*

RINFRET J.—By petition dated 19th February, 1926, addressed to the Superior Court of the province of Quebec, at Montreal, the respondent prayed that a receiving order be granted against the debtor under the *Bankruptcy Act*. Notice was given to the debtor that the petition would be presented before the Superior Court on the 8th March, 1926. The debtor contested the petition for receiving order, alleging, amongst other things:

That the debtor does not come within the jurisdiction of the Superior Court under the *Bankruptcy Act* in the district of Montreal and that the latter court has no jurisdiction to hear the present petition.

That the debtor is, as alleged in the said petition, resident, practising and carrying on business in the town of Roberval, district of Roberval, where there is a competent court of jurisdiction under the *Bankruptcy Act* and before which he should have been summoned;

That all the assets of the said debtor are situate in the said district of Roberval at a distance of more than four hundred miles (400) from Montreal and within the jurisdiction of the Superior Court of the district of Roberval.

Accordingly the petitioner concluded for the dismissal of the petition for receiving order, or alternatively, for the transfer of the record to the Superior Court, sitting in bankruptcy in the district of Roberval. The parties agreed that this question of jurisdiction should first be submitted to and decided by the court before proceeding upon the merits of the case.

By judgment rendered on the 12th May, 1926, Mr. Justice Delorimier decided that he, as a judge of the Superior Court, sitting in and for the district of Montreal, had jurisdiction to hear and decide the petition. The petitioner inscribed on appeal from this judgment; but, on the 23rd February, 1927, judgment was rendered by the Court of King's Bench sitting in appeal at Montreal, maintaining the original judgment, Mr. Justice Tellier dissenting.

The question to be decided in the present case is one of jurisdiction as to whether the Superior Court of the province of Quebec, sitting in Montreal, is competent to hear and decide a petition for receiving order under the *Bankruptcy Act* made by a resident of Montreal against a debtor residing and carrying on business in the town of Roberval. It involves the interpretation of paragraph (*b*) of subsection 4 of section 4 of the *Bankruptcy Act,* reading as follows:

> The petition shall be presented to the court having jurisdiction in the locality of the debtor.

The "locality of the debtor" is defined in the Act (s. 2x):

> (*a*) the principal place where the debtor has carried business during the year immediately preceding the presentation against him of a bankruptcy petition or the making by him of an authorized assignment; or
>
> (*b*) the place where the debtor has resided during the year immediately preceding the date of the presentation against him of a bankruptcy petition or the making by him of an authorized assignment; or
>
> (*c*) in cases not coming within (*a*) or (*b*), the place where the greater portion of the property of such debtor is situate.

The effect of the judgments complained of is to hold that the "locality of the debtor," in this case, is the whole province of Quebec; and this is alleged to be contrary to the *Bankruptcy Act,* as it enables one particular creditor to choose the judicial district in which he desires the bankruptcy proceedings to take place and to force the debtor to leave his place of business or residence and go possibly to the other end of the province in order to defend himself

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Rinfret J.

against the petition and also to compel all the other creditors to come to the bankruptcy district chosen by the caprice of the petitioner.

This decision, affecting, as it does, the jurisdiction of the courts under the *Bankruptcy Act,* is of great importance and of general interest (*Riley* v. *Curtis's and Harvey* (1) ), and there does not appear to be any jurisprudence upon this question in Canada at the present time.

The point is raised, however, that this court is not competent to entertain this appeal.

In addition to its ordinary jurisdiction, covered by the *Supreme Court Act,* the Supreme Court of Canada also holds jurisdiction " as provided in any other Act covering jurisdiction " (*Supreme Court Act,* s. 43); and this is " notwithstanding anything contained in the *Supreme Court Act.*"

The statutory provision by virtue of which this court holds jurisdiction in bankruptcy proceedings is contained in the *Bankruptcy Act,* c. 36 of the statutes of 1919, s. 74. It gives an appeal to the appeal court from an order or decision of a court or judge sitting in bankruptcy if the question to be raised on the appeal involves future rights; or if the order or decision is likely to affect other cases of a similar nature in the bankruptcy or authorized assignment proceedings; or if the amount involved in the appeal exceeds five hundred dollars; or if the appeal is from the grant or refusal to grant a discharge and the aggregate of the unpaid claims of creditors exceeds five hundred dollars.

In this case the appeal court, the Court of King's Bench of the province of Quebec, has entertained jurisdiction holding that the decision of Mr. Justice Delorimier came within one of the classes of cases where section 74 authorizes an appeal.

Under subsections 3 and 4, the decision of the appeal court " upon any such appeal " is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of this court; but this court is *expressly given* jurisdiction to hear and decide any appeal so permitted. It follows that the competency of

(1) (1919) 59 Can. S.C.R. 206.

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the Supreme Court of Canada in the present case is to be looked for in the *Bankruptcy Act* alone and is not controlled by the sections of the *Supreme Court Act* dealing with its ordinary jurisdiction.

Under those circumstances, I am of opinion that the petitioner has made out a sufficient case to obtain leave to appeal to this court. Such appeal shall operate as a stay of proceedings until it has been finally determined by this court.

The appellant shall not be required to provide security for costs; but if he should choose to do so, in order to found a claim to be awarded costs in the event of his success upon his appeal, I fix the amount of five hundred dollars ($500) for such security.

*Motion granted.*

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*Feb. 14.

LA CITE DE MONTREAL (DEFENDANT) . . APPELLANT;

AND

DAME ANNY BRADLEY (PLAINTIFF) . . . . RESPONDENT.

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

*Municipal corporation—Negligence—Street accident—Charter of the city of Montreal—Notice under section 536—Insufficiency—Failure to indicate place—Acknowledgment of notice and promise of attention—Silence of city's officers—Prejudice to city—Opportuntiy to obtain further information.*

Where the conduct of the city officials, on the receipt of an incomplete notice of an accident under section 536 of the charter of the city of Montreal, was such as to lull the victim into a sense of security and to give him cause to believe that his notice was accepted as sufficient, the trial court, under the third paragraph of section 536, could come to the conclusion that the conduct of the city officials had prevented the victim from giving a more explicit notice.

But the default of such notice cannot be remedied by the absence of prejudice to the city or by the fact that the city, having been placed in a position to receive information as to the accident, has refused to take advantage of its opportunities.

Judgment of the Court of King's Bench (Q.R. 41 K.B. 529) aff.

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

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THE CITY OF MONTREAL v. BRADLEY.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the Superior Court, Surveyer J., and maintaining the respondent's action in damages.

On the 17th March, 1925, the respondent fell on the sidewalk in the city of Montreal and suffered severe injuries, consisting chiefly in a fracture of the femur, as a result of which she suffered permanent partial disability. Her husband immediately gave notice to the city by addressing the following letter to the mayor:—

"To comply with the law, I beg to inform you that my wife, Mrs. Anny Vincent has been the victim of an accident on St. Catherine street, due to the bad condition of the sidewalk. This accident resulted in a broken thigh and Mrs. Vincent is at present in the General Hospital, Ward "K", for treatment.

"Regarding the intention on my part of taking advantage of the situation, I beg to inform you that I feel quite justified in asking for compensation and will be much obliged if you will have the proper authorities make an investigation.

"My address is 180 St. Denis street, Montreal."

This notice was acknowledged on the 21st of March by the mayor in the following terms:—

"Yours of the 19th instant received, in which you claim damages for the accident that happened to Mrs. Vincent on the sidewalk on St. Catherine street.

"I am referring your letter immediately to Mr. Jules Crépeau, director of departments, with a request to give to that question his immediate attention."

This notice fails to comply with section 536 of the city charter in that it does not sufficiently specify the place where the accident occurred.

The respondent's husband waited until the 30th of March, when he wrote to Mr. Crépeau as follows:

"Please find enclosed copy of a letter just received from Mr. Mayor. I will be grateful if you will be kind enough to let me know what steps you are taking in the matter."

(1) (1926) Q.R. 41 K.B. 529.

He waited for an answer until the 16th May, and receiving none, he wrote again to Mr. Crépeau and to the mayor including a copy of the letter to Crépeau.

On the 20th of the same month, the mayor wrote to respondent's husband as follows:

"Yours of the 16th instant received together with copy of letter mentioned. I referred your letter to Mr. Jules Crépeau, director of departments to be submitted to the executive committee."

Crépeau paid no attention, either to the mayor's letters or to the letters of the respondent. Nowhere was any objection raised to the sufficiency of the notice.

Sometime previous to the 10th of June following, the respondent's husband put the matter in the hands of his solicitors, who, unaware that a previous notice had been given, caused to be prepared a formal notice which was served on the city. This notice is dated the first of June and contains full details of the accident in compliance with the charter, with the exception of the delay from the date of the accident.

The trial judge maintained the respondent's action and gave judgment for $5,000 damages.

Amongst the *considérants* in the judgment of the trial judge were the following:

"Considering that plaintiff's original notice of suit was received by the mayor of the city defendant, and that the said mayor handed same, or at least left plaintiff under the impression that he had handed it to the officer of the defendant whom he as mayor looked upon as the party empowered to deal with it, namely the director of departments;

"Considering that within the thirty days of the said accident, namely on March 30, 1925, plaintiff's husband wrote to the said director of departments referring him to the mayor's reply, and asking him what steps he was taking in the matter;

"Considering that all the said letters were duly forwarded to the city clerk's office, but appear to have remained unanswered, according to the admissions in defendant's discovery;

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"Considering that under the circumstances, the said letters constitute a valid notice to the city defendant;

"Considering that it is true that the said notice did not specify the place where the said accident occurred, but that plaintiff, in the Montreal General Hospital, and her husband, either at his domicile or at his place of business indicated in the notices, were at all times ready to give information to the city defendant; that in any event two of the city defendant's constables were made aware of the accident shortly after it took place, and arrived at the Montreal General Hospital shortly after the plaintiff and her husband; that they may have secured all requisite information had they persisted in their inquiries;

"Considering that if defendant, having been placed in a position to receive information as to the said accident, refused to take advantage of its opportunities, it cannot set up ignorance as an excuse;

* * *

"Considering that in any event, a perfectly valid notice was served on the defendant by plaintiff's attorneys on the 10th day of June, 1925; that the said notice was just as effective and useful as if it had been served on the 30th day following plaintiff's accident; that the court, under section 536 of the charter of the city defendant, as amended, has discretionary power to decide whether or not in the special circumstances of each case, the default or *a fortiori,* the tardiness of a notice deprives a plaintiff of his right of action; that under the circumstances of the present case, plaintiff should not be deprived of her right of action for any irregularity in her notice of suit;

*Chs. Laurendeau K.C.* and *G. St. Pierre K.C.* for the appellant.

*O. S. Tyndale K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—The only question submitted by the appellant on this appeal is whether the notice which the respondent gave to the city of the accident for which she recovered damages, complied with the requirements of section 536 of the Monteal city charter. The appellant did

not otherwise, before this court, question its liability for the accident.

The contention of the appellant is that the letter written to the mayor of Montreal by the respondent's husband, on March 19, 1925, two days after the accident, did not sufficiently specify the place where the accident occurred, when it stated that the respondent had been the victim of an accident on St. Catherine street, which is a street several miles long.

The mayor answered this letter on March 21, saying that he was referring the letter immediately to Mr. Jules Crépeau, director of departments, with a request to give to the question his immediate attention. And on March 30, the respondent's husband wrote to Mr. Crépeau, enclosing a copy of the mayor's letter. He added that he would be grateful if Mr. Crépeau would be kind enough to let him know what steps he was taking in the matter. This letter was never answered.

In our opinion the learned trial judge could find on this correspondence that the conduct of the city authorities, and especially the letter of the mayor, were of a nature to lull the respondent into a sense of security and to give her cause to believe that the notice of her claim for damages was accepted as sufficient by the city. Under these circumstances and for this reason, the learned judge could come to the conclusion that the respondent was entitled to the benefit of the third paragraph of section 536 which states that

> the default of such notice, however, shall not deprive the victims of an accident of their right of action, if they prove that they were prevented from giving such notice by irresistable force, or for any other reason deemed valid by the judge or court.

The respondent was prevented from giving a more explicit notice by the conduct of the city officials, and this is a reason which we deem valid.

The appeal should be dismissed with costs, but the *considérants* of the judgment of the Superior Court based on the absence of prejudice to the city, on its having been placed in a position to receive information as to the accident, and having refused to take advantage of its opportunities, and on the notice served on the city by the re-

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Mignault J.

spondent's attorneys on June 10, 1925,—should be struck from the judgment.

*Appeal dismissed with costs.*

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

Solicitors for the respondent: *Brown Montgomery & McMichael.*

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*Mar. 15.
*Mar. 22.

OMER BARRE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

*Criminal law—Appeal—Leave to appeal to Supreme Court of Canada—Court of appeal judgment conflicting with judgment of another court of appeal in like case—Both judgments not necessarily in similar cases, but upon similar questions of law—Equal division of court of appeal—Section 1024a Cr. C.*

In order to obtain leave to appeal to the Supreme Court of Canada in a criminal case under section 1024a Cr. C., it is not necessary that the judgment from which it is sought to appeal and that of any other court of appeal should have been rendered in cases in all respects the same; but there should be a conflict between the two judgments upon a question of law similar in both cases.

*Quaere* whether a judgment rendered upon an equal division of a court of appeal is a "judgment" which can be appealed from under section 1024a Cr. C.

MOTION under section 1024a of the Criminal Code for leave to appeal to this court from the judgment of the Court of King's Bench, appeal side, province of Quebec, upholding the conviction of the appellant for forgery. Leave to appeal was refused by the judgment now reported.

*Lucien Gendron* for the motion.

*Ernest Bertrand K.C. contra.*

RINFRET J.—Cette requête demande la permission d'en appeler à la Cour Suprême du Canada de la décision de la Cour du Banc du Roi de la province de Québec qui a, par

*PRESENT:—Rinfret J. in chambers.

un jugement unanime, rejeté le pourvoi en appel d'une condamnation prononcée par la Cour des Sessions de la Paix, siégeant à Montréal.

L'accusé a été trouvé coupable de faux. Il a porté sa cause devant la Cour du Banc du Roi en se basant, entre autres moyens, sur les griefs de droit qui suivent:—

1° Il n'y avait pas au dossier la corroboration exigée par l'article 1002 du Code Criminel;

2° Une signature fictive sur le document incriminé de faux (à savoir: sur une demande de licence pour automobile) ne constitue pas le crime de faux prévu au Code Criminel.

La Cour du Banc du Roi a rejeté ces deux griefs et a confirmé la décision du premier tribunal.

L'appelant allègue que cet arrêt est contraire à deux jugements des cours d'appel de la province d'Ontario et invoque cette prétendue contradiction à l'appui de sa requête devant cette cour. Il se réclame de l'article 1024a du Code Criminel.

Cet article, pour autoriser un juge à permettre l'appel à la Cour Suprême du Canada, ne se préoccupe en aucune façon du bien ou mal fondé du jugement *a quo*, mais il exige que l'on démontre que ce jugement entre en conflit avec l'arrêt d'un autre tribunal d'appel provincial. Il n'est pas nécessaire que ces arrêts aient été prononcés dans une cause identique (*The King* v. *Boak*) (1); mais il faut au moins qu'une question de droit analogue, servant de base à chacun des arrêts, ait été tranchée par chaque cour d'appel dans un sens différent.

Ici, l'appelant interprète le jugement de la Cour du Banc du Roi comme ayant décidé en principe que le témoignage d'un expert en écriture constitue la corroboration visée par l'article 1002 du Code Criminel. Il y voit un conflit avec la décision de la Cour d'Appel d'Ontario dans l'affaire de *The Queen* v. *McBride* (2).

M. le juge Bernier, parlant au nom de la cour dans la cause actuelle, dit qu'une demande pour licence d'automobile, signée du nom de Joseph Church, a été présentée pour enregistrement au bureau de Marieville. Joseph Church y

(1) [1926] S.C.R. 481.
(2) (1895) 2 Can. Cr. Cas. 544.

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était indiqué comme propriétaire de la voiture et résidant au n° 997, rue Evelyn, à Verdun.

La licence fut accordée.

La preuve a révélé que le prétendu Joseph Church n'existait pas et que la demande a donc été signée d'un nom fictif.

Par contre, c'est l'accusé qui demeurait à l'adresse indiquée et qui était propriétaire de la maison portant cette adresse.

Le 26 mai 1925, trois demandes pour licence en vertu de la loi des véhicules-moteurs (respectivement comme chauffeur, comme commerçant d'automobiles et comme propriétaire de garage), signées du nom de l'accusé, furent déposées à Marieville. Mademoiselle M. Gareau, qui les a reçues, a identifié l'accusé comme étant celui qui les a signées. Elle a alors épinglé elle-même la photographie de Barré sur la licence de chauffeur.

Deux experts jurent que la demande du prétendu Joseph Church et les trois demandes reçues par Mademoiselle Gareau sont écrites de la même main.

L'on a aussi établi les circonstances suivantes: au cours de l'enquête préliminaire, le procureur de l'accusé a soulevé un doute sur le numéro de l'automobile pour laquelle la licence avait été accordée. Le procureur de la Couronne donna immédiatement des ordres pour qu'on emmenât la voiture à Montréal. Or, on avait devancé cette démarche; quelqu'un était allé changer les chiffres du numéro, à Thetford Mines, où se trouvait la voiture. Enfin, le document argué de faux portait au verso le nom à moitié effacé d'un parent de l'appelant, un nommé Arcade Dubois.

C'est dans ces témoignages et dans toutes ces circonstances que la Cour du Banc du Roi a trouvé la preuve et la corroboration suffisante pour justifier la conviction et la condamnation de l'accusé en Cour des Sessions de la Paix. M. le juge Bernier le dit:—

En vertu de l'article 1002 C. Cr., nulle personne ne peut être convaincue sur le témoignage d'un seul témoin, dans un cas de faux, à moins qu'il ne soit corroboré sous quelque rapport essentiel. Or, dans la présente cause, il ne peut y avoir de doute qu'il y a eu corroboration sur l'accusation portée contre l'appelant. J'ai indiqué ces faits de corroboration; ils sont multiples.

On ne saurait donc, comme le fait l'appelant, réduire ce jugement à la simple proposition " que le témoignage d'un

expert en écriture constitue la corroboration visée par l'article 1002 du Code Criminel". Ce n'est pas sur ce principe que la Cour du Banc du Roi a appuyé son jugement. Elle a trouvé qu'il y avait des témoins et de "multiples" faits de corroboration.

Ce n'est pas non plus, à notre avis, le principe contraire qui est affirmé par la cour d'appel d'Ontario *re The Queen* v. *McBride* (1). La preuve dans cette cause consistait dans la déposition d'un seul témoin à l'effet que l'écriture sur les documents argués de faux et l'écriture dans un certain livre produit était dans chaque cas celle de l'accusé. La cour refusa d'y voir la corroboration exigée par le code et s'en expliqua comme suit:—

> That the signatures in question and the names in the book were in the same handwriting in no way implicated the accused, unless it was shewn that the names in the book were written by the accused, and the only evidence of that was the evidence of Davis.
>
> It is clear, therefore, that Davis was the only witness who implicated the accused, and that there was no such corroboration of his evidence as is required to justify a conviction.

Nous ne voyons ni dans l'un, ni dans l'autre arrêt la discussion de la question de savoir si "le témoignage d'un expert en écriture constitue la corroboration visée par l'article 1002 du Code Criminel". Il n'a donc pu y avoir conflit de décision sur cette question. En somme, une cour a jugé dans une espèce qu'il y avait témoignage et corroboration par des faits "multiples"; l'autre cour, qu'un seul et même témoin déposant uniquement quant à l'identité de plusieurs écrits et les attribuant à l'accusé ne pouvait constituer à la fois le témoignage et la corroboration requis par le code.

L'appelant n'est pas plus heureux sur son second moyen.

Dans la cause *re Murphy* (2), où il prétend trouver l'affirmation d'un principe de droit contraire à celui qui est soutenu dans l'arrêt qui l'a condamné, la cour d'appel de l'Ontario, formée en cette circonstance de quatre juges seulement, s'est divisée également sur la décision à rendre. On peut se demander si un partage égal d'opinions dans un tribunal d'appel constitue un jugement, et surtout s'il peut en résulter un arrêt de principe opposé à celui d'un autre tribunal, tel que requis par l'article 1024a du Code Criminel.

(1) 2 Can. Crim. Cases, 544. (2) (1895) 2 Can. Cr. Cas. 544.

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(Voir *Beamish* v. *Beamish* (1); lire *Lumsden* v. *Temiskaming and Northern Ontario Railway Commission* (2), référant à *McArthur* v. *Northern and Pacific Junction Railway Company* (3); voir *Stuart* v. *Bank of Montreal* (4). Si l'on répondait dans la négative, il manquerait ici l'élément essentiel pour donner ouverture à un appel à la Cour Suprême du Canada.

Mais, dans cette cause de Murphy (5), l'une des questions discutées par l'un des juges d'appel seulement (lequel par surcroît n'était pas du côté dont l'opinion a prévalu) avait une analogie éloignée avec celle qui sert de base au deuxième moyen de l'appelant. Les autres juges, tant dans la "Common Pleas Division" que dans la "Court of Appeal," ont exprimé leur avis sur le point que, sur demande d'extradition pour crime de faux, il suffit de justifier de faits qui constituent un faux suivant la loi de notre pays, sans qu'il soit nécessaire d'établir quels sont les éléments constitutifs du crime de faux dans le pays étranger pour qui l'extradition est poursuivie. Il n'y a aucun rapprochement possible entre cette question et celle sur laquelle l'appelant fonde le second moyen de sa requête.

La permission d'appel à cette cour ne peut donc se justifier en vertu de l'article 1024a du Code Criminel et elle doit être refusée.

*Motion dismissed.*

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1926
* Oct. 26, 27.
1927
* Feb. 1.

ALPHONSE LAMY (DEFENDANT).....APPELLANT;

AND

DAME ALBINA ROULEAU (PLAINTIFF), RESPONDENT.

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

*Sale—Sheriff's sale—Resale for false bidding—Loan—Promise of "fournir et faire valoir"—Confusion—Arts. 1085, 1138, 1571, 1572, 1577, 1958, 1959, 2127 C.C.—Arts. 747, 758, 761 to 765, 778 C.C.P.*

The *garantie de fournir et faire valoir* stipulated in a deed of transfer of a debt has the effect of suretyship. Upon failure by the principal debtor

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

(1) (1859) 9 H.L. Cas. 274, at p. 338.
(2) (1907) 15 Ont. L.R. 469, at pp. 473, 474.
(3) (1890) 17 Ont. A.R. 86.
(4) (1909) 41 Can. S.C.R. 516, at p. 549.
(5) (1895) 2 Can. Cr. Cas. 544.

to pay, such guarantee gives rise to an *action de recours* in favour of the transferee against the guarantor.

When a debt is transferred, the debtor is a "third person" within the meaning of art. 1571 C.C., and the transferee acquires possession available against him only upon service of the transfer being made upon the debtor. Mere registration of the transfer is not sufficient.

So long as the transfer has not been served (or has not been accepted by the debtor) the transferor, with regard to third persons, remains the possessor and the owner of the debt.

As a result, the debtor is liable to the transferee only in so far as he is obligated to the transferor at the time when the transfer is served. As against the debtor, the transfer must be considered as having taken place only on the date of its signification to him.

Any mode of extinction of the debt (as, for example, compensation) operating between the debtor and the transferor previous to the service of the transfer upon the debtor has the effect of discharging the debtor, even as against the transferee.

The adjudication at a sheriff's sale, although not perfect until the price is paid, is nevertheless a sale under suspensive condition and the purchaser becomes the debtor of the price of adjudication. He is not discharged by the fact that a demand is made for resale for false bidding, but he remains debtor of the amount of his bid (together with interest, costs and damages), saving that he is entitled to credit for the amount of the price brought by the resale.

Upon the record in this case, the respondent was not entitled to succeed. C., as a false bidder at the sheriff's sale, owed the amount of his bid of $34,000 (less the proceeds of the final resale) at the time of the institution of the action. Although the appellant, in ordinary circumstances, would have been responsible to C. in virtue of the clause of warranty *de fournir et faire valoir* contained in the transfer by him to C., such responsibility was extinguished when C. himself became liable for the amount so guaranteed, C. being then in fact warrantor of his own *créance*. Therefore, as C. could not have recovered against the appellant, the respondent's husband who, by the transfer served on the 27th of March, 1924, acquired only the rights which C. had on that date, was not entitled to recover from the appellant. C. would in fact be liable to the appellant for any amount which the latter might be obliged to pay to the respondent.

The case is remitted to the trial court in order to ascertain whether, if C. had deposited the amount of his bid at the sheriff's sale, $34,000, that sum would, upon a judgment of distribution, have provided for payment in full of the respondent's claim of $5,000 and interest. Should it prove sufficient, the action should be dismissed; if not, it should be maintained for so much of the claim as would not have been collocated in a judgment of distribution.

Judgment of the Court of King's Bench (Q.R. 41 K.B.9) reversed.

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

(1) (1926) Q.R. 41 K.B. 9.

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Previous to the year 1921, the appellant had loaned to one Legault $40,000 and had taken as security an hypothec upon a certain immoveable. Later the appellant transferred to one Chauret $7,000 of his $40,000 claim against Legault and the transfer was made with the promise *de fournir et faire valoir*. Chauret caused to be served a copy of this transfer upon the principal debtor Legault and thereby, between the latter, the appellant and himself, Chauret became fully vested with the complete ownership of the claim to that extent. On the 24th of February, 1921, Chauret transferred $5,000 of that claim to one Boyer, who later died leaving his wife, the respondent, whom he had constituted his universal legatee. In this second transfer, there was no guarantee *de fournir et faire valoir* by Chauret, but he transferred to the respondent all his rights and title against Legault, the principal debtor, and also against the appellant, as guarantor. The respondent, however, neglected to perfect her title as against these two debtors, and caused her transfer to be served upon them only on the 27th of March, 1924. Before such service, an hypothecary action had been instituted by one Wilson against one Robin who was then the tiers-détenteur of the hypothecated property. Judgment having been obtained, the property was surrendered by the tiers-détenteur; it was seized upon the curator to the surrender and brought to sale by the sheriff on the 4th of October, 1923. Chauret bid upon the property, which was adjudicated to him by the sheriff for the price of $34,000. Upon his failure to pay the amount of his bid, the property was resold for false bidding and adjudicated to one Taylor for $22,350. Taylor in turn made default and the property was again resold for false bidding and adjudicated for $21,625. This last resale took place after the service of the transfer from Chauret to Boyer upon the principal debtor and upon the appellant. As the principal debtor was insolvent, Boyer brought action against the appellant for the recovery of the sum of $5,428.30, being the capital and the interest then due in virtue of the transfer by Chauret to Boyer, the respondent's husband, upon the ground that the appellant had guaranteed *de fournir et faire valoir* the payment of that sum in his deed of transfer to Chauret.

*Oscar P. Dorais K.C.* for the appellant.

*Gustave Monette* for the respondent.

The judgment of the court was delivered by—

RINFRET J.—Voici comment les faits de cette cause sont relatés dans le jugement de première instance:—

Le défendeur (appelant) a prêté sur hypothèque $40,000 à un nommé Legault, par acte fait le 29 novembre 1920, remboursable dans trois ans;

Il a été enregistré le jour suivant;

Le 15 décembre de la même année, le même défendeur (appelant) a transporté au notaire Adéodat Chauret, sur et à même les $40,000, une somme de $7,000, à prendre après les premiers $18,000;

Cette cession a été faite avec la garantie de fournir et faire valoir, le cédant s'engageant personnellement à payer le cessionnaire, si le débiteur ne payait pas; elle a été enregistrée le 21 décembre 1920;

Legault, le débiteur, a déclaré, dans le document même, l'accepter et la tenir pour signifiée; il a consenti, de plus, à payer les $7,000 et intérêts au bureau du notaire cessionnaire;

Le 24 février suivant (1921), Chauret a transporté, à son tour, $5,000 des $7,000 avec intérêt à 6 pour 100 par année à Philias Boyer, l'auteur de la demanderesse (en Cour Supérieure);

Cette cession a été faite avec garantie et avec subrogation dans tous les droits, actions, privilèges et hypothèques qu'avait Chauret;

Elle a été enregistrée, le 29 avril 1923, et elle a été signifiée au défendeur cédant et au débiteur Legault, par le ministère d'un huissier, le 27 mars 1924;

Le 4 octobre 1923, antérieurement à la signification de la cession de Chauret à l'auteur de la demanderesse, les propriétés affectées au paiement desdites sommes transportées ont été adjugées à Chauret, à une vente par shérif, dans une cause de Wilson *v.* E. Robin et Duhamel, curateur.

Chauret n'a pas payé le prix de son adjudication de $34,000 et les propriétés ont été revendues à sa folle enchère pour un prix de $22,350 à un nommé Taylor; ce nouvel adjudicataire a aussi fait défaut de payer et les mêmes propriétés ont été vendues "de novo" à sa folle enchère pour le prix de $21,625, montant insuffisant pour payer la réclamation de la demanderesse;

Lamy a enchéri à ces ventes;

Le débiteur Legault a été poursuivi par la demanderesse (en Cour Supérieure) et jugement accordé le 11 avril 1924;

Le défendeur (appelant) n'a pas requis la demanderesse (en Cour Supérieure) de discuter les débiteurs Legault et Chauret et partant n'a pas indiqué les biens leur appartenant (C. civ. 1942, 1943);

D'ailleurs ces débiteurs étaient tous les deux insolvables, lorsque la présente action a été intentée.

Cette action est basée sur la garantie de fournir et faire valoir consentie par l'appelant dans la cession qu'il a faite à Chauret et lui réclame le paiement de la somme de $5,428.30, représentant le capital et les intérêts dus en vertu du transport de Chauret à Philias Boyer.

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Voici maintenant comment le juge de la Cour Supérieure soumet la question à résoudre (et il nous paraît avoir exactement posé le problème):—

Parce que Chauret s'est porté adjudicataire et n'a pu payer le prix d'adjudication, l'appelant refuse d'exécuter, en faveur de l'intimée, l'obligation qu'il a transportée "avec garantie de fournir et faire valoir et de payer à défaut du débiteur", en soumettant que la subrogation est restée sans effet à son égard, tant qu'il n'en a pas eu signification, et que Chauret n'a pas cessé d'être propriétaire et seul responsable de la créance à partir de l'adjudication qui lui a été faite, le 4 octobre 1923, et que si Chauret n'eut pas transporté ses droits avec subrogation à l'auteur de l'intimée, il n'aurait pas eu le droit de réclamer de l'appelant, parce qu'il est devenu lui-même débiteur de la différence entre la première et la dernière adjudication; ce qui était suffisant pour satisfaire sa réclamation contre le débiteur principal et l'appelant et partant pour satisfaire le subrogé Boyer, auteur de l'intimée.

La solution de la Cour Supérieure, c'est que l'appelant est débiteur de la somme qui lui est réclamée. Il n'a cédé ses droits à personne autre qu'à Chauret. Legault, le débiteur principal, n'a rien payé. Chauret, dont la subrogation à l'auteur de la demanderesse a été enregistrée et signifiée à Legault le 27 mars 1924, n'a rien payé non plus. Le savant juge en conclut qu'ils ne sont donc pas libérés. Chauret, d'après lui, aurait pu réclamer de Legault, et l'appelant aurait été obligé de lui payer, si Legault avait fait défaut, car la différence entre le montant de la première adjudication et celui de l'adjudication définitive

n'appartient pas au défendeur (appelant), mais au shérif pour les créanciers judiciaires et le saisi dans la cause de Wilson *v.* Robin.

Cette différence n'est d'ailleurs devenue due que lorsque la dernière adjudication a eu lieu. Jusque-là, la vente au shérif n'était pas parfaite, et longtemps avant qu'elle ne le devînt la cession à l'auteur de la demanderesse avait été enregistrée et signifiée à Legault et à l'appelant. Le raisonnement est donc que l'appelant, caution de Legault et qui s'était même rendu personnellement responsable de Legault par la clause de garantie, est encore débiteur envers la demanderesse.

Ce jugement a été confirmé par la majorité de la Cour du Banc du Roi.

M. le juge Dorion a exprimé son dissentiment. Il était d'avis que Chauret, devenu adjudicataire le 4 octobre 1923, avait négligé lui-même de faire valoir sa créance en payant le prix de l'immeuble qui lui avait été adjugé, qu'il avait par là

laissé perdre les sûretés attachées à sa créance (et) s'était mis dans l'impossibilité d'exercer contre Lamy la garantie de fournir et faire valoir.

Comme la signification du transport de Chauret à Boyer n'a eu lieu que le 27 mars 1924, à ce moment il n'a pu donner à Boyer le droit, qu'il avait déjà lui-même perdu, d'exercer la garantie contre Lamy. A ce moment, il dépendait de lui de faire réaliser la créance en payant ce qu'il était tenu de payer.

Non seulement il a laissé perdre la garantie, mais il l'a fait perdre.

Dans ces conditions, Chauret ne pourrait certainement pas réclamer de Legault (ni, par conséquent, de l'appelant). C'est, au contraire, Legault (ou l'appelant) qui pourrait le forcer à payer la différence entre le montant de son enchère et celui de l'adjudication définitive " et à payer ainsi la dette ". Il resterait donc à savoir si le montant de l'enchère de Chauret ($34,000) eût été suffisant pour satisfaire la créance qui fait l'objet de la présente action. Pour vérifier cela il faut faire le rapport de distribution tel qu'il eût été fait après la première adjudication. M. le juge Dorion aurait donc retourné le dossier à la Cour Supérieure pour y faire déterminer quel eût été le jugement de distribution du montant de l'enchère de Chauret, réservant à adjuger après que cet état eût été établi.

La demanderesse est décédée au cours du procès et l'intimé, qui est son exécuteur testamentaire, a fait les procédures requises pour reprendre l'instance.

L'acte de transport de l'appelant Lamy à Chauret s'exprime ainsi:—

Lequel par ces présentes cède et transporte avec garantie de fournir et faire valoir et de payer, à défaut du débiteur, à Adéodat Chauret, etc.

Le débiteur, dans cette clause, c'est Legault. La garantie qui y est stipulée " ne produit qu'un cautionnement ". (I Bourjon, Dr. Comm., tit. 4, sec. 3, n° 25; et Loyseau, Garantie des rentes, ch. 4, n° 13: tous deux cités par les codificateurs sous l'art. 1577 du code civil). Par cet engagement, Lamy s'est rendu caution de Legault. Il s'ensuit qu'à défaut de paiement par Legault il naît de cette clause, au profit de Chauret, une " action de recours " contre Lamy (Pothier, vol. 3, n$^{os}$ 563, 564; 2 Colin et Capitant, p. 154).

En revanche, Lamy peut opposer à Chauret toutes les exceptions qui appartiennent à Legault et qui sont inhérentes à la dette (art. 1958 C.C.).

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Chauret a cédé son droit de créance à Boyer, le 24 février 1921, et ce transport fut enregistré le 23 avril 1923, mais il ne fut signifié à Legault que le 27 mars 1924.

Legault, le débiteur, était un " tiers ", au sens de l'article 1571 C.C. (*The Bank of Toronto* v. *The St. Lawrence Fire Insurance Co.* (1); Baudry-Lacantinerie, 3e éd., De la vente et de l'échange, nos 788, 789). Cela ressort inévitablement du fait que la signification peut être remplacée " par l'acceptation du transport que fait le débiteur " (art. 1571 C.C.).

L'enregistrement du transport, le 23 avril 1923, n'a pas été suffisant pour donner à Boyer la " possession utile " à l'encontre de Legault. Le code exige que l'acte de vente des créances soit signifié et qu'il en soit délivré copie au débiteur (arts. 1571, 2127 C.C.).

Tant que la signification n'a pas eu lieu (27 mars 1924), le créancier à l'égard de Legault était toujours Chauret. L'emploi dans l'article 1571 du mot " possession " au lieu du mot " titre " n'a pas été fait par le législateur dans le but de laisser entendre que le cessionnaire, avant la signification, était investi du droit de propriété sans en avoir encore reçu la tradition. Les codificateurs (4e rapport, p. 21) déclarent que

> les articles de cette section coïncident avec le Code Napoléon, de même qu'avec l'ancien droit, excepté dans les cas spécialement mentionnés.

Aucune mention spéciale n'est faite au sujet de l'article 1571 C.C.

Sous l'ancien droit, Pothier écrit:—

> Le transport d'une rente ou autre créance est, avant que la signification en ait été faite au débiteur, ce qu'est la vente d'une chose corporelle avant la tradition; de même que le vendeur d'une chose corporelle demeure, avant que la tradition en ait été faite, possesseur et propriétaire de la chose qu'il a vendue, ainsi que nous l'avons établi alors; de même, tant que le cessionnaire n'a pas fait signifier au débiteur le transport qui lui a été fait, le Cédant n'est dessaisi de la chose qu'il a transportée. C'est ce que porte l'art. 108 de la Coutume de Paris: " Un simple transport ne saisit point, il faut signifier le transport à la partie, et en bailler copie ".

Le Code Napoléon a conservé l'expression de la Coutume de Paris. L'article 1690 porte:—

> Le cessionnaire n'est saisi à l'égard des tiers que par la signification du transport faite au débiteur. Néanmoins, le cessionnaire peut être également saisi par l'acceptation du transport faite par le débiteur dans un acte authentique.

(1) (1901) Q.R. 11 K.B. 251, at pp. 266, 275; (1903 (A.C. 59, at p. 67.

La citation de Pothier explique le sens que l'on attachait dans l'ancien droit au mot " saisi ". En toutes choses, la propriété ne passait alors à l'acheteur qu'avec la possession. Mais, comme le fait observer Laurent (Vol. 24, p. 473),

ce qui autrefois était le droit commun est devenu dans le droit moderne une exception. L'acquéreur d'une chose corporelle devient maintenant propriétaire à l'égard des tiers, comme à l'égard du vendeur, par le seul fait de la convention ou du concours de volontés: tel était, du moins, le système du code civil; tandis que, pour la cession de créances, la loi exige une formalité, une signification, une acceptation, pour que le cessionnaire devienne propriétaire à l'égard des tiers. Tel est le sens du mot saisi et du principe que la loi établit.

D'ailleurs la comparaison entre les deux articles 1570 et 1571 C.C. le démontre. La vente est

parfaite entre le vendeur et l'acheteur par l'exécution du titre, s'il est authentique, ou sa délivrance, s'il est sous seing privé.

Elle ne l'est pas à l'égard des tiers

tant que l'acte de vente n'a pas été signifié et qu'il n'en a pas été délivré copie au débiteur.

Avant l'accomplissement de ces formalités (et sauf que la signification de l'action peut y suppléer, ainsi qu'il a été jugé *Re Bank of Toronto* v. *St. Lawrence Fire Insurance Company* (1). la vente du droit de créance reste donc incomplète et ne peut, par conséquent, transférer au cessionnaire le titre de propriétaire.

Il s'ensuit que le débiteur cédé ne peut être tenu envers le cessionnaire que de la même manière qu'il est obligé envers le cédant au moment de la signification du transport. (Dalloz, Codes annotés, Nouveau code civil, sous article 1690, n° 376).

A l'encontre des tiers, l'acheteur d'une créance, tant qu'il n'a pas signifié l'acte de cession, acquiert si peu le titre de propriété de la créance que si le même vendeur consent un second transport à un autre cessionnaire qui fasse signifier, c'est ce dernier qui obtient le titre à la créance, et le premier transport est sans effet à l'égard de ce cessionnaire subséquent (art. 2127 C.C.). Le titre, quant aux tiers, reste donc sur la tête du cédant, puisqu'il peut encore le conférer à un second cessionnaire qui se conforme aux exigences de la loi. De même, une créance cédée est susceptible d'être saisie-arrêtée tant que le transport n'a pas été signifié ou qu'il n'a pas été valablement accepté (Fuzier-Herman, Répertoire, *vo.* Cession de créance, n° 287).

(1) (1903) A.C. 59.

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En vertu de ces principes, Chauret et Boyer sont donc dans la même position vis-à-vis de Legault (et, par conséquent, de Lamy, qui peut se prévaloir des mêmes exceptions) que si le transport avait eu lieu le jour de sa signification, à savoir le 27 mars 1924. Jusque-là, pour Legault et pour Lamy, le créancier était Chauret; le paiement à Chauret eût libéré Lamy (art. 1572 C.C.); à cette date, l'obligation de Lamy était envers Chauret, et toute extinction de la créance due à Chauret devait profiter à Lamy, car le paiement n'est que l'une des manières par laquelle l'obligation s'éteint (art. 1138 C.C.). Tout autre mode d'extinction de la créance opérant entre Chauret et Legault antérieurement à la signification doit logiquement avoir le même résultat. C'est ainsi, par exemple, que

le débiteur peut opposer au cessionnaire la compensation de tout ce que lui devait le cédant avant la signification du transport. (Pothier, vol, 3, nº 558).

Il s'agit donc de savoir si, avant la signification du transport, quelque chose s'est produit à l'égard de Chauret qui a eu l'effet d'éteindre la créance.

L'adjudication par le shérif à Chauret de l'immeuble hypothéqué en garantie de la créance, que Chauret a cédée à Boyer, a eu lieu le 4 octobre 1923.

Quoique l'adjudication ne soit parfaite que par le paiement du prix (art. 778 C.P.C.), ce n'en est pas moins une vente avec condition suspensive. (Voir ce que dit M. le juge Allard, *Re The St. Catherines Realty Company* v. *Loranger* (1); aussi *Bacon* v. *Insurance Company of North America* (2), ainsi que les autorités auxquelles il y est référé). Du moment que la condition est accomplie, elle a un effet rétroactif (art. 1085 C.C.) et la propriété est transférée à compter de la date de l'adjudication (art. 778 C.P.C.). L'adjudicataire doit le paiement du prix. L'article 747 C.P.C. dit en toutes lettres:—

Toute offre ou enchère comporte l'engagement d'acheter la chose au prix offert, sous la condition qu'il ne surviendra aucune enchère valable.

L'adjudicataire doit payer dans les trois jours le prix, ou la balance du prix, de son adjudication, délai après lequel il est tenu aux intérêts (art. 758 C.P.C.).

Jusqu'à ce que la vente à la folle enchère soit effectuée, l'adjudicataire peut l'éviter

(1) (1917) 19 Q.P.R. 307, at pp. 311 et suiv.

(2) (1914) Q.R. 47 S. c. 74, at p. 76.

en consignant entre les mains du shérif, avant la vente, le prix de son adjudication, avec les intérêts depuis cette adjudication, etc. (art. 764 C. P.C.).

Le fol enchérisseur est tenu des intérêts (art. 765 C.P.C.).

Il s'agit donc bien d'une vente entre le shérif et l'adjudicataire, bien qu'elle soit soumise par le code de procédure à certaines règles spéciales.

Ne nous demandons pas si tous les intéressés pourraient s'entendre pour contraindre l'adjudicataire à prendre son titre de vente, puisque ce n'est pas le cas qui se présente ici. La loi dit que, sur défaut de l'adjudicataire de payer son prix d'acquisition en entier, le saisissant peut demander que

l'immeuble dont le prix est ainsi dû soit revendu à la folle enchère de l'adjudicataire défaillant (art. 761 C.P.C.).

C'est ce qui a été fait dans le cas actuel. Il ne s'ensuit pas, suivant nous, que l'adjudicataire a cessé d'être débiteur du montant de son enchère; encore moins qu'il n'en ait jamais été le débiteur. Les différents articles que nous avons cités et l'ensemble du chapitre sur l'exécution forcée des jugements démontrent le contraire.

Mais il était nécessaire que la loi pourvût à une méthode expéditive de transformer en argent les immeubles saisis. En matière de meubles, le prix d'adjudication doit être payé sur-le-champ (art. 662 C.P.C.). En matière d'immeubles, on a donné un certain délai à l'acheteur; mais, en même temps, on a voulu mettre à la disposition des parties une procédure rapide pour remédier à un défaut possible de l'adjudicataire (arts. 761, 762, 763 C.P.C.). Par le fait qu'on y a recours, on ne libère pas l'adjudicataire de son obligation de payer. Il obtient tout simplement crédit pour le montant produit par la revente effective (art. 765 C.P. C.). Il est responsable des intérêts, des frais et des dommages; et il reste débiteur du montant de son enchère, déduction faite de celui de la vente définitive, " si celui-ci est inférieur ".

Ce n'est pas au shérif qu'il doit cette somme. Le shérif ne saurait être que le dépositaire ou l'intermédiaire. La somme est due aux créanciers judiciaires et au saisi (art. 765 C.P.C.). Dans une action hypothécaire comme celle de Wilson *v.* Robin le saisi est le curateur au délaissement qui, dans l'espèce, représentait Legault, le débiteur person-

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nel. C'est bien, en effet, la chose de Legault qui devait payer la créance de Chauret. Le montant de l'enchère de Chauret n'est rien autre qu'une somme d'argent substituée à l'immeuble sur lequel cette créance était hypothéquée. Chauret a pris l'engagement (art. 747 C.P.C) de verser entre les mains du shérif la somme de $34,000. Dans l'ordre ordinaire des choses, il devait lui remettre cette somme, qui serait restée déposée jusqu'à ce que le jugement de distribution eût déclaré à qui elle devait être payée. Les collocations eussent été préparées par le protonotaire conformément aux certificats des hypothèques. Nous supposons, pour les besoins de l'argument, que l'enchère de $34,000 eût été suffisante pour couvrir la somme de $5,000 qui fait l'objet du présent litige. Cette créance eût été colloquée dans le bordereau de distribution et eût été payée et éteinte à même le montant de $34,000 déposé par Chauret.

Chauret n'a pas déposé cette somme; mais, par son enchère et par son adjudication, il en est devenu responsable. D'après la loi, c'est lui qui la doit. Encore à l'heure qu'il est, il en est le débiteur. Si Lamy fût appelé à la payer, il aurait son recours légal pour s'en faire rembourser par Chauret ou sa succession (il s'agit ici, bien entendu, de la question de droit et non de la possibilité de se faire payer). Or, s'il est exact de dire, comme nous l'avons conclu, qu'au moment de l'adjudication (qui s'est opérée avant la signification par Boyer à Legault) Chauret était alors le véritable créancier de Legault et le seul propriétaire de la créance à l'encontre de Legault, Chauret dès lors est devenu le garant de Legault et de Lamy et il s'est donc mis dans la position où Lamy pourrait lui réclamer la somme que Boyer demande actuellement par son action.

Il est évident que, dans ces conditions, Chauret ne pourrait poursuivre ni Legault, ni Lamy. Il s'ensuit que Boyer, qui n'a acquis le 27 mars 1924 (jour de la signification) que le droit que Chauret possédait, n'était pas recevable dans l'action qu'il a intentée contre Lamy.

En effet, de la clause de garantie de fournir et faire valoir, comme nous le disions au commencement en nous appuyant sur l'autorité de Pothier (Vente, nos 564 et 565), il est né une action de recours contre Lamy, mais cette action s'est éteinte en la personne de Chauret lorsqu'il est

devenu responsable du paiement de la somme garantie, ou en quelque sorte garant de sa propre créance.

Il n'est pas recevable à se plaindre que la (créance) a cessé d'être bonne, puisque c'est par son fait qu'elle a cessé de l'être.

Cette conclusion, que l'on trouve dans Pothier (vol. 3, p. 565) et qui s'accorde avec l'article 1959 C.C., se retrouve également dans le passage suivant de Baudry-Lacantinerie (De la vente et de l'échange, 3e éd. n° 838):—

Si le cessionnaire perd son recours en garantie contre le cédant, lorsqu'il a laissé le débiteur cédé devenir insolvable, à défaut de poursuites en temps utile, à plus forte raison le perdrait-il si l'impossibilité d'obtenir le paiement de la créance provenait d'un fait actif qui lui serait propre ou même d'une négligence qui aurait fait perdre les sûretés attachées à la créance, par exemple, s'il avait donné mainlevée d'une inscription hypothécaire qui assurait le paiement de la créance ou s'il l'avait laissée périmer, s'il avait renoncé à l'hypothèque ou déchargé une caution solvable qui avait garanti le paiement, ou remis un gage qui l'assurait. Dans ces cas, le cessionnaire perdrait son recours, même contre le cédant qui aurait promis de payer à défaut du débiteur.

Tout le raisonnement qui précède cependant est basé, comme nous l'avons indiqué, sur la supposition que la créance de $5,000 transférée de Chauret à Boyer et maintenant réclamée par l'ayant-cause de ce dernier, eût été payée à même l'enchère de $34,000, si Chauret, comme il le devait, en eût déposé le montant entre les mains du shérif.

Cela dépend de ce qu'eût été le jugement de distribution qui aurait fait suite à l'adjudication à Chauret. Les chiffres qui nous ont été soumis lors de l'argumentation devant cette cour semblent démontrer que la somme de $5,000 eût été couverte par le montant de cette enchère. D'autre part, M. le juge Dorion, d'après le calcul approximatif qu'il a fait en Cour du Banc du Roi, pense qu'il aurait pu subsister un déficit. En réalité, les parties ne se sont pas appliquées à établir ce résultat de manière à en faire une démonstration absolument satisfaisante et qui ne laisse planer aucun doute.

Le juge de la Cour Supérieure ne s'est pas prononcé là-dessus parce qu'il était d'avis, pour les raisons qu'il donne dans son jugement, que Lamy était responsable à tout évènement. L'instance a tourné principalement autour des questions de droit; et les parties ne se sont pas appliquées à fournir ou à discuter de part et d'autre les données nécessaires pour reconstituer les collocations qui auraient figuré dans le rapport de distribution, tel qu'il eût été fait après

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la première adjudication. Nous croyons donc que justice sera mieux rendue en adoptant la suggestion de M. le juge Dorion que le dossier soit retourné à la Cour Supérieure pour y

faire établir quel eût été le jugement de distribution du montant de l'enchère de Chauret.

S'il est alors démontré que la créance de $5,000 eût été colloquée en entier, l'intimée devra être déboutée de son action. Dans le cas contraire, l'action devra être maintenue jusqu'à concurrence de toute partie de la créance de $5,000 qui n'eût pas été colloquée sur le jugement de distribution.

Les frais de l'action en Cour Supérieure devront suivre le sort de la cause. Mais l'appelant réussit sur les questions qui ont été débattues devant nous, et il a droit à ses frais tant devant cette cour que devant la Cour du Banc du Roi.

*Appeal allowed with costs.*

Solicitors for the appellant: *Dorais & Dorais.*

Solicitors for the respondent: *Patenaude, Monette, Filion & Boyer.*

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1926

*Nov. 18.
*Dec. 15.

CONSOLIDATED WAFER COMPANY, LIMITED (OPPOSANT) ..... APPELLANT;

AND

INTERNATIONAL CONE COMPANY, LIMITED (PETITIONER) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Patents—The Patent Act (D.), 13-14 Geo. V, c. 23, s. 40—Owner of patent ordered to grant license to make and use machine covered by patent, at fixed license fee—Basis in fixing license fee—Appeal from Exchequer Court—Jurisdiction—Supreme Court Act, s. 38.*

The judgment of the Exchequer Court of Canada (Audette J.), [1926] Ex. C.R. 143, ordering (under s. 40 of *The Patent Act*, on appeal from the Commissioner of Patents) the present appellant to grant a license to the present respondent to make and use a machine (for automatic pastry making) covered by the appellant's patent, at a license fee fixed by the judgment, was affirmed.

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

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In determining the amount to be paid for such license the Exchequer Court properly took into consideration the cost of manufacture and repair of the machine, as well as the unexpired term of the life of the patent.

The Supreme Court of Canada had jurisdiction to hear the appeal; s. 38 of the *Supreme Court Act* does not apply to a proceeding brought under s. 40 of *The Patent Act*.

APPEAL from the judgment of the Exchequer Court of Canada (Audette J.) (1) allowing an appeal from the decision of the Commissioner of Patents.

The respondents, by a petition to the Commissioner of Patents, asked for the issue of a compulsory license, under s. 40 of *The Patent Act,* 13-14 Geo. V, c. 23, in respect of the patent owned by appellant for alleged new and useful improvements in "automatic pastry making machines", and that the Commissioner definitely determine the amount of the license fee. The Commissioner dismissed the petition, holding that it did not appear that the terms on which the license was offered to the petitioner were unreasonable, and that it had not been proven to his satisfaction that the reasonable requirements of the public with respect to the patented invention in question had not been satisfied. An appeal from this decision was allowed by the Exchequer Court of Canada (1), which ordered the appellant to grant to the respondent a license allowing it to make and use the machine covered by the patent during the unexpired residue of the term of the patent, upon the respondent paying to the appellant a license fee at a yearly rate of $275 royalty upon each machine made or used under the license.

The respondent, besides resisting the appeal on the merits, contended that the judgment of the Exchequer Court was rendered in the exercise of judicial discretion, from which no appeal lies, in view of s. 38 of the *Supreme Court Act,* and that, even apart from that section, the Exchequer Court was, in the present instance, *persona designata,* empowered by statute with executive discretion, and this court should not interfere with the exercise of such discretion.

(1) [1926] Ex. C.R. 143.

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*Geo. H. Kilmer K.C.* and *J. A. MacIntosh K.C.* for the appellant.

*R. S. Smart K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from a judgment of the Exchequer Court allowing an appeal taken by the present respondent from a decision of the Commissioner of Patents. The respondent, by a petition presented to the Commissioner, asked for the issue of a compulsory license under s. 40 of *The Patent Act* (13-14 Geo. V, ch. 23) in respect of the appellant's patent, no. 145,379, for alleged new and useful improvements in "automatic pastry making machines." The petition was dismissed by the Commissioner, but, on appeal, was granted by the Exchequer Court.

The appellant, among other grounds of appeal, contended before this court that the respondent had not made out a case for relief under the proper construction of s. 40.

I do not propose however to pass on this contention, for the reason that the appellant did not take that position before the learned Commissioner. On the contrary, at the very opening of the case, counsel for the appellant said:—

> There is only one question, we are willing to give them a license and the question is what the terms are.

The learned counsel also stated to the Commissioner:—

> Mr. Commissioner, you have a record tc which we are confined and on that record the sole question is what royalty should be paid, there is nothing else * * *.

Under these circumstances, any question as to the proper construction of s. 40 is eliminated, and we do not have to determine the meaning of the words "the reasonable requirements of the public", or whether the requirements of a particular individual or of a particular trade come within the purview of the section. The respondent, in view of the narrowing down of the issue to a mere question of what under the circumstances was "a reasonable price" or "reasonable terms" for the sale of the patented article or for a license for the use of the invention, was not called upon to adduce evidence to show that "the reasonable requirements of the public with respect to a patented invention" had not been satisfied.

On the issue thus narrowed down, I would not disturb the decision of the learned judge of the Exchequer Court.

The patented article is the Bruckman machine for the manufacture of what are known as ice cream cones. The patent is on the machine itself and not on its product. In determining the amount to be paid by the respondent for the issue of a license, the learned judge considered the cost of manufacture and repair of the appellant's machine as well as the unexpired term of the life of the patent. I do not think that in so doing the learned judge proceeded upon an improper basis.

An objection was taken to our jurisdiction on the ground that the judgment of the Exchequer Court was a judgment rendered in the exercise of judicial discretion within the meaning of s. 38 of the *Supreme Court Act*. I do not think that s. 38 applies to a proceeding brought under s. 40 of *The Patent Act*. The objection is not well taken.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Macdonald & Macintosh.*
Solicitor for the respondent: *Russel S. Smart.*

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MARY E. McLAUGHLIN, AND OTHERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ESTATE WM. McLAUGHLIN (DEFENDANTS) ..... APPELLANTS;

AND

EDWIN W. LONG AND JOSEPH JOHN LONG, AN INFANT BY EDWIN W. LONG, HIS NEXT FRIEND (PLAINTIFFS)..... RESPONDENTS.

1926
*Oct. 14.
1927
*Feb. 1.

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

*Negligence—Contributory negligence—Motor vehicles—Motor Vehicle Law, 1915, c. 43, s. 4, as amended 1925, c. 10 (N.B.)—Liability of owner of motor truck for personal injury caused through servant's negligent driving—Boy injured while riding on running board of truck—Essentials to constitute contributory negligence—Causa proxima, non remota, spectatur—The Contributory Negligence Act, 1925, c. 41, s. 2 (N.B.)—Whether Act would apply to affect claim for damages of father of injured boy.*

Under the *Motor Vehicle Law, 1915*, c. 43, s. 4, as amended 1925, c. 10 (N.B.), defendants were held liable in damages to a boy (the infant

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

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plaintiff) and to his father, for injury to the boy, while riding on the running board of defendants' motor truck, in an accident caused (according to jury findings sustained) through negligent driving of the truck by defendants' servant.

The benefit of s. 4 (1) of said Act is not confined to persons using the highway other than those in or upon a motor vehicle the operation of which causes injury.

The jury found the driver negligent in allowing the boy on the running board and in lack of proper attention to his duty of driving, but found contributory negligence in the boy "by staying on the car after having been asked to get off, and by standing on the running board of the car when it was moving." The courts below gave effect to the jury's findings and to *The Contributory Negligence Act*, 1925, c. 41 (N.B.) by reducing the damages otherwise recoverable.

*Held*, the evidence was consistent only with the view that the boy remained on the running board with the driver's tacit consent; and, further, the maxim *In lege causa proxima, non remota, spectator*, was not sufficiently adverted to in the courts below; there was no evidence on which the jury could find that fault of the boy was, in the legal sense, a cause of his injury; and his counsel's contentions in this respect at the trial should have been acceded to.

To constitute contributory negligence, it does not suffice that there be some fault on plaintiff's part without which the injury would not have been suffered; a cause which is merely a *sine qua non* is not adequate. As in the case of primary negligence, there must be proof, or at least evidence from which it can reasonably be inferred, that the negligence charged was a proximate, in the sense of an effective, cause of the injury (*Spaight* v. *Tedcastle*, 6 App. Cas. 217, at p. 219; Beven on Negligence—Can. Ed.—at p. 155; *Admiralty Commissioners* v. *SS. Volute* [1922] A.C. 129, at p. 136, and other cases, cited).

Damage or loss is "caused" by the fault of two or more persons, within the meaning of s. 2 of *The Contributory Negligence Act*, only when the fault of each is a proximate or efficient cause thereof; i.e., only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence (*Can. Pac. Ry. Co.* v. *Frêchette*, [1915] A.C. 871, at p. 879). *The Contributory Negligence Act* had no application to the case at bar.

Judgment of the Supreme Court of New Brunswick, Appeal Division, ([1926] 3 D.L.R. 918), reversed in part.

*Quaere* whether, assuming the boy's contributory fault, *The Contributory Negligence Act* would apply to affect the father's claim (which was to recover medical and other expenses for which defendants' negligence entailing injury to his son subjected him to legal liability). *McKittrick* v. *Byers* (58 Ont. L.R. 158), and *Knowlton* v. *Hydro Electric Power Commission of Ontario* (58 Ont. L.R. 80) commented on; the wording of s. 2 of the Act referred to.

*Per* Newcombe J.: S. 2 of *The Contributory Negligence Act* states a case where there is no liability at common law. It has applied to persons with relation to their liability for negligence, the wording of s. 2 of *The Maritime Conventions Act, 1914* (Dom.), which Act did not declare a liability where none previously existed, but regulated, as to each of the vessels at fault, the measure of damages in proportion to the degree of fault. *Quaere* whether the New Brunswick legislature,

having gone to the Admiralty provisions for the enunciation of the law, thereby adopts the Admiralty principles of contribution, including that expressed in *Admiralty Commissioners* v. *SS. Volute* ([1922] 1 A.C. 129 at p. 144).

APPEAL by the defendants, and cross-appeal by the plaintiffs, from the judgment of the Supreme Court of New Brunswick, Appeal Division (1) affirming, with a variation, the judgment of Crockett J.

The action was for damages for injury to the infant plaintiff, while riding on the defendants' motor truck, by reason of an accident caused, as alleged, through negligent driving of the truck by the defendants' servant.

The defendants conducted a bakery in the city of St. John, and delivered a portion of their goods by motor trucks to points outside the city. The accident in question occurred on a road some miles from the city. The truck plunged off the road, and the infant plaintiff, a boy about ten years of age, who was on the running board, was injured. The boy (by his father as next friend) and his father sued the defendants for damages.

The case was tried before Crockett J. with a jury. The following were the questions submitted to the jury at the close of the evidence, with the answers thereto:

1. Q. Was there any negligence on the part of the defendants' chauffeur Rogers?—A. Yes.

Q. If so, in what did such negligence consist?—A. First, in allowing the boy on the running board of the car.

Second, lack of proper attention to his duty of driving the car just previous to and at the time of the accident.

2. Q. Was the injury to the infant plaintiff entirely caused by the negligence set out in your answer to question one?—A. No.

3. Q. Was the infant plaintiff guilty of any contributory negligence without which the accident would not have happened?—A. Yes.

Q. If so, in what did such negligence consist?—A. By staying on the car after having been asked to get off, and by standing on the running board of the car when it was moving.

4. Q. If you find there was any contributory negligence on the part of the infant plaintiff, to what degree was he at fault?—A. Twenty-five per cent of the amount that otherwise would have been allowed.

5. Q. Was the infant plaintiff on the running board with the permission and consent of Rogers?—A. Yes.

6. Q. At what sum do you assess the damage to the father?—A. $559.75.

7. Q. At what amount do you assess the damage to the infant plaintiff?—A. $3,000.

(1) [1926] 3 D.L.R. 918.

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The jury explained that the amount awarded the infant plaintiff would have been about $4,000 had there been no contributory negligence; the $3,000 was awarded after deducting the 25 per cent.

S. 2 of *The Contributory Negligence Act* of New Brunswick, 1925, c. 41, provides that

> Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault: * * *

Crockett J. directed that a verdict be entered for $559.75 in favour of the plaintiff Edwin W. Long, and for $3,000 in favour of the infant plaintiff Joseph John Long by his next friend Edwin W. Long. He said

> I did not deal with the question as to whether the plaintiffs were entitled to have a verdict entered under the Motor Vehicle Act Amendment of 1925, because, in my view of the law, at common law the master would be liable.

On appeal by the defendants and cross-appeal by the plaintiffs to the Supreme Court of New Brunswick, Appeal Division, it was ordered that the verdict entered for the infant plaintiff for $3,000 should stand; that the verdict for the plaintiff Edwin W. Long for $559.75 be reduced to $419.83 (applying the 25 per cent reduction); and that the plaintiffs' cross-appeal (asking that the general damages awarded to the infant plaintiff be increased to $4,000) be dismissed.

The defendants appealed to the Supreme Court of Canada, asking that the verdict for the plaintiffs should be set aside, and a verdict entered for the defendants, or, failing that, asking for a new trial or reduction of the verdict; and the plaintiffs cross-appealed against the reduction of the damages of the plaintiff Edwin W. Long, and against the refusal of the appellate court to increase the infant plaintiff's damages to $4,000.

*G. H. V. Belyea K.C.* for the appellant.

*R. S. Robertson K.C.* and *W. R. Scott* for the respondent.

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

ANGLIN C.J.C.—The material facts of this case are fully stated in the judgment of the Appeal Division delivered

by the learned Chief Justice of New Brunswick (1). Although other aspects of the action were presented in argument, the defendants' appeal may in our opinion be disposed of by determining whether liability has been established under the New Brunswick *Motor Vehicle Law, 1915,* (5 Geo. V, c. 43, s. 4—as amended by 15 Geo. V, c. 10, s. 3), and the respondents' cross-appeal as to the application of *The Contributory Negligence Act* (15 Geo. V, c. 41) by deciding whether the issue of contributory negligence should have been withdrawn from the jury on the ground that there was no evidence on which an affirmative finding could be based.

The attack made upon the findings of the jury, that the injury to the infant plaintiff was caused by negligence of the defendants' driver, consisting first "in allowing the boy on the running board of the car," and, second, in "lack of proper attention to his duty of driving the car just previous to and at the time of the accident," was ineffective. There is abundant evidence to sustain these findings and there can be no doubt that they establish that the defendants' motor vehicle was operated by their servant on a public highway " so as to endanger the life or limb " of the infant plaintiff.

Subsection 1 of section 4 of the New Brunswick *Motor Vehicle Law, 1915,* reads in part as follows:

> 4. (1) No person shall operate a motor vehicle on a public highway at a greater rate of speed than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, or the safety of any property * * *

Subsection 6 (added to section 4 in 1925) provides that:

> (6) The owner of a motor vehicle shall be responsible civilly as well as hereunder for any violation of any provision of this Act or of any regulation made under this Act, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner, without his consent, expressed or implied, and the driver of a motor vehicle not being the owner, shall also be responsible for any such violation, provided that no such owner shall be liable to imprisonment in respect of such violation.

The motor vehicle at the time of the occurrence in question was admittedly in possession of the driver with the owners' consent.

It has been suggested that the benefit of subsection 1 of section 4 should be confined to persons using the highway

(1) [1926] 3 D.L.R. 918.

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other than those in or upon a motor vehicle the operation of which causes injury. While such persons may have been the immediate object of solicitude by the legislature in enacting the *Motor Vehicle Law,* we fail to find in the statute anything which would justify placing such a restriction on the comprehensive words "any person" in the clause "so as to endanger the life or limb of any person." Nor does it seem material in connection with this statutory liability to determine the precise legal status of the infant plaintiff while riding on the running board of the motor truck, although it by no means follows that contributory negligence on his part, if established, would not afford a defence to his claim as has been held in regard to other statutes imposing similar liability, for instance, in the well-known cases under the Factories' Acts.

The facts alleged in the statement of claim suffice to bring the case within the ambit of s. 4 of the *Motor Vehicle Law, 1915.* Paragraph 5 reads:

> The said motor truck was driven so recklessly, incapably, negligently and without exercising reasonable and proper care, it plunged off the road and struck a tree and a telegraph pole and badly injured the said infant plaintiff.

No doubt liability at common law of the defendants as masters and employers of the driver was chiefly stressed at the trial. But the right of the plaintiffs to invoke the *Motor Vehicle Law, 1915,* was also distinctly asserted by their counsel and the learned trial judge expressly stated that he refrained from dealing with that aspect of the matter only because he was quite convinced of the defendants' liability at common law. The case was fully tried out. There is no suggestion that if possible liability under the statute had been earlier or more pointedly brought to the attention of the defendants' counsel any other or further evidence would have been adduced, or that such evidence is now available. We see no valid reason for excluding the plaintiffs in this action from the benefit of the *Motor Vehicle Law, 1915,* and that statute is, in our opinion (subject to the question of contributory negligence presently to be considered), conclusive of the liability of the defendants as owners of the motor vehicle the negligent operation of which caused injury to the infant plaintiff resulting in the loss of his arm.

The plaintiffs' challenge of the finding of contributory negligence affects both the appeal and the cross-appeal. If there is no evidence to support that finding the plaintiffs' right to recover is clear and no question of apportioning the damages can arise. The contributory negligence of the infant plaintiff as found by the jury was "by staying on the car after having been asked to get off, and by standing on the running board of the car when it was moving." They had already found the driver negligent "in allowing the boy on the running board of the car." The evidence is consistent only with the view that the boy remained on the running board with the tacit consent of the driver.

At the trial, counsel for the plaintiffs distinctly asked for the withdrawal of the issue of contributory negligence from the jury before the learned judge made his charge, and again at its conclusion in these words:

> Mr. Scott: I wish it to be distinctly understood and noted that I am objecting to any question of contributory negligence in this case going to the jury.
>
> The Court: That is clear. If there is no such evidence as would warrant me in submitting the question to the jury, it would be open to you whether you objected or not.

Again, in his argument on the motion for entry of verdict counsel for the plaintiffs took this position:

> There was no act of Jackie Long's which was the decisive cause of the injury to himself or which materially contributed to it or affected it in any way. * * * Contributory negligence must in effect have been the decisive cause of the collision * * *. The act of getting up on the running board * * * is separate and distinct from the negligence which was the decisive cause of the injury, namely the so handling the car that it ran off the road and collided with the tree.

With the utmost respect, it would appear that in the courts below the application to a charge of contributory negligence of the maxim, *in lege causa proxima, non remota, spectatur,* was not sufficiently adverted to.

In *Spaight* v. *Tedcastle* (1), Lord Chancellor Selborne said, at p. 219,

> Great injustice might be done, if, in applying the doctrine of contributory negligence * * * the maxim, *causa proxima, non remota spectatur,* were lost sight of * * *. An omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendants' fault, and if it had no proper connection as a cause with the damage which followed as its effect.

(1) (1881) 6 App. Cas. 217.

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In order to constitute contributory negligence it does not suffice that there should be some fault on the part of the plaintiff without which the injury that he complains of would not have been suffered; a cause which is merely a *sine qua non* is not adequate. As in the case of primary negligence charged against the defendant, there must be proof, or at least evidence from which it can reasonably be inferred, that the negligence charged was a proximate, in the sense of an effective, cause of such injury. The law on this point is admirably stated by Mr. Beven in his work on "Negligence" in the following passage: (Canadian Edition, at p. 155):

> Much of the difficulty in fixing the meaning of contributory negligence arises from the ambiguous use of the phrase, "contributing to the injury." This may indicate any of the whole set of antecedents necessary to produce the effect, or that one of them which marks their final completion and the actual calling into being of the effect. The *causa sine qua non* of an accident is not that on which depends the legal imputability of the accident. The liability depends not on that but on the *causa efficiens*. In fact the same test is applicable to the ascertaining what negligence contributes to an injury, as we have already applied to the ascertaining negligence itself. We must trace the negligent consequences to the last responsible agent, who, either seeing the negligent consequences or negligently refusing to see them, has put into motion the force by which the injury was produced.

Not only would any injurious consequences of the infant plaintiff's fault in standing on the running board of the car probably have been avoided by the exercise of ordinary care and caution by the defendants' driver (*Tuff* v. *Warman* (1) ), but no view is possible on the evidence before us other than that it was the failure of the driver to take such ordinary care and caution in the operation of the motor vehicle which was the sole direct cause—*causa causans*—or, as Lord Sumner suggested in *B.C. Electric Ry. Co.* v. *Loach* (2), "the cause" of the infant plaintiff's injury.

> A. is suing for damages * * * . He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. (the defendant) had not been subsequently and severably negligent. A. recovers in full.

(*Admiralty Commissioners* v. *SS. Volute* (3) ).

We are for these reasons of the opinion that there was no evidence to submit to the jury on the issue of contribu-

(1) (1858) 5 C.B. (N.S.) 573, at p. 585.

(2) [1916] 1 A.C. 719, at p. 728.

(3) [1922] 1 A.C. 129, at p. 136.

tory negligence—no evidence on which they could find that fault of the infant plaintiff was in the legal sense a cause of his injury; and that the learned judge should accordingly have acceded to the request of the plaintiffs' counsel that the questions on that issue should be withdrawn, and, failing that, should have acceded to his subsequent motion that judgment be entered in favour of the plaintiffs for the full amount of the damages found by the jury regardless of the finding of contributory negligence.

In our opinion, within the meaning of s. 2 of *The Contributory Negligence Act* of New Brunswick (1925, c. 41) damage or loss is "caused" by the fault of two or more persons only when the fault of each of such persons is a proximate or efficient cause of such damage or loss, i.e., only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence. *Canadian Pacific Ry. Co.* v. *Frêchette* (1). It follows that *The Contributory Negligence Act* has no application to the case at bar.

To avoid misapprehension we should, perhaps, add that neither approval of, nor dissent from, the opinion of the New Brunswick Appeal Division that, on the finding of the infant plaintiff's contributory fault, *The Contributory Negligence Act* would apply also to the case of the adult plaintiff may be inferred from the present judgment. The claim of the father is to recover medical and other expenses for which the negligence of the defendants entailing injury to his infant son subjected him to legal liability. There is recent judicial authority for the view that contributory negligence of the infant plaintiff in the case at bar would at common law preclude the father's recovery upon his own claim. *McKittrick* v. *Byers* (2); *Knowlton* v. *Hydro Electric Power Commission of Ontario* (3). In these cases the position of the father is assimilated to that of a master who sues for tortious injury to his servant. That analogy is perhaps questionable and there is not a little to be said for the view that instead of the negligence of the infant plaintiff being attributable to his father so as to bar his recovery, the former and the defendants are, *quoad* the

(1) [1915] A.C. 871, at p. 879. (2) (1925) 58 Ont. L.R. 158.
(3) (1925) 58 Ont. L.R. 80.

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father, rather in the position of joint tortfeasors. But, if the view taken in the two Ontario cases be sound, is the father one "of two or more persons" whose fault caused injury "to one or more of them" within s. 2 of the statute? It is unnecessary, however, to deal further with this question, interesting as it is, in view of our conclusion that the finding of contributory negligence on the part of the infant plaintiff cannot be sustained.

It is sufficiently clear upon the record that the jury meant to find that the total damages of the infant plaintiff amounted to $4,000, and reduced their verdict in his favour to $3,000 solely by making a reduction of 25% under *The Contributory Negligence Act.*

The appeal should be dismissed with costs, and the cross-appeal allowed with costs, and judgment should be entered for the plaintiff Joseph John Long for $4,000, and for the plaintiff Edwin W. Long for $559.70, and also for their costs of the action and of the appeal and cross-appeal to the Appeal Division of the Supreme Court of New Brunswick.

NEWCOMBE J.—*The Contributory Negligence Act* of New Brunswick, ch. 41 of 1925, s. 2, enacts that:

> Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault.

It thus states a case where there is no liability at common law. Lord Blackburn in *Cayzer* v. *Carron* (1), said:

> Where the cause of the accident is the fault of one party and one party only, Admiralty and Common Law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of Admiralty and the rule of Common Law. The rule of Common Law says, as each occasioned the accident neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss it shall be brought into hotchpotch and divided between the two. Until the case of *Hay* v. *Le Neve* (2), which has been referred to in the argument, there was a question in the Admiralty Court whether you were not to apportion it according to the degree in which they were to blame; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is, that if there is blame causing the accident on both sides they are to divide the loss equally, just as the rule of law is

(1) (1884) 9 App. Cas. 873, at p. 881.

(2) (1824) 2 Shaw, Sc. App. 395.

that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls.

Therefore, at common law, there was no contribution, but in Admiralty, although the question of fault was regulated by the same principles as those prevailing at common law, a plaintiff against whom contributory fault had been found, could, by the law maritime, recover half his loss.

*The Maritime Conventions Act, 1914,* of Canada, ch. 13 of 1914, s. 2, does not declare a liability where none previously existed. It regulates, as to each of the vessels at fault, the measure of damages in proportion to the degree of fault. Now the New Brunswick Legislature has applied this Act, *ipsissima verba,* to persons with relation to their liability for negligence. When the question arises as to what is the effect of this, the language will, presumably, be construed so that if possible the enactment may have a reasonable application, and therefore, if there be no conceivable common law liability in the case stated by the statute, the court may, not improbably, find an intention to impose statutory liability in such cases; but, if so, seeing that the legislature has gone to the Admiralty provisions for the enunciation of the law, does it thereby adopt the Admiralty principles of contribution?—including that expressed by Lord Birkenhead in the House of Lords in *Admiralty Commissioners* v. *SS. Volute* (1), as follows:

> I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the Bywell Castle rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect.

These questions may, as I have said, be decided when they arise; but in this case we heard no argument upon the interpretation of the statute, and I do not find it necessary to assent to more, upon the point involved in *The Contributory Negligence Act,* than that, in my opinion,

(1) [1922] 1 A.C. 129, at p. 144.

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the infant plaintiff's negligence was not a cause, or any part of the cause, of the injury which he suffered, and therefore that *The Contributory Negligence Act* has nothing to do with the case.

*Appeal dismissed with costs, and cross-appeal allowed with costs.*

Solicitor for the appellants: *W. J. Mahoney.*

Solicitor for the respondents: *W. R. Scott.*

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ROBERT HENRY GALE, TERMINAL GRAIN COMPANY LIMITED, JOHN RUSSELL SMITH AND WILLIAM FARQUHAR GURD (DEFENDANTS)... } APPELLANTS;

AND

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DAI THOMAS (PLAINTIFF).....RESPONDENT.

*May 4, 5.

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*Jan. 4.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Agency—Contract—Claim for commission—General or special employment—Promise to pay commission on moneys raised for certain project, in consideration of letters of introduction—Project arrived at different from that originally contemplated—Companies—Payment of dividend without regard to claim for commission against company—Liability of directors—Debt "existing" or "thereafter contracted"—Companies Act, R.S.C., 1906, c. 79, s. 82.*

G., president of defendant company, was authorized on its behalf to negotiate and conclude arrangements for raising $1,000,000 or such other sum as might be found necessary for the erection and equipment by the company of an elevator, etc. It was contemplated he should go to England for the purpose. He discussed the matter with plaintiff and, before going to England, gave plaintiff a letter from the company in which he said "Relative to the project of building grain elevators, etc., in Vancouver, concerning which we have had several discussions * * *. I shall be pleased to take advantage of the letters of introduction which you have given me to the following persons and concerns [which were here set out]. In the event of my being successful in raising the money required for my project, from or through any of these concerns, I * * * agree on behalf of [defendant company] to protect you to the extent of 2% commission on the amount of money so raised, said commission to be paid

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

to you as and when the money is received." G. did not present the letters of introduction but, through a cable sent at plaintiff's instance, he was met in England by an official of one of the concerns mentioned in the letter, who introduced him to an official of S., with whom eventually an agreement was made by which S. should loan the money required up to $2,500,000, to erect an elevator on an enlarged site, but the elevator and site were to be the property of a new company, 70% of the shares of which were to become the property of S. who should elect a majority of the board of directors. Plaintiff claimed commission, but the defendants alleged that the project ultimately arrived at and carried out between G. and S. was so entirely different (particularly, among other things, as to the holding of control) from the project originally contemplated that it did not come within the terms of the commission agreement. There was conflicting evidence of what G. had told plaintiff was his project when the agreement for commission was made.

*Held,* reversing judgment of the Court of Appeal of British Columbia (36 B.C. Rep. 512), Idington and Duff JJ. dissenting, that plaintiff could not recover; the agreement for commission constituted a special employment, and its restricted character precluded him from claiming commission in respect to an advance for the carrying out of the project ultimately arrived at, which was essentially different from that contemplated when plaintiff was engaged.

In arranging for the carrying out of the project arrived at, steps were taken for the transfer of defendant company's assets to a new company in consideration of all the capital shares of the new company, and provision was made for distribution of said shares by way of dividend to the shareholders of defendant company. The agreement with S. was not consummated until after the payment of this dividend. Plaintiff sought to hold the directors of defendant company liable, under s. 82 of the *Companies Act,* R.S.C., 1906, c. 79, for having paid this dividend without providing for payment of his claim for commission. Idington and Duff JJ., dissenting, who held defendant company liable to plaintiff, held also that the directors were liable; that plaintiff's claim, if not strictly a debt "existing" at the time the dividend was paid, was a debt "thereafter contracted" within the meaning of s. 82.

APPEAL by defendants from the judgment of the Court of Appeal of British Columbia (1) which (M. A. Macdonald J.A. dissenting), dismissed an appeal by defendants, and allowed a cross-appeal by plaintiff, from a judgment of Gregory J. (2) in an action to recover commission.

In 1923 the defendant The Terminal Grain Company Limited, a Dominion company, having corporate powers enabling it, *inter alia,* to construct and work elevators and mills, had its head office in Vancouver, the defendant Gale being president of it, and the defendants Smith and Gurd,

(1) 36 B.C. Rep. 512 [1926] 1 W.W.R. 569.

(2) (1925) 36 B.C. Rep. 512.

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with Gale, directors. The company held a lease of a property on the Vancouver waterfront from the Vancouver Harbour Commissioners, reserving a yearly rental of $4,400, and by that instrument, among other provisions, it was stipulated that the demised premises should be used solely for the purposes of a grain elevator and feed and flour mill, and that an elevator and mill constructed according to plans approved by the Harbour Commissioners, and costing not less than $500,000, should be begun within six months and completed within two years from the date of the lease, which was 19th July, 1923.

At a meeting of the directors held on 10th August, 1923, it was resolved

that the president be authorized to enter into negotiations and conclude arrangements on such terms as he shall consider reasonable, for the raising of the sum of $1,000,000 or such other sum as may be found to be necessary for the erection and equipment of the elevator proposed to be erected by the company, and also for a feed mill and for working capital; and that such moneys may be raised in one or more ways and in one or more sums, and at different times, and either by the sale of debentures, secured in such manner and payable on such terms as he may deem it expedient to concede, or by the sale of preferred shares with any rights and restrictions he may deem it advisable to grant, or by the sale of common stock or by any two or more of such methods; and in pursuing such negotiations to enter into such engagements and or financial obligations on behalf of the company as he may find to be necessary or expedient; and for the attainment of said object to proceed to England or elsewhere at the company's expense.

According to the plans of the directors, Gale was to proceed, and did proceed, to England to attempt to raise the money there. Before leaving Vancouver, he discussed the subject of his visit to England with the plaintiff. As a result, Gale, on behalf of The Terminal Grain Company Limited, wrote to plaintiff, on August 30, 1923, the following letter embodying the agreement which is the basis of the plaintiff's action:

Relative to the project of building grain elevators, etc., in Vancouver, concerning which we have had several discussions, I beg to advise that I shall be pleased to take advantage of the letters of introduction which you have given me to the following persons and concerns:

[Here are set out the persons or concerns referred to.]

In the event of my being successful in raising the money required for my project, from or through any of these concerns, I shall be pleased and do hereby agree on behalf of the Terminal Grain Company Limited, to protect you to the extent of two (2%) per cent. commission on the amount of money so raised, said commission to be paid to you as and when the money is received. * * *

Gale proceeded to England. He did not present the letters of introduction given him by the plaintiff, but through a cable sent, at the plaintiff's request, from Vancouver by an official (who had just arrived at Vancouver) of the Canadian British Corporation (one of the concerns mentioned in Gale's letter to plaintiff aforesaid), Gale was met in England by another official of the Canadian British Corporation, who subsequently introduced him to Sir William Nicholls, of Spillers Milling and Associated Industries Ltd. (Hereinafter referred to as the "Spillers"). Eventually an agreement was arrived at between Gale and the Spillers by which the Spillers should loan the money required, up to $2,500,000, to erect an elevator on an enlarged site, including the land leased to The Terminal Grain Co., Ltd., by the Harbour Commissioners, but the elevator and site were to be the property of a new company, The Vancouver Terminal Grain Co., Ltd., and 70% of the shares of the new company were to become the property of the Spillers, who should elect the majority of the membership of the board of directors.

On 8th February, 1924, the old company, The Terminal Grain Co. Ltd., and the new company, The Vancouver Terminal Grain Co. Ltd., entered into an agreement by which the old company agreed to transfer all its assets to the new company in consideration of the allotment to the old company or its nominees of all the capital shares of the new company. On the same date a resolution was passed at a meeting of the directors of The Terminal Grain Co. Ltd., and also at a general meeting of the company, providing for the payment of a dividend by distribution among the shareholders of The Terminal Grain Co. Ltd., of the said shares. Later, on consummation of the agreement with the Spillers, arrangement was made for the transfer of 70% of the shares to the Spillers, according to the understanding on which the Spillers entered into the project as above mentioned.

The main questions in dispute were:

(1) Was the plaintiff entitled to commission from the defendant The Terminal Grain Co. Ltd.? This would appear to depend on whether or not it could be said that the arrangement ultimately arrived at between Gale and

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the Spillers came within the scope of Gale's "project" as referred to in his letter to plaintiff of 30th August, 1923. There was also involved the question of whether the agreement sued upon constituted a general or special employment of the plaintiff.

(2) If the plaintiff was entitled to commission, on what basis should it be calculated?

(3) If the plaintiff was entitled to commission, had he a claim against the defendants the directors of The Terminal Grain Co. Ltd., under s. 82 of the *Companies Act*, R.S.C., 1906, c. 79, upon the ground that they had declared and paid a dividend to the shareholders, which exhausted the capital of the company, without making provision for payment of his claim for commission?

On behalf of the plaintiff it was contended that the contract with him was one which contemplated payment of a commission in the event of variations being made in the proposal of The Terminal Grain Co. Ltd., and the variations that were made in the deal consummated were within the scope of the original proposition, so that the promise to pay commission included a promise to pay commission in the deal as actually consummated.

On behalf of the defendants it was contended that the project referred to in Gale's letter to plaintiff of 30th August, 1923, was changed entirely, and, indeed, abandoned altogether, and a new one substituted, involving, among other things, an entirely different arrangement than that originally contemplated as to the holding of control.

The resolution of 10th August, 1923, above quoted, had not been shown to the plaintiff. The parol evidence as to what Gale told the plaintiff was his project, was conflicting.

The trial judge, Gregory J., held the plaintiff entitled to commission, the formal judgment limiting the commission to 2% on $1,000,000. He also held the defendant directors jointly and severally liable to the plaintiff for the amount of said commission, under s. 82 of the *Companies Act*, R.S.C., 1906, c. 79.

The court of appeal affirmed the judgment of Gregory J. in holding plaintiff entitled to commission, and the defendant directors liable under s. 82 of the *Companies Act;* but (allowing a cross-appeal by plaintiff) it varied his

judgment by striking out the proviso limiting the commission recoverable to 2% on $1,000,000. Martin J.A. dissented on the question of the directors' liability. M. A. Macdonald J.A, dissenting, held that the plaintiff was not entitled to any commission, as the project actually carried out was so different from the one originally contemplated that it did not come within the terms of Gale's letter to the plaintiff of 30th August, 1923. Having reached this conclusion, he found it unnecessary to deal with the point of law in respect to the alleged liability of the directors. His reasons were substantially adopted by the majority of the court in the judgments now reported.

*E. P. Davis K.C.* and *E. F. Newcombe* for the appellants.

*C. W. Craig K.C.* for the respondent.

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

ANGLIN C.J.C.—Substantially for the reasons stated by Mr. Justice M. A. Macdonald in his dissenting judgment in the Court of Appeal, I would allow this appeal and dismiss the plaintiff's action.

The agreement sued upon constituted a special employment of the respondent. The contract eventually made was for the carrying out of a project essentially different from that contemplated when the respondent was engaged. Whatever might have been the case had the respondent's employment been general, its restricted character, in my opinion, precludes his right to claim commission in respect of an advance of moneys for the carrying out of a project entirely outside the contemplation of the parties at the time the respondent was so employed.

IDINGTON J. (dissenting).—I agree in the main with the reasoning of each of the four judges in their several judgments in the court below upon which was founded the judgment from which appeal is taken herein.

I entirely agree with the judgment of my brother Duff, and hence with his conclusion that this appeal should be dismissed with costs.

I was for a time during the argument and later, inclined to agree with the decision of the learned trial judge, but

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the result of the full consideration I have given the case renders it impossible for me to agree with his judgment in limiting the commission to 2% on $1,000,000. The documents upon which the respondent's claim rests seem expressly to contemplate obtaining money to a greater extent than the $1,000,000, and, as put by the Chief Justice in the court below, it seems to be all or nothing.

The respondent, being either a sensible man desiring to avoid further litigation or, failing that, feeling that he might reasonably be satisfied, under all the circumstances of the case, with $20,000, offered to abandon his cross-appeal if the present appellants abandoned their appeal.

This mid-way that the respondent was willing to go has been treated with contempt, and hitherto, has been supported by only one judge, who can find no cause of action.

The excellent factum of counsel for the respondent has produced an array of authorities, and such an analysis of the evidence and dealing with the various views taken by the judges in the courts below, presents a case that adds much to what my brother Duff has considered, but the essential features thereof are fully presented by him and in such a way as renders it unnecessary for me to resort to the many other features put forward in said factum.

DUFF J. (dissenting).—In 1923 the appellant, The Terminal Grain Company, Limited, a Dominion company (having corporate powers enabling it, *inter alia*, to construct and work elevators and mills), had its head office in Vancouver, the appellant Gale being president of it, and the appellants Smith and Gurd, with Gale, directors. The company held a lease of a property on the Vancouver water front from the Vancouver Harbour Commissioners, reserving an annual rental of four thousand dollars odd, and by that instrument, among other provisions, it was stipulated that the demised premises should be used solely for the purposes of a grain elevator and feed and flour mill, and that an elevator and mill, constructed according to plans approved by the Harbour Commissioners, and costing not less than $500,000, should be begun within six months, and completed within two years from its date, which was the 19th of July, 1923.

At a meeting of the directors held on the 10th of August, of that year, the president was authorized to take steps and conclude arrangements "for raising the sum of one million dollars or such other sum as may be found necessary" for the erection and equipment of the proposed elevator and feed mill, and "for working capital." By the terms of the resolution by which this authority was conferred, the president was empowered to raise this money

> in one or more ways and in one or more sums, and at different times, and either by the sale of debentures * * * or by the sale of preferred shares * * * or by the sale of common stock, or by any two or more of such methods and * * * to enter into such engagements or financial obligations on behalf of the company as he may find to be necessary or expedient.

According to the plans of the directors, Gale was to proceed, and did proceed, to England to attempt to raise this money there.

Before leaving Vancouver, Gale discussed the subject of his visit to England with the respondent and, the respondent having delivered to Gale certain letters of introduction, an agreement was entered into between them, Gale speaking in the name of The Terminal Grain Company, by which the respondent was to receive a commission of two per cent. on moneys raised "from or through" any of the concerns to whom these letters of introduction were directed. This agreement is embodied in a letter addressed to the respondent and signed by The Terminal Grain Company, and is the basis of the respondent's action.

The primary issue for determination is whether or not the conditions have been fulfilled upon which the respondent's right to commission must rest, according to the terms of this letter.

Gale did, in fact, procure an arrangement with the Spillers Milling and Associated Industries, Limited (whom I shall designate as the Spillers), of which Sir William Nicholls was managing director, one of a group of concerns to which Spillers & Baker, one of the firms mentioned in the letter of the 30th of August, belonged; Gale having been introduced to Sir William Nicholls by Mr. White, of the Canadian British Corporation, Limited, another concern mentioned in that letter, at the instance of the respondent. The learned trial judge finds as a fact, and this finding is accepted by the Court of Appeal, that Gale was introduced

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to the Spillers through the Canadian British Corporation, and that his introduction to the Canadian British Corporation was the "direct and immediate result of the plaintiff's act supplementing his letter of introduction to them." This finding is adequately supported by the evidence, and we need not stop to discuss it. By the arrangement with the Spillers, a sufficient sum, up to two and a half million dollars, was to be provided for the building of a grain elevator at Vancouver, on an enlarged site, including the land leased to The Terminal Grain Company by the Harbour Commissioners. But by the scheme as ultimately settled, the elevator and the site were to be the property of a new company, The Vancouver Grain Company, and seventy per cent. of the shares of the new company were to become the property of the Spillers. The proposition upon which the claim of the respondent rests is that this sum, which the Spillers on these terms agreed to advance, answers the description in the letter of the 30th of August as being "money raised" for The Terminal Grain Company's "project," and that, this money having been procured through the Spillers, to whom Gale was introduced by the Canadian British Corporation, one of the concerns mentioned in the letter, the company cannot deny that it has been "successful" in raising the money "required" for its "project" in a manner contemplated by the letter. In the courts below and in this court, the debate turned chiefly upon the point, which is really the crux of the dispute, whether moneys procured for the purpose outlined, and by the means and on the terms outlined, can fairly be said to be "the money required for" The Terminal Grain Company's "project," within the meaning of the letter.

On behalf of the appellants it is said that at the time when this letter was written the plan of the directors of The Terminal Grain Company was to raise money by way of loan, with or without a bonus of shares, but that an essential element of the plan as they conceived it, and as Gale described it to the respondent, was that the relation between the company and the persons furnishing the money should in substance be that of borrowers and lenders merely, and that the voting control and the actual management of the company should remain in the hands of

Gale and Smith; and that the scheme ultimately adopted, under external pressure, involved departures in respect of these essentials so great as to give it the character of an entirely new "project"—a "project" of a type not contemplated by the agreement between the parties.

On behalf of the respondent it is said that this condition, of retaining the control and the management in the hands of the existing directors, was never imparted to the respondent, and that in truth it never was regarded as of the essence of the directors' plans, and that Gale, while desiring to retain control, never regarded that as more than a desideratum.

The learned trial judge has found, on these disputed points, in favour of the respondent, and four out of five of the learned judges who sat in the Court of Appeal have concurred in these findings. These concurrent findings, it goes without saying, the appellants cannot succeed in reversing, without establishing—proving, that is to say, to a demonstration—some specific error or errors vitiating the grounds upon which the findings proceed.

Two considerations militate gravely against the appellants' attack on the conclusions of the courts below. The first arises out of the terms of the resolution already quoted. On the face of it, the resolution makes provision for the possible modification of plans, both as to the amount to be raised and as to the manner of raising it, of a radical character, with a view, one cannot doubt, to coping with the vicissitudes of the negotiations and satisfying the ultimate requirements of the London market. Admittedly, at an early stage, before the Spillers had been interviewed at all, the amount had been increased by Gale, on his own authority, from one million to two millions. In view of the character of the alternatives provided for in the resolution, it seems difficult to say that the resolution itself does not contemplate the abandonment of control by the existing shareholders as a possibility at least. One of the methods specified for raising the money required is by a sale of common stock, and by that alone. In other words, the resolution contemplated the possibility of acquiring the money needed from persons who should not become lenders at all, but virtually co-owners. It is indeed difficult to

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suppose that experienced men of affairs could have thought of seeking to procure capital on such a scale upon such terms without looking forward to the abandonment of control as a likely, if not, indeed, an inevitable condition of success.

The other consideration arises out of the findings of the learned trial judge as to credibility. He accepts the evidence of White as that of a truthful witness; and White received the impression from Gale, for whom he prepared the statement presented to Spillers, and whose confidence he seems to have fully enjoyed, that Gale, while very much averse to parting with so large a share of the property as the Spillers demanded, was not so keenly concerned as to the voting control, which White thought he would not have been unwilling to see vested in a voting trust. Again, the testimony of Gale and that of the respondent came into conflict on more than one point, and on these points the learned trial judge was not satisfied with Gale's testimony. These views of the trial judge were, as already mentioned, concurred in by the Court of Appeal; and in such circumstances it is not the office of this court to inquire what its own view might have been, had it heard the testimony. Criticism of no little force was directed by counsel for the appellants against the views of the learned trial judge as to the testimony of White and as to the testimony of Gale, but, to cite once again the phrase of Lord Haldane in *Nocton* v. *Lord Ashburton* (1), it would be little less than "a rash proceeding" on part of this court to set aside or disregard these findings, which primarily rest on the basis of the learned judge's views as to credibility—views, moreover, confirmed and fortified, to adopt the suggestion of Mr. Justice Martin, by inferences fairly deducible from the documentary evidence.

Loss of control was the point chiefly emphasized by Mr. Davis, but the appellants also rely upon the circumstance that, according to the plan ultimately adopted, the proprietorship of the elevator was vested in an entirely new company. As regards this circumstance, the view taken by the courts below seems to be the right one, namely, that

(1) [1914] A.C. 932, at p. 945.

this was a matter of machinery rather than something affecting the substance of The Terminal Company's "project."

There remains the question of the personal liability of the directors. The obligation arising out of the letter of the 30th of August was, it is contended on behalf of the appellants, neither a debt "existing" at the time of the declaration and payment of the dividend, nor a debt "thereafter contracted," and consequently the directors of The Terminal Company do not fall under the liability created by s. 82 of the Dominion *Companies Act*. Let it be conceded that, strictly, there was no existing debt. Does the obligation in favour of the respondent, which became exigible after the pertinent date, fall within the scope of the later phrase, "debts thereafter contracted"? The obligation took its rise from the letter of the 30th of August. It was a conditional obligation in the sense that the respondent was to become entitled to certain payments upon the fulfilment of certain conditions. The conditional contract was completely constituted as an executory contract before the declaration of the dividend, but the right to payment, conditional in its inception, became absolute—ripened into a "debt"—on the performance of the conditions. This debt was a contractual obligation resulting from the performance by the respondent of the conditions of the executory contract. It does not seem to be an abuse of language to describe such a contractual obligation as "contracted" at the time when it came into existence as a debt, through the performance of the conditions of the contract in which it originated.

The appeal should be dismissed with costs.

*Appeal allowed with costs.*

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

Solicitor for the respondent: *Clarence Darling.*

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*Feb. 1.

ALPHONSE WEIL ET FRERES (PLAINTIFFS) ..... } APPELLANTS;

AND

THE COLLIS LEATHER COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

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

*Sale of goods—Calfskins—Description in contract—Weight—Some skins over stipulated weight—Purchaser's right of rejection*

Plaintiffs contracted to sell to defendant calfskins, of certain kinds described. Defendant refused to accept delivery, objecting as to quality, and plaintiffs sued for damages for breach of contract. The descriptions of the skins in the contracts contained the words "weight 7 to 15 lbs." or "weight 8 to 15 lbs." A material number weighed over 15 lbs.

*Held,* plaintiffs could not recover; defendant was entitled to reject the skins offered for delivery, and was not confined to a remedy in damages for breach of warranty; the stipulations descriptive of the weights were material terms constituting conditions of delivery; there was no evidence sufficient to establish any custom of trade, usage or course of dealing by which defendant became bound to accept overweight skins; and the right to reject such skins involved or carried with it the right to refuse a quantity materially less than that ordered, or packages with which substantial quantities of goods which defendant was not liable to accept were intermingled.

Where sellers of goods do not satisfy the stipulated descriptions, the question whether or not this is a cause for rejection or gives rise only to a claim for damages, depends upon the intention of the parties as evidenced by the contract in the light of the surrounding circumstances.

*Graves* v. *Legg* (9 Ex. R. 709, at p. 716), *Bentsen* v. *Taylor* ([1893] 2 Q.B. 274, at p. 281), *Levy* v. *Green* (5 Jur. N.S. 1245), and other cases, referred to.

*Held,* further, that there was nothing in subsequent agreements between the parties, or elsewhere in the negotiations, whereby defendant became bound to accept goods not of the descriptions required by the contracts of sale, or, by reason of its refusal to accept such goods, to forfeit certain allowances which it had received in accordance with such subsequent agreements.

Judgment of the Appellate Division of the Supreme Court of Ontario (58 Ont. L.R. 1) affirmed, with a minor variation.

APPEAL by the plaintiffs, and cross-appeal by the defendant, from the judgment of the Appellate Division of

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

the Supreme Court of Ontario (1) affirming the judgment of Rose J. (2), dismissing the plaintiffs' action, and holding the defendant entitled to recover $3,446.33 in respect of its counter-claim.

The plaintiffs sued for damages for refusal by the defendant to accept delivery of calfskins sold, under contracts, by the plaintiffs to the defendant. The defendant claimed that the skins offered for delivery were not according to contract, and, besides denying liability, set up a counter-claim for alleged defects in skins accepted and paid for and for alleged shortages and other matters. Rose J. dismissed the plaintiffs' action and dismissed defendant's counter-claim except as to the sum of $3,446.33 (2). An appeal and cross-appeal to the Appellate Division was dismissed (1). The plaintiffs appealed to the Supreme Court of Canada, and the defendant cross-appealed, asking for an increase of the amount awarded on its counter-claim.

The material facts of the case are sufficiently stated in the judgment now reported. The judgment below was varied by reducing the amount allowed defendant on its counter-claim to $373.96, and subject thereto the appeal and cross-appeal were dismissed with costs.

*Wallace Nesbitt K.C.*, *R. S. Robertson K.C.*, and *G. M. Huycke* for the appellants.

*J. W. Bain K.C.* and *M. L. Gordon* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The claims in controversy arise out of some unfortunate commercial transactions between the parties during the year 1920. The story may be briefly told.

The plaintiffs are a partnership, carrying on business in Paris and New York as dealers in skins. The defendant, a joint stock company, is a manufacturer of leather, and has a tannery at Aurora in Ontario. There are four contracts between the parties, described as the March, April, May and June contracts respectively, each expressed to be c.i.f. New York, viz., the contract of 22nd March, whereby the

(1) (1925) 58 Ont. L.R. 1. (2) (1924) 58 Ont. L.R. 1.

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plaintiffs sold to the defendant about 10,000 green salted Paris and best French trimmed calfskins, weight 7 to 15 lbs., averaging about 10½ to 11 lbs., at 80 cts. per pound, and about 10,000 best French calfskins, weight 8 to 15 lbs., averaging about 10½ to 11 lbs., at 65 cts. per pound; the contract of 10th April, for the sale of 10,000 green salted Paris and best French trimmed calfskins, weight 7 to 15 lbs., averaging about 10½ to 11 lbs., at 80 cts. per pound, and about 10,000 best French calfskins, weight 8 to 15 lbs., averaging about 10½ to 11 lbs., at 65 cts per pound; the contract of 17th May, for the sale of about 5,000 green salted Paris and best French trimmed calfskins, weight 7 to 15 lbs. at 70 cts. per pound, and the contract of 1st June, for the sale of 10,000 green salted Paris and best French trimmed calfskins, weight 7 to 15 lbs., at 65 cts. per pound. The prices, in each case, were to be computed in United States currency. There is a dispute as to the existence of the April contract, which, although reduced to writing and signed by the plaintiffs, was not signed on behalf of the defendant, but the learned trial judge finds upon the evidence, including the correspondence in the case, that this contract was concluded, and that the parties became bound, and I see no reason to doubt the propriety of this finding. The defendant also, at one time, denied the June contract, but Mr. Bonisteel, the defendant's manager, acknowledged at the trial that it no longer remained in question.

Mr. Bonisteel, who negotiated the contracts, left Aurora on 7th April and sailed for Europe on the 9th. While absent he made the contracts of May and June. He returned to Aurora on or about 7th June. In the meantime some of the shipments of the goods contracted for had arrived, and been delivered to the defendant at Aurora. Other shipments were on the way. The defendant's storehouse was stocked with skins; but the prices had fallen, and the market was still going down.

As to the ordinary manner of shipment and payment, the plaintiffs, who were the shippers, tied the skins in bundles, each containing 6 to 8 skins, without any regard to uniformity of weights, so that all weights were mixed together in the bundles; shipped them to New York to the order of the shippers, and drew, at sight, on the defend-

ant company at Aurora for the invoice prices, through their bank in Paris, with the shipping documents attached to the drafts. The drafts were forwarded for collection to La Banque d'Hochelaga at Montreal, and were presented and collected, when the defendant paid them, by the Imperial Bank, agent of La Banque d'Hochelaga at Aurora. When the defendant paid such a draft it sent the ocean bill of lading to the plaintiffs at New York, and the plaintiffs saw to the entry and receipt of the goods, and forwarded them by rail to the defendant at Aurora, the defendant paying the cartage and freight. When the draft was not paid, it was returned with the documents to the plaintiffs in New York, and thus they got possession of the goods. If, as sometimes happened, goods which were in the plaintiffs' warehouse in New York were dispatched to the defendant at Aurora, the plaintiffs made a sight draft in New York, with railway bill of lading attached, which the defendant would take up at Aurora, and receive the goods.

Mr. Bonisteel, having returned to Aurora, and finding that he had ordered in excess of his requirements, confirming a telegram, wrote to the plaintiffs' New York house, on 10th June, with regard to a shipment of 1,690 bundles from Havre, of which he had been advised, questioning the right of the plaintiffs to forward these skins, and he said:

> This week, we have been getting cancellations of orders in every mail, and it will be impossible for us to take in any more skins, and we have asked you in this telegram to cable Paris not to ship these skins, or any other skins, and we would ask you to kindly cancel all our orders, as it will be impossible for us to take care of the drafts, and it will be of no use your Paris House making shipments to us when we will be unable to take care of the drafts, and we are obliged to accept the cancellations that are coming in.

Correspondence followed, and Mr. Cahn, the plaintiffs' New York manager, went to Aurora to see Mr. Bonisteel, on or about 12th June. The contracts and deliveries came under discussion, and in the result a memorandum was signed at Toronto, dated 16th June, by Mr. Cahn for the plaintiffs, and Mr. Bonisteel for the defendant, whereby, in order that all existing contracts between the parties should be filled, it was agreed that an allowance of 10 cts. per pound should be made on several parcels of skins invoiced at Paris, on 29th April, in the aggregate 15,222 skins, and an allowance of 15 cts. per pound on other skins in-

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voiced under five later invoices, 18th May to 3rd June, covering 17,801 skins, and that the defendant would pay, within six weeks from date, for the shipments invoiced under date of 29th April, and, for all other shipments, within three months. At this time a considerable quantity of the skins contracted for in March had been received by the defendant, and carloads were coming forward from New York, or were waiting at Aurora for delivery to the consignees. Mr. Cahn says that Mr. Bonisteel was in a much agitated condition; that he had found his business in bad shape upon his return from Europe; that his bankers, upon whom he was dependent for money to retire the drafts, refused to make further advances for the purchase of skins, and that his customers were, owing to the condition of the market, cancelling the orders upon which he depended for his receipts. He says, as to the shipments which were on the cars at Aurora, or coming there, that Mr. Bonisteel volunteered to take these into his warehouse, and keep them separate until he could pay for them, but that he, Mr. Cahn, considered that

> in view of the fact that he told me that he was not getting any money from the bank, and his agitated condition, I thought that he was not any good any more, and I refused to touch the skins and rather stored them in New York.

Accordingly, Mr. Cahn ordered these cars back to New York, and put the shipments into store there, where they remained, along with other skins shipped under the various contracts and unaccepted, until disposed of in the manner which will presently be disclosed. The defendant company did not meet the payments within the extended terms stipulated by the memorandum of 16th June, but, at the end of July, sent in claims in respect of the skins which it had received for damages or allowances due to the quality of those skins; the complaints relating especially to butcher scars. After some correspondence and interviews Mr. Bonisteel, on 24th August, had an interview with the plaintiffs at their office in New York, the result of which is stated in a memorandum of that date as follows:

> With reference to the shipments of French Calfskins, on which drafts are being held by the Banque d'Hochelaga, we had to-day another conference with Mr. Bonisteel, of the Collis Leather Co., and the following differences due to the Collis Leather Co. were established:

1. Excess shrinkage ..... $10,294 64
   Allowances for quality, etc..... 17,661 18
   Allowances for quality, etc., in full settlement of all shipments made to the Collis Leather Co. to date..... 30,000 00
   $57,955 82

2. Credit was established in favour of the Collis Leather Co. for $59,161.15 on the invoices now in abeyance, which include allowances of 10c. and 15c. per lb. respectively and excess shrinkages on these lots.

3. It was agreed that the skins should be shipped within a reasonable time in accordance with the instructions received by the Collis Leather Co.

4. As shipments of skins now in warehouse are made Alphonse Weil & Bros. will send a check to the Banque d'Hochelaga, which will include the excess shrinkages and allowance as per paragraph 2, and also 20% of the amount of the original Paris Invoices for the skins shipped, this 20% to apply against shrinkages and allowances as per paragraph No. 1. Alphonse Weil & Bros. will instruct the Banque d'Hochelaga to accept from the Collis Leather Co., in lieu of amount of draft, the difference between the amount of check sent to the Banque d'Hochelaga and the amount of original draft, and to deliver upon payment B/L for the respective shipment.

This memorandum was not signed by Mr. Bonisteel, although I think he admits that it sets out substantially the arrangement which was made, and, according to Mr. Cahn, the reason he gave for not signing it was that he was not permitted by his bank to sign any further agreements. There was however an additional claim of upwards of $7,000 which Mr. Bonisteel put forward, and which the plaintiffs were unwilling to allow, and Mr. Bonisteel says that he did not sign the memorandum because "I was not satisfied as they would not allow me all my claims." The learned trial judge considered that the agreements of 16th June and 24th August, although relied upon by the defendant as evidence of admissions by the plaintiffs affecting the quality of the skins, were not in fact intended so to operate, but rather as allowances which, on account of the state of the market, the plaintiffs were willing to make conditionally, in so far as these agreements were carried out. Mr. Cahn however tells us upon discovery that the agreement of 24th August was a compromise settlement, and he reiterates in his testimony at the trial that the allowance was a compromise. Subsequently the plaintiffs made two shipments of 665 bundles of skins, on 26th August, and 784 bundles, on 15th September, which the defendant

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received and paid for, and, as to which, allowances were received by the defendant in accordance with the terms of the August agreement; but the defendant claimed that the skins comprised in these two shipments were not of contract quality, in that they were salt stained, butcher scarred, or had long shanks.

The market appears to have gone from bad to worse, and ultimately, in October, the defendant company temporarily closed its factory. In the meantime the skins, in respect of which the action is brought, remained with the plaintiffs in their New York warehouse, and there came a time when, on 29th September, the plaintiffs wrote the defendant that

> unless you will be here next week to approve of the skins we shall be obliged to take other steps to finally reach a conclusion of this matter.

Then the defendant wrote the plaintiffs, on 4th October, reiterating or referring to its complaints with regard to the skins shipped subsequently to 24th August, and saying:

> As we have already notified you, if the balance of the skins are as represented, we are, and always have been, willing to accept them, but if they are anything like the skins which have been recently shipped, we will not accept them as they are of no use to us.

Subsequently, in October, Mr. Bonisteel with others, the defendant's employees, or acting under their instructions, came to New York for the purpose of examining the skins in store, and he obtained from Mr. Cahn, or from his office, an order to the warehouseman to permit the inspection. He, and those who were with him, did inspect the skins on that occasion, and, after a day and a half, he went to the plaintiffs' office and told them that he would not accept the skins, as they were not of correct quality. And, on 2nd December following, this action was begun.

The defendant, as I understand the case, has accepted and paid for all the calfskins of the March contract, except 1,150 Paris and best French trimmed, weighing 12,623 lbs., at 80 cts. per pound; also all the skins purchased by the April contract, except 5,045 trimmed, weighing 54,001 lbs., at 80 cts. per pound, and 3,197 best French calfskins, weighing 40,074 lbs. at 65 cts. per pound. None of the skins provided for by the other two contracts has been accepted or paid for, and in the action the plaintiffs seek to establish a tender of the skins which were not accepted; that the defendant refused to accept delivery thereof or to pay therefor, and that the plaintiffs are entitled to recover, in

respect of the unaccepted skins appertaining to each contract, the prices stipulated therefor respectively in the original contracts, less $53,338.60 which the plaintiffs ultimately realized upon the sale of the unaccepted skins, the total claim amounting to $141,852.57.

The defendant, having finally rejected the skins which remained in the plaintiffs' warehouse, and which were examined on the defendant's behalf in October, the plaintiffs disposed of them in the following manner. They sold all the trimmed skins, under 12 lbs. in weight, to Albert Trostel and Sons Company, of Milwaukee, and all the trimmed skins, over 12 lbs. in weight, to the Monarch Leather Company of Chicago, and they reshipped to Paris all the untrimmed skins with heads and short shanks, where they sold them; Mr. Cahn stating, as to the latter, that they were too light for the trade in America at the time; that the market had collapsed, and that they were sure of getting more money in France where the market was high. This disposition of the skins involved the breaking up of the bundles, and distribution according to the weights of the skins, and it was found that a very considerable number of them weighed in excess of 15 lbs. each, the limit fixed by the defendant's contracts. The invoices to the Monarch Co. show that there were no less than 787 heavy skins, that is, exceeding 16 lbs. The evidence further shows that the skins were about equally distributed as to weights, and that therefore, taking the upper limit as 15 lbs., there would have been a proportionate increase of heavies. The learned trial judge put his finding in this way. He said that:

> On the weighing it was found that there were 8,020 skins weighing over twelve pounds each and that of these 714 were over sixteen pounds, running up to twenty pounds, in some instances; and a witness says, and it seems probable, that of the remainder of the 8,020 a good many weighed between fifteen and sixteen pounds. The witness said that approximately there were as many skins of any given weight as of any other; and it is suggested by counsel that from this evidence one can ascertain the number that there were over the fifteen pounds, which was the limit in the defendants' case, but not exceeding the sixteen pounds, which was the limit on the sale to the Trostel (sic) Company. This would be to take the evidence rather too literally. It may, however, be assumed that the number of those that weighed over fifteen pounds each was considerably in excess of 714; and it may, and ought to be found that the skins weighing over fifteen pounds were distributed throughout the various consignments.

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He found that there was no custom of the trade entitling the vendor to deliver skins not of the weight contracted for, and that, in the absence of such a custom, the fact that a substantial number of heavy skins were mixed with the contract skins, in the bundles which were tendered for inspection and delivery, justified the defendant's refusal to accept, and he referred to the case of *Levy* v. *Green* (1). In that case the vendor had sent a crate containing a deficient quantity of the particular goods ordered, along with other goods not ordered, packed in the same crate. He debited the whole contents of the crate, which the defendant refused to receive upon the ground that they were out of time; but, at the trial, the objection was taken that the defendant was not bound to take any part of the goods, because of the manner in which they were sent, accompanied by goods not ordered. In the Queen's Bench (2) Lord Campbell C.J., and Wightman J., considered that the purchaser was not bound to accept, while Coleridge and Erle JJ., were of the contrary opinion. But, in the Exchequer Chamber (3), Martin, Bramwell and Watson BB. and Willes and Byles JJ. were unanimous in holding, with Lord Campbell and Wightman J. that the purchaser had the right to reject the whole. It was for a like reason that the present action failed at the trial, and the judgment was unanimously upheld by the Appellate Division.

The plaintiffs (appellants) now object, upon appeal, that the judgment is erroneous for various reasons. They say that the presence of overweight skins did not entitle the defendant to reject; that there was no breach of condition, but at most a breach of warranty, on account of which the defendant's remedy was in damages, and that, in any case, according to the general course of dealing and conduct of the parties, the defendant had no right to reject for overweight. I am of the opinion, however, that the stipulations of the several contracts, descriptive of the weights of the skins which were to be supplied, were material terms, constituting conditions of delivery. The clause which is common to all the contracts, 7 to 15 lbs. (or

(1) (1859) 1 El. & El. 969; 5 Jur. N.S. 1245.

(2) (1857) 8 El. & Bl. 575.

(3) (1859) 5 Jur. N.S. 1245; 1 El. & El. 969.

8 to 15 lbs.), obviously defines by reference to weights the kind or character of the skins which were intended to be shipped; moreover the word "calfskins," in itself, is not apt to include skins weighing more than 15 lbs.; these, up to 25 lbs., are, according to the plaintiffs' evidence, classified in the trade as "kips." The plaintiffs have therefore not satisfied the stipulated descriptions. Whether or not their non-compliance is a cause for rejection, or gives rise only to a claim for damages, must depend upon the intention of the parties as evidenced by the contracts and the facts in proof. See the judgment of Parke B., in *Graves* v. *Legg* (1). *Bowen* L.J., said in *Bentsen* v. *Taylor* (2):

> There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. There, again, it might be necessary to have recourse to the jury. In the case of a charterparty it may well be that such a test could only be applied after getting the jury to say what the effect of a breach of such conditions would be on the substance and foundation of the adventure; not the effect of the breach which has in fact taken place, but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract.

See also *per* Fletcher Moulton L.J., in *Wallis* v. *Pratt* (3), whose judgment was upheld by the House of Lords (4). Applying these principles to the interpretation of the contracts in question, I find myself in accord with the view, which I conceive to be implied, if not expressed, in the judgments of the courts below, that the plaintiffs' right to recover is dependent upon the skins offered for delivery having the descriptive weights. There is no evidence sufficient to establish any custom of trade, usage or course of dealing by which the defendant became bound to accept skins not within the description by which the goods are defined in the documents, and the right to reject such skins involves or carries with it the right to refuse a quantity

(1) (1854) 9 Ex. R. 709, at p. 716.
(2) [1893] 2 Q.B. 274, at p. 281.
(3) [1910] 2 K.B. 1003, at p. 1011 et seq.
(4) [1911] A.C. 394.

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materially less than that ordered, or packages with which substantial quantities of goods which the defendant is not liable to accept are intermingled. The proof and the findings leave no doubt as to the materiality of the quantity of the skins which were overweight. The court is, of course, always very careful, in the interpretation of commercial contracts, not to introduce a variation. A kindred question was recently considered in this court in *California Prune and Apricot Growers* v. *Baird & Peters* (1). See also the well known case of *Bowes* v. *Shand* (2).

Then it is said that the defendant, although it may originally have had the right to reject, lost that right by reason of what occurred subsequently; that, although the defendant received benefits under the agreements of 16th June and 24th August by way of reduction in the prices, these reductions were made only conditionally, and that the defendant should at least be chargeable with the original contract prices of the two shipments which were made from New York subsequently to the agreement of 24th August, and which the defendant received at Aurora and paid for in accordance with the agreements of 16th June and 24th August. I do not consider however that these two agreements were intended to supersede the original agreements of March, April, May and June, under which the goods were shipped. The agreement of 16th June expressly declares that it is made in order that the existing contracts shall be fulfilled. It provides for the stipulated allowances of 10 cts. and 15 cts., and for payment to be made within six weeks and three months from the date of the agreement. The agreement of 24th August, according to its terms, establishes allowances for excess shrinkage and for quality as to the shipments which had already been received and paid for by the defendant, amounting in all to $57,985.82. As to the remaining invoices, which include the goods now in question, as well as the two shipments which were made later in August and in September, credit was established in favour of the defendant for $59,161.15, which includes the allowances resulting from the agreement of 16th June and for excess shrinkage upon the lots to be delivered, and it provides moreover that, as

(1) [1926] S.C.R. 208. (2) [1877] 2 App. Cas. 455.

the shipments were made of the skins in warehouse, the plaintiffs would pay to the bank the excess shrinkages and allowances upon the invoices outstanding on 24th August, and, in addition, 20% of the amount of the original Paris invoices for the skins shipped, to be applied in reduction of the general allowance of the $57,955.82 above mentioned; the plaintiffs and defendant thus to contribute proportionately to the payment of the original drafts, as the shipments were received by the defendant. There is no expression either in the agreement of 16th June, or in the written memorandum expressive of the agreement of 24th August, which makes them, or either of them, conditional upon the defendant accepting and paying for the entire quantity of the skins which the plaintiffs were holding in their New York warehouse, and which had been shipped from Paris in fulfillment of the original contracts. There are, however, some expressions that these agreements were intended to operate conditionally; they are comprised in three passages. Mr. Cahn, upon discovery, when asked as to whether he remained bound by the agreement of 16th June, considered the question to be one of law; he referred it to the solicitor who was representing him at the discovery, and the solicitor answered:

> This was a conditional arrangement providing that Mr. Bonisteel do so and so, they were prepared to do so and so.

Mr. Cahn's answer was accordingly in the negative. Mr. Copeland, the plaintiffs' accountant, who was present at the meeting of 24th August, when asked in cross-examination as to whether the plaintiffs had agreed to pay the allowance of $58,000, answered:

> Providing Mr. Bonisteel, The Collis Leather Company agreed to take delivery and pay the outstanding drafts.
>
> Q. And pay the outstanding drafts for the goods which were then in the warehouse, were they?
>
> A. Yes, under various contracts.

Mr. Bonisteel, in his cross-examination with reference to the agreement of 24th August, gave the following answers:

> Q. And they (the plaintiffs) were, as we saw yesterday, if they allowed any amount on your claims, to deduct the amount of the allowances proportionately from later invoices; that was the method of dealing with it that was discussed?
>
> A. Yes, sir.
>
> Q. And it meant this, that unless you took the rest of the skins you did not get the allowance; that is so, isn't it?
>
> A. That was the understanding.

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The learned trial judge, in considering the evidence as to the defective character of the skins, said:

> The defendants suggest also that in a memorandum signed by the parties at Toronto on June 16 (ex. 7), and in another prepared by the plaintiffs in New York on August 24, which Mr. Bonisteel refused to sign, there are admissions that the skins were defective; but, as a matter of fact, the documents evidence merely certain allowances that the plaintiffs were willing to make if the defendants fulfilled their contracts and took in and paid for all the skins shipped from France. The transactions between the parties had been extensive and mutually satisfactory; the plaintiffs had the skins on hand, and no market at nearly the price that the defendant had agreed to pay was available; it was very doubtful whether the defendants were able to pay for the skins at the contract prices, their market for leather being what it was; and whether they could pay or not, it was fair and businesslike on the part of the plaintiffs to give them some extra time and to share the loss with them. This was the purpose of the arrangements made in June and August; and the allowances conditionally, and only conditionally, agreed upon in respect of earlier shipments and of goods still to be delivered cannot be treated as admissions of defects either in the goods theretofore delivered or in those still to be delivered.

It is however to be inferred that the learned judge did not intend these observations to affect the defendant's right to the allowances which it had actually received upon the two shipments of 26th August (665 bundles) and 15th September (784 bundles), which were invoiced from New York and paid for subsequently to the agreement of 24th August, and as to which the deductions were actually allowed on the invoices and settled. Those he regarded, and I think rightly, as concluded transactions, because he did not find the plaintiffs entitled to recover the allowances which they had paid and deducted upon these invoices. Of course the defendant was, by the terms of the agreements, to receive its allowances upon future payments, and, if it did not make those payments, there was nothing upon which the deductions could operate; in that sense the allowances were conditional, but I think that is all that is intended or involved in the evidence and findings as to the conditional nature of the agreements. The benefits which the defendant received were those sanctioned by the agreements. They were spread over the invoices, and accrued only as payments were made, but the subject-matter of the original contracts of sale remained constant, and I find nothing in the arrangements of June and August, or elsewhere in the negotiations, whereby the defendant became bound to accept goods not of the descriptions required by the con-

tracts of sale, or, by reason of its refusal to accept such goods, to forfeit allowances which it had received.

For these reasons I am in agreement with the courts below that the action fails.

But there is also a cross appeal. The defendant counter-claimed for damages on account of shortages, defects, inferior quality and differences in weight of the skins delivered. The learned trial judge considered these claims very carefully, and he came to the conclusion that they could not be maintained, except as to the two items amounting to $3,446.33, to which I shall refer again. He thought that generally the claims themselves were put forward rather by reason of the defendant's anxiety to escape or mitigate its losses, due to the collapse of the market at a time when it had on hand an excessive quantity of stock purchased at the higher prices previously prevailing, than to the quality of the goods delivered, or any confidence which it had in the reality of its claims; and he expressed his preference for the testimony of Mr. Cahn, the plaintiffs' leading witness, where it differed from that of Mr. Bonisteel, the defendant's manager, and his findings were accepted unanimously by the Appellate Division. In these circumstances, while, speaking from the evidence as it appears upon the record, I might not be indisposed to modify in some particulars the findings which have been enunciated, I do not think that they can be disturbed consistently with the principles which regulate this court in the consideration of concurrent findings, or that any useful purpose will be served by reviewing at length the massive evidence which is comprised in the case. *SS. Hontestroom* v. *SS. Sagaporack* and *SS. Durham Castle* (1).

As to the sum of $3,446.33, for which the defendant recovered judgment upon its counter-claim, the item, except as to $308.61, is admitted as an original liability for shrinkage, but it would appear that the learned judge failed to take into account the allowances made for shrinkage of which the defendant had already received the benefit in the invoices of 26th August and 15th September. I am indebted to the appellants' factum for a careful analysis of

(1) (1926) 136 L.T. 33, at pp. 37 *et seq.*; [1927] A.C. 37.

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the accounts, and computation of the difference which this involves, and, if the point had similarly been drawn to the attention of the trial judge, I am sure it would not have been overlooked. It appears that the amount which the defendant had received by way of reduction from the Paris invoices in respect of the August and September shipments is $2,793.76, which of course it cannot also recover under its counter-claim. Also there is an item of $308.61, charged in the particulars of the statement of claim for freight prepaid on the 784 bundles of skins which were shipped in September. This item is proved by Mr. Copeland, the plaintiffs' accountant, and should apparently be taken in reduction of the amount found on the counter-claim, thus reducing that amount as follows:

| | | |
|---|---|---|
| Trial judge's finding | | $3,446 33 |
| Included in allowances of 26th August and 15th September | $2,763 76 | |
| Prepaid freight | 308 61 | 3,072 37 |
| Balance | | $ 373 96 |

to which the amount found for the defendant upon the counter-claim should be reduced.

While this leads to a variation of the judgment in the appellants' favour by a comparatively small amount, I would not therefore allow them the costs, because I think the amount should have been rectified upon the minutes before the trial judge, and that, if the matter had been so presented, an appeal would have been unnecessary; moreover the appellants did not limit their appeal, as authorized by the rules, to the minor point upon which they succeed.

The appeal and cross-appeal should be dismissed with costs, and the judgment should be varied by reducing the amount found upon the counter-claim to $373.96.

*Appeal and cross-appeal dismissed with costs. Judgment varied.*

Solicitors for the appellants: *Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Bain, Bicknell, White & Gordon.*

ANDREW VALIANTES (PETITIONER).....APPELLANT; 1927 Feb. 1.

AND

LESLIE GORDON BELL (DEFENDANT)...RESPONDENT.

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

*Appeal—Jurisdiction—Election petition—Irregularity—Dismissal by one judge before trial—Dominion Controverted Elections Act, as amended by 5 Geo. V, c. 13.*

The Supreme Court of Canada has no jurisdiction to entertain an appeal from a judgment rendered by a judge of the Superior Court in Quebec dismissing an election petition for irregularity upon a motion presented before trial.

Under the *Dominion Controverted Elections Act,* no appeal lies to the Supreme Court of Canada except from the final judgment or decision of the judges who have tried the petition.

MOTION to quash for want of jurisdiction an appeal from the judgment of Bruneau J., a judge of the Superior Court, at Montreal, maintaining respondent's motion to dismiss an election petition.

The appellant presented a petition under the *Dominion Controverted Elections Act* and complained of the undue election or return of the respondent as member of the constituency of Montréal-St. Antoine. After the service of the petition, the respondent presented to a judge of the Superior Court, in Montreal, a motion to dismiss the election petition as not being drawn in conformity with the *Dominion Controverted Elections Act,* and more particularly because it did not contain any details of the complaint relied upon by the petitioner, as required by s. 4 of c. 13 of 5 Geo. V. The respondent's motion was granted and the election petition was dismissed with costs. The appellant then appealed to the Supreme Court of Canada.

Section 64 of the *Dominion Controverted Elections Act,* as substituted by s. 13 of c. 13 of 5 Geo. V, reads as follows:

64. An appeal shall only lie after the final decision of the court after the trial of an election petition. If any party is dissatisfied with such

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decision, an appeal shall lie to the Supreme Court of Canada from the judgment or decision on any question of law or of fact of the judges who tried the petition.

*Paul St. Germain K.C.* for the motion.

*D. F. Ryan K.C.* and *J. P. Callaghan contra.*

The judgment of the court was delivered orally by the Chief Justice, at the conclusion of the argument, as follows:

"We are all of the opinion that there is no jurisdiction to entertain this appeal. The motion to quash is granted with costs."

*Appeal quashed.*

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*Feb. 9. 10.
*Mar. 8.

OLE SIGERSETH, AS ADMINISTRATOR OF THE ESTATE OF MATIAS SIGERSETH, DECEASED (DEFENDANT) ..... } APPELLANT;

AND

ERLING PEDERSON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Negligence—Master and servant—Injury to farm employee in employer's dwelling—Defective conditions alleged as cause—Alleged negligence of employer—Reasonable efforts by employer to remedy condition—Error of judgment as to cause of trouble—Acceptance by employee of risk.*

Plaintiff was employed by S. as a farm labourer. They lived together in a shack on S.'s farm. It was heated by a stove, which gave trouble by smoking, which S., assisted by plaintiff, tried to remedy. One afternoon plaintiff, feeling ill, went to bed, S. sitting up to look after the stove. Plaintiff awoke two days later with his feet frozen. S. was found dead on the floor. The cause of his death was matter of conjecture. The fire in the stove had burned out. Plaintiff claimed damages from S.'s estate.

*Held,* plaintiff could not recover; S. did all a reasonable man would have done to render the shack safe; assuming that S. committed an error of judgment in thinking (as apparently plaintiff thought also) that the cause of the trouble was in the stove (which S. proposed to replace by a new one as soon as weather permitted) and in not suspecting it to be in the "roof-jack" (serving as a chimney), such an error

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

of judgment would not support a charge of negligence under the circumstances; moreover, if there was an obvious danger, it was as obvious to plaintiff as to S.; and plaintiff, with every means of information that S. possessed, voluntarily remained in the shack; on the evidence, it was not merely a case of knowledge by plaintiff of a possible danger, but of free acceptance by him of any risk there might have been in the existing conditions.

Judgment of the Court of Appeal of Saskatchewan (20 Sask. L.R. 468) reversed.

APPEAL by the defendant, the administrator of the estate of Matias Sigerseth, deceased, from the judgment of the Court of Appeal of Saskatchewan (1) which, reversing judgment of Mackenzie J., held plaintiff entitled to recover damages from the defendant for personal injuries resulting, as alleged, from defective conditions in the deceased's shack, where plaintiff, who was employed by the deceased as a farm labourer, lived with the deceased. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs. As to a small item for arrears of wages the judgment below for the plaintiff was not disturbed.

*C. E. Gregory K.C.* for the appellant.

*J. S. Rankin* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—The respondent, Erling Pederson, after having failed in the trial court (Mackenzie J.), succeeded in obtaining from the Court of Appeal of Saskatchewan a judgment for substantial damages for personal injuries. His action was brought against the administrator of the estate of Matias Sigerseth, deceased, who now appeals to this court.

Pederson is a young Norwegian who, in the late autumn of 1924, was employed as a farm labourer by the deceased, a man said to have been sixty-eight years old, with whom he resided in a shack on the latter's farm. The shack was a wooden structure, divided into two rooms, a kitchen, and a bedroom with two beds, one for the respondent and the other for the deceased. There was no door between the

(1) 20 Sask. L.R. 468; [1926] 2 W.W.R. 205.

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kitchen and the bedroom, but only an opening. In the kitchen there was a coal stove or range with a seven-inch smoke pipe which rose straight from the stove and thence was carried along the ceiling to the middle of the room where it went through the roof. There was no chimney, but on the roof, where the smoke pipe passed, there was what is called a roof-jack, which served as a chimney, and was itself enclosed in a wooden box filled with cement or sand from which the pipe emerged.

For some time previous to the 16th of December, the coal stove had smoked rather badly, and to let out the smoke the deceased used to open the outside door slightly. Together with the respondent, he sought to discover the cause of the trouble, and in the beginning of the month the two men took the stove and pipes outside and cleaned them, afterwards setting them up in their previous position. They did not go up on the roof to inspect the roof-jack. There appears to have been some improvement, but, in the middle of December, a spell of extremely cold weather set in, and the stove again gave trouble.

In the afternoon of Tuesday, December 16, the respondent complained of a headache, and the deceased advised him to go to bed, saying that he would do his work that evening, and that he would also sit up to look after the stove. The respondent, therefore, went to bed, fully dressed, and with three blankets over him. The deceased was then sitting by the stove and the shack door was partly open to let out the smoke.

The respondent states that he awoke only in the afternoon of Thursday, the 18th of December. His two feet were frozen. He arose and went to the kitchen to get some food. There was then no fire in the stove, the coal being fully burned out, and on the kitchen floor, in front of the stove and facing the door, he found the dead and frozen body of Sigerseth. The shack door was closed. A little later, the son of a neighbour came to the shack and brought the respondent to his father's house, from which he was taken to the hospital. There is no doubt his injuries were of a serious nature.

The evidence is that on the 16th and following days the weather was extremely cold, and it is stated that the temperature reached 40 degrees below zero.

On the 19th of December a hardware merchant and undertaker, named Saunders, who had sold the stove to the deceased, and who says it was a good stove, although a little hard to clean out, went to the shack to remove the body. He states that he noticed something on top of the roof-jack which looked like a rag stuffed into it. With the aid of a ladder he climbed up and examined it; it was like frost, and the chimney or roof-jack was filled as though the smoke had condensed and frozen. In appearance, he says, it was kind of white, almost like snow, with a small hole or vent, about an inch in diameter. He is unable to form any idea how long it had been that way. In cross-examination he expresses the opinion that it was the cold, during the few days of extreme cold weather, that caused the obstruction. He is asked by the appellant's counsel:

Q. And you would think it was probable during these two or three cold days immediately preceding the time you were there this filled up?

A. Well, I would imagine it would be, although I am not in a position to say, of course.

The inquiry was not pushed further, and it is a matter of conjecture whether the condition observed by Saunders, on the 19th, existed on or prior to the 16th of December. What caused Sigerseth's death is also a matter of conjecture. The physician who was called at the trial never saw his body, no post-mortem examination was made, and his assertion that the deceased died from suffocation by carbon monoxide and freezing is only a surmise from what he was told by others.

The respondent testifies that the deceased "was doing the best he could under the cold weather," that "he tried his best to keep the fire going," that he "was doing what he thought best around the stove under the cold weather" and that "he was always careful about the fires." Conditions in regard to the stove became worse when the extreme cold weather set in, and the deceased then spoke of going to town to get a new stove but was prevented from doing so by the excessive cold. It is impossible to read the respondent's testimony—and he is the only witness who can speak of what happened prior to the accident—without coming to the conclusion that the deceased made every effort to remedy the smoking condition of the stove, and the respondent joined with him in this attempt. Apparently none of them suspected that the cause of the trouble

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was elsewhere than in the stove, or that the roof-jack had anything to do with it. That the respondent was fully aware of the conditions which prevailed, and nevertheless consented to remain in the shack with the deceased cannot be questioned.

Under these circumstances, the learned trial judge considered that a case of negligence was not made out and he dismissed the action. In his opinion, when the respondent went to bed indisposed on the afternoon of the 16th of December, the effect of the trouble and its possible dangers were as obvious to him as they were to the deceased. The latter's duty to the former was to take reasonable precautions to see that the house was kept warm enough to prevent the respondent from perishing from the cold on the one hand and from suffocating from the coal gas on the other. To meet this situation the deceased, instead of going to bed, stayed up by the fire to tend and watch it. That, in the opinion of the learned trial judge, was a reasonable course for him to take and as much as could well be expected of him. To his mind, the whole case was one of pure misadventure.

The Court of Appeal reversed this judgment and awarded substantial damages to the respondent. In the opinion of Mr. Justice McKay, with whom the other judges concurred, the smoking condition was caused by the gradual accumulation of the condensed smoke and frost at the top opening of the roof-jack during the cold weather. He held that when the cold weather came and the stove was smoking greatly, a dangerous situation was created and it was then the duty of the deceased to take all reasonable steps to remove this danger. The roof-jack and not merely the pipes and stove should have been cleaned by the deceased.

With great respect, and in so far as this is a finding that the deceased did not take reasonable steps to discharge the duty he owed the respondent, I am unable, on a careful reading of the testimony, and especially of that of the respondent, to come to the same conclusion as the Court of Appeal. The roof-jack served as a chimney, and neither the respondent nor the deceased ever suspected that there was in it any obstruction to the escape of the smoke. It is mere conjecture—and a doubtful one at the best—

whether the condition observed on the 19th December existed before the cold spell set in. Assuming that the deceased committed an error of judgment after the cleaning of the stove and pipes in thinking that the cause of the trouble was in the stove which he proposed to replace by a new one as soon as the weather would permit, such an error of judgment would not support a charge of negligence under the circumstances. In my opinion, the deceased did all that a reasonable man would have done to render the shack safe as a residence for the respondent and himself. If the respondent's suggestion that his death was caused by suffocation from coal gas and freezing be justified, he sacrificed his life in looking after the fire while the respondent slept. It is a case of misadventure and not of negligence.

Moreover, if, as the respondent contends, there was an obvious danger, this danger was as obvious to the respondent as to the deceased. And the respondent, with every means of information that the deceased possessed, voluntarily remained in the shack and slept there after the cleaning of the pipes. On the evidence, it is not merely a case of knowledge by the respondent of a possible danger, but of free acceptance by him of any risk there might have been in the existing conditions.

I cannot see any ground for holding the appellant liable in damages for the respondent's injuries.

The Court of Appeal granted the respondent $28.85 for arrears of wages. This item, which was claimed by the action, was apparently overlooked by the learned trial judge when he dismissed the respondent's demand *in toto*. I would not disturb the judgment of the Court of Appeal in that respect, but allowance of this small item should not affect the disposition of the costs of this litigation, for the respondent fails as to the principal object of his action.

I would therefore allow the appeal with costs throughout against the respondent, and restrict the latter's recovery to the sum of $28.85, to be offset against the costs which he must pay.

*Appeal allowed with costs.*

Solicitors for the appellant: *Buckles & Graham.*

Solicitor for the respondent: *R. A. Hutchon.*

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*Feb. 21.
*Mar. 8.

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

*Costs—Party and party costs—Appellant sued by respondents for damages caused through automobile collision—Appellant insured against liability—Insurer instructing solicitors to act in suit on appellant's behalf—Right of successful appellant to recover costs from respondents.*

Plaintiffs sued A. (the appellant) for damages for injuries suffered through an automobile collision. Judgment against A. by the Appellate Division, Ont., was reversed by this Court, which allowed A.'s appeal with costs ([1926] S.C.R. 575). The Registrar declined to tax costs to A., on the ground that the solicitors, who nominally acted for him in carrying on the appeal, were not in fact retained by him or on his behalf, but were employed by an insurance company, which had insured A. against liability, to defend the action and to prosecute the appeal to this Court, and that A. was under no personal liability to such solicitors for the costs of the appeal, and was, therefore, not in a position to claim indemnification by plaintiffs for such costs. A. appealed.

*Held,* A. should recover his costs from plaintiffs; on the evidence, the insurer instructed its solicitors to defend the action on behalf of A., who, from the course of the proceedings, must have employed the solicitors or sanctioned their carrying on of his defence, so as to become personally liable for their costs, unless there was an agreement binding on the solicitors excluding such liability; no such agreement was established; the fact that there was an obligation by the insurer to pay the solicitors' costs, and that the solicitors would naturally apply in the first instance to the insurer, as being ultimately liable to pay the costs by reason of A.'s right of indemnification against it, would not exclude A.'s liability.

*Adams* v. *London Improved Motor Coach Builders Ltd.,* [1921] 1 K.B. 495, applied; *Rex* v. *Archbishop of Canterbury,* [1903] 1 K.B. 289, at 295, referred to; *Ryan* v. *McGregor,* 58 Ont. L.R. 213, unless distinguishable from the present decision, and so far as inconsistent therewith, overruled.

APPEAL by the defendant Armand from a ruling of the Registrar holding him not entitled to recover from the

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plaintiffs the costs of the appeal to this Court awarded him by the judgment of this Court (1).

The plaintiffs sued Armand and Wilcox for damages for injuries suffered by the plaintiffs through an automobile collision. The trial judge held Wilcox alone to blame. The Appellate Division of the Supreme Court of Ontario held Armand jointly liable with Wilcox (2). Armand appealed to the Supreme Court of Canada, who allowed his appeal with costs (1).

The grounds taken by the Registrar for declining to tax Armand's costs, and the circumstances of the case bearing on the question now to be decided, are sufficiently stated in the judgment now reported, and are indicated in the above head-note.

*A. C. Heighington* for the appellant.

*D. O. Cameron* for the respondents Carr.

The judgment of the court was delivered by

ANGLIN C.J.C.—The appellant Armand appeals from a ruling of the Registrar holding him not entitled to recover from the respondents the costs of the appeal to this court awarded him by the judgment reported in [1926] S.C.R., at p. 575.

The ground taken by the Registrar for declining to tax these costs to the appellant is that the solicitors, who nominally acted for him in carrying on the appeal, were not in fact retained by him or on his behalf, but were employed by the British Traders' Insurance Company (with whom the appellant was insured) to defend the action brought against him and to prosecute the appeal to this court, and that the appellant was under no personal liability to such solicitors for the costs of the appeal and was, therefore, not in a position to claim indemnification by the respondents for such costs; and *Ryan* v. *McGregor* (3), is cited in support of these conclusions.

Upon careful consideration of all the material before us, we are satisfied that the insurance company instructed its own solicitors to defend the action not on its behalf but

(1) [1926] S.C.R. 575. (2) (1925) 28 Ont. W.N. 310.
(3) (1925) 58 Ont. L.R. 213.

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Anglin C.J.C.

on behalf of the appellant, thus implementing its obligation " to defend in the name and on behalf of the insured any civil actions, etc." The solicitors so instructed entered an appearance in which they style themselves " solicitors for the defendant " (the appellant). For so doing his authority was necessary and was undoubtedly obtained. Their character as defendant's solicitors they maintained throughout the litigation in which, from time to time, the appellant personally took part by making affidavits, giving evidence, executing a bond, etc. From this course of conduct his employment of the solicitors who appeared on his behalf, or his sanctioning their carrying on his defence, is the only proper inference; and whether it should be taken that the insurance company, in instructing its solicitors to defend the action, etc., acted as agent for the defendant, or that he personally so employed the solicitors, their retainer as his solicitors in a manner binding upon him admits of no doubt. Such retainer or employment carries with it personal liability of the defendant (appellant) for the costs reasonably incurred by the solicitors pursuant to it, unless there was a contract or agreement binding on the solicitors excluding such liability. In that connection the Registrar says:

> I have reviewed the evidence and my conclusion is that Armand, when he came in to sign the necessary papers in connection with this appeal, did not expect he would be called upon personally to pay any costs * * *.
>
> The language used by the taxing officer in *Ryan* v. *McGregor* (1) referred to in my reasons is applicable in this case, viz: "I think that there was at least an implied agreement to the effect that the cost of defending the action should be assumed and paid by the company, and that the defendant should be under no liability with respect thereto."
>
> I do not say that if the insurance company failed to pay the costs, and Armand had the means of paying the same, that the solicitors would have been unable on the facts of this case to collect the same from Armand. I do not think it necessary for the purpose of my judgment to make any finding as to this.

This is obviously not a definite finding that there was an agreement relieving the defendant-appellant of all liability to his solicitors such as must be established by the respondent-plaintiffs, if they would on that ground avoid payment of party and party costs to the successful appellant. *Adams* v. *London Improved Motor Coach Builders, Ltd.* (2).

(1) (1925) 58 Ont. L.R. 213.

(2) [1921] 1 K.B. 495.

The evidence is not very definite or very precise. In our opinion it clearly falls short of establishing any agreement binding on the solicitors that they should not in any event look for payment of their costs to the appellant. No doubt there was an obligation on the part of the insurance company to pay the defendant's solicitors their reasonable costs. Adapting to the circumstances of the present case the language of Atkin L.J. in the *Adams case* (1), at page 504: Nevertheless there is nothing inconsistent in that obligation co-existing with an obligation on the part of the defendant to remunerate the solicitors. Naturally, as a matter of business, the solicitors would, we have no doubt, apply in the first instance to the insurance company, as being the persons ultimately liable to pay the costs as between all parties—that is to say, the persons who would have to indemnify the defendant against the costs. But that does not exclude the liability of the insured, and it seems to us not in the least to affect the position that the client may be liable although there may be a third person to indemnify the client. It appears to us that that state of things would account for the whole of the evidence that was given. But we feel satisfied of this: that upon the direct evidence in the case it would be wrong to draw the conclusion that there was an express bargain that the defendant was not to be liable to the solicitors for the costs incurred; and, quite apart from the express evidence that no such arrangement was made, it appears to us that there was no evidence given on behalf of the respondents that an express arrangement to that effect had in fact been made.

Upon the facts in evidence the appellant's right to recover from the respondents the costs of his appeal awarded to him by the judgment of this court cannot, we think, be denied. The decision in *Adams* v. *London Improved Motor Coach Builders, Ltd.* (1), is directly in point and conclusive in his favour. See, too, the judgment of Romer L.J., at p. 295, in *Rex* v. *Archbishop of Canterbury* (2).

In so far as the decision in *Ryan* v. *McGregor* (3) may not be consistent with this conclusion we are unable to

(1) [1921] 1 K.B. 495. (2) [1903] 1 K.B. 289.
(3) (1925) 58 Ont. L.R. 213.

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follow it. That case, however, may perhaps be distinguishable on the ground that the court there regarded the finding of fact of the taxing officer as definitely negativing any retainer of the solicitors by the defendant and as not open to review because of the circumstances under which the matter came before the court.

The appeal will, accordingly, be allowed with costs, including the costs of and incidental to the application before the Registrar.

*Appeal allowed with costs.*

Solicitors for the appellants: *Symons, Heighington & Shaver.*

Solicitor for the respondents Carr: *D. O. Cameron.*

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*Feb. 4.
*Mar. 8.

SCYTHES & COMPANY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

GIBSON'S LIMITED (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Landlord and tenant—Lease of parts of building—Bursting of standpipe in leased premises—Damage to lessee's goods—Alleged liability of landlord.*

Defendant, lessee of a building, sublet parts thereof to plaintiff. The premises sublet were described as floor spaces, the superficial dimensions being ascertained by the measurement of horizontal distances along the interior surfaces of the walls and partitions. A standpipe, for conducting through the building water from the city's system for fire protection, which passed through plaintiff's premises, burst thereon, in a part used for storage purposes, and plaintiff's goods were damaged by water. Plaintiff sued defendant for damages, alleging that the pipe froze and burst through defendant's negligence in failing to heat the premises, in failing to turn off the water and drain the pipe during the cold weather, or in failing to take certain other precautions. The lease to plaintiff contained no provision for heating. There were no means within the building of turning off the water. There was a valve at the standpipe connection in an area under the street sidewalk and perhaps another at the junction with

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

the city water main, but it was not shown that defendant had control of these.

*Held,* defendant was not liable; there was no evidence that in fact defendant had possession of, or exercised any control over, those portions of the pipe which were within plaintiff's premises; it could not be said that, by reason of the description of the demised premises as floor spaces of defined areas within walls and partitions, the pipe was not included in the description; *Hargroves* v. *Hartopp* ([1905] 1 K.B. 472), *Dunster* v. *Hollis* ([1918] 2 K.B. 795), and *Cockburn* v. *Smith* ([1924] 2 K.B. 119), distinguished. There was no room for application of the rule in *Rylands* v. *Fletcher* (L.R. 3 H.L. 330), either in its general effect or subject to any of its modifications.

The fact that a radiator in plaintiff's office was supplied with heat from a small furnace which defendant operated did not justify an implication that defendant undertook to keep the room where the break occurred free from frost or its consequences.

Anglin C.J.C., while concurring in the reasons above indicated, also agreed with the grounds taken by Macdonald C.J.A. and M. A. Macdonald J.A. in the court below ([1926] 3 W.W.R. 129).

Judgment of the Court of Appeal of British Columbia ([1926] 3 W.W.R. 129) affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal of British Columbia (1) which allowed an appeal taken by the defendant from the judgment of Morrison J. in favour of the plaintiff in an action for damages to plaintiff's goods caused by the bursting of a standpipe on premises leased by the plaintiff from the defendant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

*I. F. Hellmuth K.C.* and *W. Zimmerman* for the appellant.

*R. S. Robertson K.C.* for the respondent.

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

NEWCOMBE J.—The defendant (respondent) company, being lessee of the three story building belonging to the Crane Company, situate at the corner of Alexander and Carrall streets at Vancouver, sublet parts of the building to the plaintiff (appellant) company by indenture of 1st September, 1923, in pursuance, as stated in the instrument, of the *Leaseholds Act* of British Columbia. The premises sublet are described as floor spaces, the superficial dimen-

(1) [1926] 3 W.W.R. 129.

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sions being ascertained by the measurement of horizontal distances along the interior surfaces of the walls and partitions. The plaintiff company occupied a part of the ground floor, where its office and business headquarters were, and, for warehouse purposes, the greater part of the first floor, and all of the second floor. The defendant company occupied those parts of the building which were not demised to the plaintiff until November, 1924, when it moved out.

There was no provision in the plaintiff's lease for the heating of the building, but in fact there was a very small, coal burning, hot water furnace in the basement, from which the water pipes extended to the ground floor, and to one of the rooms occupied by the defendant on the first floor, but there was only one radiator in the premises sublet to the plaintiff, and that was in the office on the ground floor. The defendant kept up the fire in the furnace after moving, but, during the latter part of December, the weather was, for the greater part of the time, according to the record of the Meteorological Service, below freezing, and the temperature fell as low as 8 degrees on the 17th. There were some complaints, during this time, that the plaintiff's radiator was cold, and there is a difference in the testimony as to whether or not the fire was not occasionally allowed to go out, but the defendant maintains that it was kept burning. The learned trial judge finds that the furnace was not kept up to a sufficient degree of heat to prevent frost in the building, and that may be taken as established; but it seems moreover to be proved that the heating equipment of the building was insufficient, in the existing conditions, even when operated to its capacity, to exclude frost in those parts of the upper stories where there were no radiators. About the 21st, the gravity tank on the third floor froze and burst, and was renewed by the defendant, and there were also some taps frozen in the plaintiff's premises on the second floor.

There was in the building what is called a standpipe, the purpose of which was to conduct through the building water from the city's water system for purposes of fire protection. It is not shown whether or not the standpipe was introduced in compliance with municipal regulations, but

it is said that the water could not be shut off from it without permission from the city; it is independent of the pipes which supply the building with water for other purposes, and terminates on the third floor in a dead end, affording no circulation or outlet, except by use of the hose attachments. The area under the sidewalk of Carrall St., on the west side of the building, is excavated, and it was in this excavated area that the standpipe was connected with the branch leading to the building from the water main in Carrall St. There is a valve in the area, and perhaps another at the intake from the main, where the water may be turned off, but there are no means within the building of excluding the water from the standpipe, and it appears to be inconsistent with its purpose that the water should be turned off. The standpipe enters the building through the area, passing through the foundation, whence it is carried backward and upward by steps or sets off, and rises through the plaintiff's office on the ground floor, through the first floor, near the middle, in that part of it which was occupied by the plaintiff, through the second floor, and to the third floor. There was connected with this pipe, on the first floor, and also on each of the other floors, a hose attachment.

On the afternoon of Saturday, 27th December, when the plaintiff's premises were closed, "the T. to which was attached the fire hose pipe burst and let the water over the stock in the warehouse." And, when the plaintiff's manager went to the place on the afternoon of the following day, he found the first and ground floors flooded and the stock damaged by the water.

The plaintiff seeks to recover these damages, alleging that the defendant, having vacated the building in November, 1924,

> negligently failed to heat the premises thereafter, whereby the water in the standpipe froze, and the said standpipe, controlled by the defendant, burst, and flooded the plaintiff's premises, and damaged its stock of goods, wares and merchandise, on or about the 27th day of December, 1924.

The particulars of the negligence are alleged as failure to turn off the water and drain the standpipe during the period of excessive cold; failure to keep the water in the standpipe circulating, and allowing it to freeze and burst; failure to protect the standpipe by suitable covering to pre-

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vent frost, and failure to heat the building, so as to keep the water in the standpipe from freezing. It is moreover alleged, in the 8th paragraph of the statement of claim, that:

> The said standpipe and the valve for turning off the water supply thereto and controlling the same were at the times aforesaid always under the control and management of the defendants and their servants and the plaintiff had no control thereof whatsoever.

There is however no proof of this paragraph in so far as it is intended to allege that the defendant had control of the valve in the area under the sidewalk, or at the junction with the city main, and no means were provided for turning off the water elsewhere.

The learned trial judge found for the plaintiff, and directed the damages to be assessed, for the reason as he states, referring to the defendant company, that:

> It was their duty to take reasonable care that the premises and its amenities retained in their occupation and possession were not in such a condition as to cause damage to the parts demised.

He said that the defendant had not succeeded in negativing negligence, and that the proximate cause of the damage was the water from the pipe, which was under the control of the defendant, and which had been allowed to burst as a result of the frost. The Court of Appeal unanimously reversed this judgment, and dismissed the action, although Galliher J.A., expressed some doubts. Upon the appeal to this Court it was argued for the appellant that the defendant company, notwithstanding its sub-lease to the plaintiff, retained the possession and control of the standpipe, because the demised premises were, by the description, confined to floor space, and therefore did not include the walls, partitions, pillars, and pipes enclosing, standing upon or passing through the floors which were demised; and it was contended therefore that the defendant became liable under the law as expounded in such cases as *Hargroves* v. *Hartopp* (1); *Dunster* v. *Hollis* (2); and *Cockburn* v. *Smith* (3), in which it was held that, in the circumstances, it was the duty of a landlord to exercise care to prevent damage to his tenant. It was also urged that the learned judges of the Court of Appeal erred in so far as

(1) [1905] 1 K.B. 472. (2) [1918] 2 K.B. 795.
(3) [1924] 2 K.B. 119.

their expressed view of the facts differed from that of the learned trial judge, but, in my judgment of the case, the liability is not affected by these differences and their solution becomes unnecessary. The material facts are not in question.

In the cases upon which the appellant relies the damage suffered was due to the neglect of the landlord to take care that damage was not caused to the tenant through the landlord's failure to maintain in safe condition, or his misuse of, those portions of the building comprising the demised premises which were retained in his possession and control. In *Hargroves* v. *Hartopp* (1), a case which is said to have received the approval of the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (2), the landlord had retained possession of the roof, but he allowed the gutter to become stopped up, and neglected to clear it after notice, and, by reason of the stoppage, the rain-water found its way into the tenant's premises. It was held that the landlord was under a duty to take care that the water collected by the gutter did not cause damage to the tenant. In *Dunster* v. *Hollis* (3), there was a common stairway controlled by the landlord which, through his neglect, was unsafe. *Cockburn* v. *Smith* (4), is another case of damage by water collected on the roof which remained in the landlord's possession and control. In the present case there is no evidence that in fact the landlord had the possession of, or exercised any control over, those portions of the standpipe which were within the demised premises, and the damage was caused by the bursting of the pipe in a part of the premises which was demised. The argument upon which the case is principally founded, that the standpipe was not included in the description of the lease, is not, I think, worthy of serious consideration. That part of the first floor, where the break occurred, was leased and occupied by the plaintiff for storage purposes. The standpipe was there, with hose connected, for fire protection. The lessee covenanted to repair, and that the lessor might enter and view the state of repair, and the lessor covenanted for quiet enjoyment. And when, in the description contained

(1) [1905] 1 K.B. 472.
(2) [1923] A.C. 74.
(3) [1918] 2 K.B. 795.
(4) [1924] 2 K.B. 119.

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in the lease, the demised premises were described as floor spaces of defined areas within walls and partitions, it is impossible, I think, reasonably to suggest that these spaces did not contemplate extent in three dimensions, or did not include space upward from floor to ceiling, including the walls, partitions and fixtures within. Space in a newspaper means one thing; space in a warehouse means another. The word should be interpreted having regard to the obvious use for which the space is required, and, in the latter case, it includes "room." It is a rule of the common law that, in the absence of covenants providing otherwise, a tenant who takes a floor in a house must be held to take the premises as they are and cannot complain that the landlord does not repair, or that the house was not constructed differently. *Pomfret* v. *Ricroft* (1); *Carstairs* v. *Taylor* (2). A landlord is not liable for the consequence of letting a house which is out of repair, even if the state of disrepair be dangerous, and I think it must follow that he is not liable, unless by stipulation, for damages caused to the tenant by frost or its consequences. It is reasonable that this should be so. No means had been provided by the landlord for the heating of the room in which the break in the pipe occurred. It appears that the building had been in use for many years, and it was not known that the standpipe had previously been frozen, but when the temperature fell below the freezing point, and especially when it went to 8 degrees, the tenant must have known as well as the landlord that there was risk of the pipe freezing, and being in possession, had the means to prevent it, or to avoid the consequences.

It was pointed out by Scrutton L.J. in *Cockburn* v. *Smith* (3), that

there are exceptions which modify the rule in *Rylands* v. *Fletcher* (4), and reduce the duty of insuring against damage to an obligation to take reasonable care that damage does not occur. One of these exceptions is where the premises on which the artificial construction is erected and the premises damaged by the escape of water are in one house and the construction is erected for the use of both premises. In this case the occupier of the latter premises takes the ordinary risks of damage from escaping water. * * * In my view his [the landlord's] duty may be based upon

(1) [1669] 1 Saunders 321.
(2) (1871) L.R. 6 Ex. 217, at p. 222.
(3) [1924] 2 K.B. 119, at pp. 132, 133.
(4) (1868) L.R. 3 H.L. 330.

that modified doctrine of *Rylands* v. *Fletcher* (1) which is applicable where he retains in his control an artificial construction which becomes a source of danger to his tenant.

See also *Anderson* v. *Oppenheimer* (2). But, in the present case, I see no room for application of the rule in *Rylands* v. *Fletcher* (1), either in its general effect or subject to any of its modifications. Indeed I do not perceive any principle upon which the landlord is answerable. The fact that the radiator in the plaintiff's office, on the ground floor, was supplied with heat from the small furnace which the defendant operated in the basement does not, in my judgment, justify an implication that the defendant undertook to keep the room occupied by the plaintiff on the first floor free from frost, or its consequences.

The appeal should be dismissed with costs.

ANGLIN C.J.C.—While fully concurring in the opinion of my brother Newcombe, I should be prepared to dismiss this appeal on the ground taken by the Chief Justice of the Court of Appeal and Mr. Justice M. A. Macdonald.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Wherry, Zimmerman & Osborne.*

Solicitors for the respondent: *Mayers, Lane & Thomson.*

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ADDIE L. HIGGINS AND CHAN SING (PLAINTIFFS) ..... } APPELLANTS;

AND

COMOX LOGGING AND RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

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*Feb. 4.
*Mar. 8.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA

*Negligence—Fire—Logging operations—Steel cable snapping and striking another, the friction causing sparks, starting fire—Damage to property—Method of operation—Dry season—Pure accident.*

Defendant was carrying on logging operations, using the "Lidgerwood system" for lifting the logs and carrying them through the air to its railway siding. A steel cable snapped, and a broken end coiled

(1) (1868) L.R. 3 H.L. 330. (2) (1880) 5 Q.B.D. 602.

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

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around a steel guy line, the friction causing sparks which ignited the bark of a tree, starting a fire. Defendant had all the appliances required by law for fighting fires, and its men did all they could to extinguish the flames, but the fire spread and damaged plaintiffs' property. Plaintiffs claimed damages.

*Held,* plaintiffs could not recover; as to the complaint that defendant should have used a "tree jack" in its system of operations, it could not be said, on the evidence, that defendant's method of operation was defective; and, although the season was drier than usual, it could not be said that operating at all at the time was *per se* negligence; the fire was a pure accident (*Municipality of Port Coquitlam* v. *Wilson,* [1923] S.C.R. 235, referred to).

Judgment of the Court of Appeal of British Columbia (37 B.C. Rep. 525) affirmed.

APPEAL by the plaintiffs from the judgment of the Court of Appeal of British Columbia (1) reversing the judgment of Morrison J. who held the plaintiffs entitled to recover against the defendants for damages to their property through a fire which started from sparks caused by the friction of a broken end of a steel cable striking another steel cable, in the course of defendant's logging operations. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

*E. Lafleur K.C.* and *F. Higgins K.C.* for the appellant.

*R. S. Robertson K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—This appeal raises the question whether the respondent is liable for the damage caused by a fire which started in the place where it was carrying on its logging operations and spread to the property of the appellant Higgins, which was leased to the appellant Chan Sing. The learned trial judge found the respondent liable, and appointed a referee to assess the damages. This referee made his report, in accordance with which judgment issued awarding $1,132.50 to the appellant Higgins and $394 to the appellant Chan Sing. From this judgment an appeal was taken by the respondent. The appellants also cross-appealed against the assessment of their damages, alleging

(1) 37 B.C. Rep. 525; [1926] 3 W.W.R. 417.

that the referee, before making his report, had improperly visited the property in the absence of the parties and of their counsel. The main appeal was allowed by the Court of Appeal, Macdonald C.J.A., and McPhillips J.A. dissenting. The dissenting judges would also have maintained the cross-appeal of the appellants. The latter now appeal to this court, asking that the decision of the appellate court be set aside and that their cross-appeal be allowed. In the view I take of the question at issue, it will not be necessary to deal with the cross-appeal.

The material facts of the case may be briefly stated.

In the summer of 1925, the respondent was carrying on logging operations in the Comox District, Vancouver Island, using what is known as the Lidgerwood system for lifting the logs and carrying them through the air to its railway siding. In this system, there is what is called the sky line, a steel cable connecting at a height of about 75 feet two trees, one known as the head spar tree, near the siding, and the other, the tail spar tree, which was at a distance of 1,100 feet from the former. Suspended to the air line there was a movable appliance called the bicycle, from which another cable hung, on to which the logs were hooked in order to be carried down the line to the siding and there loaded on the respondent's cars.

The sky line was a new steel cable, one inch and a half in diameter, in use only for about three weeks. It was daily inspected, and usually would not be used more than a few hours on the same trees. Where it reached the tail spar tree it was looped or wrapped around the tree, and held in place by spikes, and it then continued towards the ground a distance of 175 to 200 feet, where it was firmly anchored to a tree stump. The tail spar tree was also protected as far as possible from oscillation by two steel guy lines on either side of the descending portion of the sky line.

The summer of 1925 was drier than usual. On August 8, the day the fire started, the degree of humidity was 47, but we are without information as to the temperature. About half-past nine in the forenoon, what I have called the descending portion of the sky line suddenly snapped about 20 feet from the tail spar tree, and one of the broken ends of the steel cable coiled around one of the guy lines,

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the friction causing sparks which ignited the bark of a tree, and pieces of the burning bark fell from the tree and set fire to some cedar brush. The respondent had all the appliances required by the forestry laws of the province for fighting fires, but although its men immediately set to work to extinguish the flames and did all they could, the fire spread and eventually reached the appellant's property some miles distant and caused the damage for which this action was brought.

The sole point with which we are concerned is whether the respondent is liable towards the appellants for the damages which they claim. The legal principles governing liability in such a case were fully explained in the decision of this court in *The Municipality of Port Coquitlam* v. *Wilson* (1), where all the relevant authorities were referred to. If, applying these principles to the case under consideration, it can be said that the fire in question "accidentally began," no liability was incurred by the respondent.

It was contended by the appellants at the trial that the respondent should have used what is called a tree jack on the tail spar tree through which the sky line would have passed. The evidence however was contradictory as to the usefulness of such an appliance, the respondent's experts stating that, unless it were possible to find a tail stump or anchor directly in line with the spar trees, the cable would scrape against the shell of the jack and would be cut. In their opinion, looping or wrapping the air line cable around the tail spar tree is the only practicable method of operation. The respondent had tree jacks but after trying them had discontinued their use.

The learned trial judge purposely did not deal with the respective merits of these two methods, being in doubt whether he was in position to say that one was better than the other. On the other hand, the dissenting judges in the Court of Appeal considered that the method of wrapping the steel air line around the tail spar tree instead of using a tree jack was a defective method, and that the defect was calculated to break the cable and start the fire.

After having carefully read all the testimony, I am, with great respect, unable on the evidence to say that the re-

(1) [1923] S.C.R. 235.

spondent's method of operation was defective. The reason given by practical loggers for discarding the tree jack—the difficulty of finding a tail stump or anchor directly in line with the spar trees—seems plausible. There is no evidence that at the place here in question there was available a convenient tail stump or anchor in line with the spar trees, and I am not in position to find, against the opinion of the majority of the learned judges of the Court of Appeal, and in the absence of a finding by the learned trial judge, that the respondent was negligent in not using the tree jack in this instance.

I have therefore only to consider whether the respondent was guilty of negligence importing liability for the sole reason that it carried on its operations in a season drier than usual, when, if by such an accident as occurred a fire was ignited, it might spread and cause damage. In the opinion of the learned trial judge, there was a breach of the duty of the respondent to take due care in the circumstances "by operating at that time of the year with an appliance of that sort."

So far as the experience of the practical loggers called at the trial went, they had never heard of a fire caused by the snapping of a steel cable and its coming in contact with another cable. It is true that it is a well known fact that sparks are caused by the striking of one piece of steel against another or against a stone. But no one had ever heard of a fire being occasioned by the snapping of the sky line of a logging machine such as that used by the respondent. I may refer to the evidence given by one of the appellants' witnesses, whose testimony impressed the learned trial judge, Allen Brady. He is asked in cross-examination:—

Q. Now did you ever see this kind of accident happen before?
A. I never seen anything like that happen before, not like that.

So far therefore as this unfortunate occurrence might have been anticipated by a practical logger, the testimony is entirely in favour of the respondent.

As Mr. Justice Galliher observes:

Lumbering is one of the chief industries of British Columbia, and the felling and logging of timber is one of the elements of that industry. This operation is necessarily of a more or less dangerous character, and that danger is accentuated at certain seasons of the year by conditions of

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humidity, in various stages, such as partly prevailed at the time in question here.

But the legislature has not seen fit to establish a close season for such operations. The regulations made under the forestry laws of the province require logging concerns to have on hand certain appliances for fighting fires, and these requirements were complied with by the respondent, as Major Cowan, District Forester of Vancouver Island District, testifies. He says that the fire fighting equipment of the respondent was always more than up to the general standard. It is stated that the respondent received warnings from the forestry authorities, but these warnings, which were not filed at the trial, appear to have been merely a request to be careful, and the respondent was careful.

In my opinion, it is impossible to say that operating at all at the time was *per se* negligence. I am therefore impelled to the conclusion that liability was not incurred by the respondent solely by carrying on its operations under the circumstances that prevailed. I think the fire was a pure accident.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *Frank Higgins.*

Solicitors for the respondent: *Farris, Farris, Stulz & Sloan.*

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1927

*Mar. 7.
*April 20.

## IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF SECTION 17 OF THE ALBERTA ACT.

*Constitutional Law—The Alberta Act (D., 1905, c. 3), s. 17—Constitutional validity—Review of constitutional legislation—Dominion powers—Variation of s. 93 of B.N.A. Act, 1867, in its application to Alberta—Education—Separate schools—Appropriation and distribution of moneys for schools.*

S. 17 of *The Alberta Act* (D., 1905, c. 3), varying the provisions of s. 93 of *The B.N.A. Act, 1867,* in their application to the province of Alberta, and enacted to perpetuate under the Union the rights and privileges with respect to separate schools and with respect to religious instruction in the public or separate schools, as provided under the

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

terms of chapters 29 and 30 of the Ordinances of the North-West Territories passed in the year 1901, and to prevent discrimination in the appropriation and distribution of moneys for support of schools, was within the powers of the Dominion Parliament, and is wholly *intra vires.*

Constitutional legislation reviewed.

REFERENCE, by order of the Governor General in Council, of 24th June, 1926, to this Court for hearing and consideration, pursuant to s. 60 of the *Supreme Court Act,* of the following question:

"Is section 17 of *The Alberta Act,* in whole or in part, *ultra vires* of the Parliament of Canada, and, if so, in what particular or particulars."

*E. Lafleur K.C.* and *L. Cannon K.C.* for the Attorney General of Canada, in support of the validity of the legislation.

*F. H. Chrysler K.C. contra* (under appointment of the Court, pursuant to s. 60 of the *Supreme Court Act,* to represent all interests opposed to the validity of the Act).

*G. F. Henderson K.C.* for the province of Alberta.

*H. Fisher K.C.* for the province of Saskatchewan.

The judgment of the Court was delivered by

NEWCOMBE J.—By order of the Governor General in Council of 24th June, 1926, the following question was referred to the Supreme Court of Canada for hearing and consideration, pursuant to s. 60 of the *Supreme Court Act:*

Is Section 17 of the *Alberta Act,* in whole or in part, *ultra vires* of the Parliament of Canada, and, if so, in what particular or particulars?

The reasons for the reference are thus stated in the order:

The Committee of the Privy Council have had before them a report, dated 24th June, 1926, from the Minister of Justice, stating that as the result of certain negotiations looking to the transfer to the province of Alberta of the public lands within that province, now vested in the Crown and administered by the Government of Canada for the purposes of Canada, an agreement was entered into on the 9th January, 1926, between the governments of the Dominion of Canada and of the province of Alberta, respectively, whereby it was agreed that certain provisions of the *Alberta Act* should be modified to the intent that all Crown lands, mines, minerals and royalties within the province, and sums due or payable for such lands, mines, minerals or royalties should, from and

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REFERENCE RE S. 17 OF *The Alberta Act.*

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after the coming into force of the said agreement, belong to the province, subject to any trusts existing in respect thereof and to the several other terms and conditions particularly set forth in said agreement. Subsequently, the two governments agreed upon certain additional provisions to be inserted in the said agreement relative to the transfer and administration of the School Lands Fund and certain specified school lands, to parks and forest reserves affected by the agreement, and to the rights and properties of the Hudson's Bay Company. Notice was given by a resolution that a bill would be introduced into Parliament, at its present session, to approve and give effect to the said agreement as so modified, but a question having been raised as to the constitutional validity of section 17 of the *Alberta Act*, relative to the subject of education and schools within the said province, it was decided not to proceed with the proposed legislation as drafted until this question of doubt could be authoritatively settled.

In accordance with the directions which were subsequently given, pursuant to the rules, the Attorney General of Saskatchewan and the Attorney General of Alberta received notice of the hearing, but neither of them filed a factum, although it was expressly directed that each might do so, and each of them announced his intention to appear, but not to take part in the argument. The Attorney General of Canada, represented by counsel, filed a factum maintaining the enacting authority of Parliament, and the Court, in the exercise of its discretion under subsec. 5 of section 60, requested Mr. Chrysler, K.C., to argue the case in opposition to the view submitted by the Attorney General of Canada, and the hearing was postponed to afford adequate time for preparation. The difficulties in the way of the opposition were very great, as will presently appear, but it is needless to say that any interest, whatever it may be, which is concerned to have s. 17 of the *Alberta Act* pronounced invalid, can have no cause to complain that Mr. Chrysler did not exhaust the legitimate resources of advocacy in support of his case.

The province of Alberta was carved out of that part of the Dominion which was described in s. 146 of the *British North America Act, 1867*, as Rupert's Land and the Northwestern Territory. By this section it was lawful for the Queen in Council, upon address from the Houses of Parliament of Canada, to admit Rupert's Land and the Northwestern Territory, or either of them, into the Union, on such terms and conditions as were in the address expressed and as the Queen thought fit to approve, "subject to the provisions of this Act"; and it was declared that the pro-

visions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom. The manner in which this power was exercised, and the subsequent acts and proceedings leading up to the constitution of the new prairie provinces, may be briefly mentioned.

By the effect of the *Rupert's Land Act, 1868*, 31-32 Vic., c. 105; the surrender of the Hudson's Bay Co. of 19th July, 1869, and the Order of the Queen in Council of 23rd July, 1870, Rupert's Land and the Northwestern Territory, which I shall hereinafter call the Territories, were admitted into and became part of the Dominion, and it was declared that the Parliament of Canada should have authority to legislate for the peace, order and good government, or the future welfare and good government, thereof. Temporary provision for the government of the Territories was made by Act of the Dominion, c. 3 of 1869; the province of Manitoba was constituted by the *Manitoba Act*, 1870, 33 Vic., c. 3, and these Acts were confirmed by the *British North America Act, 1871*, 34-35 Vic., c. 28. By the latter Act, upon the recital that doubts had been entertained respecting the powers of the Parliament of Canada to establish provinces in Territories admitted, or which might thereafter be admitted, into the Dominion, and that it was expedient to remove such doubts and to vest such powers, it was enacted, by s. 2, that the Parliament of Canada might, from time to time, establish new provinces in any territories forming, for the time being, part of the Dominion, but not included in any province, and might

> at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government of such province, and for its representation in the said Parliament.

It was also enacted, by s. 4, that

> the Parliament of Canada may, from time to time, make provision for the administration, peace, order and good government of any territory not, for the time being, included in any province.

By the two remaining sections, 5 and 6, the Act for the temporary government of Rupert's Land and the Northwestern Territory, and the *Manitoba Act*, 1870, were confirmed, and it was declared that it should not be competent to the Parliament of Canada to alter the provisions of the last mentioned Act "or of any other Act hereafter estab-

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lishing new provinces in the said Dominion." Subsequently, by Order of Her Majesty in Council of 31st July, 1880, it was comprehensively ordered and declared that:

> From and after the first day of September, 1880, all British Territories and Possessions in North America, not already included within the Dominion of Canada, and all Islands adjacent to any of such Territories or Possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws for the time being in force in the said Dominion, in so far as such laws may be applicable thereto.

By the *British North America Act, 1886,* entitled "An Act respecting the representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any province," it is recited that it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada, but is not included in any province, and it is provided that the Parliament of Canada may make provision for such representation; it is also provided that any Act theretofore passed by the Parliament for the purpose mentioned shall, if not disallowed, be deemed to have been valid and effectual from the date when it received the assent, and, subjoined to this provision, which is to be found in s. 2, is the following declaration:

> It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of Members of the House of Commons specified in the last mentioned Act is increased by the number of Senators or of Members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or territories of Canada.

There is also the concluding provision which was relied upon as declaratory of the unity of the several Acts. It provides that:

> This Act and the British North America Act, 1867, and the British North America Act, 1871, shall be construed together, and may be cited together as the British North America Acts, 1867 to 1886.

It was in pursuance of the powers thus conferred and existing that the Parliament of Canada, on 20th July,

1905, enacted the *Alberta Act,* to come into force on 1st September of that year. It recites the provisions of the *British North America Act, 1871,* and that it is expedient to establish as a province the territory therein described, and to make provision for the government thereof, and the representation thereof in the Parliament of Canada. The territory described was wholly comprised within the North-western Territory or Rupert's Land, which, down to the time of the constitution of the new province, had been governed under the provisions of the *North West Territories Acts,* enacted by the Parliament of Canada pursuant to the powers derived from the *British North America Act, 1871.* The authority of the Parliament to make laws for the peace, order and good government of the territory which became the province of Alberta, so long as it remained a part of the Territories, and to provide that it should be constituted into a province, is thus incontestable, and it was not contested. But it was said that the Parliament could not vary, for the new province of Alberta, s. 93 of the *British North America Act, 1867,* which defines the provincial legislative powers relating to education in each of the original provinces. It was sought to introduce a limitation into the ample and comprehensive powers declared by the *British North America Act, 1871,* depending, as I understood the argument, not upon the fact that the enactment is designed to regulate education, but upon a general exception, which, it was said, is to be found in the words of s. 146 of the *British North America Act, 1867,* "subject to the provisions of this Act," and that these words must, by implication, be read into s. 2 of the Act of 1871; it was argued that these words must be impliedly incorporated, because s. 146 provides for the admission into the Union, not only of the colonies of Newfoundland, Prince Edward Island and British Columbia, but also of Rupert's Land and the Northwestern Territory, or either of them, "on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act." It was ingeniously urged that the provisions referred to were all those which were, in the *British North America Act, 1867,* common to the original provinces, and that the Terri-

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tories thus became constitutionally incapable of incorporation into the Union as provinces upon terms or conditions in anywise different from those which applied equally to Ontario, Quebec, Nova Scotia and New Brunswick. This contention, if maintainable, might have constituted a very serious impediment, if not an insurmountable obstacle, to the framing of satisfactory constitutions, but it does not appear to have occurred to anybody before the hearing of this case, and the argument does not rest upon any sound foundation, as I think the following considerations will show.

The provisions of s. 93 of the *British North America Act, 1867*, are well known, and they have frequently been the subject of judicial interpretation. The section provides that

in and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions.

These provisions are set out in four enumerations, the first of which is that:

Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.

The second enumeration is designed to ensure equality in relation to separate schools as between Ontario and Quebec, and the other two enumerations contain special provisions for the working out of the general principle enunciated by the first:

By s. 17 of the *Alberta Act* it is provided as follows:

Section 93 of the British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:—

"1. Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is

employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

It was enacted by s. 3 of the *Alberta Act* that:

> The provisions of The British North America Acts, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment, may be held to be specially applicable to or only to affect one or more and not the whole of the said provinces.

There is a corresponding provision in the *Manitoba Act*, 1870, s. 2, and in the terms of Union with British Columbia, clause 10; also in the terms of Union with Prince Edward Island, the penultimate clause. In each case the provisions of the *British North America Act, 1867*, were to apply, except so far as varied by the terms of Union, and it was thus, in these particular cases, found not incompatible with admission into the Union with provincial status that the terms of Union should have the right of way. But, so far as the Territories are concerned, the powers conferred by s. 146 were exhausted or spent by their admission into the Union under the Order in Council of 23rd July, 1870; I cannot discover that any terms were introduced which conflict with the provisions of the *British North America Act, 1867*, and nobody doubts, and it is not denied, that the Territories were lawfully admitted. Consequently, it is not necessary for present purposes to interpret the general meaning or effect of the words "subject to the provisions of this Act," as found in s. 146. The Territories were admitted in the execution of competent powers under the provisions of the Act of 1867 and the *Rupert's Land Act, 1868*, and the legislative powers of the Parliament of Canada with regard to them were declared in the most comprehensive terms by the Act of 1871. Parliament, it is declared, may make laws for the peace, order and good government of the Territories. These words, as said by Lord Halsbury in *Riel* v. *The Queen* (1), are

> apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure as it is known and practised in this country have been authorized in Her Majesty's Indian Empire. Forms

(1) (1885) 10 App. Cas. 675, at pp. 678-679.

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of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence. They are the common words which are used in the execution of the powers of the Crown or of Parliament for the constitution of Colonial Governments.

Chapters 29 and 30 of the Ordinances of the North-west Territories, 1901, which are mentioned in s. 17 of the *Alberta Act,* are the *School Ordinance* and the *School Assessment Ordinance* which were in force at the time of the constitution of the province, and which regulated the matter of education and taxation for school purposes, under the authority of the then existing legislation of Canada, comprised in the *Northwest Territories Act* and its amendments. The Territories had, from the time of their admission into the Union, exercised, under legislative grant from the Dominion, powers of self-government which had gradually been expanded, until, when the Ordinances of 1901 were passed, they had for many years enjoyed a representative assembly, with powers of legislation not far inferior to those of the provincial Legislatures. See the *North-west Territories Act,* as enacted in c. 50 of R.S.C., 1886, as amended, particularly c. 19 of 1888, and c. 22 of 1891, of the Dominion. It is useless, in view of the governing cases, to suggest any doubt as to the authority of Parliament to confer these legislative powers. *The Queen* v. *Burah* (1); *Hodge* v. *The Queen* (2); *Liquidators of The Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (3). These authorities make it clear that the Parliament of Canada had plenary powers of legislation as large and of the same nature as those of the Parliament of the United Kingdom itself; and, thus construed, so long as there was no repugnancy to an Imperial Statute, there was no limit, operating within the Territories, to the legislative power which the Dominion might exercise for their administration, peace, order and good government, while they continued to be Territories, or, at the time of the establishment of new provinces therein, for the constitution and administra-

(1) (1878) 3 App. Cas. 889, at pp. 903-905.
(2) (1883) 9 App. Cas. 117, at pp. 131, 132.
(3) [1892] A.C. 437, at pp. 441-443.

tion of any such province, and for the passing of laws for the peace, order and good government thereof, and for its representation in the Parliament of Canada.

It was to perpetuate under the Union the rights and privileges with respect to separate schools, or with respect to religious instruction in the public or separate schools, and to avoid discrimination in the appropriation and distribution of the legislative grants for education, as provided for in the *North-west Territories Acts* of the Dominion, and in the Territorial Ordinances of 1901, that s. 17 of the *Alberta Act* was enacted, and it would be strange indeed if, when the new provinces emerged, constitutional guarantees could not be afforded by a law-making body which had the powers of the Imperial Parliament to legislate for their constitution and administration, and to define their powers to pass laws for their peace, order and good government. The Ordinances, as I have shown, derived their force mediately from the Parliament of Canada, which had conferred the territorial legislative powers under which they were directly enacted. It is unquestionable that they had the force of law in the Territories from the time of their enactment down to the constitution of the province of Alberta in 1905, and it seems to be as plain as words can tell that, at the time of the establishment of the province of Alberta, the Parliament of Canada had the power to define and to regulate the legislative powers which were to be possessed by the new province. It is, I think, as impossible as it is inexpedient to cast any doubt upon the generality and comprehensive nature of constitutional powers conferred for peace, order and good government, and I do not find, either in the *British North America Act* of 1867 or of 1871, anything expressed or implied which limited the power of the Parliament of Canada in 1905 to define the constitution and powers of the provinces which were at that time established and constituted within the Territories.

Of course, if the second paragraph of s. 2 of the *British North America Act, 1886*, be intended to have general application, the case is relieved of any possibility of a suggestion or accent of doubt, because it is there declared that

> any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act, or in the

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British North America Act, 1871, has effect notwithstanding anything in the British North America Act, 1867.

But, in the view which I take, it is not necessary to consider the application of this provision, which, it may be suggested, is limited, having regard to the title of the Act, and its purpose as set forth in the recital, and the concluding sentence of the paragraph to which I have referred, which makes provision for representation in the Senate and House of Commons of Canada, a subject which, it may be observed, is also expressly included in s. 2 of the *British North America Act, 1871.*

For the above reasons my answer to the question submitted is that s. 17 of the *Alberta Act* is not, in whole or in part, *ultra vires* of the Parliament of Canada.

*Question referred answered accordingly.*

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*

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*Nov. 17.

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*Feb. 21, 22.
*April 20.

GORDON MACKAY & COMPANY, LIMITED, SUING ON BEHALF OF ITSELF AND ALL OTHER CREDITORS OF J. A. LAROCQUE, LIMITED, AND CANADIAN CREDIT MEN'S ASSOCIATION LTD., TRUSTEE OF THE PROPERTY OF J. A. LAROCQUE, LIMITED, A BANKRUPT (PLAINTIFFS) ..... } APPELLANTS;

AND

CAPITAL TRUST CORPORATION LIMITED (DEFENDANT) ..... } RESPONDENT;

AND

J. A. LAROCQUE LIMITED ..... (DEFENDANT).

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

*Chattel mortgage—"Floating charge" created by company to secure payment of its bonds—Requirement of registration under Bills of Sale and Chattel Mortgage Act, Ont. (R.S.O., 1914, c. 135).*

A trading company (formed under the Dominion *Companies Act*), to secure payment of its bonds, by a "trust deed" purported to "sell,

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

assign, transfer, hypothecate, mortgage, pledge and set over and charge" unto a trustee, certain land, and all its movable assets for the time being, both present and future, in the province of Ontario, subject to the proviso that the "floating charge" created should not prevent the company, until the security should become enforceable and the trustee should have demanded or become bound to enforce it, dealing with the subject matter of the "floating charge" in the ordinary course of its business and for the purpose of carrying on the same. The instrument was registered in the land registry office, and was filed with the Secretary of State as required by the Dominion *Companies Act,* but was not registered under the Ontario *Bills of Sale and Chattel Mortgage Act* (R.S.O., 1914, c. 135), and, for want of such registration, was attacked on behalf of the company's creditors.

*Held* (Anglin C.J.C. and Rinfret J. dissenting) that the instrument was a "mortgage" within the meaning of the said *Bills of Sale and Chattel Mortgage Act,* and required registration under it.

Judgment of the Appellate Division, Ont. (59 Ont. L.R. 293) reversed on this point.

The nature and effect of a "floating charge" discussed, with references to authorities.

*Per* Anglin C.J.C. and Rinfret J. (dissenting): If the Act had been originally enacted in its present form and terms, a floating charge might be deemed to fall within its operation, as being within the mischief it was designed to meet; but, according the proper consideration to the history and development of the statute, a floating charge (within which term the instrument came) cannot be said to be a "mortgage" or a "conveyance intended to operate as a mortgage" within the meaning of the Act. History of the legislation reviewed, with references to cases; *Johnston* v. *Wade* (17 Ont. L.R. 372) explained and discussed.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1) in so far as it varied the judgment of Fisher J. (2) by holding that the instrument in question did not require registration under the Ontario *Bills of Sale and Chattel Mortgage Act.*

The defendant J. A. Larocque Limited was incorporated under the Dominion *Companies Act* (R.S.C., 1906, c. 79), and carried on the business of retail merchants at the city of Ottawa, Ontario. The company decided to borrow money for its corporate purposes by the issue of bonds, and to secure payment thereof it gave a "trust deed" to the defendant the Capital Trust Corporation Limited (therein

(1) (1926) 59 Ont. L.R. 293. (2) (1926) 58 Ont. L.R. 305.

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called "The Trustee"), dated 17th September, 1923. The instrument read in part as follows:

Now therefore this indenture witnesseth that in order to secure the payment of the principal and interest of all the said bonds at any time issued and outstanding hereunder, according to their tenor, the company, in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and in consideration of the sum of $1 to it paid by the Trustee, receipt whereof is hereby acknowledged, has sold, assigned, transferred, hypothecated, mortgaged, pledged and set over, and by these presents doth sell, assign, transfer, hypothecate, mortgage, pledge and set over and charge unto the Trustee, its successors and assigns, forever:

1. All that certain parcel or tract of land and premises [particularly described].

2. All its movable assets for the time being, both present and future, of whatsoever kind and wheresoever situate, in the province of Ontario, hereinafter referred to as the "floating charged property" and including its undertaking and its other property and assets, real, personal or mixed, present and future, not hereinbefore assured, together with all its present and future tolls, rents, revenues, incomes and sources of income, goodwill, chattels, stock-in-trade, plant, furniture, books of account, moneys, credits, things in action, contracts, agreements, bills, notes, negotiable and non-negotiable instruments, judgments, securities, rights, powers, patents, trade-marks, copyrights, privileges and franchises, and all of the property and things of value of every kind and nature which the company may be or hereafter shall become possessed of or entitled to, providing that the "floating charge," created by this paragraph shall in no way hinder or prevent the company until the security hereby constituted shall become enforceable and the Trustee shall have demanded or become bound to enforce the same, either by dividends out of profits, leasing, mortgaging, pledging, selling, alienating or otherwise disposing of or dealing with the subject matters of such "floating charge" in the ordinary course of its business and for the purpose of carrying on the same.

The instrument was registered in the land registry office, and was filed with the Secretary of State as required by the Dominion *Companies Act* (R.S.C., 1906, c. 79, as amended by 4 & 5 Geo. V, c. 23, s. 3, and 7 & 8 Geo. V, c. 25, s. 9), but was not registered pursuant to the Ontario *Bills of Sale and Chattel Mortgage Act* (R.S.O., 1914, c. 135), nor pursuant to the Ontario *Assignment of Book Debts Act, 1923,* (c. 29).

Default was made by the debtor company, and on 9th June, 1925, under the provisions of the said instrument, the defendant the Capital Trust Corporation Limited, the trustee, appointed a receiver who took possession of the debtor company's property and carried on its business.

On 6th August, 1925, the plaintiff Gordon Mackay & Company Limited, commenced this action on behalf of

itself and all other creditors of the debtor company, to set aside the trust deed for want of registration, both as a chattel mortgage and as an assignment of the book debts.

On 21st August, 1925, the debtor company was, by order of the court, adjudged bankrupt, and the plaintiff Canadian Credit Men's Association Limited became trustee in bankruptcy, and, by order of 17th November, 1925, was added as a plaintiff in the action, and by the same order leave was granted to the plaintiffs to proceed with the action.

The trial judge, Fisher J., gave judgment in favour of the plaintiffs (1), declaring that, so far as the instrument purported to cover the goods and chattels and book debts, it was null and void as against the plaintiffs for want of registration.

The Appellate Division (2) varied the judgment of Fisher J. by declaring (Magee and Ferguson, JJ.A., dissenting) that the security created, in so far as it purported to cover the goods and chattels, was a valid floating charge or security, and was not required to be registered as a mortgage under the provisions of the *Bills of Sale and Chattel Mortgage Act*. It declared (unanimously upholding the judgment of Fisher J. in this respect) that, in so far as it purported to cover the book debts, it was, as against the plaintiffs, null and void for want of registration under the *Assignment of Book Debts Act, 1923*.

In so far as the judgment of the Appellate Division varied the judgment of Fisher J., as above stated, the plaintiffs appealed to this Court.

The question for decision by this Court was whether the instrument in question was a mortgage within the meaning of the *Bills of Sale and Chattel Mortgage Act*, R.S.O., 1914, c. 135, and, for want of registration, was void as regards the chattel property. The defendant the Capital Trust Corporation Limited contended that, the effect of the instrument, as to the chattel property, being merely to create a "floating charge", it was not a mortgage within the meaning of that Act and did not require registration under it.

(1) (1926) 58 Ont. L.R. 305. (2) (1926) 59 Ont. L.R. 293.

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*G. H. Kilmer K.C., T. A. Beament K.C.,* and *H. H. Davis* for the appellant.

*F. H. Chrysler K.C.* and *P. H. Chrysler* for the respondent.

ANGLIN C.J.C. (dissenting).—If the *Bills of Sale and Chattel Mortgage Act* (R.S.O., 1914, c. 135) had been originally enacted in the form and terms in which we now find it, and if the question on this appeal were *res integra,* it may be that, giving due effect to the rule of construction embodied in s. 10 of the *Interpretation Act,* (R.S.O., c. 1), a floating charge such as that now before us might be held to come within its purview. The unknown and unregistered floating charge is as formidable a menace to the confiding and unsuspecting creditor, purchaser or mortgagee as is the unregistered bill of sale or chattel mortgage not accompanied by delivery and actual and continued change of possession. Within the mischief which the statute was designed to meet, the floating charge might be deemed to fall within its operation as now framed, if it were a new Act.

But, in construing a statute of gradual growth, such as the *Bills of Sale and Chattel Mortgage Act* in its present form, we cannot ignore its history and development without incurring grave risk of giving to it an effect which the legislature has not intended. *MacMillan* v. *Dent* (1); *Eastman Photographic Materials Co., Ltd.* v. *Comptroller-General of Patents* (2); *Shaw* v. *Great Western Railway Company* (3). According the consideration to which they are entitled to the history and development of this statute, the majority of the Appellate Divisional Court (Mulock C.J.O., Hodgins and Smith JJ.A.), were, in my opinion, right in holding (4) that a floating charge is not a mortgage, or a conveyance intended to operate as a mortgage (s. 2 (*c*) ), within the meaning of that Act.

The floating charge, its character and incidents, and the distinction between it and a chattel mortgage with licence to sell and substitute in the ordinary course of business, although that distinction is fine and sometimes elusive, are well-known to English law. Of this the cases cited in the

(1) [1907] 1 Ch. 107, at p. 120.
(2) [1898] A.C. 571, at p. 575.
(3) [1894] 1 Q.B. 373, at p. 380.
(4) (1926) 59 Ont. L.R. 293.

judgments of Hodgins and Smith JJ.A., afford abundant illustration. With those learned judges, I am convinced that the instrument now under consideration was intended to be, and must be regarded as, a floating charge in the sense defined by the English authorities. It did not operate, when given, as a specific charge on any property of J. A. Larocque, Ltd.; it covered that company's entire undertaking as a floating charge in suspense until the situation arose and the acts were done upon which it was to become a specific mortgage, and thereupon it attached to and bound every portion of the personal property of the company comprised in its undertaking as it then subsisted. I do not dwell further upon this aspect of the case, because neither in this Court nor in the Appellate Divisional Court does there seem to be any serious difficulty in regard to it.

There can be no doubt that the *Bills of Sale and Chattel Mortgage Act,* as originally enacted in 1849 (12 Vic., c. 74), as re-enacted in 1857 (20 Vic., c. 3), and as consolidated in 1859 (C.S., U.C., c. 45), in 1877, (R.S.O., c. 119), and in 1887, (R.S.O., c. 125), applied only to mortgages and sales of goods *in esse* and susceptible of immediate delivery by the mortgagor, and had no application to such securities as floating charges. The provisions of the first section of each of these statutes, requiring registration of mortgages of goods and chattels not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, puts this beyond controversy. That the application and scope of this legislation was thus restricted was the effect of many early Upper Canada and Ontario decisions. For instance, reference may be had to *Harris* v. *Commercial Bank of Canada* (1), where a conveyance, and to *May* v. *Security Loan and Savings Co.* (2), where a mortgage, in each case of goods in bond, were held not within the Act because the goods were not in the present possession and disposition of the mortgagor; to *Burton* v. *Bellhouse* (3), where a transfer of goods in course of manufacture was excluded from the operation of the Act; to *Hamilton* v. *Harrison* (4), where a mortgage upon growing crops was held not covered by the statute; and

(1) (1858) 16 U.C.Q.B. 437.
(2) (1880) 45 U.C.Q.B. 106.
(3) (1860) 20 U.C.Q.B. 60.
(4) (1881) 46 U.C.Q.B. 127.

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to *Banks* v. *Robinson* (1), where an agreement charging an interest in "future-acquired property" was likewise held not to require registration. All these decisions were based on the view that the statute applied only to conveyances or mortgages of goods and chattels in the actual possession of, and susceptible of present delivery by, the mortgagor or vendor. As put by Hagarty C.J., in *May* v. *Security Loan and Savings' Co.* (2):

> In the case of goods in a bonded warehouse we do not see how a registered bill of sale is necessary. They are not in the actual possession of the vendor.

Therefore, until after 1887, it would seem clear that a floating charge intended to attach to all the personal property comprised in a company's undertaking, as it should then be, only upon the mortgagee's claim becoming exigible, was not within the purview of the *Bills of Sale and Chattel Mortgage Act.*

The later amendments relied upon by the appellants to bring such a charge within the statute are now embodied in chapter 135 of the R.S.O., 1914, as sections 11, 16 and 24.

It was not until 1892 that the present s. 11, extending the application of the statute to mortgages and sales of "future-acquired property," was enacted (55 Vic., c. 26, s. 1); (R.S.O., 1897, c. 148, s. 37). It deals with mortgages and sales of goods not the property of or in the possession of the mortgagor or bargainor; but its application is confined to "mortgages and sales." There is nothing in it indicative of a legislative intent to embrace instruments intended not to operate as mortgages of specific existing or future-acquired property, but merely to have effect as floating charges. As an amendment intended to enlarge the scope of a statute operating in derogation of the common law, this provision may not be given a wider construction than its language imports merely because, in the opinion of the court, it would be in the public interest that its application should be so extended. *Judicis est jus dicere, non dare.* The terms of the amendment clearly indicate the intention that the requirement of registration shall apply to "after-acquired property," but only where

(1) (1888) 15 O.R. 618.

(2) (1880) 45 U.C.Q.B. 106, at p. 110.

the instrument affecting such property is a "mortgage" or a "sale." This section merely does away with the former restriction, of which it affords some legislative recognition, viz: that the operation of the statute had been theretofore confined to goods owned by or in the possession of the mortgagor at the time the mortgage was made.

The present section 16 was enacted in 1896 (59 Vic., c. 4, s. 1) (R.S.O., 1897, c. 148, s. 11). It has to do with contracts to give mortgages. It clearly contemplates agreements intended to be followed by instruments which should be mortgages within the purview of the statute. It is difficult indeed to conceive that in enacting this provision the legislature had in view floating charges. To include them, terms entirely different would have been required.

The obvious purpose of s. 24 of the R.S.O., 1914, first introduced in 1890 (53 Vic., c. 35, s. 1) and amended in 1897 (60 Vic., c. 14, s. 86), was to provide, in the case of company mortgages to secure debentures, a substitute for the affidavit of *bona fides* usually required from chattel mortgagees (s. 5 (*b*) ), and for the renewal of such mortgages, the existing statutory provisions having been, in these respects, inapplicable to them. Again there is nothing whatever in the terms employed by the legislature indicative of an intent to extend the application of the statute to instruments intended to operate as floating charges as distinguished from mortgages, or to give to the word "mortgage" in the statute a new and extended meaning, such as that for which the appellant contends.

We are invited by the appellants to overrule the decision of the Ontario Court of Appeal in *Johnston* v. *Wade* (1). Mr. Justice Smith would seem (2) to have been of the opinion that a judgment in their favour would involve a reversal of that case.

But, as pointed out by Moss C.J.O. (3), the Court was dealing in *Johnston* v. *Wade* (1) not with a covering instrument, such as that now before us, designed to secure debentures by a charge upon the issuing company's undertaking, but with a charge created by the debentures themselves which, says the learned Chief Justice,

(1) (1908) 17 Ont. L.R. 372. (2) 59 Ont. L.R., at p. 302.
(3) 17 Ont. L.R., at p. 386.

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pass no property in the goods and chattels to the holder and confer upon him no right to take possession of them or to interfere with them in any way, except through the interposition of the Court.

The actual decision in *Johnston* v. *Wade* (1) does not, therefore, conclude a case where the debentures are secured by a covering instrument such as a floating charge, which, upon the prescribed circumstances coming into existence, attaches as a specific mortgage to all the property then comprised in the mortgagor's undertaking, and may be enforced without curial intervention if it contain provisions apt to sanction that being done. Towards the close of his judgment in *Johnston* v. *Wade* (1), however, Moss C.J.O. said (p. 386):

> The words of s. 1 of the Act 12 Vict., c. 74, are "every mortgage or conveyance intended to operate as a mortgage of goods and chattels." And the words of the Act 13 & 14 Vict., c. 62, are, "every sale of goods and chattels." These words have been carried without alteration through the 20 Vict., c. 3, the C.S.U.C., and various revisions, to the present R.S.O., 1897, c. 148, secs. 2 and 6. There is no other definition of chattel mortgages or bills of sale. The words "mortgage or conveyance intended to operate as a mortgage of goods and chattels" describe instruments of a well-known character.

Osler J.A., added, at pp. 387-8:

> The instruments to which the Act applies are such as directly affect the title to goods and chattels, either by immediate assignment or conveyance intended to operate as an assignment by way of mortgage to a mortgagee, and covenants, promises, and agreements to make, execute, or give such instruments. Section 23 of the Act shews how far the legislature intended to go in dealing with instruments for securing the bonds or debentures of a company. The only instruments of that class which are required to be registered are mortgages or conveyances of goods and chattels made to a bondholder or trustee for the purpose of securing the bonds or debentures of the company—instruments, as I understand the section, of the same character as those mentioned in other sections of the Act, something quite different from the security by way of floating charge which the Companies Act enables the company to create by the bonds themselves.

Meredith J.A. pointed out (p. 389) that the goods comprised in the company's undertaking, upon which its debentures may be secured (p. 391),

> may be in different countries and removable from one county to another for the purposes of the company's business. The provisions of the Act and its requirements are so inapplicable as to render compliance with it impossible if these bonds were such mortgages. * * * The same legislative power which imposed the provisions of the Chattel Mortgage Act also conferred power to pledge the whole of the assets of the company to secure payment of the bonds in a manner quite inconsistent with an intention to require compliance with the provisions of that Act.

(1) (1908) 17 Ont. L.R. 372.

* * * The Chattel Mortgage Act has, I think, always been held—generally speaking—to be inapplicable to cases in which it is impossible to comply with its requirements.

This judgment of the highest court of final resort in Ontario has been generally regarded as implying that a "floating charge" given to secure debentures issued by a company is not a "mortgage or conveyance intended to operate as a mortgage of goods and chattels" within the purview of the *Bills of Sale and Chattel Mortgage Act,* which, from its first enactment in 1849 (12 Vic., c. 74) has described in these words the instruments to which it was meant to apply. Since *Johnston* v. *Wade* (1) was decided in 1908, many instruments similar in character to that now before us have been executed, and debentures running into many millions of dollars are probably secured to-day throughout Ontario by covering conveyances in the nature of floating charges which are invalid for want of registration if subject to the requirements of the *Bills of Sale and Chattel Mortgage Act.*

Moreover, the *Ontario Companies Act* (R.S.O., 1914, c. 178) (like that of the Dominion, [secs. 69 and 69A of the *Companies Act,* R.S.C., c. 79; 4 & 5 Geo. V, c. 23, s. 3; 7 & 8 Geo. V, c. 25, s. 9] which applies to the defendant company) contains the following provisions:

82. (1) The directors may charge, hypothecate, mortgage, or pledge any or all of the real or personal property, including book debts and unpaid calls, rights, powers, undertaking and franchises of the corporation to secure any bonds, debentures, debenture stock, or other securities, or any liability of the corporation.

(2) A duplicate original of such charge, mortgage, or other instrument of hypothecation or pledge made to secure such bonds, debentures, or debenture stock, or other securities, shall be forthwith filed in the office of the Provincial Secretary as well as registered under the provisions of any other Act in that behalf.

This section apparently contemplates that there may be charges which do not require registration under any other statute and makes provision for their publicity by enacting that duplicates thereof be filed *forthwith* in a government office.

With Meredith J.A. (*Johnston* v. *Wade* (1), at p. 391), if it is desirable that such a charge as that claimed in this case should be registered under the provisions of the Chattel Mortgage Act * * * it is, I think, the duty of the Court to wait until the legislature so enacts,

(1) (1908) 17 Ont. L.R. 372.

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not to anticipate such an enactment upon the more than doubtful language of the present enactments upon the subject.

For these reasons, as well as for those stated by Hodgins and Smith JJ.A., in the Appellate Divisional Court, the floating charge executed by the defendant company in favour of the respondent does not, in my opinion, fall within the purview of the *Bills of Sale and Chattel Mortgage Act.*

The present appeal, therefore, fails and should be dismissed with costs.

DUFF J.—This appeal raises the question whether or not a certain instrument falls within the category of instruments dealt with by Chapter 135 of the Revised Statutes of Ontario for 1914, known as the *Bills of Sale and Chattel Mortgage Act.* The immediate practical point is whether or not the requirements of the statute apply in such a way as to make registration of the instrument obligatory.

The instrument was executed on the 17th of September, 1923, by J. A. Larocque, Ltd., in favour of The Capital Trust Corporation, Ltd., described as the Trustee; and by it the company sold, assigned, transferred, hypothecated, mortgaged, pledged and set over as security for certain bonds of the company a certain parcel of real estate in the city of Ottawa and all its movable assets for the time being, both present and future, in the province of Ontario, subject to provisoes of redemption, and also subject to the condition that until the security should become enforceable, the company should not, by reason of the floating charge created by the instrument, be hindered or prevented dealing with any of its property in the ordinary course of its business and for the purpose of carrying on the same.

The question to be decided is whether an instrument of this character—that is, an instrument intended to operate as a floating charge—falls within the category of mortgages dealt with by the statute mentioned.

I have not been able to satisfy myself that you cannot have a floating security by way of mortgage. Nobody doubts that you can have a mortgage of after acquired property: the statute, indeed, recognizes that itself. You can have, for example, a valid mortgage of chattels to be afterwards brought upon certain premises. As soon as the

property is brought there and identified, the equitable right of the mortgagee attaches. That being so, I do not understand why you cannot have a mortgage of present and after acquired property to which the equitable rights of the mortgagee only attach specifically on the intervention of the mortgagee in the events upon which his right to intervene arises. In *Tailby* v. *Official Receiver* (1), Lord Macnaghten describes the nature of this class of security in these words:

> I pause for a moment to point out the nature and effect of the security created by the bill of sale of 1879. It belongs to a class of securities of which, perhaps, the most familiar example is to be found in the debentures of trading companies. It is a floating security, reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. In other words, the mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation.

The instrument in question in that case seems to have been almost identical in terms with the instrument now before us; and throughout the judgment of Lord Macnaghten it is everywhere spoken of as a mortgage. And in truth the language of that judgment makes it quite clear that in the opinion of that great judge and master of equity, such a document as that before us might properly be described as an equitable mortgage.

It may, moreover, be observed that one of the recognized modes of creating an equitable mortgage is to create an equitable charge. That an instrument creating a floating security creates a present charge upon the property for the time being, falling within the description of property affected by it, is shewn by the fact that, notwithstanding the right of the mortgagor to deal with the property in the ordinary way of business, the charge takes priority over executions and judgments and over the rights of general creditors. There seems to be no reason to doubt the soundness of the statement in Palmer's Company Law, 11th Ed., p. 319:

> A floating charge operates as an immediate and continuing charge on the property charged, subject only to the company's powers to deal with the property in the ordinary course of its business.

Then arises the question whether a security of this character, although properly described as a mortgage, does or

(1) (1888) 13 App. Cas. 523, at p. 541.

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does not fall within the operation of s. 11 of the statute. That section is very comprehensive in its terms; it extends to all mortgages, including equitable mortgages, of present and future goods, and there appears to be no good reason for affirming that it does not extend to a mortgage by an individual trader of all his present and future property, held in connection, for example, with a given business, or, indeed, without such restriction, in so far as that property may consist of goods and chattels. It seems impossible to restrict the section in such a way as to exclude an instrument which pledges other property as well as goods and chattels: one cannot suppose that either s. 5 or s. 11 could be evaded by the device of adding, for example, a charge upon book debts. Such an instrument would, on the principle of the judgment of Giffard L.J., in *In Re Panama, New Zealand, and Australian Royal Mail Co.* (1), be a floating security, because it would naturally imply that the trader was entitled to carry on his business; nor does there seem to be any sound reason for excluding from the operation of s. 11 a mortgage of such a character containing an express provision that, subject to the mortgagee's right to intervene in named conditions, the mortgagor should be entitled to deal with the mortgaged property in the ordinary way of his business and for the purposes of that business.

And if that section has its full operation as respects such instruments when executed by individual traders, it is not easy to assign a reason for holding that it should not apply equally in the case of such instruments when executed by trading companies. The Act is general in its operation, and I can think of no reason, based on constitutional grounds, for holding that it is not applicable to instruments executed by Dominion companies.

The appeal should be allowed with costs, and the judgment of Fisher J. restored.

MIGNAULT J. concurs with Duff J.

NEWCOMBE J.—The question is whether the trust deed of 17th September, 1923, is a mortgage or a conveyance in-

(1) (1870) L.R. 5 Ch. App. 318.

tended to operate as a mortgage within the meaning of the *Bills of Sale and Chattel Mortgage Act*, of Ontario, R.S.O., 1914, c. 135, and it depends upon the intent of the instrument, by which, in order to secure the payment of the principal and interest of the bonds, the respondent, Larocque Co., sells, assigns, transfers, hypothecates, mortgages, pledges, sets over and charges, first, the real estate described, and secondly:

all its movable assets for the time being, both present and future, of whatsoever kind and wheresoever situate, in the province of Ontario, hereinafter referred to as the "floating charged property" and including its undertaking and its other property and assets, real, personal or mixed, present and future, not hereinbefore assured, together with all its present and future tolls, rents, revenues, incomes and sources of income, goodwill, chattels, stock-in-trade, plant, furniture, books of account, moneys, credits, things in action, contracts, agreements, bills, notes, negotiable and non-negotiable instruments, judgments, securities, rights, powers, patents, trade-marks, copyrights, privileges and franchises, and all of the property and things of value of every kind and nature which the company may be or hereafter shall become possessed of or entitled to, providing that "the floating charge," created by this paragraph shall in no way hinder or prevent the company until the security hereby constituted shall become enforceable and the Trustee shall have demanded or become bound to enforce the same, either by dividends out of profits, leasing, mortgaging, pledging, selling, alienating or otherwise, disposing of or dealing with the subject matters of such "floating charge" in the ordinary course of its business and for the purpose of carrying on the same.

Some light may be afforded by considering the instrument in its application to a subsequent disposition by the company of existing assets made otherwise than "in the ordinary course of business and for the purpose of carrying on the same." I apprehend that this would constitute default "in the observance or performance of something hereby (by the trust deed) required to be observed and performed by the company." This default, if not made good, would terminate the company's right to possession, and the security would thereby become enforcible. The express permission which the company has to dispose of the assets described is limited to dispositions in the ordinary course of its business and for the purpose of carrying on the same, and it follows from the principle of interpretation expressed in the maxim *expressio unius est exclusio alterius* that it is not intended to reserve any other power of disposition. It is, I think, clear that the charge created is to have precedence of transfers made by the company

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otherwise than in the ordinary course of business, and it is from the time of its creation always effective for that purpose as against any assets, identified as within the description, which are thus disposed of. The provisions of the trust deed which it is said distinguish the sort of charge which it was intended to create from a mortgage, or a conveyance intended to operate as a mortgage, have no application to subsequent transfers not made in pursuance of the conceded power to deal with the subject-matter in ordinary course, and therefore an interest acquired by means of a disposition not permitted by the trust deed cannot prevail as against that of the trustee claiming by force of his original title. The instrument is in form and expression, to all intents and purposes, a mortgage, except that until the mortgagee take possession upon default the mortgagor retains a limited power of disposition.

I know that it has been said by high authority that "a floating security is not a specific mortgage of the assets plus a license to the mortgagor to dispose of them in the course of his business," per Buckley L.J. in *Evans* v. *Rival Granite Quarries Ltd.* (1). This observation is, I think, to be understood by applying the emphasis to the word "specific," because the learned Lord Justice, in the very same passage, speaks of a floating charge as a mortgage subject to a license to carry on business. Lord MacNaghten said, in *Governments Stock and Other Securities Investment Co., Ltd.*, v. *Manila Ry. Co., Ltd.* (2),

> It is of the essence of such a charge (a floating security) that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes.

Therefore, if there be no period of dormancy, there is no floating charge. In the present case a charge is declared and established by the conveyance, and is, except by the exercise of a special power thereby stipulated, so to remain until satisfied, and if that be therefore not a floating charge, then it was a misnomer to describe the security as a floating charge; but, however that may be, the instrument is, I think, not inaptly described as a mortgage. See *In Re*

(1) [1910] 2 K.B. 979, at p. 999. (2) [1897] A.C. 81, at p. 86.

*Florence Land and Public Works Co.* (1); *Hubbuck* v. *Helms* (2); *In Re Standard Manufacturing Co.* (3); *Driver* v. *Broad* (4); *Wallace* v. *Evershed* (5).

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RINFRET J. (dissenting) concurs with Anglin C.J.C.

*Appeal allowed with costs.*

Solicitors for the appellants: *Kilmer, Irving & Davis.*

Solicitors for the respondent: *Chrysler & Chrysler.*

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*Feb. 10.
*April 20.

CHARLES LEMCKE AND JOHN S. CRAIK (PLAINTIFFS) ..... } APPELLANTS;

AND

W. C. NEWLOVE AND THOMAS H. NEWLOVE, EXECUTORS OF THE LAST WILL AND TESTAMENT OF THOMAS NEWLOVE, LATE OF LOREBURN, SASKATCHEWAN, DECEASED (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Executors and administrators—Loss to estate of benefit of asset—Liability for devastavit—Measure of liability—Expenses chargeable to estate—Findings of courts below on oral testimony—Sale of land—Crop-payment agreement—Operation of acceleration clause.*

The Court refused to disturb the allowance by the trial judge, upheld by the Court of Appeal to the defendants, executors of an estate, of certain expenses as a proper charge against the estate, his findings having proceeded upon interpretation of oral testimony and credibility of a witness (as to the terms of an oral arrangement under which the expenses were incurred), and not being clearly shown to be erroneous.

Executors of a deceased's estate held an agreement of sale of land from T. to deceased and an agreement of sale of the land from deceased

(1) (1878) 10 Ch. D. 530, at p. 541.
(2) (1887) 56 L.T.N.S. 232.
(3) [1891] 1 Ch. 627, at p. 641, per Fry L.J.
(4) [1893] 1 Q.B. 744, at p. 748, per Kay L.J.
(5) [1899] 1 Ch. 891, at p. 894.

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

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to K., the amount owing by K. much exceeding that owing to T. Having defaulted in payment to T., who pressed for payment, and having made some unsuccessful efforts to obtain a loan upon the land, they quit-claimed to T., and subsequently assigned their interest in the K. agreement to their mother, who obtained a transfer from T., and paid him off, having borrowed, on the security of the land, sufficient for that purpose. Creditors of the estate sought to charge the executors for a *devastavit*.

*Held* (reversing judgment of the Court of Appeal, Sask.—21 Sask. L.R. 91) that, on the evidence, the disposition by the executors of the K. agreement was not justified, and they should be charged; but not (as directed at trial) with the difference between the amount owing from K. and that owing to T., but only with the value, as of the date of the quit-claim, of the estate asset represented by the K. agreement, including the equity of the estate in the land; and interest.

Executors' duties and liabilities, as to estate assets, and collection of moneys, discussed, with references to authorities.

Land was sold, in 1920, under agreement of sale, for $38,280, payable, $5,000 down, and the balance "by crop payments in annual instalments," with interest payable yearly, "and in the event of default being made in payment of any sums payable hereunder (including taxes and insurance premiums) or any part thereof, the whole purchase money to forthwith become due and payable." The purchaser covenanted to pay "the said purchase price and interest as herein set forth." The vendor was to convey "on payment of all the said sum of money with interest as aforesaid in manner aforesaid." The purchaser agreed to farm and seed each year, to harvest, and to deliver to the vendor his share of the crop each year immediately after threshing. The share so delivered was to be applied, at the then market price of the grain, in payment of interest, any arrears, and on account of the purchase money. The purchase price was to be paid in full on or before 31st December, 1930, and if the crop payments should not by then "have paid all sums payable hereunder, the balance unpaid shall on that date become due and payable * * * in lawful money of Canada." The purchaser's executors failed to pay certain taxes, and, crippled by crop failure in 1924, abandoned the land.

*Held,* the acceleration clause applied, and operated to make the whole balance of the purchase price forthwith due and payable in currency; it so operated, for default in payment of taxes, or for default in crop payments. (Judgment of the Court of Appeal, Sask., 21 Sask. L.R. 91, sustaining, on equal division, judgment of Brown C.J. on this point, affirmed).

APPEAL by the plaintiffs in certain respects, and cross-appeal by the defendants in certain respects, from the judgment herein of the Court of Appeal for Saskatchewan (1), on appeal from the judgment of Brown C.J. at trial.

The defendants were the executors of the estate of Thomas Newlove, deceased. The plaintiff Lemcke was

(1) 21 Sask. L.R. 91; [1926] 2 W.W.R. 830.

the vendor of certain land, under agreement of sale, to the said deceased. The plaintiff Craik had an interest in the said agreement of sale and in the said land by reason of an assignment by Lemcke to him as collateral security for certain indebtedness.

The plaintiffs, in the action, claimed that default had been made under the said agreement of sale, and asked for judgment against the defendants for the amount alleged to be due and owing under the agreement, a declaration of a vendor's lien, a direction for sale, and judgment against the defendants for any deficiency. The defendants, among other defences, pleaded *plene administravit*. In regard to this defence the plaintiffs contended that the defendants had been guilty of a *devastavit*.

The three main questions before this Court, and the decisions thereon below, were as follows:

(1) Whether the reasonable expenses of Mrs. Newlove, the defendants' mother, in connection with the management of the farm of the estate, should be allowed as a proper charge against the estate beyond what was realized upon the sale of certain stock and implements. Brown C.J. held that they should be allowed, and his judgment in this respect was affirmed by the Court of Appeal (1). The plaintiffs appealed on this question.

(2) Whether the defendants should be held liable for a *devastavit*, and, if so, in what measure, for their acts in regard to certain land which the deceased had purchased under agreement of sale from one Thompson, and had sold under agreement of sale to one Knox. The amount owing to the estate under the Knox agreement much exceeded that owing by the estate under the Thompson agreement. The defendants, under certain circumstances set out in the judgment now reported, quit-claimed their interest in the land to Thompson; and subsequently assigned all their interest in the Knox agreement to their mother. Thompson then transferred the land to the defendants' mother, and she borrowed, upon the security of the property, an amount sufficient to discharge the liability of the estate to Thompson, and paid him off. Brown C.J. held that the defendants should be charged with the differ-

(1) 21 Sask. L.R. 91; [1926] 2 W.W.R. 830.

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ence, as of the date of the quit claim, between the amount owing from Knox and the amount owing to Thompson, and interest. The Court of Appeal (1) reversed this decision, and held that, under the circumstances in question, the defendants should not be held liable. The plaintiffs appealed on this question.

(3) Whether, in view of the terms of the agreement of sale from the plaintiff Lemcke to the deceased, which was a "crop-payment" agreement, the "acceleration clause" therein applied, so that, as the plaintiffs claimed, on the default that occurred the whole balance of the purchase price became due and payable. Brown C.J. upheld the plaintiffs' claim in this respect, and was sustained in the Court of Appeal upon an equal division of opinion (1). The defendants cross-appealed on this question.

The material facts of the case bearing on the above questions are sufficiently stated in the judgment now reported.

*W. H. B. Spotton K.C.* for the appellant.

*W. H. McEwen K.C.* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—This action was brought by Chas. Lemcke, the vendor of lands described as the north half of s. 21, and the east half of s. 20, in township 26, range 4, west of the 3rd Meridian in Saskatchewan, and John S. Craik, who had an interest in these lands by way of collateral security, against the defendants, W. C. Newlove and Thos. H. Newlove, as executors of the last will and testament of the late Thos. Newlove, deceased, alleging an agreement of sale of 10th February, 1920, between the plaintiff Lemcke and the deceased Thos. Newlove, whereby the latter agreed to purchase the lands described for the sum of $38,280, payable $5,000 at the date of the agreement, and the remainder by crop payments in annual instalments, with interest at 7%; the purchaser agreeing also to pay the taxes and to insure the buildings; and whereby it was agreed moreover that, if the purchaser made default in his payments, the vendor might determine and put an

(1) 21 Sask. L.R. 91; [1926] 2 W.W.R. 830.

end to the agreement. By the statement of claim it was alleged that the executors had made default in payment of principal, interest, taxes and insurance premiums stipulated for by the agreement, and that the whole purchase money had become due and payable by reason of the default. The plaintiffs therefore sought to recover $31,770.24, of which particulars were stated, claiming a vendor's lien for that amount; the sale of the lands; the application of the proceeds of the sale on account, and judgment against the defendants for the deficiency. The defendants pleaded, among other defences, *plene administravit*. The action was tried before the Chief Justice of the Court of King's Bench of Saskatchewan, who found for the plaintiffs upon the main question of default, and that the defendants should pay into court, to the credit of the cause, $32,057.41, with interest and costs; that the lands should be sold by the sheriff, if these moneys were not paid on or before the sale; the proceeds, after satisfying the expenses and costs, to be applied in payment of the net amount found due to the plaintiffs, with interest; the balance, if any, to be paid into court to the credit of the cause, and that the plaintiffs should have judgment against the defendants for deficiency "to the extent that they (the defendants) have or should have assets of the deceased in their hands." A reference was also directed to the local registrar of the court at Moose Jaw to take the accounts of the defendants as executors, and to ascertain and report what assets of the deceased were or should be in their hands as such executors.

Thomas Newlove died on or about 8th September, 1921. The executors farmed the lands for several years thereafter, and it was directed by the judgment that they should be given credit for all expenses incurred in connection with that, including any reasonable amounts paid or allowed to Robt. Newlove, their brother, or Margaret Newlove, their mother, in connection with the management of the lands. Differences developed at the trial with regard to some matters connected with the administration, in respect of which it was alleged that the executors had been guilty of a *devastavit*, which had caused a failure of the assets, and the learned Chief Justice disposed of these by his judgment.

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Upon the appeal to this court only two of the charges, which I shall now explain, remain in question.

The executors, with the assistance of their brother, Robert, had worked the farm after the testator's death in 1921 and during 1922, but the results, particularly during the latter year, were not encouraging, and, at the end of that season, they made an arrangement with their mother, the details of which are not very satisfactorily proved, but it appears that she was to take over the management of the farm, and advance money when necessary to pay the debts and the operating expenses, for which she was to receive $50 a month, and that, if the proceeds of the crop were insufficient for the expenses and her remuneration, she was to be recouped out of the stock and implements. The defendant, Thos. H. Newlove, says, in his cross-examination:

Q. Will you please tell me just what the agreement with your mother was?

A. I agreed that my mother would have the management of the place. She would be paid $50 a month; she would pay any of the debts, that is the present debts that the estate owed, any of those that were asking us for payment; she would run the place and pay expenses out of the crop as far as it went, and any other expenses she would pay herself; and she would be recouped out of the stock and implements, chattels.

Later, during the witness's cross-examination, his evidence upon discovery was read to him, in which he states the agreement as follows:

A. I made a bargain with her to pay her $50 a month, and to pay the expenses of the farm out of the crop as far as it would go, and that she was to have the horses, the machinery and to pay out of her own money any deficit that might accumulate or any debts that might accumulate in connection with the running of that farm.

* * *

Q. 286. Well, then, was the arrangement between the executors and your mother that she was to accept the stock and implements in settlement of any claim she had against the estate for advances?

A. For any advances she may have made.

Q. 287. Whether it was more than what she realized out of the stock and implements or not?

A. Whether it was more or less.

Q. 288. She is not making any claim against the estate, and cannot make any claim against the estate for any surplus so advanced?

A. There would be no use. There isn't any.

Q. 289. But I mean, that was your bargain?

A. That was the bargain?

Q. 290. That was the bargain that was made in 1922?

A. That was the bargain that was made in 1922.

Q. Not up to this time——?

Here the witness interposed to say that these answers were not correct, and, later, when his attention was directed to

the answer to the effect that his mother was to have the proceeds of the stock and implements, whether more or less than the amount of her personal advances, he answered that

> what I meant to say was that if the chattels came to more than what she advanced, she was to be paid what she advanced, but the rest would be estate money.

And he maintained that the word "less" in his answer upon discovery was a mistake. The arrangement between the executors and their mother, whatever be the effect of it, was made orally, and there is no proof of it except by the evidence of Thos. H. Newlove.

The stock and implements were sold at public auction, realizing an amount insufficient to satisfy Mrs. Newlove for her outlay, and it was claimed on behalf of the plaintiffs that she was not entitled, under the arrangement in proof, to look to the executors for indemnity beyond what was realized upon the sale, and therefore that the balance was not chargeable against the estate. The learned Chief Justice however directed by his judgment that:

> on the taking of the said accounts the executors be charged with the proceeds of the chattels sold at public auction in the fall of the year 1924, and that any reasonable expenses incurred by Mrs. Margaret Newlove in connection with the operation of the farm be allowed as a proper charge against the estate.

This direction, although confirmed upon review by the Court of Appeal, is one of the grounds of the plaintiffs' appeal to this Court. I am of the opinion that the finding of the learned Chief Justice, with regard to the disposition of these expenses, upheld as it is by the Court of Appeal, ought not to be disturbed. It proceeds upon the interpretation of the oral testimony taken at the trial, and the credibility of the witness, as to which the finding at the trial should be accepted, since it is not clearly shown to be erroneous.

The executors produced an inventory of the testator's property for succession duty purposes, with the statutory affidavit; they included in this inventory an item reading as follows:

> N. ½ Sec. 31, Twp. 25, Rge. 4, West 3rd Meridian, Saskatchewan, purchased by deceased from one Richard A. Thompson by agreement for sale dated the 3rd day of December, 1917, under which there was owing by deceased at date of death the sum of $3,985.49, and sold by deceased to one Samuel Knox under agreement for sale dated January 31, 1920, under which there was owing to deceased at date of death the sum of $15,895.35, leaving a net equity in deceased at date of death $11,909.86.

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The fair market value, as well as the net value, of this property is stated in the inventory to be the above mentioned sum of $11,909.86. Evidence of the transaction was given at the trial corresponding to the description in the inventory. The agreement whereby the testator purchased the property from Thompson was produced, but the agreement between the testator and Knox was not produced. It is admitted that they were both half crop agreements, and moreover it was not disputed at the trial that the estate had a valuable equity in the Knox agreement. What happened with regard to it was this. In 1921 Knox paid to the defendants $913, and, in 1922, $1,070, on account of the purchase price. The defendants accounted to Thompson for the $913, but failed to account for the $1,070, which they applied in payment of their debts and operating expenses connected with the working of the farm. Thompson should have received the latter amount, and he insisted upon the payment. In the meantime Knox, considering that he had agreed to pay more for the land than it was worth, expressed his dissatisfaction with the agreement and threatened to leave the place, whereupon the defendants forgave him $3,000, on account of the price, a concession which both courts have found to be not unreasonable. Then, in order to accommodate the situation which had arisen as between themselves and Thompson, owing to the withholding of their share of the crop for 1922, they made some unsuccessful efforts to obtain a loan upon the land, and afterwards, on 9th July, 1923, quitclaimed their interest in the land to Thompson, and, by assignment of 21st July, 1923, to which Knox was a party, assigned all their interest in the Knox agreement to their mother for the expressed consideration of $4,000. Thompson then transferred the land to Mrs. Newlove, the mother of the executors, and she borrowed, upon the security of the property, an amount sufficient to discharge the liability of the estate to Thompson, and paid him off. It appears that at this time the Knox agreement was in good standing as between Knox and the estate, so far as delivery of half the crop was concerned, but that Knox was in default in the payment of taxes to the extent of $249, an amount which apparently was subsequently paid by Mrs. Newlove. In the result, therefore, Mrs. Newlove acquired the Knox agreement, and the land therein described, by pay-

ing only the balance due to Thompson under his agreement with the testator; the estate thus seems to have received no benefit whatever from the asset, which, as already shewn, had been inventoried for succession duty purposes at $11,909.86, an amount which, however, should be reduced by the allowance of $3,000 which the executors subsequently made to Knox. In these circumstances, the learned Chief Justice directed that upon the taking of the accounts the defendants should be charged with the difference between the amount owing from Knox to the testator under the agreement of 31st January, 1920, and the amount owing from the testator to Thompson under the agreement of 3rd December, 1917, to purchase from Thompson, after allowing the reduction of $3,000 which the executors had conceded to Knox, this difference to be ascertained as of 9th July, 1923, and to bear interest from that date at the rate of seven per cent per annum. The Court of Appeal, on the contrary, was of the view, for reasons stated in the judgment of Martin J.A., that the executors, in the embarrassing circumstances in which they were placed, had acted honestly in accordance with what they considered to be in the best interests of the estate, and that, while they should, in the circumstances, have applied to the Court for advice, they might fairly be excused under the provision of s. 44 of the *Trustee Act*, R.S.S., 1920, c. 75; accordingly it was ordered that the judgment of the Chief Justice should be varied by striking out that portion of it which relates to the responsibility of the executors for the amount outstanding on the Knox agreement. The court has thus taken a benevolent view, and I would sustain it if I could, but I regret that I cannot, upon the evidence in the case, find any justification for the disposition of the Knox agreement which is disclosed. It was admittedly a valuable asset, and it passed into Mrs. Newlove's hands, inferentially by reason of a family arrangement, and without any apparent consideration moving from her to the estate. She was able to borrow upon the property an amount sufficient to discharge the vendor's claim, somewhat less than $4,000, and acquired the title subject to the sale to Knox, which must have shewn a profit, if it were carried out. There is no evidence whatever as to what was subsequently done with the property, or whether or not Knox

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completed his purchase. Mrs. Newlove gave no testimony, neither did the defendant Thos. H. Newlove's co-executor and co-defendant, although it would seem that, as he took nothing under the will, he left the administration of the estate in the hands of his brother, who was a beneficiary. The transaction indeed does not appear to differ substantially from a gift by the executors to their mother of the asset represented by the Knox agreement, and one way by which the executors may waste and misspend the testator's estate is, as we are told by Wentworth's Office and Duty of Executors, a work distinguished for its "sound principles and authentic information," p. 226; 14th Am. Ed., pp. 300, 301:

> By the Executor his plain, palpable, and direct giving, selling, spending or consuming the Testator's Goods after his own will, leaving debts unpaid.

Therefore I think that the learned Chief Justice was right in directing that the defendants should be charged, but I am afraid that some injustice may be done by his measure of the charge. It is laid down by the venerable authority which I have quoted, at p. 236, that a wasting executor shall incur damages or make his own goods liable no further than the value of the testator's goods wasted or misadministered.

The appellants rely upon a passage in Williams on Executors which refers to *Lowson* v. *Copeland* (1), where Lord Thurlow held an executor liable to answer for 100 pounds not got in from a bond debt in consequence of his neglect to secure payment; but that decision relates to money lent upon a mere personal obligation. *Powell* v. *Evans* (2), is another case where the executors were charged with loss by neglecting to collect money lent by the testator upon a bond, and it was shown that the money could have been realized if the executors had been diligent, and there were also other special circumstances; it was there held that, inasmuch as the money was due upon personal security, the executors ought not, without great reason, to have permitted it to remain longer than was absolutely necessary. See also *East* v. *East* (3); also *Bailey* v. *Gould* (4). In the latter case, Alderson B., observed, at p. 226:

(1) (1787) 2 Brown's Ch. Cas. 156.
(2) (1801) 5 Ves. 838.
(3) (1846) 5 Hare 343, at p. 348.
(4) (1840) 4 Y. & C. 221.

But as to the £50, it was outstanding on personal security which had been taken by the testator, and which had not been got in, but on which interest had been paid up to the date of the report. The Master took the correct distinction between property invested on real and property invested on personal estate; holding that, inasmuch as the personal security changes from day to day by reason of the personal responsibility of the party giving the security, and as a testator's means of judging of the value of that responsibility are put an end to by his death, therefore, although no loss may have occurred in the interval, the executor who has omitted to get it in within a reasonable time, becomes himself the security.

These cases rule in the circumstances to which they apply, but the general and reasonable rule, which should govern this case, is that stated by Wentworth, and by the Master of the Rolls (Sir John Romilly) in *Clack* v. *Holland* (1), where he says:

Where it is the duty of a trustee or executor to obtain payment of a sum of money, the trustee or executor is exonerated and never required to make good the loss, if he has done all he can to obtain payment, but his efforts have not proved successful. Nay, more, if he has taken no steps at all to obtain payment, but it appears that if he had done so, they would have been, or there is reasonable ground for believing that they would have been ineffectual, then he is exonerated from all liability. *In re Tucker* (2).

In the present case the agreement for sale, which is not produced, had been made with the testator, and, while it probably embraced a covenant by the purchaser to pay the consideration money in the manner stipulated, the vendor meantime retained by way of security his interest in the land; and it is, I think, most probable that his security consisted chiefly of that interest. The purchaser, Knox, had performed his obligations, except as to the payment of some taxes, and there is no proof that the executors acted negligently or unreasonably, save with relation to the transactions by which the agreement and property passed from the executors to Mrs. Newlove. In respect of these transactions the asset was not properly administered, but the executors did not, I think, therefore incur a greater liability than to indemnify the estate for what it had lost.

Consequently, while the judgment of the Court of Appeal as to the Knox agreement cannot, in my opinion, be upheld, that of the trial judge should be varied by directing that the defendants shall be charged only with the value, as of 9th July, 1923, of the estate asset represented by

(1) (1854) 19 Bevan 262, at p. 271.

(2) [1894] 1 Ch. 724, at p. 734.

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the Knox agreement, including the equity of the estate in the land therein described, and the interest.

This disposes of the items in question upon the appeal, and it follows that the appeal should be allowed in respect of the Knox agreement, and that the trial judgment should be restored subject to the variation which I have outlined. But inasmuch as the plaintiffs appeal upon two items, and have failed as to one, and, as to the other, have succeeded only partially, I would not allow costs.

There remains the defendants' cross-appeal, which raises an important question as to the interpretation of the agreement of purchase of 10th February, 1920, between the plaintiff, Chas. Lemcke, and the testator, Thos. Newlove. It is stipulated by the first clause of the agreement that the vendor agrees to sell, and the purchaser agrees to purchase, the land therein described, for the price of $38,280, payable as follows:

> the sum of Five Thousand ($5,000) dollars on the day of the date hereof, the receipt whereof is hereby, by the vendor acknowledged, and the remaining sum of Thirty-three thousand two hundred and eighty dollars by crop payments, in annual instalments as hereinafter provided; together with interest at the rate of seven (7%) per centum per annum from the day of the date hereof, to be paid on the said sum or so much thereof as shall from time to time remain unpaid and as well after as up to maturity; such interest to be payable yearly on the First day of November until the whole of the moneys payable hereunder are fully paid and the first of such payments of interest to become due and be payable the first day of November, A.D. 1920; interest in arrear to be forthwith added to the principal and to bear interest at the said rate; and in the event of default being made in payment of any sums payable hereunder (including taxes and insurance premiums) or any part thereof, the whole purchase money to forthwith become due and payable.

The purchaser agreed to farm and seed the land each year, and to harvest the crops, and to deliver to the vendor his share of the crops each year immediately after the threshing. The executors, down to 1924, inclusive, accounted to the plaintiffs for their full half share of the crops, but in 1924 the wheat was almost a total failure, and the executors, after delivering to the plaintiffs their half share, could not pay the expenses or buy feed, and so they sold the stock and implements, and abandoned the land. Moreover they had not paid the taxes for 1923 or 1924, and the plaintiffs claimed in the action under the clause above quoted the whole purchase price, as payable in money. The learned trial judge upheld the claim, and he was sustained

in the Court of Appeal upon an equal division of opinion, Lamont and McKay JJ.A., holding that the acceleration clause did not apply, while the Chief Justice and Martin J. agreed with the trial judge. A similar question, in other cases, had previously given rise to some difference of judicial opinion in the Prairie Provinces. In Manitoba (*Sherrin* v. *Wiggins* (1) ) Mathers C.J., had declined to give effect to such a clause in an agreement for the sale and purchase of land where the parties had contracted for the delivery of half the crops, but the agreement in that case seems to differ from this in material particulars. In *Wellington* v. *Selig* (2), the question came before the Court of Appeal of Saskatchewan in a case which is perhaps indistinguishable, and the court divided equally upon it, Newlands and Lamont JJ.A., holding that it was impossible to accelerate payments which were to be made by delivery of crops, while the Chief Justice and Elwood J.A., would give effect to the clause. Subsequently, in *Pattison* v. *Behr* (3), McDonald J. held the clause applicable. To the like effect is the judgment of Bigelow J. in *Central Canadian Securities Ltd.* v. *Brown* (4).

Now while it is true, as stated in some of these judgments, that crops to be grown in future years cannot be made actually deliverable at the present time, I am disposed, with great respect, to think that effect may be given to the clause in question in this agreement without attributing to the parties any such impossible intention. The consideration is stated in dollars, and, deducting the $5,000 which were to be paid down, the remainder is to be paid by "crop payments in annual instalments." The purchaser covenants with the vendor that he "shall and will pay the vendor the said purchase price and interest as herein set forth." The vendor is to convey "on payment of all the said sum of money with interest as aforesaid in manner aforesaid." By the 9th clause of the agreement it is stipulated that:

> THE SAID SHARE OF CROP so delivered under the provisions hereof by the purchaser to the vendor shall be by the vendor applied at the then market price of the grain, first, in payment of the interest payable hereunder in that year; next, in payment of arrears of any kind payable hereunder; and the balance on account of the purchase money.

(1) [1917] 2 W.W.R. 895.
(2) (1919) 13 Sask. L.R. 12.
(3) (1920) 13 Sask. L.R. 137.
(4) (1921) 15 Sask. L.R. 97.

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By clause 18 it is provided:

> NOTWITHSTANDING anything herein contained, it is agreed that the said purchase price of the said land is to be paid in full on or before the thirty-first day of December, A.D. 1930, and if the crop payments herein provided to be made shall not by that time have paid all sums payable hereunder, the balance unpaid shall on that date become due and payable by the purchaser to the vendor in lawful money of Canada.

These and other provisions of the agreement show very clearly that the half crop delivered each year was to be taken as a payment in money, computed at its value in money, and that the delivery of crop is treated as payment to the extent of the market price of it. It is, of course, necessary to reach a conclusion whereby if possible a reasonable meaning may be given to every clause of the contract, and I have no doubt that, when the parties stipulated for the event of default being made in the payment of any sums payable under the contract, they had in mind the crop payments as sums payable thereunder. The clause was certainly never introduced with the object of providing for the event of the purchaser not paying down the $5,000 which was to be paid on the day of the date of the agreement; the vendor was absolutely protected as to that; but $33,280 still remained payable under the agreement, exclusive of taxes and insurance premiums, and this sum was, until 31st December, 1930, payable by crop payments. Therefore, except as to the taxes and insurance premiums, the clause can have no application, and is ineffective and useless, unless it be intended to operate in the event of default in the crop payments. Then the consequence of default is declared to be that the whole purchase money shall forthwith become due and payable. And, since crops to be grown in the future could not at the time of default be delivered, it is, I think, reasonable to conclude that the purchase money would at that time become due and payable in currency. But moreover, in this case, the executors were in default in payment of the taxes, and it is expressly stipulated that, in the event of such default, the whole purchase money shall forthwith become due and payable.

Clause 18, upon my interpretation, adds nothing to the case, except to suggest words by the use of which the difficulty which has arisen might have been avoided. Its purpose is to fix a date, 31st December, 1930, when the purchase price is to be paid in full, and beyond which the credit is not to be extended. The provision is that " the

balance unpaid shall on that date become due and payable by the purchaser to the vendor in lawful money of Canada." The words "in lawful money of Canada" are thus introduced, and, if they had been expressed at the end of clause 1, the point in question could not have arisen, but, in my view, these words are necessarily implied at the end of the latter clause. "The whole purchase money," according to its meaning in the concluding lines of clause 1, must be figured in currency, and it is only in currency that it can forthwith become due and payable.

I would dismiss the cross-appeal with costs.

*Appeal allowed in part, without costs.*
*Cross-appeal dismissed with costs.*

Solicitor for the appellants: *W. H. B. Spotton.*
Solicitors for the respondents: *Martin, McEwen, Martin & Hill.*

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*Feb. 22.
*April 20.

THE CORPORATION OF THE TOWNSHIP OF BUCKE, J. I. RITCHIE, AND ALPHONSE MONDOUX (DEFENDANTS) ..... } APPELLANTS;

AND

THE MACRAE MINING COMPANY LIMITED (PLAINTIFF) ..... } RESPONDENT;

AND

J. N. MALOOF AND N. N. MALOOF....(DEFENDANTS).

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

*Assessment and taxation—Mines and minerals—Mining rights and surface rights acquired and held by same corporation under separate grants and titles—Assessment by township municipality—Sale for taxes—Validity—Title of purchaser—Mining rights, as such, not assessable—Description in tax deed—Lost assessment rolls—Presumption as to description of property assessed—Ambiguous description—Presumption as to what property assessed—Falsa demonstratio—Right of township to assess land including minerals—Acquisition, under tax deed, of land including minerals—Assessment Act, R.S.O., 1914, c. 195—Land Titles Act, R.S.O., 1914, c. 126.*

Grantees under two Ontario Crown grants, one of the mines, minerals and mining rights in certain land, and the other of that land without mines and minerals, transferred their rights in the properties to plain-

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

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tiff. The mining rights and surface rights were transferred separately, and were registered separately, under *The Land Titles Act,* Ont., in plaintiff's name. The property was within defendant township's territory, and it imposed municipal taxes in respect thereof, and, certain taxes remaining unpaid, it effected a sale by auction and gave the purchaser a tax deed. This recited that a warrant had issued commanding the treasurer "to levy upon the land hereinafter mentioned for arrears of taxes due thereon", and that the treasurer had sold "that certain parcel or tract of land or premises hereinafter mentioned" on account of arrears of taxes "alleged to be due thereon," etc., and purported to grant "all that certain parcel or tract of land and premises containing 20 acres, more or less, being composed of: the north half of parcel number 2831 in the register * * * and is described as follows: situate in the township of Bucke * * * namely: the north half of the north-east quarter of the south half of lot number 14 in the first concession * * * containing by admeasurement 20 acres more or less." Parcel 2831 in the register comprised only the mining rights. The assessment rolls were lost by fire. Plaintiff asserted right of ownership and asked to have the tax deed set aside.

*Held,* it must be presumed, in the absence of the assessment rolls, that the description in the deed conformed to that of the property assessed (that the property sold was that assessed, was also the clear purport of the deed's recitals); this description was ambiguous, as parcel 2831 mentioned comprised only the mining rights, while the particular description of the land which followed was a description of the land in which such mining rights would, if not excepted, be included; the mining rights, as such, were not assessable; but the township could assess the land, including the underlying minerals; the description of the subject of assessment being ambiguous, the presumption is that the township acted within its jurisdiction and assessed what it had power to assess; while the surface rights and mining rights were severable, and had, since the Crown grants, been dealt with as separate hereditaments, nevertheless, ownership of both having vested in the same corporation (the plaintiff), there could be valid assessment of the land, including the minerals, which *The Assessment Act,* s. 40 (5), expressly contemplates; to make such assessment was apparently intended, and the description of the land, without exclusion of minerals, included the minerals therein contained; the assessment should, therefore, be treated as assessment of mineral land, and the words "parcel number 2831", etc., might be disregarded as *falsa demonstratio,* or as inserted by mistake; without these words, there was sufficient description of the subject of assessment, and it is not material in what part of the description the *falsa demonstratio* occurs (Broom's Legal Maxims, 9th Ed., p. 404; *Watcham* v. *Attorney General of the East Africa Protectorate,* [1919] A.C. 533); construing the tax deed according to the same rules, and in conformity with its recitals, the purchaser acquired the land including the minerals.

Judgment of the Appellate Division of the Supreme Court of Ontario (58 Ont. L.R. 453) reversed.

*Quaere,* whether merger is an appropriate term to describe the effect of the ownership of what had been seperate hereditaments in the same area coalescing in the same person.

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APPEAL by the defendants the Corporation of the Township of Bucke, J. I. Ritchie and Alphonse Mondoux (the other defendants not appealing), from the judgment of the Appellate Division of the Supreme Court of Ontario (1) allowing an appeal from the judgment of Mowat J. at trial.

The action was brought for a declaration that the plaintiff is the owner of certain land, or, in the alternative, is the owner of the mines, minerals and mining rights in, upon and under the said land, and to set aside a certain tax sale, and tax sale deed, from the defendant the Corporation of the Township of Bucke to the defendant Ritchie. The interests of the other defendants existed by reason of certain transfers from the defendant Ritchie.

The trial judge, Mowat J., dismissed the action. The Appellate Division varied his judgment by declaring that the defendants are the owners, as their several interests may appear, of the surface rights of the land in question, but that the plaintiff is the owner, free of any claims on the part of the defendants, of the mines, minerals and mining rights in the land, and directing amendment of the land titles registers accordingly, and directing that the certificate of title issued to the defendant Ritchie be delivered up for cancellation.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed with costs.

*A. G. Slaght K.C.* for the appellants.

*A. M. Le Bel* and *W. J. Gilhooly* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—The defendants, the corporation of the township of Bucke, J. I. Ritchie and Alphonse Mondoux (in the courts below J. N. Maloof and N. N. Maloof were also defendants, but have not appealed), appeal from a judgment of the second Appellate Divisional Court of Ontario which reversed, Latchford C.J. dissenting, the judgment of the trial judge, Mowat J. The litigation arose out of the following circumstances.

(1) (1926) 58 Ont. L.R. 453.

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On January 30th and February 1st, 1907, James A. Macrae and James A. Mulligan obtained two grants in fee simple from the Crown, in right of the province of Ontario, the first of mines, minerals and mining rights, and the second of surface rights, i.e., of land without the mines and minerals (1).

In the first grant, the property is described as follows:

The mines, minerals and mining rights in, upon and under all that parcel or tract of land situate, lying and being in the township of Bucke in the district of Nipissing, in the province of Ontario, containing by admeasurement forty acres be the same more or less, which said parcel or tract of land may be otherwise known as follows, that is to say, being composed of the northeast quarter of the south half of lot no. 14 in the first concession of the said township of Bucke.

The description of the property conveyed by the second grant is the same as that contained in the first grant from the words "all that parcel or tract of land", inclusive, to the end of the extract above quoted. In this grant, ores, mines or minerals are excepted.

The sale of the mining rights was made under *The Mines Act, 1906,* 6 Edw. VII, c. 11, and, as shewn by the price paid ($60.00), was of "mining rights" as distinguished from "mining lands" (s. 174 of the Act).

Both grants were registered under *The Land Titles Act* at North Bay, the grant of the mining rights being entered as parcel 4059 and the grant of the surface rights as parcel 4163.

In October and December, 1907, Macrae and Mulligan assigned to the respondent company their rights in the properties conveyed by these two grants, each of them transferring by separate transfers the mining rights and the surface rights.

In these transfers, the mining rights (referred to as parcel 4059 in the register for the district of Nipissing) are described as

the mines, minerals and mining rights in, upon and under the land hereinafter particularly described, namely, the northeast quarter of the south half of lot no. 14 in the first concession of the township of Bucke, containing by admeasurement forty acres, more or less.

And the description of the surface rights (referred to as parcel 4163 in the same register) is as follows:

the land hereinafter particularly described, namely: the northeast quarter, etc., etc. (*ut supra*).

(1) The interest of Macrae was described as a three-quarters interest and that of Mulligan as a one-quarter interest.

The mining rights and the surface rights, thus registered separately, so remained on the register of land titles in the name of the respondent company for more than ten years. The parcel numbers, however, were changed at some time which is not mentioned, apparently upon the establishment of a new land titles office for the northern division of Nipissing, and the parties agree that parcel 4059 (the mining rights) and parcel 4163 (the surface rights) in the register of Nipissing became respectively parcel 2831 and parcel 2899 in the register for "Nipissing North Division." It also appears that, since the tax sale and transfer to which I will refer, the north half of the northeast quarter of the south half of lot no. 14, alleged to have been sold for taxes, is described as parcel 928 in the register for "South Temiskaming" in the land titles office at Haileybury. I merely mention this parcel number without for the moment entering upon the question whether it covers the surface rights, or the mining rights, or both.

The property in question lies within the territory administered by the corporation of the Township of Bucke, which I will call the Corporation. Municipal taxes in respect of this property were imposed by the corporation on the respondent, and these taxes for the years 1916, 1917 and 1918 were not paid and remained unpaid for more than two years thereafter.

In 1920, the corporation caused a sale by auction to be effected for these taxes, and the purchaser was one John I. Ritchie. Subsequently the warden and the treasurer of the township executed a transfer in favour of Ritchie, the construction of which is in issue between the parties, the respondent contending that it comprised merely the surface rights, while the appellants argue that with the surface rights the mining rights were conveyed to Ritchie. This transfer, which is undated, was filed in the land titles office at Haileybury on the 11th of June, 1921.

S. 66 of *The Land Titles Act* (R.S.O., 1914, ch. 126) requires that, where a sale is made for taxes, a notice of the lodging of the transfer for registration be given to the persons who appear by the register to be interested in the land, and the deputy local master of titles at Haileybury sent a notice by registered letter to "Macrae Mining Co. Ltd., Try Toronto, Ont." The respondent's office is at

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Ottawa and the letter was returned marked "not found"; but as the respondent had not registered its address as required by s. 112 of *The Land Titles Act,* and as no address is given in the other registered documents, the respondent cannot rest anything on insufficiency of the notice.

The transfer was registered and Ritchie's name was entered in the register as owner (vested in fee) of parcel 928 "with an absolute title of the mines, minerals and mining rights in, upon and under." He received from the local master of titles a certificate of title under *The Land Titles Act* for parcel 928. He executed several transfers of parts of or shares in parcel 928, and the transferees were made defendants in this action.

The record contains a copy of the register with respect to parcels 928 and 2,899, as the register stood on the 3rd of November 1925, for parcel 928, and on the 4th of November, 1925, for parcel 2,899. In the register, parcel 928 appears to stand for the mining rights of the north half of the respondent's forty acres, while the surface rights in these forty acres are still called parcel 2,899, N.N.D.

Under these circumstances, the respondent, in May, 1925, brought an action against the appellants and the two Maloofs, asserting its right of ownership in these parcels, and asking that the tax deed or transfer be declared null and void. The learned trial judge dismissed the action on the ground that the respondent was too late to impeach the tax deed, in view of s. 178 of *The Assessment Act* (R.S.O., 1914, ch. 195). This judgment was, however, reversed by the Appellate Divisional Court which decided, on the construction of the tax deed and transfer, that it covered only the surface rights. The learned judges considered the description in the deed ambiguous with its reference to the north half of parcel 2,831 followed by a particular description which they thought could only apply to the surface rights. Being of the opinion that the mining rights, as such, were not assessable (and in this Latchford C.J. concurred), they held that the deed should be restricted to the surface rights, for otherwise it would be void: *ut magis valeat quam pereat.*

In my opinion, the mining rights, as such, were not assessable for municipal taxes. The relevant section of *The Assessment Act* (R.S.O., 1914, ch. 195) is section 40,

subsections 4, 5 and 6 of which are in the following terms:

(4) The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to subsection 8, the minerals in, on or under such land, shall not be assessable.

(5) In no case shall mineral land be assessed at less than the value of other land in the neighbourhood used exclusively for agricultural purposes.

(6) The income from a mine or mineral work shall be assessed by, and the tax leviable thereon shall be paid to the municipality in which such mine or mineral work is situate. Provided that the assessment on income from each oil or gas well operated at any time during the year shall be at least $20.

Mr. Slaght, for the appellants, argued that as, under s. 2, ss. (*h*), of *The Assessment Act*, the words "land," "real property" and "real estate" include all mines, minerals, etc., in and under land, and as, in a sale from subject to subject of land containing minerals, the latter pass to the purchaser without special mention, the tax sale of the land carried with it the minerals, and consequently Ritchie became owner of these mining rights.

He also contended that, inasmuch as s. 40 of *The Assessment Act* is under the heading "Valuation of lands," the provisions of ss. 4 must be taken to mean, not that minerals, *qua* minerals, cannot be assessed, but that their value is not to be considered in valuing the land subject to assessment.

The second contention, in my opinion, ignores the plain language of the statute. Subsection 4 states that, subject to subsection 8 (which has no application here), "the minerals in, on or under such land, shall not be assessable." The meaning of the three subsections, when read together, is obvious. Minerals, as such, that is to say minerals considered as a subject of ownership distinct from the ownership of the land in which they are contained, are not assessable (subsection 4). Land containing minerals is however assessable as land, but it is not to be assessed at less than the value of other land in the neighbourhood used exclusively for agricultural purposes (subsection 5). And the income derived from a mine or mineral work, which supposes that minerals have been extracted from the land, is also assessable (subsection 6).

The question involved in Mr. Slaght's first contention is: What, on the proper construction of the tax deed and

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transfer, was the subject of the sale? We have not the assessment rolls for the years 1916, 1917 and 1918, which were destroyed in the great fire at Haileybury some years ago. We know, however, that on the register of the land titles office the mining rights and the surface rights were entered as separate subjects of ownership, and each had a parcel number distinguishing it from the other. In the grants from the Crown and in the assignments from the original grantees they were also treated as separate properties.

Looking now at the tax deed and transfer, which follows the form prescribed by *The Assessment Act* (section 173 and form 12), it recites that a warrant had issued under the hand of the warden and seal of the township commanding the treasurer " to levy upon the land hereinafter mentioned, for arrears of taxes due thereon," and that, on the 16th of February, 1920, the treasurer had sold by public auction to John I. Ritchie " that certain parcel or tract of land or premises hereinafter mentioned," at and for the price of $136.52, on account of arrears of taxes " alleged to be due thereon " up to the 31st of December, 1918, together with costs. Then follows the operative clause, by which

> the Warden and Treasurer of the said Township, in pursuance of such sale, and of "*Assessment Act*," and for the consideration aforesaid, do hereby Grant, Bargain and Sell unto the said John I. Ritchie, his heirs and assigns, ALL THAT certain parcel or tract of land and premises containing twenty acres, more or less, being composed of: The North half of Parcel Number 2831 in the register for Nipissing North Division and is described as follows: Situate in the Township of Bucke in the District of Nipissing North Division, namely: The North half of the Northeast quarter of the south half of Lot Number Fourteen in the first Concession of the said Township of Bucke containing by admeasurement twenty Acres more or less.
>
> Excepting five per cent of the acreage thereby granted for roads and the right to lay the same where the Crown or its officers may deem necessary.

I think it must be presumed, in the absence of the assessment rolls, that the description in this transfer conformed to the description of the property assessed in the assessment rolls for 1916, 1917 and 1918. That the property sold and transferred was the property which had been assessed is also the clear purport of the recitals of the transfer.

We have, therefore, assessments in the terms of the description in the transfer. It seems unquestionable that

this description is ambiguous, for parcel 2831 on the register, at the time of the sale, comprised only the mining rights, while the particular description of the land which followed was a description of the land in which such mining rights would, if not excepted, be included.

It has already been stated that the mining rights, as such, were not assessable. On the other hand, the corporation could assess the land, including the underlying minerals. The description of the subject of the assessments being ambiguous, the presumption is that the corporation acted within the limits of its jurisdiction and assessed what it had the power to assess, for otherwise the assessments would be void. This is the familiar rule of construction expressed by the maxim *ut res magis valeat quam pereat* (Broom, Legal Maxims, p. 343 and following).

There is no doubt that the surface rights and the mining rights were severable. Since the grants from the Crown, they had been dealt with as separate and distinct hereditaments. Nevertheless, ownership of both having vested in the same corporation, there could be valid assessments of the land containing and including the minerals, which the statute (s. 40, ss. 5) expressly contemplates. To make such assessments was apparently intended, and the description of the land, without exclusion of minerals, includes the minerals therein contained. The assessment should, therefore, be treated as assessments of mineral land, and the words "Parcel number 2831, etc.," may be disregarded or struck out as a *falsa demonstratio,* or as inserted by mistake. Without these words, there is adequate and sufficient description of the subject of the assessments, and it is not material in what part of the description the *falsa demonstratio occurs* (Broom's Legal Maxims, 9th Ed., p. 404, *Watcham* v. *Attorney General of the East Africa Protectorate* (1).

The assessments being regarded as of mineral lands, and the transfer being construed according to the same rules, and in conformity with its recitals of a levy upon and a sale of "the land" described, Ritchie acquired that

(1) [1919] A.C. 533.

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land including the minerals in and beneath it. This also applies to the interest that Mondoux took by virtue of the transfer which Ritchie made to him.

Under these circumstances, it is unnecessary to invoke s. 178 of *The Assessment Act*, on which the learned trial judge relied, and which renders valid and binding a tax sale unless it be questioned within two years, unless indeed to meet other objections to the tax sale not relied upon in this court by the respondent.

Section 42 of The Land Titles Act confirms in the appellants Ritchie and Mondoux an absolute title to what was transferred to them.

It appears unnecessary to discuss the question of merger referred to in the arguments and in the judgment appealed from. It may, perhaps, be open to question whether merger is an appropriate term to describe the effect of the ownership of what had been separate hereditaments in the same area coalescing in the same person.

The appeal should be allowed with costs here and in the Appellate Divisional Court and the judgment of the trial judge should be restored.

*Appeal allowed with costs.*

Solicitor for the appellants: *Arthur G. Slaght.*

Solicitor for the respondent: *Arthur M. LeBel.*

FREDERICK GEORGE HAACK AND FRANK BERNARD HAACK BY HIS NEXT FRIEND JOHN HAACK (PLAINTIFFS) } APPELLANTS;

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*Feb. 10, 11.
*April 20.

AND

EDWARD A. MARTIN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Damages—Quantum—Wrongful eviction of lessees of farm—Liability of lessor—Measure of damages—Loss of unexpired term—Matters to be considered in assessing damages.*

There is no special rule in regard to damages recoverable by a wrongfully evicted lessee; the case is governed by the general rule applicable to all breaches of contract, namely, that the party wronged is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. Compensation to the lessee will not be confined to the value of the unexpired term, but will include all loss naturally resulting from the eviction.

The impossibility of assessing with mathematical accuracy the damages to a wrongfully evicted lessee for the loss of the unexpired term of a farm lease does not relieve the lessor from liability for such damages; and the court may award an amount though it may be to some extent speculative. The actual results from working the land between the date of the eviction and the time of the trial should be taken into account. Estimates of damages as to future years should be based on the assumption, not of unusual, but of normal, conditions as they have existed in the past.

Lessees of farm property sued for damages for wrongful eviction. They were awarded at trial, ([1925] 3 W.W.R. 769), $1,217 for summer-fallowing done by them, and $22,500 for loss of the unexpired term (about five years). The Court of Appeal, Sask. (21 Sask. L.R. 19; ([1926] 3 W.W.R. 11) reduced the $22,500 to $2,500.

*Held,* on the evidence, and having regard to the actual results from working the land between the date of eviction and time of trial, the average yield for preceding years, the conditions in the district, and the nature of the land (and taking into account the cost of operating, marketing, etc., and other circumstances), that the allowance by the Court of Appeal was insufficient; but that the allowance by the trial judge, who had not given due regard to the uncertainty of the price of wheat or the possibility of the lessees earning on another farm, was excessive; and that the damages should be $15,000, covering both the summer-fallowing and the loss of the unexpired term.

APPEAL by the plaintiffs from the judgment of the Court of Appeal of Saskatchewan (1) reducing the amount of damages awarded to the plaintiffs by the trial judge, Bigelow J. (2), from $23,717 to $3,717.

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

(1) 21 Sask. L.R. 19; [1926] 3 W.W.R. 11.

(2) [1925] 3 W.W.R. 769.

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The plaintiffs were lessees from the defendant of certain farm lands, and the action was brought to recover damages for alleged wrongful dispossession, in breach of the covenant in the lease for quiet enjoyment. There were a number of issues raised in the courts below, but the only question before this Court was as to the quantum of damages.

The trial judge allowed the plaintiffs $1,217 in respect of certain summer-fallowing that they had done on the land, and $22,500 for loss of the unexpired term. The Court of Appeal did not disturb the allowance for summer-fallowing, but reduced the amount allowed for loss of the unexpired term to $2,500. The plaintiffs appealed against this reduction. The material facts bearing on the question are sufficiently stated in the judgment now reported.

*P. M. Anderson K.C.* for the appellants.

*J. F. Bryant* for the respondent.

The judgment of the court was delivered by

RINFRET J.—This case comes to us from the Court of Appeal for Saskatchewan. It arises out of the breach by the respondent Martin of a covenant for quiet enjoyment, in a lease of a certain tract of land in the Milestone district of the province of Saskatchewan to the appellants, Haack Brothers. The lease was dated the 26th February, 1924, and was made for six years on the basis of a yearly rental of a share of the crop.

In October, 1924, the Canada Trust Company, claiming through or under the respondent, interrupted and disturbed the appellants in their possession and evicted them from the land. There was no justification whatever for the eviction. The respondent contended that the appellants had not farmed or summer-fallowed the lands properly and, in fact, filed a counter-claim based upon these complaints; but they were held groundless by the trial judge, who found that the appellants had farmed and summer-fallowed the lands in a reasonably good and husband-like manner. These findings were concurred in by the Court of Appeal.

Both courts were of opinion that the plaintiffs were entitled to damages for the disturbance in their possession; but they differed on the quantum of damages to be awarded.

The trial judge held that the appellants should recover $2,717 for the summer-fallow done by them on the property. As they had already been paid $1,500, they were allowed the balance of $1,217. The Court of Appeal confirmed this allowance.

But the trial judge assessed the damages of the appellants through the loss by them of the unexpired term of their lease at $22,500. The Court of Appeal reduced that amount to $2,500.

The appeal is only as to this quantum of damages, and there is no cross-appeal. The learned trial judge thought that the plaintiffs were entitled to the value of the unexpired term and that such value was to be arrived at in this way:

> The rental value to the plaintiffs was two-thirds of the crop, and to estimate that we have to consider the cost of working the farm, and the probable profits. The average crop for the last ten years was twenty bushels to the acre; two-thirds of the land would be put in crop each year; 1,280 acres at 20 bushels to the acre would be 25,600 bushels of wheat that would be grown on that land in an average year; at a dollar a bushel that would be worth $25,600; two-thirds of that would be $16,167. Deduct $8,000, the outside cost of operating, would represent a profit of $8,167. The general evidence that a reasonable value of the unexpired term would be $1,500 a section, or $4,500 for the land in question per year, would seem well within the mark. That amount for five years would be $22,500.

Mr. Justice McKay, speaking for the Court of Appeal, said that he could not agree with this valuation. According to him,

> this method of arriving at the value of the unexpired term to the plaintiffs depends upon too many contingencies, upon which the success of raising a crop rests. There is always the risk of drought, hail, and frost and other things, which cause crop failures. * * * There is also the uncertainty of the price of wheat to be considered. * * * It also assumes that plaintiffs cannot do any other work during the unexpired term of the lease.

Because, however, these damages could not be assessed with certainty was no reason, in his opinion, why the appellants should not be entitled to substantial damages. Under all the circumstances of the case, he did "not think it unreasonable to allow plaintiffs $2,500 damages for the unexpired term, in addition to the $1,217, altogether amounting to $3,717."

Against this variation of the judgment of the trial court, the plaintiffs now appeal to the Supreme Court of Canada,

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asking the restoration of the amount awarded by the trial judge, or such other amount as the Supreme Court will deem proper.

There is no special rule in regard to damages recoverable by a wrongfully evicted lessee. The case is governed by the general rule applicable to all breaches of contract, and laid down as follows by Parke B. in *Robinson* v. *Harman* (1).

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

This was quoted with approval as being " a rule of good sense " in *Lock* v. *Furze* (2), where the plaintiffs sued upon the covenant for quiet enjoyment contained in a void lease. There, Channell B. (p. 452) said:

> I take the indisputable rule of law to be, that, where a man enters into a contract, and fails to perform it, he must make compensation to the extent of the injury sustained by the person with whom he has contracted.

In the case of a lease, the compensation will not be confined to the value of the term, but will include all loss naturally resulting from the eviction. Such is the effect of the judgment in *Grosvenor Hotel Company* v. *Hamilton* (3), where the lessee claimed damages as the consequence of a nuisance caused by his lessor. Vibration resulting from the working of engines on land adjacent to the demised premises had damaged the house rented to the lessee to such an extent that the premises became useless to him and he was obliged to remove his business to another house. The lessor was held liable in damages on the ground that the landlord could not defeat his own grant contained in the lease, and Lindley L.J. said (p. 840):

> There being a good cause of action, the question of damages arises. It is contended for the plaintiffs that the damages consist solely in the loss of the term. If the term were of value, the defendant could recover its value by way of damages; but to say that the damages are confined to the value of the term is erroneous in point of law. The damages are whatever loss results to the injured party as a natural consequence of the wrongful act of the defendant.

The difficulty, however, lies in ascertaining the true extent of the pecuniary loss naturally flowing from the breach.

(1) (1848) 1 Ex. 850, at p. 855. (2) (1866) L.R. 1 C.P. 441, at p. 451.

(3) [1894] 2 Q.B. 836.

With regard to the first year after the eviction, there are in the record, as will appear presently, sufficient elements to estimate the loss with a reasonable degree of certainty. It is not so for the subsequent years, as to which the exact data are of course lacking and the evidence is somewhat conjectural. The average yield since 1910 of the lands rented, and the normal cost of production and of marketing are known. It is established that the land "is away better," and would ordinarily produce per acre five bushels more, than the "average land." Experience has shown that failures are unusual in that district and that none have occurred for the last fifteen years. Such evidence—which is uncontradicted—goes towards extenuating some of the possibilities and of the contingencies dreaded by the Court of Appeal. It is not unreasonable to assume that the same land, year in and year out, will produce the same results. Estimates must be based on the assumption, not of unusual, but of normal, conditions as they have existed in the past. Otherwise the ordinary conduct of business would be a practical impossibility.

When the respondent and the appellants in this case got together on the 26th day of February, 1924, and made the agreement whereby the respondent leased his lands and the appellants promised to pay the yearly rental of one-third of the crop, no doubt the crop each party anticipated was the average crop grown on these lands during the previous years; and the value to each of them of such average crop may reasonably be considered as representing the damages within the contemplation of the parties, if for some reason they happened to be deprived of their share or portion of the yearly rental. Such therefore, in this case, is the measure whereby the damages must be computed, in addition to any actual loss or expense that may be established.

The learned trial judge did take into consideration the average crop for the last ten years, the total absence of failures during a still longer period of years, the cost of operating the farm and of marketing the grain, and he estimated thereby the yearly profit which that would represent for the five years to run of the unexpired lease. He did not however allow any offset for the uncertainty of the

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price of wheat, a very material element in the computation of damages of this character. Neither did he consider the possibility of the appellants earning on another farm. Although, during the interval between the eviction and the trial, they were "unable to get a similar lease of as good land in the Milestone district," it cannot be expected that such a condition would be likely to persist during the remaining four years. They had been set free and they could work elsewhere. They may possibly have secured a lease yielding benefits equal to—if not higher than—those which they could have derived from the cancelled lease. In either case, their loss after the first year would be negligible, if not wholly eliminated.

It must not be forgotten also that any amount awarded to the appellants is to be paid at once and can be put to profitable use immediately, while the money earned on the farm would be available only by fractions and from year to year.

We agree therefore with the Court of Appeal that the award made by the trial judge was excessive and could not be maintained. But the appellants have also satisfied us that the allowance of $2,500 made by the Court of Appeal for the whole of the unexpired term is utterly insufficient.

The eviction of the appellants occurred in October, 1924. The trial took place in November and December, 1925. Evidence was given of what actually happened in 1925. We know what the crop was and that the profit derived from the lands by those who replaced the appellants was close to $12,000.

In *Findlay* v. *Howard* (1), this Court held that

> in an action for damages for loss of future profits arising out of a wrongful breach of partnership contract, events which happened between the date of the commission of the wrong and the time of the trial must be taken into account in estimating the loss for which the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach.

We see no reason why this rule should not apply here. If the appellants had not been dispossessed, they would have had the benefit of the profits of 1925. It may be that they would not have done just as well as their successors. They may not have had all the equipment required for a

(1) (1919) 58 S.C.R. 516.

two thousand acre farm. But all allegations of improper farming made against them were disbelieved by both courts. They were held to have shown themselves competent farmers. Nevertheless, in the computation of the damages allowed by either court, the actual results for the year 1925 appear to have been altogether disregarded. There was nothing speculative about them. The appellants were entitled to ask that these results be taken into account in ascertaining their damages, for the holding was that during that time they were unable to earn anything elsewhere, although they used all reasonable efforts to get other land and, in the words of the trial judge, they "did everything possible to minimize the loss." For this reason the judgment of the Court of Appeal must be modified. Of course, the year 1925 was admittedly an exceptional year and could not be set up as a standard. But it shows conclusively to our mind that the amount allowed by the Court of Appeal must be materially increased. It is obviously impossible to assess the damages "with mathematical accuracy," but that is not necessary, and such impossibility "does not relieve the wrongdoer of the necessity of paying for his breach of contract" (*Chaplin* v. *Hicks* (1) ).

Any amount awarded must be to some extent speculative. We must proceed "largely as a jury." We have, however, the benefit of the calculations made by the learned trial judge and by the Court of Appeal. If we apply to their figures the corrections which, in our view, are made necessary for the reasons which we have given, we think that an amount of $15,000, covering both the summer-fallowing and the loss of the unexpired term is justified upon the evidence in the record. This is, of course, without prejudice to the amount allowed on the counter-claim with which we are not concerned. It also leaves untouched the order as to costs and as to the right to set-off made by the Court of Appeal.

The appeal should be allowed to the extent indicated, and the appellants should have their costs before this Court. *Appeal allowed, to extent indicated, with costs.*

Solicitors for the appellants: *Anderson, Bayne & Bigelow.*
Solicitors for the respondent: *Bryant & Burrows.*

(1) [1911] 2 K.B. 786.

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*Feb. 23.
*April 20.

THE CUSTODIAN (RESPONDENT).....APPELLANT;

AND

LOTHAIR WILLIAM GEBHARD BLUCHER (CLAIMANT) ..... } RESPONDENT;

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Interest—Exchange—Dividends on company shares—Right to receive dividends suspended during the War—Trading with the enemy regulations—Dividends payable in United States currency—Payment after the War—Conversion into Canadian funds—Rate of exchange—Time as to which prevailing rate applied—Right to interest on dividends withheld.*

At the beginning of the War the claimant, a British subject, owned shares of stock in C. Co. As these shares were registered in the name of an enemy bank, payments of dividends were withheld during the War, the Custodian becoming entitled to receive them by the trading with the enemy regulations. The dividends were, however, retained by C. Co. After the peace, the claimant established his right to the shares and accrued dividends; the Custodian released them; and on 1st June, 1921, C. Co. registered the shares in the claimant's name and paid him the dividends accrued after 1st October, 1917, but still withheld the previous dividends. These were paid in March, 1924, except as to disputed claims to premium of exchange and interest. The dividends were payable in United States currency. The payment in 1924 was in the Canadian equivalent of the amount in United States funds, as of February, 1924. The Custodian, under an arrangement, assumed C. Co.'s liability to the claimant for the balance of his claim, both for premium of exchange and for interest, and the claimant sued the Custodian in the Exchequer Court. Audette J. held ([1926] Ex. C.R. 77) that the claimant should be paid at the rate of exchange ruling on the date when each dividend became due and payable to the Custodian, and should be paid interest from 1st June, 1921. The Custodian appealed, denying the claimant's right to interest; and the claimant cross-appealed, claiming the difference in exchange as of 1st June, 1921, or, in the alternative, more interest.

*Held,* the rate of exchange should be that which ruled at the time when each of the dividends became due and payable to the Custodian, who was the lawful recipient during the war, and not that of 1st of June, 1921, when the claimant became entitled to receive them; had there been no war, the conversion to Canadian money should have been made as at the time when the obligation to pay in foreign currency was incurred, that is, the respective dates when the dividends were declared to be payable (cases cited); and the fact that, at the times fixed for payment, the claimant's right to receive them was suspended by reason of the war, was not a ground for application of a different rule.

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

*Held,* further, that, having regard to s. 34 of the Ontario *Judicature Act,* and to its interpretation in *Toronto Railway Co.* v. *City of Toronto* ([1906] A.C. 117, at pp. 120-121), interest should be paid from 1st June, 1921, as upon a just debt improperly withheld; the dividends constituted a "debt" within the meaning of the interpretation given to the statute; the right of recovery was in suspense during the war, but the debt nevertheless remained; that the dividends were payable in U.S. currency did not alter their character as a debt (*In re Severn and Wye and Severn Bridge Ry. Co.,* [1896] 1 Ch. 559; *Ehrensperger* v. *Anderson, 3 Ex. 148; Société des Hôtels le Toquet Paris-Plage* v. *Cummings,* [1922] 1 K.B. 451; *Manners* v. *Pearson,* [1898] 1 Ch. 581, referred to); the claimant's contention that interest should be reckoned from the respective dates when the dividends were declared, could not succeed, because these were not contractually interest bearing debts, and the withholding of the dividends during the war was lawful, and therefore should not be visited by damages.

APPEAL by the Custodian from the judgment of Audette J. in the Exchequer Court of Canada (1) in so far as it allowed the claimant's claim to interest; and cross-appeal by the claimant from the said judgment in so far as it held that the rate of exchange for conversion into Canadian currency of the dividends payable to him must be the rate ruling on the date when each dividend became due and payable to the Custodian, and not the rate of exchange as of 1st June, 1921, as claimed by the claimant; and, in the alternative, if the said judgment be held to be correct as to the time or times for conversion into Canadian funds of the dividends in question, then in so far as the said judgment awarded interest only from 1st June, 1921, and not from the respective dates when each dividend became due and payable to the Custodian.

The material facts of the case, and the respective contentions of the parties, are sufficiently stated in the judgment now reported.

*G. Wilkie K.C.* and *J. Mulvey* for the appellant.

*J. W. Bain K.C.* and *E. Bristol* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—This case was tried upon admissions, and there is an appeal and cross-appeal.

At the beginning of the War, 420 shares of the capital stock of the Canadian Pacific Railway Company, which were registered in the name of the Nationalbank fur

(1) [1926] Ex. C.R. 77.

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Deutchsland, belonged to the claimant, who was a British subject; and, as this was an enemy bank, payments of dividends upon the stock were of course withheld during the War, the Custodian becoming entitled to receive them by the trading with the enemy regulations. The dividends were nevertheless retained by the Railway Company, although subsequently, by order of the Superior Court of Quebec of 23rd April, 1919, the shares registered in the name of the Nationalbank fur Deutchsland, including those of the claimant, were, together with the dividends, declared to be vested in the Custodian, and moreover, pursuant to the order, the stock was registered in his name. The claimant, after the peace with Germany, established his status as a British subject, and his right to the 420 shares and the accrued dividends; the Custodian released them; and, on 1st June, 1921, the Railway Company registered the shares in the name of the claimant, and paid to him the dividends accrued after 1st October, 1917, but the previous dividends, amounting to $13,650, were still withheld by the company. It is admitted that these dividends were payable in United States currency, and the claimant therefore sought to recover from the company payment, not only of the said sum of $13,650, but also 12% thereof for excess value of United States funds, that being the rate of exchange in favour of the United States prevailing on 1st June, 1921, when the claimant's stock was restored; he also claimed interest thereon from the latter date. The Railway Company having refused to recognize this claim, the claimant instituted an action in Ontario against the company to recover these amounts, and that action was, on 3rd March, 1924, settled by payment of $14,085.09, the Canadian equivalent of $13,650 in United States funds as of February, 1924, the latter being then at a premium of 3·2%. At the same time an arrangement was made between the parties and the Custodian, the reasons for which are not disclosed, by which the Custodian assumed the liability of the Railway Company to the claimant for the balance of his claim, both for premium of exchange and for interest. Afterwards the claimant instituted proceedings in the Exchequer Court of Canada against the Custodian to recover $3,309.72, according to the following particulars:

| | | |
|---|---|---|
| 1st June, 1921— | | |
| Market value in Canada of $13,650 in United States funds then at a premium of 12 per cent | $15,288.00 | |
| Interest thereon to 3rd March, 1924, at 5 per cent | 2,106.81 | |
| | $17,394.81 | |
| 3rd March, 1924— | | |
| By cash, being value of $13,650 in United States funds then at a premium of 3·2 per cent | 14,085.09 | |
| Balance due as of 3rd March, 1924 | $ 3,309.72 | |

By the judgment of the Exchequer Court, the claimant recovered $1,641.27, the learned judge finding, for reasons which he states and upon the authorities to which he refers,

> that the rate for conversion must be the rate ruling on the date when each dividend became due or payable to the Custodian, and not either the 1st of June, 1921, or the 3rd of March, 1924, that is at the date of the breach or default (such) a sum in Canadian currency as would at that date have been produced by the American currency.

And he found that the claim for interest, upon the amount as so figured, should be allowed.

The Custodian appeals, denying the plaintiff's right to interest; and the claimant cross-appeals, claiming the difference in exchange as of 1st June, 1921; or, in the alternative, more interest.

On behalf of the Custodian, it is maintained that this is an action, not of debt, but to recover damages for non-delivery of United States currency which must be treated as a mere commodity, and that the measure of damages is not interest to compensate for delay in payment, but is to be ascertained as in the case of goods, by comparison of the contract price with the market price at the time of delivery.

Now it is settled law that interest is payable only by statute, or when contracted for, and, as there is in this case no contract to pay interest, the right therefore must rest upon statute. The liability for interest in judicial proceed-

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ings is regulated in Ontario by sections 34 and 35 of the *Judicature Act;* and, although there was some discussion of s. 35 at the hearing, it became in the end matter of common ground that s. 34 is, for this case, the governing provision; it enacts that " Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it." Mr. Holmested, in his 4th ed. at p. 195, very truly says that " Interest is in practice more frequently allowed by our juries than English authorities would seem to warrant," and the highest authority for this statement is to be found in Lord Macnaghten's judgment in the Judicial Committee in *Toronto Railway Co.* v. *City of Toronto* (1), where, referring to the section which I have quoted, and to the provincial decisions in which it had been expounded, His Lordship said:

> The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

This interpretation of the statute appears to me conclusive of the appeal. The Custodian presents a powerful argument to demonstrate that the liability was not for a sum certain, or payable by virtue of a written instrument at a time certain, and that there had been no demand in writing claiming interest from the date of the demand. This might have been effective if the claim were founded solely upon s. 35 of the *Judicature Act,* but the claimant, very judiciously I think, does not rely upon this section, and these considerations do not, in the circumstances of the case, make against the equity or fairness of an allowance of interest to compensate for the delay. When, on 1st June, 1921, the Railway Company registered the claimant as owner of the stock, and when it paid him the dividends accrued since October, 1917, it knew that he was equally entitled to the earlier dividends; that these amounted to 13,650 United States Dollars, and that the exchange, whatever the proper rate might be, was in favour of the United States. Moreover it ought to have been reasonably plain to the company that the claimant should have had the

(1) [1906] A.C. 117, at pp. 120, 121.

benefit of exchange, at least to the same extent as if the payments could have been made quarterly from time to time as the dividends were declared. Therefore I think that the fair and equitable character of the claim for interest is not, and cannot be, successfully assailed. Then, was the liability for payment of the $13,650 a just debt? That it was just is not in question. Ordinarily, when a company declares a dividend, a debt becomes payable to the shareholder in respect of his dividend for which he can sue at law. *In re Severn & Wye & Severn Bridge Railway Co.* (1). The right of recovery was in suspense during the War, but the debt nevertheless existed; it was payable, it is true, in United States currency, but in *Ehrensperger* v. *Anderson* (2), it was held to be no objection to an action upon the common count for money had and received, that the money had been received in rupees and not in English currency. Parke B., said:

> Upon that objection, certainly, we consider that the plaintiff is not prevented from recovering. There are two authorities on the subject: one of these is a case of *Harington* v. *Macmorris* (3), in which an objection having been made, that the money received was foreign money, Lord Chief Justice Gibbs, then Mr. Justice Gibbs, treated that objection as having been exploded for thirty years. The real meaning of such a count is, that the defendant is indebted for money of such a value or amount in English money. However, the objection appears to have been listened to, perhaps more than it ought to have been, in a subsequent case of *McLachlan* v. *Evans* (4); but the Court of Exchequer held that an action for money had and received for English money would not lie, unless there had been a reasonable time, after the receipt of the foreign money, to convert it into English. Possibly that case cannot be received as being very satisfactory; at all events, we do not decide this case against the plaintiff on this ground.

Apparently a similar view was entertained in *Société des Hôtels le Touquet Paris-Plage* v. *Cummings* (5). Obligations payable in foreign money which, if payable in English money, would constitute debts are spoken of in the books as debts payable in foreign money. There is essentially no difference between a debt payable in England and one payable in a foreign country, except that, when a debt payable in foreign currency is recovered in England, the foreign amount must be converted into English money,

(1) [1896] 1 Ch. 559.
(2) (1848) 3 Ex. 148.
(3) (1813) 1 Marsh. 33; 5 Taunt. 228.
(4) (1827) 1 Y. & J. 380.
(5) [1922] 1 K.B. 451.

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because the court has generally no jurisdiction to order payment in any other currency. I have not overlooked the fact that the claimant, by his pleading, claims to recover the premium of exchange as damages by reason of the failure of the Railway Company to deliver to him United States funds representing the nominal amount of the dividends withheld, and I am aware that a suggestion in support of the propriety of a claim for damages is to be found in the judgment of Vaughan Williams L.J., in *Manners* v. *Pearson* (1); but I think the claim should be considered and effect given to the rights of the parties upon the facts admitted, and that, in the circumstances of this case and under the authorities which I have mentioned, the dividends constitute a debt within the meaning of the statute as interpreted. In substance there is a liquidated demand in money, and the withholding of payment is the cause of action. The form does not matter.

I am therefore of the opinion that the interest is payable, and I would dismiss the appeal with costs.

Upon the cross-appeal the claimant contends that the proper date for conversion of the dividends from United States currency to Canadian currency was 1st June, 1921, when, in view of the state of war which had existed and the identification of his stock with the enemy, he first was entitled to claim them. And moreover he contends, by his factum, that, if the dates for conversion should be as found by the trial judge, the interest should run from those dates.

As to the time for conversion, I think the learned judge of the Exchequer Court was right in principle, and upon the authority of the decisions, which in England have been substantially uniform, that the rate is that which ruled at the time when each of the quarterly dividends became due or payable to the Custodian, who was the lawful recipient during the War. The dates which were set up in competition are 1st June, 1921, when, after the War was over, the claimant became entitled to receive the dividends, and 3rd March, 1924, when the Railway Company paid to the claimant $14,085.09, the amount then representing, in Canadian funds, the unpaid dividends. I see no reason,

(1) [1898] 1 Ch. 581, at p. 594.

however, why the exchange should be computed as of a date depending upon the termination of the War and the diligence of the claimant in rectifying his title, nor why the claimant should derive any benefit from the fact that the Railway Company had failed to deposit these dividends with the Custodian as required by the trading with the enemy regulations. If the War had not occurred, the dividends would have been paid to the Nationalbank fur Deutchsland from time to time as they were declared and became payable. Neither the Company nor the Custodian is answerable for the legal delay in payment which was brought about by the War, although that is a condition with which the parties have to reckon. If there had been no war, the authorities are conclusive that, if payment were claimed in Canadian money, the conversion should be made as at the time when the obligation to pay in foreign currency was incurred, that is, the respective dates when the dividends were declared to be payable. See the following cases: *Cockerell* v. *Barber* (1); *Scott* v. *Bevan* (2); *Bertram* v. *Duhamel* (3); *Manners* v. *Pearson* (4); *Di Ferdinando* v. *Simon, Smits & Co. Ltd.* (5); *SS. Celia* v. *SS. Volturno* (6); *Société des Hôtels le Touquet Paris-Plage* v. *Cummings* (7); *In re British-American Continental Bank, Lim., Goldzieher and Penso's claim,* also *Liegeois' claim* (8); *Peyrae* v. *Wilkinson* (9).

The claimant, in effect, now seeks, in this action, the conversion of the debt into Canadian funds. The rate and times of payment of the dividends were regulated by the Railway Company when they were declared. Is there then a different rule because, at the time fixed for payment, the right was suspended by reason of the War? I say no. The obligation remained; it was by reason of the original obligation that payment was exigible, and, although the exercise of the right of conversion was, by the law, postponed, the right, when it became exercisable, had reference to the original subject-matter, and remained the same. It results

(1) (1810) 16 Ves. 461.
(2) (1831) 2 B. & Ad. 78.
(3) (1838) 2 Moore's P.C. 212.
(4) [1898] 1 Ch. 581.
(5) [1920] 3 K.B. 409.
(6) [1921] 2 A.C. 544.
(7) [1922] 1 K.B. 451.
(8) [1922] 2 Ch. 575 and 589.
(9) [1924] 2 K.B. 166.

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only in confusion to think of the time for conversion as shifting according to contingent or uncertain events, or the election of the claimant as to when he would establish his title.

The claimant's contention that interest should be reckoned from the respective dates when the dividends were declared cannot succeed, because these were not contractually interest bearing debts, and the withholding of the dividends during the War was lawful, and therefore is not to be visited by damages.

The cross-appeal should therefore be dismissed with costs.

*Appeal and Cross-appeal dismissed with costs.*

Solicitors for the appellant: *Wilkie & Hamilton.*

Solicitors for the respondent: *Bain, Bicknell, White & Gordon.*

On the 30th May, 1927, an application was made to the Court, on behalf of the Custodian, for a re-hearing of the above appeal, on the ground that the laws applicable to the issues raised upon the appeal of the Custodian were the laws of the province of Quebec, whereas the appeal had been submitted to the Court as if the laws of Ontario were the only laws applicable. The application was refused, the Court stating that the case was not one in which a re-hearing should be granted; it would be establishing a very dangerous precedent, to grant a re-hearing because of a point overlooked in argument; that was really all that the motion came to; that it was satisfied, from counsel's statement, that other cases would not be affected, as the point desired to be raised on the re-hearing applied for was still open to be raised in other cases; other cases would be affected only on such points as the judgment of this Court had directly decided.

ADDISON McPHERSON (PLAINTIFF).....APPELLANT; 1927

AND *Feb. 8, 9. *April 20.

JOHN L'HIRONDELLE (DEFENDANT)....RESPONDENT.

AND

THE SOLDIER SETTLEMENT BOARD OF CANADA .....} (DEFENDANT)

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

*Contract—Want of consideration—Alleged declaration of trust—Written words of confirmation or acknowledgment—Statute of Frauds, ss. 4, 7.*

Plaintiff transferred land (including mines and minerals; except coal, which was reserved from his title) to the Soldier Settlement Board, which sold it to defendant. Plaintiff claimed against defendant an undivided one-half interest in the mines and minerals (except coal) in the land, under an alleged oral agreement with defendant, which, he alleged, was subsequently confirmed and acknowledged in writing. This writing was a power of attorney (prepared by plaintiff's solicitor on plaintiff's instructions) whereby defendant on his account authorized plaintiff "to * * * dispose of my undivided one-half interest (the other undivided one-half interest belonging to the said [plaintiff]) in the mines and minerals, including petroleum and natural gas" in said land. Defendant, a man of little education, said he understood that the parenthetical clause referred to plaintiff's interest in another parcel of land, and that the project authorized by the power of attorney was the sale by plaintiff of the oil rights in both parcels together, the one belonging to defendant and the other to plaintiff, and defendant denied any agreement such as plaintiff alleged. Plaintiff, in the alternative, claimed that defendant should be deemed to hold in trust for his benefit an undivided one-half interest in the mines and minerals.

*Held,* plaintiff could not succeed on his alleged contract, as there was no consideration, and s. 4 of the *Statute of Frauds* was not complied with; the words in parenthesis in the power of attorney did not constitute a sufficient memorandum or note within s. 4; nor did said words operate as a declaration of trust; moreover, s. 7 of the *Statute of Frauds* was not complied with.

Mere words of confirmation or acknowledgment cannot make a valid contract of that which is ineffective as a contract for lack of consideration, and an incomplete voluntary transfer will not be construed as a declaration of trust unless it appear that there is an intention to declare a trust, and not merely to make a transfer (*Heartley* v. *Nicholson,* L.R. 19 Eq. 233, *Richards* v. *Delbridge,* L.R. 18 Eq. 11, at p. 15, and other cases, cited).

Judgment of the Appellate Division, Alta. (22 Alta. L.R. 281), affirmed.

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

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APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) allowing the defendant L'Hirondelle's appeal from the judgment of Simmons C.J. (2) in which he adjudged that the defendant L'Hirondelle should account to the plaintiff for a portion of the purchase money payable by one Herron under Herron's contract of purchase of certain land, the portion to be accounted for representing a one-half interest in the mines and minerals in and under the south-west quarter of section 17, township 20, range 2, west of the 5th meridian. The material facts of the case are sufficiently stated in the judgment now reported. The plaintiff's appeal to this Court was dismissed with costs.

*W. F. O'Connor K.C.* for the appellant.

*H. P. O. Savary K.C.* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff was the owner of three parcels of land in Alberta, first, the S.W. ¼ of section 17, township 20, range 2, west of the 5th Meridian, including the minerals therein; secondly, the S.E. ¼ of section 18 in the same township and range, but without the minerals; thirdly, 240 acres in section 8 immediately to the south of the first parcel above described, including the minerals. The property was subject to a mortgage in favour of the Associated Investors of Rochester, N.Y., for $4,500, upon which there was due $4,751.60, and there were also unpaid taxes. The controversy is with regard to the first parcel. The mortgage company was pressing for payment, and the plaintiff approached the defendant, who was a neighbour and connected with him by marriage, and suggested that he should acquire the first and second parcels through the Soldier Settlement Board, which had been recently constituted and was exercising the powers conferred by the *Soldier Settlement Act*, ch. 71 of the Dominion, 1919. The defendant made application to the Board for the purchase and secured an agreement, dated 24th December, 1920, whereby the Board agreed to sell these two parcels to the defendant, under the provisions of the Act, and according

(1) 22 Alta. L.R. 281; [1926] 3 W.W.R. 481.

(2) [1926] 2 W.W.R. 465.

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to the stipulations of the agreement, subject to the reservations, limitations and conditions contained in the original grant from the Crown, for the sum of $5,000 to be paid, $500 down, and the balance in 25 equal, consecutive, annual instalments of $319.30 each, consisting of principal and interest calculated annually at 5%. In the meantime the Board had negotiated with the plaintiff for the acquisition of the title, and had advanced to the plaintiff's solicitor the amount necessary to discharge the mortgage and taxes, and, on 18th January, 1921, the plaintiff executed a transfer of the land to the Board for the consideration of $5,000, the receipt of which was thereby acknowledged. At the same time the plaintiff, through his solicitors, informed the district office of the Board that he wished to reserve for himself the oil and mineral rights, but the answer was that the district superintendent had no authority under the Board's regulations to accept title from a vendor subject to any personal reservations, and that, if Mr. McPherson wished to retain the oil and minerals, it would be necessary to submit the case to the head office for consideration in a formal manner. The plaintiff did not pursue the matter with the head office, and his transfer expressly included the mines and minerals in the S.W. $\frac{1}{4}$ of s. 17, and the right to work the same, except the coal, which, according to his title, belonged to the Canadian Pacific Railway Company. It would seem that the defendant entered into and remained in possession under his agreement until 2nd March, 1926, when, by the consent of the Board, he made an agreement with Wm. Stewart Herron, whereby he assigned all his right, title and interest in the land, and the benefit of all covenants, terms and conditions contained in his agreement with the Board, for the price or sum of $20,800, to be paid, with interest, in the manner and at the time stipulated by the agreement. Then, on 3rd March, 1926, the plaintiff registered with the registrar of the Southern Alberta Land Registration District a caveat in which he stated that he claimed:

an undivided one-half interest in mines and minerals, including petroleum and natural gas (excepting coal reserved to the Canadian Pacific Railway Company) in and under the South-west Quarter of Section Seventeen (17), Township Twenty (20), Range Two (2), West of the Fifth (5th) Meridian in the Province of Alberta, containing one hundred and sixty (160) acres more or less, under and by virtue of an agreement with

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JOHN L'HIRONDELLE, of near Black Diamond Post Office in the Province of Alberta, farmer, whereby I was to become the owner of an undivided one-half interest of the said mines and minerals in and under the said land, which said agreement was confirmed and acknowledged by the said John L'Hirondelle by an instrument in writing dated the 24th day of February, 1926, the said John L'Hirondelle claiming interest in the said mines and minerals in and under the said lands under an agreement with The Soldier Settlement Board of Canada, which agreement included the purchase by the said John L'Hirondelle of the mines and minerals (excepting coal reserved to the Canadian Pacific Railway Company) in and under the said land, standing in the register in the name of The Soldier Settlement Board of Canada.

With the caveat was filed the plaintiff's affidavit, in which he stated that he had a good and valid claim upon the land.

The defendant then caused notice to be served upon the plaintiff, requiring him, under the provisions of the Land Titles Act, to take proceedings to verify his caveat, and thereupon the plaintiff commenced this action, in which the statement of claim was filed on 16th March, 1926.

By the statement of claim, the plaintiff alleged that:

By an agreement made between the Defendant John L'Hirondelle and the Plaintiff herein the said Defendant agreed to transfer and convey to the Plaintiff an undivided one-half interest in the mines and minerals in and under the said lands including petroleum and natural gas and excepting coal, which said agreement was confirmed and acknowledged by the said Defendant by an instrument in writing dated the 24th day of February, 1926.

After the evidence had been taken at the trial, the plaintiff amended by adding another paragraph, in which he alleged in the alternative that, by an instrument in writing of 24th February, 1926, the defendant made a declaration that he was the owner of an undivided one-half interest in the mines and minerals, and that the other undivided one-half interest was the property of the plaintiff. The plaintiff had claimed, by his original pleading, a declaration that he had an undivided one-half interest in the mines and minerals as against the defendant, and that the registered caveat should be continued. By his amended pleading, he claimed in the alternative a declaration that the defendant should be deemed to hold in trust for his use and benefit "an undivided one-half interest in whatever right, title or interest may be hereafter acquired by the said defendant in the mines and minerals," and that the defendant should be deemed to hold in trust for the plaintiff an undivided one-half interest in the money or other consideration received by the defendant on account of any sale of the mines and

minerals. The plaintiff was ordered to give particulars, and in response stated that the agreement referred to in the 4th paragraph of the statement of claim was an oral agreement entered into during or about the months of December, 1920, and January, 1921, and that it was afterwards confirmed by an instrument in writing of 24th February, 1926, and he stated the consideration for the agreement to be:

money advanced by the Plaintiff to the said Defendant, and the promise of money afterwards advanced to the said Defendant, and the allowing of the said Defendant by the Plaintiff to forthwith occupy and live on the Plaintiff's farm adjoining the land hereinbefore mentioned, and further, the arranging for the sale, and the sale by the Plaintiff, of the South-west quarter of Section Seventeen (17) in Township Twenty (20) Range Two (2) West of the Fifth Meridian in the Province of Alberta, so as to enable the said Defendant to purchase the said land and against which the caveat mentioned in the Statement of Claim was filed.

The defendant, by his defence, denied the alleged agreement, and he moreover alleged that there was no consideration for it, and that there was no memorandum of it to satisfy the *Statute of Frauds*.

The action was tried before Simmons C.J., of the Trial Division of the Supreme Court of Alberta, on 19th May, 1926. The two witnesses upon the disputed facts were the plaintiff and the defendant; the former testified that, after he had transferred to the Board, the defendant told him that they would hold the mineral rights together "fifty-fifty"; and, in another place, that they would have the oil rights together. He admits that the agreement was oral, but he produced, by way of corroboration, a power of attorney from the defendant to himself, dated 24th February, 1926, which is the instrument referred to in his pleadings, by which the constituent appoints the plaintiff

for me and in my name, place and stead and for my sole use and benefit to sell, lease, or otherwise dispose of my undivided one-half interest (the other undivided one-half interest belonging to the said Addison McPherson) in the mines and minerals, including petroleum and natural gas, in and under the south-west quarter of Section Seventeen (17) in Township Twenty (20), Range Two (2), West of the Fifth Meridian in the Province of Alberta.

The power of attorney was prepared by the plaintiff's solicitor under his instructions in the defendant's absence and without his knowledge, but the defendant signed it after it had been read and explained to him by the solicitor. The defendant, who is a half-breed with very little educa-

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tion, says, however, that he understood the clause in parenthesis to refer to the plaintiff's interest in the 240 acres which the plaintiff had retained, and that the project which he thought he was authorizing by the power of attorney was the sale by the plaintiff of the oil rights in both parcels together, the one belonging to the defendant and the other to the plaintiff. The plaintiff does not deny that such a sale was in contemplation or had been discussed, and there is a memorandum in evidence, prepared by him, and which was used on the day the power of attorney was signed, when he persuaded the defendant to sign it, in which the plaintiff figures the value of his 240 acres at $2,500 per acre, and suggests particulars for an agreement of sale. The defendant denies that he ever promised the plaintiff any interest in the minerals, and it is, I think, a reasonable inference from the evidence that the plaintiff was using the defendant, who was a returned soldier, in order to effect a sale of the two quarter-sections to the Board, so as to save the 240 acres which he retained, and which were also covered by the mortgage to the Associated Mortgage Investors Company. The defendant testifies that it was not until after he had sold to Herron that he knew or learned that the plaintiff claimed an interest in the minerals. No proof was adduced of the considerations for the agreement alleged by the plaintiff's particulars.

The learned Chief Justice expresses his finding (1) in the following language:

> Upon the controversial aspects of the case as between the plaintiff and the defendant L'Hirondelle, I am satisfied that the oral agreement alleged by the plaintiff was made by the defendant, and that the document executed on February 24, 1926, takes the same out of the *Statute of Frauds* which is pleaded in evidence against the plaintiff, but although the plaintiff alleges certain considerations passing I am satisfied no such consideration passed and that there was no consideration for the declaration of trust.

And his conclusion (2) is that:

> It would appear that the defendant, L'Hirondelle, has an interest in the purchase moneys accruing due to the Board under the Herron purchase and the plaintiff is apparently entitled to a declaration that the defendant, L'Hirondelle, should account to him for a portion of said purchase money representing one-half interest in the mines and minerals which passed under the plaintiff's transfer, to the Board.

(1) [1926] 2 W.W.R. 465, at p. 467.

(2) [1926] 2 W.W.R. 465, at p. 468.

The defendant appealed, and the Appellate Division (1) found in effect that there was no agreement between the parties respecting the minerals, no consideration for any such agreement, no completed gift, and no evidence of intention to declare a trust; the learned judges, five of them, were unanimous in allowing the appeal.

Now it will be perceived from the foregoing narrative that the plaintiff, who is now the appellant, launched his case upon an oral agreement to transfer and convey an undivided half-interest in the mines and minerals. That is what he averred and deposed to by his caveat, and what he alleged in his statement of claim and particulars. It is obvious that the claim so stated cannot succeed, because the contract which was pleaded was without consideration according to the evidence and the concurrent findings, and moreover because the fourth section of the *Statute of Frauds* was not complied with. The words in the brackets of the power of attorney, "(the other undivided one-half interest belonging to the said Addison McPherson)," do not set out the names of the parties, the terms, or the consideration of the contract; nor indeed do they suggest the existence of any contract, and they in no wise constitute a sufficient memorandum or note of a contract within the meaning of the section. The learned Chief Justice seems, however, to regard these words as expressing a declaration of trust, although, according to the caveat and the statement of claim, they were intended to confirm or acknowledge the alleged agreement for the transfer of an undivided one-half interest in the minerals. The clause evidently must have been introduced for a purpose which is not made clear on the face of the instrument, and, seeing that the power of attorney was written for the plaintiff and under his instructions, it is, I think, fair and probably not far from the truth to admit the motive and intention which he attributes to it; at all events the plaintiff cannot complain if his allegations be accepted. But mere words of confirmation or acknowledgment cannot make a valid contract of that which is ineffective as a contract for lack of consideration, and an incomplete voluntary transfer will not be construed as a declaration of trust unless it appear that

(1) 22 Alta. L.R. 281; [1926] 3 W.W.R. 481.

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there is an intention to declare a trust, and not merely to make a transfer. *Heartley* v. *Nicholson* (1); *Lee* v. *Magrath* (2); also the judgment of Parker J., in *In re Innes* (3). Moreover,

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> If it (the settlement) is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument could be made effectual by being converted into a perfect trust.

*Richards* v. *Delbridge* (4), a decision of Jessel M.R., following *Milroy* v. *Lord* (5). The clause in question is not evidence of an intention to declare a trust; it is, by interpretation, more apt as matter of description, or perhaps to acknowledge a title by some means already vested, and it contains no word or accent pointing to the assumption by the defendant of the duties, obligations or character of a trustee. Moreover, of course, as said by the Appellate Division, there is no compliance with the 7th section of the *Statute of Frauds*. The appellant's case is thus confronted with insurmountable difficulties and the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Burns & Mavor.*

Solicitors for the respondent: *Savary, Fenerty & McLaurin.*

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JOSEPH SANKEY .....APPELLANT;

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AND

*June 13.
*June 17.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Criminal Law—Evidence—Unsworn testimony of child of tender years—Necessity of inquiry by trial judge before admitting evidence—Admission in evidence of statement by accused—Proof of its voluntary character—Questioning of accused by police—Necessity of disclosure of process leading to accused's statement.*

Before receiving the unsworn testimony of a child of tender years, under s. 16 of the *Canada Evidence Act*, the presiding judge should ascertain by appropriate methods whether or not the child understands

(1) (1875) L.R. 19 Eq. 233.
(2) (1882) 10 L.R. Ir. 313.
(3) [1910] 1 Ch. 188.
(4) (1874) L.R. 18 Eq. 11, at p. 15.
(5) (1862) 4 D.F. & J. 264, at p. 274.

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

the nature of an oath; to do this is quite as much his duty as it is to satisfy himself of the child's intelligence and appreciation of the duty of speaking the truth; on both points alike he is required to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. Of no ordinary child over seven years of age can it be safely predicated, from his mere appearance, that he does not understand the nature of an oath. A very brief inquiry may suffice to satisfy the judge on the point. But some inquiry is indispensable.

The Court (reversing judgment of the Court of Appeal of British Columbia [1927] 2 W.W.R. 265) quashed a conviction for murder and granted a new trial, on the ground that the unsworn testimony of a child ten years old was improperly received (*Allen* v. *The King* 44 Can. S.C.R. 331 cited), there being no material before the judge on which he could properly base an opinion that the child did not understand the nature of an oath.

Questioning of an accused by police, if properly conducted and after warning duly given, will not *per se* render the accused's statement inadmissible. But the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from accused while under arrest was voluntary, always rests with the Crown (*The King* v. *Bellos*, [1927] S.C.R. 258; *Prosko* v. *The King*, 63 Can. S.C.R. 226). That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer who obtained it, that it was made freely and voluntarily; what took place in the process by which the statement was ultimately obtained should be fully disclosed; and, with all the facts before him, the judge should form his own opinion that the tendered statement was indeed free and voluntary, before admitting it in evidence.

APPEAL from the judgment of the Court of Appeal of British Columbia (1) sustaining, by a majority, the conviction of the appellant, on his trial before D. A. McDonald J. and a jury, on a charge of murder. The grounds of appeal, and the material facts of the case bearing on the points dealt with by this Court, are sufficiently stated in the judgment now reported. The appeal was allowed; the conviction was quashed, and a new trial ordered.

*O. M. Biggar K.C.* and *J. Edward Bird* for the appellant.

*J. A. Ritchie K.C.* and *A. M. Johnson K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The defendant appeals to this Court from the judgment of the Court of Appeal of British Columbia dismissing his appeal from a conviction for murder.

(1) [1927] 2 W.W.R. 265.

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The opinion of the majority of the court (Macdonald C.J.A., Galliher and Macdonald JJ.A.) was delivered by the Chief Justice. A direction given by the court, pursuant to ss. 5 of s. 1013 of the *Criminal Code,* allowing the delivery of separate judgments, is embodied in the formal judgment dismissing the appeal. Dissenting opinions were accordingly delivered by Martin and McPhillips JJ.A., who would have directed a new trial.

Five distinct grounds of appeal, based on the judgment of McPhillips J.A., were taken by the appellant:

1. Insufficiency of the evidence to warrant a conviction;
2. Mis-direction of the jury by the learned trial judge;
3. Rejection by the Court of Appeal of a motion by the defendant for the reception of further evidence;
4. Wrongful admission of the unsworn testimony of Haldis Sandahl, a child aged ten years;
5. Wrongful admission of a statement procured by the police from the accused while under arrest, because its voluntary character had not been established.

Mr. Justice Martin's dissent rests solely on the ground last mentioned.

When the child, Sandahl, was called as a witness the record shews what occurred as follows:

HALDIS SANDAHL, a witness called on behalf of the Crown, testified as follows:

Mr. JOHNSON: I think that if you put her in a chair in the box; we haven't a high chair. This child, my lord, is of tender years, nine years old and I tender her evidence under the provisions of section 16 of the Canada Evidence Act.

Mr. PATMORE: I understand that this is because this child does not understand the nature of an oath.

Mr. JOHNSON: That is for the judge to satisfy himself.

The COURT: Q. Where do you live, Haldis?—A. Port Essington.

Q. See how loudly you can speak. How old are you?—A. Eight—ten.

Q. And what is your daddy's name?—A. Mr. Sandahl.

Q. What does he do, does he live up there?—A. Yes.

Q. And your mother, does she live with you too?—A. Yes.

Q. You go to school?—A. Yes.

Q. Can you read a little bit?—A. Yes.

Q. And write your own name?—A. Yes.

Q. Do you know that it is very bad for little girls to tell lies?—A. Yes.

Q. Did they tell you that little girls must never tell stories? Do you understand that?—A. Yes.

Q. You must always tell the truth?—A. Yes.

Q. We want you to answer the questions these men ask you and be sure to tell the truth.

The witness then proceeded to give unsworn testimony, which covered ground as to identification most vital to the interest of the defendant.

S. 16 of the *Canada Evidence Act* reads as follows:

16. In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice, or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given on oath, if, in the opinion of the judge, justice, or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

2. No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

The only light thrown by the record on the view taken by the learned trial judge as to the scope of his function in regard to determining whether the girl, Sandahl, understood the nature of an oath is found in his charge to the jury when he said:

The little girl Haldis Sandahl, she was ten years old last February, and as you noticed when the question came up the law provides that if a child is called as a witness in any case, if the judge thinks the child is not old enough to understand the nature of an oath she can give evidence. Then when it is given, that evidence has exactly the same weight as any other evidence, subject to this, and then provides that on that evidence alone you must have other evidence with it. * * *

The learned judge made no inquiry as to the capacity or education of the girl in regard to her comprehension of the meaning, effect and sanction of an oath, presumably because, from her appearance, he thought her "not old enough to understand the nature of an oath." She was tendered by the Crown as a witness whose evidence could be received under s. 16 of the *Canada Evidence Act;* and, apparently because no objection was taken by counsel for the prisoner, she was allowed to give her evidence unsworn, the learned trial judge having first satisfied himself by apt questions that "she (was) possessed of sufficient intelligence to justify the reception of her evidence and (understood) the duty of speaking the truth."

Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself of the intelligence of

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such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. The term "child of tender years" is not defined. Of no ordinary child over seven years of age can it be safely predicated, from his mere appearance, that he does not understand the nature of an oath. Such a child may be convicted of crime. *Crim. Code,* sections 17-18. A very brief inquiry may suffice to satisfy the judge on this point. But some inquiry would seem to be indispensable. The opinion of the judge, so formed, that the child does not understand the nature of an oath is made by the statute a pre-requisite to the reception in evidence of his unsworn testimony. With the utmost respect, in our opinion there was, in this instance, no material before the judge on which he could properly base such an opinion. He apparently misconceived the duty in this regard imposed upon him by the statute.

The unsworn testimony of Haldis Sandahl was, we think, improperly received. Its importance is not questioned. It may well have been the deciding factor which led the jury to the conclusion that identification of the defendant as the person guilty of the murder in question was sufficiently established. The case falls clearly within the decision of this Court in *Allen* v. *The King* (1).

The conviction must, therefore, be quashed and a new trial ordered.

We feel, however, that we should not part from this case without expressing our view that the proof of the voluntary character of the accused's statement to the police, which was put in evidence against him, is most unsatisfactory. That statement, put in writing by the police officer, was obtained only upon a fourth questioning to which the accused was subjected on the day following his arrest. Three previous attempts to lead him to "talk" had apparently proved abortive—why, we are left to surmise. The accused, a young Indian, could neither read nor write. No particulars are vouchsafed as to what transpired at any of the three previous "interviews"; and but meagre details are

(1) (1911) 44 Can. S.C.R. 331.

given of the process by which the written statement ultimately signed by the appellant was obtained. We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he "interviewed" the prisoner; and, if another policeman was present, as the defendant swore at the trial, his evidence should have been adduced before the statement was received in evidence. With all the facts before him, the learned judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission, rather than accept the mere opinion of the police officer, who had obtained it, that it was made "voluntarily and freely."

It should always be borne in mind that while, on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. *The King* v. *Bellos* (1); *Prosko* v. *The King* (2). That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

The place at which the next trial shall be held is in the discretion of the Supreme Court of British Columbia, to which, if so advised, the accused may make application for a change of venue.

*Appeal allowed, and new trial ordered.*

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(1) [1927] S.C.R. 258. (2) (1922) 63 Can. S.C.R. 226.

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*May 3.
*May 30.

LEO PAUL HUBIN .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Criminal Law—Evidence—Corroboration—Cr. Code, s. 1002 (as amended, 1925, c. 38, s. 26)—Nature of evidence required for corroboration—Charge of offence, under Cr. Code, s. 301, of carnally knowing girl under 14 years of age.*

The corroboration required by s. 1002 of the *Criminal Code* (as amended 1925, c. 38, s. 26) must be by evidence independent of the complainant, and it must tend to show that the accused committed the crime charged (*R.* v. *Baskerville*, [1916] 2 K.B. 658). The question whether there is any evidence within that description, on which a jury could find corroboration, is one of law; although, whether corroborative inferences should be drawn is a question for the jury (*R.* v. *Gray*, 68 J.P. 327).

On a charge of carnally knowing a girl under 14 years of age, under s. 301 of the *Criminal Code*, it was held (reversing judgment of the Court of Appeal for Manitoba, 36 Man. R. 373) that the identification, by its plate number and a certain cushion, by the girl, of accused's motor car as the one driven at the time of the offence by the person committing it, was not, in a proper sense, independent evidence tending to connect accused with the crime, and therefore did not fulfil the requirement as to corroboration of the girl's evidence that accused committed the offence. But the Court was of opinion that, while the evidence was not explicit that accused maintained silence when charged with the crime on his arrest, and again when confronted with and identified by the girl, his conduct on those occasions, so far as disclosed, and in subsequently voluntarily making two inconsistent statements, was such that a jury, or a judge trying the case without a jury, might infer from it some acknowledgment of guilt; whether such inferences should be drawn was a question of fact; (*R.* v. *Christie* [1914] A.C. 545, at pp. 554, 559-560, 563-564, 565-566; *Mash* v. *Darley* [1914] 3 K.B. 1226, at pp. 1230-1231, 1234; *R.* v. *Feigenbaum* [1919] 1 K.B. 431, at pp. 433-434, cited); had such conduct of accused been found by the trial judge to be corroborative of the girl's story the conviction could not have been set aside; but, there being no finding by the trial judge as to the inference to be drawn from such conduct of accused, nor any adjudication that it afforded the requisite corroboration, this Court could not, without usurping the exclusive function of the tribunal of fact, make such an adjudication; the trial judge's ruling that accused's admission of ownership of the car and its identification by the girl constituted corroborative evidence, was erroneous, and resulted in a mis-trial; the case did not fall within the saving operation of s. 1014 (2) (as enacted 1923, c. 41) of the *Criminal Code*, and the conviction should be set aside; but the Court, in the exercise of its discretion under s. 1014 (3), refused to direct accused's discharge, and ordered a new trial.

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

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APPEAL from the judgment of the Court of Appeal for Manitoba (1) affirming, by a majority, the conviction of the appellant by His Honour Judge Stacpoole, in the County Court Judge's Criminal Court, for the offence of carnally knowing a girl under the age of 14 years, contrary to s. 301 of the *Criminal Code.*

The complainant, the victim of the alleged offence, stated in her evidence that, as she was on her way to the post office at Lockport, the accused overtook her in a motor car, and offered to take her to her destination, that she got in the car, that accused took her out of her way and committed the offence on a road; that after the offence was committed and as the accused was leaving her, she made a note of the plate number of the car. She subsequently picked out the car, recognizing it, according to her evidence, by its plate number and by a certain cushion on the seat. Evidence from other sources was given to show that this car belonged to the accused. The complainant also picked out the accused, as the one who had committed the offence, from a line of five men in the police office. After the complainant had picked him out and left the office, the accused made a statement to the police, which he immediately afterwards corrected by another statement, to show his movements on the day the alleged offence was committed. He admitted he owned a car with a plate number the same as that alleged by the complainant, and that he was driving it on the day in question, but at Winnipeg, which is nearly twenty miles from Lockport.

The question before the court on this appeal was whether or not there was evidence upon which corroboration of the complainant's evidence, as required by s. 1002 of the *Criminal Code,* as amended 1925, c. 38, s. 26, could properly be found.

*J. M. Isaacs* for the appellant.

*R. W. Craig K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The appellant was convicted, on the 7th of March, 1927, in the County Court Judge's Criminal Court, at Winnipeg, of an offence under s. 301 of the *Crim-*

(1) 36 Man. R. 373; [1927] 1 W.W.R. 705.

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*inal Code.* On appeal, based on the grounds, (*a*) of non-corroboration of the evidence of the complainant, and (*b*) of absence of proof that the complainant was not the wife of the appellant, his conviction was affirmed by the Manitoba Court of Appeal, unanimously as to ground (*b*), and with Prendergast and Fullerton JJ.A. dissenting as to ground (*a*). These learned judges were of the opinion that there was no evidence upon which the corroboration required by s. 1002 of the *Criminal Code,* as amended by s. 26 of c. 38 of the statutes of 1925, could be found:

> 1002. No person accused of an offence, etc., shall be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused.

Since the decision of the Court of Criminal Appeal in *R.* v. *Baskerville* (1), the requirements of the provision now found in s. 1002 admit of no doubt. The corroboration must be by evidence independent of the complainant; and it

> must tend to show that the accused committed the crime charged.

The question we have to pass upon is whether the record before us contains any evidence within that description, on which a jury could find corroboration, Prendergast and Fullerton JJ.A., resting their dissent on the proposition that such evidence is entirely lacking. That question we regard as a question of law, although, no doubt, whether corroborative inferences should be drawn is a question for the jury. *R.* v. *Gray* (2); S. 1024, *Crim. Code,* as enasted by s. 27 of c. 38 of the statutes of 1925.

Of most of the matters relied upon by the Crown as implicating the accused, however, it cannot, in our opinion, be safely predicated that they are in evidence independently of the testimony and conduct of the complainant, or that, without her testimony, they " tend to show that the accused committed the crime charged." This defect affects everything in connection with the alleged implication of the accused because of the admission by him of the ownership and driving, on the morning in question, of the car identified by the complainant as that in which she was taken to the scene of the crime. While the verification of the details given by her no doubt adds to the credibility

(1) [1916] 2 K.B. 658. (2) (1904) 68 J.P. 327.

of the story she tells, everything in that connection, including the admitted facts of ownership and driving (not at or near the scene of the offence, but in and about Winnipeg) depends, for its evidentiary value, upon her statement that a certain license number was that carried by the car in which she was conveyed to the scene of the crime and her subsequent identification of a cushion found in the car bearing that number. This is not, in a proper sense, independent evidence tending to connect the accused with the crime. In themselves these facts and circumstances merely "relate to the identity of the accused without connecting him with the crime." *R.* v. *Baskerville* (1). They implicate the accused solely by reason of the complainant's statement as to the number of the car and her identification of the cushion in it. Without this additional factor they are quite irrelevant. Nor can any multiplication of such facts amount to corroboration. *Thomas* v. *Jones* (2). They are all admissible only by reason of the girl's own story connecting them with the crime. They lack, therefore, the essential quality of independence.

But there are in evidence certain other matters which, according to the view to be taken of, and the inferences to be drawn from, them by the tribunal of fact, may meet the requirements of s. 1002 of the *Criminal Code.*

When the accused was first charged with the offence by the constable who arrested him, so far as the record discloses he made no reply to the charge which was read to him; again, when, at the police station, he was identified by the complainant, who, going up to him, said: "That is the man," so far as the evidence shows, he made no denial in her presence. But, almost immediately after she had gone away, he asked to make, and made, a voluntary statement of his movements on the morning of the 20th of July, when the crime is charged to have been committed. Scarcely had that statement been signed by him when he said he had made a mistake and dictated a second statement which he also signed. The manifest object of these two statements was to show that during the material time he was in and about the city of Winnipeg, 20 miles distant

(1) [1916] 2 K.B. 658, at p. 665.

(2) [1921] 1 K.B. 22, at pp. 33-4, 48.

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from Lockport near which the crime was committed. Of these two statements the learned Chief Justice of Manitoba says:

> The first statement was to the effect that he, the accused, was driving his car in Winnipeg and conversing with various persons there at about the same time that the girl says he overtook her on the road to Lockport, which is twenty miles away, and induced her to enter his car. In the second statement, made immediately after the first, he gave a completely different account as to his movements on the day in question: He says he went in his car to his mother's place in St. Boniface and stayed there until 10.30, when he went to his sister's place in the same city and she came back with him to his mother's; that he stayed there about fifteen minutes and then went home, arriving there about noon.
>
> These statements were clearly made for the purpose of founding an alibi upon them. Probably, after he had made the first statement, he feared that the persons he mentioned as in conversation with him that forenoon might not support his statements. It would seem, therefore, that he made the second statement in the expectation that his mother and sister would assist him. However, no evidence for the defence was put in.

Mr. Justice Trueman, with whom Mr. Justice Dennistoun concurred, says:

> These statements carry nothing but conviction that they are a tissue of lies. Each completely contradicts and refutes the other. It is not necessary to examine or compare them in detail. In the first statement there is no mention of visits to his mother and sister, to whom, with his wife, the proof of the alibi is left by the second statement. That both statements are false I have no doubt. That one is assuredly false need alone be stated.

While the evidence is not explicit that the appellant maintained silence when charged with the crime on his arrest and again when confronted with and identified by the complainant, his conduct on those occasions, so far as disclosed, and in voluntarily making the two inconsistent statements referred to, was such that a jury might—and in this case that the trial judge might—infer from it some acknowledgment of guilt. Whether such inferences should be drawn is a question of fact.

As put by Lord Atkinson, in *R.* v. *Christie* (1)—where there was a question of the admissibility of evidence of a statement made by the complainant (a boy of 5, who testified without being sworn) in the presence of the accused, who was charged with indecent assault—

> As to the second ground, the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or

(1) [1914] A.C. 545, at p. 554.

denial from him, is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them.

Lord Moulton, in the same case, at pp. 559-560, said:

It is common ground that, if on such an occasion he admits it, evidence can be given of the admission and of what passed on the occasion when it was made. It seems quite illogical that it should be admissible to prove that the accused was charged with the crime if his answer thereto was an admission, while it is not admissible to prove it when his answer has been a denial of the crime, and I cannot agree that the admissibility or non-admissibility is decided as a matter of law by any such artificial rule. Going back to first principles as enunciated above, the deciding question is whether the evidence of the whole occurrence is relevant or not. If the prisoner admits the charge the evidence is obviously relevant. * * * The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge, but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. I am, therefore, of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt.

Lord Reading, at pp. 563-4, said:

As to the second ground. A statement made in the presence of one of the parties to a civil action may be given in evidence against him if it is relevant to any of the matters in issue. And equally such a statement made in the presence of the accused may be given in evidence against him at his trial.

And he added, at pp. 565-6:

It might well be that the prosecution wished to give evidence of such a statement in order to prove the conduct and demeanour of the accused when hearing the statement as a relevant fact in the particular case, notwithstanding that it did not amount either to an acknowledgment or some evidence of an acknowledgment of any part of the truth of the statement. I think it impossible to lay down any general rule to be applied to all such cases, save the principle of strict law to which I have referred.

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*Mash* v. *Darley* (1), was a case of bastardy. The defendant had already been convicted of having had unlawful carnal knowledge of the complainant. On his preliminary hearing preceding that conviction he had deposed that the complainant was a fast girl and that that was the cause of her condition. On his trial no such suggestion was made. The question was whether proof of these facts could afford corroboration of the complainant's story in the bastardy case. Buckley L.J., said, at pp. 1230-1:

> There are two matters, it seems to me, which are plainly admissible evidence. The first is that the superintendent of police said that he was present at the inquiry before the justices when the appellant gave evidence which suggested that the respondent was a fast girl and that that was the reason of her condition. That is admissible. The second is that the superintendent of police was in Court during the trial at the assizes and he says that no suggestion was then made by the appellant that the respondent was a fast girl, nor did the appellant repeat the evidence on this point, which he gave at the hearing of the charge before the justices in August, 1912. That is admissible. Corroborative evidence, I conceive, may be found either in admissions by the man or inferences properly drawn from the conduct of the man. Admission here, there is none. Conduct there is. Were or were not the justices entitled to take into account as a matter of evidence upon which they might come to some conclusion the fact that the man before the justices told a story, namely, that she was fast and that her condition was due to that state of things, and the fact that when at the assizes he stood in peril and when, if the defence was true, it was to his interest to set it forward, he did not set it forward at all? It has been argued before us as if he could not have set up that defence without going into the box and exposing himself to cross-examination. It appears to me that that is a mistake. The defence could have been set up in cross-examination of the girl when she was in the box. Nothing of the kind was done. So, upon matters which are admissible in evidence, it is established that the conduct of the man was this—that before the justices he took a particular course and at a subsequent date he did not take a particular course, and that that was a course which you would have expected him to take under circumstances of his innocence. It is not for us to say what weight ought to be given to that evidence. All that we have to look at is to see whether there was evidence. If there was evidence, it is not for us but for the justices to determine whether or not that was evidence which satisfied them. It appears to me that that was corroborative evidence and that the justices were entitled to take into account that the man so conducted himself as that there was reason from his conduct to infer that the girl's story was presumably true. It appears to me that that disposes of this case.

Kennedy, L.J., said, at p. 1234:

> I also agree that there may be cases in which language, whether used in a Court of justice or outside a Court of Justice, may be considered as having the effect of corroboration, although there is nothing like an express admission. There may be such cases.

(1) [1914] 3 K.B. 1226.

Phillimore L.J., also thought the evidence admissible and such as the justices might act upon.

In the case of *R.* v. *Feigenbaum* (1), the Court of Criminal Appeal dealt with the question of corroboration in a case where the appellant had been convicted of inciting boys to steal. The boys were accomplices and their evidence, therefore, could not safely be relied upon unless corroborated.

Darling J., delivering the judgment of the Court of Criminal Appeal (Darling, Avory and Shearman JJ.), said, at pp. 433-434:

> In this case the deputy-chairman rightly directed the jury as to the danger of believing the uncorroborated evidence of the accomplices, and as to what was, or might be, corroboration; and, in our opinion, it would, in the circumstances of this case, have been wrong for him to say that in his opinion there was no corroboration of the boys' evidence. What had happened was this. After the boys had been arrested, and statements implicating the appellant had been made by them to the police, a police officer went to the appellant's house. He gave the appellant specific information as to the names of the boys, as to what they had told the police, and as to the charge against them. The appellant did not make any reply to the statement of the police officer. We are of opinion that, in these circumstances, it would be wrong to say that there was no evidence on which the jury could find that the boys' evidence had been corroborated. The deputy-chairman quite properly pointed out to the jury that the failure of the appellant to make any reply to the statement of the police officer might, having regard to the nature of the statement and to the circumstances in which it was made, be considered as being a corroboration of the boys' evidence, that it was for the jury to consider whether in their opinion it did, or did not, amount to corroboration, and, if they thought it did, it was for them to say whether they thought there was sufficient evidence on which to convict the appellant.

Mr. Justice Avory had been a member of the Court of Criminal Appeal in the case of *R.* v. *Baskerville* (*supra*) (2) and was also the dissenting judge in the Divisional Court in *Thomas* v. *Jones* (3), whose judgment was afterwards approved in the reversing judgment of the Court of Appeal (4).

We are of the opinion that, if the conduct of the appellant when arrested and again when identified by the complainant and in making the two inconsistent statements had been found by the trial judge to be corroborative of the story of the complainant, the conviction before us could not have been set aside.

(1) [1919] 1 K.B. 431.
(2) [1916] 2 K.B. 658.
(3) [1920] 2 K.B. 399.
(4) [1921] 1 K.B. 22.

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Anglin C.J.C.

Unfortunately, however, the trial judge appears not to have considered this evidence or passed upon its sufficiency. In pronouncing judgment against the appellant he said:

> The evidence I regard as corroborative is contained in the statement of the accused whereby he admits the ownership of the car. The little girl claims that car was out there, and that was the car she was conveyed in to where the offence took place. The accused admits the ownership of the car, and that is a corroboration on a material point implicating the accused.

For reasons already indicated we are unable to agree with this view of the learned judge.

There is no finding by the trial judge as to the inference to be drawn from the conduct of the accused, already adverted to, nor any adjudication that it affords the requisite corroboration. We cannot, without usurping the exclusive function of the tribunal of fact, make such an adjudication.

This case does not fall within the saving operation of s. 1014 (2) of the *Criminal Code* (13 and 14 Geo. V, c. 41, s. 9). On the other hand the circumstances do not seem to call for an unqualified order quashing the conviction and directing the discharge of the appellant. While of the opinion that the ruling of the trial judge was erroneous and has resulted in a mis-trial, we think that,

> having regard to the nature of the offence and the circumstances under which * * * it was committed, the present case is one in which the discretion (conferred by s. 1018—now s. 1014 (3)—of the *Criminal Code*) should be exercised in such manner as to afford the Crown an opportunity of once more putting the law in motion * * * if it thinks fit to do so.

*R.* v. *Burr* (1).

The conviction, therefore, should be set aside and a new trial directed.

*Conviction set aside and new trial ordered.*

Solicitors for the appellant: *Isaacs & Isaacs.*

Solicitor for the respondent: *The Honourable R. W. Craig, Attorney General for Manitoba.*

(1) (1906) 13 Ont. L.R. 485.

1927

*May 3.
*May 30.

IN THE MATTER OF THE "FIRE INSURANCE POLICY ACT," BEING R.S.B.C. 1924, CHAP. 122 AND AMENDMENTS;

AND

IN THE MATTER OF THE "ARBITRATION ACT," BEING R.S.B.C., CHAP. 13 AND AMENDMENTS;

AND

IN THE MATTER OF A CERTAIN CLAIM BY THOMAS D. BULGER AGAINST THE HOME INSURANCE COMPANY UNDER POLICY OF FIRE INSURANCE No. 5605

BETWEEN

THOMAS D. BULGER .....APPELLANT;

AND

THE HOME INSURANCE COMPANY...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Appeal—Jurisdiction—Final Judgment—Amount in Controversy—Supreme Court Act, ss. 2 (e), 36, 39 (a).*

The insured under a fire insurance policy, alleging that the insurer had elected, under a provision in the policy, to reinstate the property destroyed instead of paying money compensation, sued the insurer for $2,255 damages for failure to reinstate, and, alternatively, claimed the same sum as money compensation. The insurer, denying that it had elected to reinstate, and insisting that the insured's only right was to recover money compensation, applied for the appointment, pursuant to the British Columbia *Fire Insurance Policy Act* and *Arbitration Act*, of an arbitrator, by reason of the insured's failure to appoint one. Hunter C.J. B.C. dismissed the application, but his order was set aside by the Court of Appeal ([1927] 2 W.W.R. 456) which directed a reference to appoint an arbitrator and, by a separate order, stayed the insured's action. The insured appealed to the Supreme Court of Canada, and the insurer moved to quash the appeal for want of jurisdiction.

*Held,* the judgment of the Court of Appeal was a final judgment within s. 2 (e) of the *Supreme Court Act;* it impliedly negatived the existence of the insurer's obligation to effect a reinstatement and the insured's right to recover damages for its alleged failure to discharge its obligation in this regard; while the judgment stood, those issues

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

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were conclusively determined against the insured; it determined a substantive right of the insured in controversy in a judicial proceeding. Moreover, it was a direct, and not a merely collateral and consequential, effect of the judgment that the insured's right to sue for and recover damages alleged to exceed $2,000 was denied. The Court had, under ss. 36 and 39 (*a*) of the *Supreme Court Act*, jurisdiction to entertain the appeal. The case was within the principle of *Shawinigan Hydro Electric Co.* v. *Shawinigan Water & Power Co.*, 43 Can. S.C.R. 650.

MOTION to quash appeal to this Court for want of jurisdiction. The grounds of the motion and the facts bearing on the question to be decided on the motion are sufficiently stated in the judgment now reported. The oral reasons delivered for the judgment from which the appeal was taken are reported in [1927] 2 W.W.R. 456.

*H. A. Aylen* for the motion.

*E. P. Davis K.C. contra.*

The judgment of the court was delivered by

ANGLIN C.J.C.—The respondent moves to quash this appeal for want of jurisdiction on the grounds that the judgment against which it is sought to appeal is not a final judgment and that the amount or value of the matter in controversy in the appeal does not exceed the sum of $2,000.

The respondent company had insured the appellant against loss by fire. Such loss occurred and the liability therefor of the respondent is not in issue, only the amount of indemnity being contested. The policy contained the usual provision entitling the respondent to reinstate property injured or destroyed instead of making good the insured's loss by money compensation. This option, the appellant maintains, the company elected to exercise, and he brought action against it, alleging failure on its part to discharge the obligation thus undertaken and claiming $2,255 damages for such breach of contractural obligation and, alternatively, the same sum as money compensation for the loss sustained as a result of the fire. The respondent, denying that it had elected to reinstate the property and insisting that the appellant's only right was to recover money compensation for his loss, proceeded by originating summons before the Chief Justice of British Columbia in

Chambers for the appointment, pursuant to the *Fire Insurance Policy Act* and the *Arbitration Act,* of an arbitrator by reason of the failure of the appellant to appoint an arbitrator pursuant to written notice in that behalf.

The learned Chief Justice, upholding the contention of the appellant, the insured, dismissed the motion.

The Court of Appeal set aside the order of the Chief Justice and directed a reference to a judge of the Supreme Court of British Columbia in Chambers to appoint an arbitrator as sought by the respondent company and, by a separate order, stayed the plaintiff's action pending the arbitration.

This judgment impliedly negatived the existence of the obligation of the company to effect reinstatement as claimed by the appellant and his right to recover damages for the alleged failure of the company to discharge its obligation in this regard. While it stands those issues are conclusively determined against the appellant. The judgment appealed from is, therefore, in our opinion, a final judgment within the definition of the *Supreme Court Act* (s. 2 (*e*) ) inasmuch at it determines a substantive right of the appellant in controversy in what is, beyond doubt, a judicial proceeding.

Moreover, it is a direct, and not a merely collateral and consequential, effect of that judgment that the appellant's right to sue for and recover damages alleged to exceed $2,000 is denied.

As the value or amount of the matter directly in controversy in this appeal from a final judgment of the highest court of final resort in the province of British Columbia exceeds the sum of $2,000, it follows that this Court has jurisdiction to entertain this appeal. Sections 36 and 39 (*a*) of the *Supreme Court Act.* The case is within the principle of the decision in *Shawinigan Hydro Electric Co.* v. *Shawinigan Water & Power Co.* (1).

The motion to quash will accordingly be dismissed with costs.

*Motion dismissed with costs.*

Solicitors for the appellant: *McPhillips & Duncan.*

Solicitors for the respondent: *Walsh, McKim, Housser & Molson.*

(1) (1910), 43 Can. S.C.R., 650.

1927

*April 26.
*May 3.

ALEX DE BORTOLI.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA

*Criminal law—Appeal to Supreme Court of Canada—Cr. Code, ss. 1013 (5), 1024—Difference of opinion in Court of Appeal—Absence of requisite direction under s. 1013 (5)—Misdescription of count in judge's charge to jury.*

An appeal does not lie to this Court under s. 1024 of the *Cr. Code* in the absence of the direction of the court of appeal required by s. 1013 (5), which direction must be evidenced by the order of the court and should be plainly expressed (*Gouin* v. *The King*, [1926] S.C.R. 539); the plain operation and effect of s. 1013 (5) is not only to maintain the restriction of the right of appeal conferred by s. 1024 to questions of law, but also to restrict the cases in which upon questions of law lack of unanimity may be expressed to those in which the court of appeal considers it in the interest of justice that separate judgments should be pronounced by the members of the court (*Davis* v. *The King*, [1924] S.C.R. 522).

At the trial on a charge of perjury, the judge, when giving, near the conclusion of his address to the jury, a short recapitulation of each count in the indictment, by a slip of the tongue misdescribed a count (the one on which accused was found guilty), the substance of which he had, just before, correctly stated to the jury. An appeal from the accused's conviction to the Court of Appeal of British Columbia was dismissed ([1927] 2 W.W.R. 300), the majority of the judges holding that, notwithstanding the misstatement, no substantial wrong or miscarriage of justice had occurred. Two judges of the court expressed a different view on this point and were in favour of allowing the appeal and granting a new trial. On appeal to the Supreme Court of Canada on the ground of misdirection to the jury:

*Held,* the appeal to this Court was not open to accused, by reason of the absence of the requisite direction under s. 1013 (5); but, its absence not having been brought to this Court's attention, and the appeal having been heard on the merits, the Court expressed the view that, on the merits, the appeal could not have succeeded. *Quaere,* whether, even had a dissent been regularly and legally pronounced, a difference of opinion on such a question should be considered as a dissent upon a question of law.

APPEAL from the judgment of the Court of Appeal of British Columbia (1) dismissing an appeal from a conviction for perjury.

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

(1) [1927] 2 W.W.R. 300.

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The appellant was charged with having, while a witness in a judicial proceeding, falsely and with intent to mislead the magistrate holding the proceeding, deposed and sworn that (1) he had not worked for one Joe Esposito during the year 1926; (2) he had not given any evidence during the year 1926 with regard to Joe Esposito dealing in liquor; and, (3) he did not know whether or not Joe Esposito had kept intoxicating liquor for sale between the 1st January and the 21st May, 1926. The jury found him guilty on the third count.

In his charge to the jury the trial judge referred to the third count and stated it in substance correctly; but, very shortly afterwards, near the close of his address, in giving a short recapitulation of each count in the indictment, he misdescribed the third count by stating it to be that the appellant had falsely sworn that "he had not given evidence with regard to Esposito having kept intoxicating liquor for sale."

The appellant appealed to the Court of Appeal of British Columbia on a number of grounds, including that of misdirection in reference to the third count. The appeal was dismissed (1). The majority of the court were of opinion that, notwithstanding the said misstatement, no substantial wrong or miscarriage of justice had occurred. Martin and McPhillips JJA., however, expressed a different opinion on this point and were in favour of allowing the appeal and granting a new trial.

The formal judgment of the Court of Appeal read as follows:—

This appeal coming on for hearing on the 5th and 6th days of January, A.D. 1927, before this Honourable Court at Victoria, B.C., in the presence of Mr. Bruce Boyd of Counsel for the Appellant and Mr. C. L. McAlpine of Counsel for the Respondent and upon hearing read the Appeal Book herein and what was alleged by counsel aforesaid and judgment being reserved until this day.

This Court doth order and adjudge that this appeal be and the same is hereby dismissed.

The appellant appealed to the Supreme Court of Canada, on the ground that the learned trial judge misdirected the jury in reference to count 3 of the indictment, and that such misdirection confused, or may have confused, the jury.

(1) [1927] 2 W.W.R. 300.

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DE BORTOLI v. THE KING

*E. F. Newcombe* for the appellant.

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

The judgment of the court was delivered by

RINFRET J.—The appellant, de Bortoli, was accused of perjury. Three different counts were laid against him in the indictment. He was charged with having falsely and with intent to mislead justice deposed and sworn that:—

1. He had not worked for one Joe Esposito;

2. He had not given evidence during the year 1926 with regard to Joe Esposito dealing in liquor;

3. He did not know whether or not Joe Esposito had kept intoxicating liquor for sale between the 1st January and the 21st May, 1926.

The jury found him guilty on the third count.

De Bortoli appealed on several grounds. They were all dismissed by the Court of Appeal of British Columbia. After the argument was concluded, the Chief Justice, who presided, declared that he would dismiss the appeal and would deliver his reasons later. Then the other members of the court proceeded in turn to give their reasons, two of the judges (Martin and McPhillips JJA.) being in favour of allowing the appeal, the two others (Galliher and M. A. Macdonald JJA.) concurring with the Chief Justice. The president of the court then announced: "The appeal is dismissed." In due course, came to be signed the formal judgment in which there is apparent neither dissent nor direction indicating that, in the opinion of the court, any question raised upon the appeal was "a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court." (*Crim. Code,* s. 1013 (5) ).

This Court, in *Gouin* v. *The King* (1), has already indicated that the direction required by ss. 5 of s. 1013 of the *Criminal Code* "must be evidenced by the order of the Court and should be plainly expressed." It is further the unmistakable effect of our decision in *Davis* v. *The King* (2)

that the plain operation and effect of subsection 5 is, not only to maintain the restriction of the right of appeal conferred by section 1024 to

(1) [1926] S.C.R. 539 at p. 540. (2) [1924] S.C.R. 522.

questions of law, but also to regulate the cases in which upon questions of law lack of unanimity may be expressed so as to embrace only those cases in which the court of appeal considers it in the interest of justice that separate judgments should be pronounced by the members of the court.

Since *Davis* v. *The King* (1), s. 1024 was amended (15-16 Geo. V, c. 38, s. 27) and its language establishes still more clearly that no appeal in criminal matters can be taken to this Court except on a "question of law on which there has been dissent in the Court of Appeal." This amendment only confirmed the uniform interpretation which this Court had given to the former section.

Moreover, as was stated in the *Davis Case* (1), this Court could not "acquire jurisdiction by a learned judge of the court of appeal pronouncing a dissent which the statute forbids to be pronounced."

It follows that, upon the record in the present case, and having regard to the requirements of sections 1013 and 1024, an appeal to the Supreme Court of Canada was not open to the appellant.

The absence of the requisite direction under subsection 5 of section 1013 was, however, not brought to our attention and we have heard counsel on the merits of the case. We may therefore add that, had there been jurisdiction, the result could not, in our view, have been different from that reached by the Court of Appeal of British Columbia.

The ground of appeal was misdirection. The learned trial judge, when giving, at the conclusion of his address to the jury, a short recapitulation of each count in the indictment, by a slip of the tongue, misdescribed the third count, the substance of which he had, but a moment before, correctly stated to the jury. The three judges who concurred in dismissing the appeal were of opinion that, notwithstanding this misstatement, no substantial wrong or miscarriage of justice had actually occurred. The two other judges thought differently.

It is at least doubtful whether, even had a dissent been regularly and legally pronounced, a difference of opinion on such a question should be considered as a dissent upon a question of law. It is not necessary, however, to decide that point in this case, since a careful examina-

(1) [1924] S.C.R. 522.

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Rinfret J.

tion of the whole record and a full consideration of the able argument presented to us does not, in our view, warrant interference with the judgment of the court below.

*Appeal dismissed.*

Solicitor for the appellant: *Bruce Boyd.*

Solicitor for the respondent: *C. L. McAlpine.*

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*Feb. 1, 2.
*April 20.

# IN THE MATTER OF A REFERENCE AS TO THE POWER OF THE PARLIAMENT OF CANADA AND OF THE GOVERNMENT OF CANADA WITH RESPECT TO PRECIOUS METALS IN, UNDER OR UPON CERTAIN LANDS OF THE HUDSON'S BAY COMPANY, AND AS TO THE OWNERSHIP OF SUCH PRECIOUS METALS.

*Real property—Mines and minerals—Crown's prerogative right to precious metals—Law as to title to, and conveyance of, precious metals—Precious metals in lands formerly owned by Hudson's Bay Company under its Charter of 1670—Construction and effect of Deed of Surrender of 1869 from the Company to the Crown, and of subsequent proceedings and legislation—Precious metals in such lands as belong to the Company under the terms of its surrender, etc.*

Titles to lands evidenced by grants from the Crown to subjects, and estates in fee simple, do not, in the absence of explicit words apt and precise to indicate them, carry the prerogative right to the precious metals.

Mines of gold and silver, while held by the Crown, are not to be regarded as *partes soli* or as incidents of the land in which they are found, and are not held (as are the lands of the Crown and the baser metals contained in them) by proprietary title; they may, however, by appropriate and precise words, be severed from the Crown and granted to another. (*The Mines Case*, 1 Plowd. 310; *Woolley* v. *Atty. Gen. of Victoria*, 2 App. Cas. 163; *Atty. Gen. of British Columbia* v. *Atty. Gen. of Canada*, 14 App. Cas. 295 at p. 302). But, while the precious metals and the lands are vested in the one owner other than the Crown, such metals are part of the land, and pass from such owner by a grant in absolute terms of the fee simple estate in the land.

Under the Royal Charter of 1670, the Hudson's Bay Company, prior to the acceptance on 23rd June, 1870, of its deed of surrender of 19th November, 1869, owned the precious metals in the territories granted to it. The source of its title, alike to the precious metals and to the lands in which they lay, was the grant from the Crown. The precious metals in the land were *partes soli* while owned by the com-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Maclean (*ad hoc*) JJ.

pany. It held land and precious metals alike by the same proprietary title.

The said deed of surrender from the company to the Crown should be construed, having regard to the nature and object of the agreement pursuant to which it was made, and to the operative words in the deed itself, as carrying, as *partes soli*, the precious metals in the lands surrendered.

After the execution and acceptance of the deed of surrender, the precious metals in Rupert's Land again belonged to the Crown by prerogative right, and under the Order in Council of 23rd June, 1870, the beneficial interest in, and the right of governmental control over, them was transferred to, and became vested in, the Dominion of Canada.

As to the posts or stations "retained" by the company, excepted from the deed of surrender, the precious metals in the subjacent lands passed under the general terms of the surrender to the Crown. An exception in a deed of grant should be taken most strongly against the party for whose benefit it is introduced, and should be allowed to control the instrument only in so far as its words extend; and, having regard to this ordinary rule of construction, and to the fact that it was an exception out of property being transferred to the Crown, and to the object of the exception, and to the nature and purpose of the instrument in which it occurred, it must be construed as not including the precious metals.

As to the blocks of land (adjacent to the posts or stations) to be "selected" by the company, and the areas in the fertile belt of which they might claim grants, the intent to be taken from the deed of surrender is that the lands were to pass under the general surrender, but on the term or condition that, after they had been transferred to the Dominion of Canada and surveys had been made and the right of "selection" or "claim" had matured, the Crown through the Dominion Government would re-grant or re-transfer to the company the blocks so to be "selected" and the parcels so to be "claimed." When the surrendered lands vested in the Crown and all effects of the earlier grant of them to the company had been extinguished (*Rupert's Land Act, 1868*, s. 4), the precious metals in such lands, which had been granted out of the prerogative, again belonged to the Crown by prerogative right (*Atty. Gen.* v. *Trustees of the British Museum*, [1903] 2 ch. 598, at pp. 612-3); whereas its title to the lands surrendered (exclusive of such metals) was proprietary. Upon such re-grants or re-transfers to the company, however effected, precious metals would not pass unless specifically mentioned and covered by apt and precise words. Accordingly, it must be held that the precious metals in all such lands have, since the execution and acceptance of the deed of surrender, belonged to the Crown.

(If the company's right to the precious metals subsisted as a franchise, its surrender of such, by the terms of the deed of 1869, was complete and without exception or qualification.)

The above construction accords with the nature and purpose of the agreement pursuant to which the deed of surrender was made. The purpose undoubtedly was to preserve intact the Crown's prerogative rights throughout the new territory acquired by the Dominion of Canada. The construction is also supported by the company's subsequent conduct in accepting grants from the Dominion of the

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REFERENCE RE PRECIOUS METALS IN CERTAIN LANDS OF THE HUDSON'S BAY COMPANY.

"selected" blocks of land (including in the description of them the lands on which the "retained" posts and stations were actually erected) and in assenting to the provisions of the *Dominion Lands Act* of 1872 (ss. 17-21) and of the Canadian Order in Council of 6th December, 1872, being substituted for those of the deed of surrender of Rupert's Land in all matters pertaining to the company's one-twentieth of the lands within the Fertile Belt. The company must be taken to have implicitly recognized that its deed of surrender had operated to vest all these lands in the Crown, subject to the company's right to have them re-granted or re-transferred to it in its new capacity as a purely trading corporation.

S. 36 of the *Dominion Lands Act* of 1872, providing that "no reservation of gold, silver, iron, copper, or other mines or minerals shall be inserted in any patent from the Crown granting any portion of the Dominion lands" (repealed, 43 Vic., c. 26; and see declaratory legislation, 46 Vic., c. 17, s. 43) did not necessarily imply that the gold and silver in all Dominion lands (including those reserved for the company) to be granted should pass to the grantees (*The Mines Case*, 1 Plowd. 310; Maxwell on Interpretation of Statutes, 6th ed., pp. 244-5; 31 Vic., c. 1, s. 6 (23)); and it cannot be said that in accepting the provisions of the *Dominion Lands Act* of 1872 and of the Order in Council of 6th December, 1872, the company was under the impression that it would thereby become entitled to the precious metals underlying the lands for which it might subsequently obtain grants or titles by notification under s. 21 of the statute.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, under and pursuant to the *Supreme Court Act*, of certain questions for hearing and consideration as to the power of the Parliament of Canada and of the Government of Canada over the precious metals, gold and silver, in, under and upon, certain lands of The Governor and Company of Adventurers of England trading into Hudson's Bay, commonly called the Hudson's Bay Company, and as to the ownership of the said precious metals.

The Order in Council providing for the reference was dated 26th January, 1926 (P.C. 108), and was amended by Order in Council dated 12th October, 1926 (P.C. 1561).

The following is a statement of the case and questions submitted for decision, as agreed upon between the Minister of Justice, on behalf of the Government of Canada, and the Company:

"WHEREAS questions have arisen as to the power of the Parliament of Canada and of the Government of Canada over the precious metals, gold and silver, in, under or upon lands of The Governor and Company of Adventurers of

England trading into Hudson's Bay, hereinafter called the Company, and as to the ownership of the said precious metals:

AND WHEREAS it is deemed advisable to refer the said questions to The Supreme Court of Canada for hearing and consideration:

AND WHEREAS the opinion of the said Supreme Court is desired upon the following case:—

1. By letters patent granted by His late Majesty, King Charles the Second, bearing date the 2nd day of May, 1670, the Company was granted the lands and territories as therein described, also the gold and silver to be found or discovered therein and other rights, etc., the whole as more fully described in said letters patent, a true copy whereof is annexed hereto as Schedule 'A.'

2. By Deed of Surrender bearing date the 19th day of November, 1869, the Company did surrender to Her late Majesty on the terms and conditions of the said Surrender, and on condition of the said Surrender being accepted pursuant to the provisions of The Rupert's Land Act, 1868, all the rights of government and other rights, privileges, liberties, franchises, powers and authorities granted or purported to be granted to the Company by the said letters patent, and also all the lands and territories within Rupert's Land (except and subject as in the said terms and conditions mentioned) granted or purported to be granted to the Company by the said letters patent.

3. The said Surrender was duly accepted, and by Order of Her late Majesty in Council, bearing date the 23rd day of June, 1870, Rupert's Land and the North-West Territories were admitted into the Dominion of Canada. Schedule 'B' hereto contains a true copy of the said The Rupert's Land Act, 1868, Order in Council and Surrender.

4. The Company, pursuant to the said Deed of Surrender and Order in Council, retained all the posts or stations actually possessed and occupied by it or its officers or agents at the time of the said Surrender and after the acceptance of said Surrender, duly selected blocks of land adjoining each of its posts or stations within any part of British North America, not comprised in Canada and British Columbia.

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REFERENCE RE PRECIOUS METALS IN CERTAIN LANDS OF THE HUDSON'S BAY COMPANY.

5. Since the said Surrender was so made and accepted, the Crown, represented by the Dominion of Canada, has issued patents of the lands so selected adjoining each of its said posts or stations and the said patents also included the land actually possessed and occupied by the Company as posts or stations at the time of the said Surrender. Schedule 'C' hereto is a true copy of one of said patents bearing date the 27th of January, 1882, and the other patents were issued in the same form.

6. One of the terms and conditions of the said Surrender was that the Company might at any time within fifty years after the acceptance of the said Surrender claim in any township or district within the fertile belt as therein described in which land is set out for settlement grants of land not exceeding one-twentieth part of the land so set out, the same to be determined by lot.

7. The Dominion Lands Act, Chapter 23 of the Statutes of Canada, 1872, contains provisions relating to lands to which the Company became entitled under such conditions in the said surrender. An Order in Council was passed by the Dominion Government on the 6th of December, 1872, a true copy of which is annexed hereto as Schedule 'D,' and the Company on the 7th of January, 1873, adopted the Resolution a copy of which is annexed hereto as Schedule 'E.'

8. The Company has from time to time received title by notification of the surveys of townships and confirmation thereof to certain sections and parts of sections within the territory described as the fertile belt, and has also from time to time received title by patent from the Crown, represented by the Dominion of Canada, to other sections and parts of sections of land within the fertile belt, for the Company's one-twentieth of the lands in fractional townships and in townships broken by lakes and in lieu of the sections or parts of sections allotted to the Company found to be settled upon. None of the said patents so issued expressly refer to the precious metals or to any minerals. Schedule 'F' hereto contains a copy of one of such notifications, bearing date the 30th of June, 1881, and Schedule 'G' hereto contains a copy of one of said patents issued to the Company for such lands in fractional townships, bearing

date the 7th of July, 1910. Schedule 'H' hereto contains a copy of one of said patents issued to the Company for land in lieu of land so settled upon, bearing date the 10th of May, 1913. These may be regarded as typical of such documents.

9. At the request of the Crown, the Company from time to time, before receiving title to sections or parts of sections of land to which it was entitled, relinquished and surrendered its rights thereto, and obtained patents for other lands in lieu thereof from the Crown. Neither the said surrenders nor the said patents contain any express mention of minerals.

10. The Company, after having received title to sections and parts of sections of land within the said fertile belt, has from time to time, at the request of the Crown, conveyed to the Crown the said lands, and obtained patents from the Crown for other lands in lieu thereof. Neither the said conveyances from the Company nor the said patents contain any express mention of minerals, and the lands so patented to the Company comprise lands both within and without the said fertile belt.

11. Therefore it is desired to refer for hearing and consideration to the Supreme Court of Canada certain questions which, for the sake only of convenience and not as intending to waive, release or affect any rights or claims of any party, are confined to lands in the area now included in the Northwest Territories and in the provinces of Alberta, Saskatchewan and Manitoba, the said questions being as follows:—

1. In whom, after the acceptance of the said Surrender and the passing of the said Order in Council of the 23rd day of June, 1870, were vested the precious metals, gold and silver, in, under or upon, the lands in the said area possessed and occupied at the date of the said surrender as posts or stations by the Company, its officers or agents, whether in the Crown represented by the Dominion of Canada, or in the Company?

2. In whom were vested the precious metals, gold and silver, in, under or upon the blocks of land adjoining the said posts or stations of the Company and selected by the

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REFERENCE RE PRECIOUS METALS IN CERTAIN LANDS OF THE HUDSON'S BAY COMPANY.

Company, whether in the Crown represented by the Dominion of Canada or in the Company:—

(a) Upon the selection by the Company of the said blocks of land.

(b) Upon the issue to the Company of the Crown patents for the said blocks of land?

3. In whom were vested the precious metals, gold and silver, in, under or upon, the sections of land or parts thereof in the said fertile belt which were vested in the Company by notification, upon such notification, whether in the Crown represented by the Dominion of Canada, or in the Company?

4. In whom were vested the precious metals, gold and silver, in, under or upon, the land granted to the Company by letters patent from the Crown upon the issue thereof:—

(a) In satisfaction of the Company's one-twentieth of the land in fractional townships, or in townships broken by lakes.

(b) In lieu of lands allotted to the Company but found to be settled upon?

5. In whom were vested the precious metals, gold and silver, in, under or upon, the lands granted to the Company by letters patent in lieu of land in which the Company relinquished and surrendered its rights to the Crown upon the issue of such patents?

6. In whom were vested the precious metals, gold and silver, in, under or upon, the land granted to the Company by letters patent in lieu of land conveyed by the Company to the Crown upon the issue of such patents?

7. If in any of such cases the precious metals, gold and silver, were vested in the Company, did the repeal of section 37 of The Dominion Lands Act, 1879, Chapter 31 of 42 Victoria, by section 6 of Chapter 26 of 43 Victoria, or the enactment of section 43 of Chapter 17 of 46 Victoria, or of The Dominion Lands Act, Chapter 20 of 7 and 8 Edward VII, or any other enactment affect the ownership of the said precious metals in such case?

12. For the purpose of such hearing and consideration, the said Court may in addition to such other facts and matters as the Court may see fit, take into consideration the statements, facts and documents herein mentioned or

set forth, and the Statutes of the Parliament of the United Kingdom of Great Britain and Ireland, and of the Parliament of Canada, bearing upon such questions, and the fact that the Company was not requested to consent to and did not consent to the amendment or repeal of any of the provisions of The Dominion Lands Act of 1872, and such other statements, facts and documents, as may be submitted to the Court by order of the Governor in Council."

It was not intended by the reference to raise any issues as between the Dominion and any province, and it was provided that, so far as any lands in the province of Manitoba were concerned, questions numbers 1, 2 and 3 might be answered as if the words "represented by the Dominion of Canada", where they occur after the word "Crown" in each of said questions, were struck out, and that, in answering any of the questions referred, it would be sufficient to state what were the rights of the Crown and the Company, respectively, without indicating whether any of the rights of the Crown are vested in the Dominion or the Province.

Pursuant to an order of the Court, notification of the hearing of the agreement was sent to the Attorneys General of Manitoba, Saskatchewan and Alberta, and was published in the *Canada Gazette*. The Attorneys General of the provinces of Manitoba and Saskatchewan were represented by counsel at the hearing. Their respective factums, after referring to the fact that the province was not a party to the reference, and after referring to the intention, as above indicated, that no issues were to be raised as between the Dominion and any province, etc., supported the position taken by the Dominion as to the rights of the Crown.

*Aimé Geoffrion K.C.* and *O. M. Biggar K.C.* for the Attorney General of Canada.

*F. H. Chrysler K.C.* for the Province of Manitoba.

*H. Fisher K.C.* for the Province of Saskatchewan.

*D. H. Laird K.C.* and *G. P. R. Tallin* for the Hudson's Bay Company.

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The judgment of the Court was delivered by

ANGLIN C. J. C.—Under the authority of s. 60 of the *Supreme Court Act* His Excellency the Governor General in Council has referred to the Court for hearing, consideration and answer a series of questions relating to the ownership of the precious metals in lands formerly "held or claimed to be held" by the "Governor and Company of Adventurers of England trading into Hudson's Bay" (31-2 Vic., (Imp.), c. 105, s. 2), and now included in the Provinces of Manitoba, Saskatchewan and Alberta and the North-West Territories of Canada.

That the Hudson's Bay Company, prior to the 23rd of June, 1870, owned the precious metals in the territories granted to it in 1670 by Charter from King Charles II is indisputable. That Royal Charter vested in the Company not only all the lands and territories comprised in Rupert's Land as therein described, not already actually possessed by or granted to any of the King's subjects or possessed by the subjects of any other Christian Prince or State, but also in express terms

> all mines Royal, as well discovered as not discovered, of Gold, Silver, Gems, and precious Stones to be found or discovered within the Territories, Limits and Places aforesaid.

It was decided in 1568 in *The Mines Case* (1) that, although all mines of gold and silver within the realm, while held by the Crown, are not to be regarded as *partes soli* or as incidents of the land in which they are found, and are not held (as are the lands of the Crown and the baser metals contained in them) by proprietary title, whether they be in the lands of the Queen or of subjects (p. 336), they may, nevertheless,

> by grant of the King be severed from the Crown and be granted to another, for it is not an incident inseparable to the Crown but may be severed from it by appropriate and precise words (p. 336A).

The law of England in these particulars, as thus defined in *The Mines Case,* persists to the present day (*Woolley* v. *Attorney General of Victoria* (2); *Attorney General of British Columbia* v. *Attorney General of Canada* (3); and it is conceded that according to that law the questions now before us must be answered. The title, therefore,

(1) 1 Plowd. 310.
(2) (1877), 2 App. Cas. 163.
(3) (1889), 14 App. Cas. 295, at p. 302.

of the Governor and Company under the Royal Charter of 1670 to the precious metals in Rupert's Land was beyond cavil. They were "absolute lords and proprietors of the territory", saving the allegiance due to His Majesty.

Indeed this was common ground between counsel; and this aspect of the matter is now dwelt on only to give prominence to the fact that the source of the Company's title alike to the precious metals and to the lands in which they lie was the grant from the Crown. Both were granted to the Company by the same Royal Charter.

Consequent upon such grant, as is stated in the factum of the Company (p. 3), the precious metals in the land transferred to it "became part of the land the same as other metals", because (p. 6),

> while the precious metals and the lands are vested in the one owner other than the Crown, such metals are part of the land and pass from such owner by a grant in absolute terms of the fee simple estate in the land;

and again (p. 7),

> The ownership of precious metals by the owner of the land in which they are found is not a right, privilege, liberty, franchise, power or authority. In such a case it is part of his estate in the land. Even if it were a right while held by the Crown, or a person other than the owner of the land, once it is vested in the owner of the land it merges in the land and becomes extinguished.

In this view counsel for the Crown are also fully agreed; and, as will presently appear, it meets the chief difficulty suggested by counsel for the Company in regard to the scope and effect of the deed of surrender to the Crown in 1870, apart from those which it is argued arise upon the terms and conditions contained in that instrument and subject to which it was given.

Prior to Confederation the Hudson's Bay Company seems to have been quite ready, if not anxious, to part with its proprietary rights and franchises to the English Crown for a consideration. Indeed negotiations were being carried on, as appears from correspondence set out in the Company's factum, to achieve that purpose. In the Canadian Confederation scheme as formulated in the *British North America Act* of 1867 provision was made (s. 146) for the admission into the Union, on address from the Houses of Parliament of Canada, of

> Rupert's Land and the North-Western Territory, or either of them * * * on such terms and conditions in each case as are in the Addresses ex-

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pressed and as the Queen thinks fit to approve, subject to the provisions of this Act;

and the statute proceeded to declare that

the provisions of any Order in Council in that behalf shall have the same effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Negotiations ensued between representatives of the Company and of the Dominion Government, in which the Colonial Office also intervened. These culminated in an arrangement whereby, subject to certain terms and conditions, notably the payment to the Company of £300,000 stg. and the retention or reservation by it, or an undertaking for a re-grant to it, of certain of its holdings, the Company was to surrender and relinquish to the Crown

all rights of government and proprietary rights and all other privileges, liberties, franchises, powers and authorities whatsoever granted or purported to be granted by the said Letters Patent (of 1670);

and upon such surrender all such rights, franchises, etc. were to be "absolutely extinguished" and the territory so surrendered was, by Order in Council, to be transferred to, and to become part of, the Dominion of Canada as contemplated by the *British North America Act*. The negotiations and their outcome are evidenced by various resolutions, letters and documents set out in the case before us, which, however, it does not seem necessary to quote in detail. To enable the arrangement above sketched to be carried out, the Imperial Parliament passed the *Rupert's Land Act, 1868*. This statute it may, perhaps, be advisable to set out in part:

After reciting the grant by the Company's Charter and the relevant provision of s. 146 of the *British North America Act*, the statute proceeds:

And whereas for the purpose of carrying into effect the Provisions of the said British North America Act, 1867, and of admitting Rupert's Land into the said Dominion as aforesaid upon such terms as Her Majesty thinks fit to approve, it is expedient that the said Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers and Authorities so far as the same have been lawfully granted to the said Company shall be surrendered to Her Majesty, Her Heirs and Successors, upon such terms and conditions as may be agreed upon between Her Majesty, and the said Governor and Company as hereinafter mentioned:

Be it therefore enacted, etc., as follows:—

1. This Act may be cited as "Rupert's Land Act, 1868."

2. For the Purposes of this Act the Term "Rupert's Land" shall include the whole of the Lands and Territories held or claimed to be held by the said Governor and Company.

3. It shall be competent for the said Governor and Company to surrender to Her Majesty, and for Her Majesty by any Instrument under her Sign Manual and Signet, to accept, Surrender of all or any of the Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers and Authorities, whatsoever granted or purported to be granted by the said Letters Patent to the said Governor and Company within Rupert's Land upon such terms and conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company; provided, however, that such Surrender shall not be accepted by Her Majesty until the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty, and embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada in pursuances of the One Hundred and Forty-sixth Section of the British North America Act, 1867, and that the said Surrender and Acceptance thereof shall be null and void unless within a month from the date of such Acceptance Her Majesty does by Order in Council under the Provisions of the said last recited Act admit Rupert's Land into the said Dominion; provided further, that no charge shall be imposed by such terms upon the Consolidated Fund of the United Kingdom.

4. Upon the acceptance by Her Majesty of such surrender all Rights of Government and Proprietary Rights, and all other Privileges, Liberties, Franchises, Powers, and Authorities whatsoever, granted or purported to be granted by the said Letters Patent to the said Governor and Company within Rupert's Land, and which shall have been so surrendered, shall be absolutely extinguished; provided that nothing herein contained shall prevent the said Governor and Company from continuing to carry on in Rupert's Land or elsewhere Trade and Commerce.

5. It shall be competent to Her Majesty by any such Order or Orders in Council as aforesaid, on Address from the Houses of Parliament of Canada, to declare that Rupert's Land shall, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada; and thereupon it shall be lawful for the Parliament of Canada from the date aforesaid to make, ordain and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions and Ordinances, and to constitute such Courts and Officers, as may be necessary for the Peace, Order and Good Government of Her Majesty's Subjects and others therein: Provided that, until otherwise enacted by the said Parliament of Canada, all the Powers, Authorities, and Jurisdiction of the Several Courts of Justice now established in Rupert's Land, and of the several Officers thereof, and of all Magistrates and Justices now acting within the said Limits, shall continue in full force and effect therein.

A formal deed of surrender to the Crown was executed by the Company in 1869, and in June, 1870, matters had so far progressed that an Imperial Order in Council was passed accepting such surrender and admitting Rupert's Land and the North Western Territory into the Dominion of Canada. Thus the vast territory extending from the Lake of the Woods and Lake Winnipeg and Hudson's Bay

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in the East to the Rocky Mountains in the West became part of Canada "from and after the 15th of July, 1870."

It is chiefly concerning the scope and effect of the deed of surrender of 1869 that the controversy now before us has arisen. No question is presented as to the respective interests of the Crown in right of Canada and of the Crown in right of the several provinces; the only questions are whether the Hudson's Bay Company or the Crown is entitled to the precious metals, gold and silver, "in, under or upon" the lands which formed the subject of the deed of surrender or any of them, and, subject to what is to be said at a later stage as to the possible effect of subsequent legislation, the solution of these questions depends upon the construction of the terms of the deed of surrender itself.

In approaching this problem of construction the first feature of the deed which attracts our attention is the recital, immediately preceding the operative paragraph, that

> the surrender hereinafter contained is intended to be made in pursuance of the agreement * * * hereinbefore stated,

i.e., the agreement above outlined. It is of vital moment that the purpose and object of that agreement should be well in mind in construing the surrender in order that, consistently with its terms, it may be given the scope and meaning that will best carry into effect the intent with which it was made. A company which had theretofore owned territories having the extent of a vast empire, which had throughout those territories enjoyed the widest powers of government and administration together with rights, faculties, franchises, privileges and prerogatives that usually appertain to a sovereign state, or, under the system now prevalent in the British Empire, to one of its self-governing constituent parts, and which, as incidental to the possession of such powers of government and administration, had been accorded the Royal prerogative of taking the Royal fish in the waters within and contiguous to its territories and also the Royal prerogative of owning and exploiting the Royal Mines within such territories, was surrendering to the Crown all these powers, rights and franchises as well as its proprietary rights, and this surrender was being made with the object that the rights, governmental and proprietary, and the franchises so surrendered should be extinguished in order to pave the

way for the transfer by Her Majesty of the fullest rights of government and administration over, and ownership of, the territory in question to the new Dominion of Canada. The Company as an instrument of government was to pass from the scene and was thereafter to carry on solely as a trading corporation, holding its trading posts and stations, with immediately adjacent parcels of land needed for their proper conduct, and receiving, as part consideration for the surrender it was making, a right to parcels of land in the so-called Fertile Belt (part of the surrendered territory) equal to one-twentieth of the portions thereof to be opened for settlement. The Company was to exercise and possess for the future no rights other than those of a private trading corporation owning property in Canada. Indeed so complete and all-embracing was the contemplated surrender of its rights, powers and franchises that it was deemed prudent, no doubt to preclude possible misapprehension, explicitly to provide in *The Rupert's Land Act, 1868* (s. 4)

> that nothing herein contained shall prevent the said Governor and Company from continuing to carry on in Rupert's Land or elsewhere Trade and Commerce.

Whatever reasons there may have been for the original grant to the Company of Royal prerogative rights ceased to exist on the acceptance of the surrender. Governmental control over and administration of, and all beneficial interest in, the territories which the Company was relinquishing were thereafter to be vested in the Dominion of Canada. These were the salient features of the arrangement pursuant to, and as a step towards the accomplishment of, which the deed of surrender was made.

What did the Company purport to surrender?

The operative clause of the deed is in these terms:

> Now know ye, and these presents witness, that, in pursuance of the powers and provisions of the "Rupert's Land Act, 1868," and on the terms and conditions aforesaid, and also on condition of this surrender being accepted pursuant to the provisions of that Act, the said Governor and Company do hereby surrender to the Queen's Most Gracious Majesty, all the rights of government, and other rights, privileges, liberties, franchises, powers and authorities, granted or purported to be granted to the said Governor and Company by the said recited Letters Patent of His Late Majesty King Charles the Second, and also all similar rights which may have been exercised or assumed by the said Governor and Company in any parts of British North America, not forming part of Rupert's Land or of Canada, or of British Columbia, and all the lands and terri-

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tories within Rupert's Land (except and subject as in the said terms and conditions mentioned) granted or purported to be granted to the said Governor and Company by the said Letters Patent.

Reading this clause, for the moment, as if it did not contain the words in brackets, the generality of its language is *ex facie* unrestricted. All the Company's lands and territories within Rupert's Land (and it had no title to any lands in the North-Western Territory except, perhaps, by occupation) granted or purported to be granted to it by its Royal Charter of 1670 were surrendered to the Crown. In those lands were undoubtedly then included the precious metals as well as other metals lying in, under or upon them. The precious metals therein were *partes soli* while owned by the Company. They had been "granted" to it by the same letters patent which "granted" the lands themselves. The Company held land and precious metals alike by the same proprietary title. The description in the deed of surrender "All the lands and territories within Rupert's Land * * * granted or purported to be granted to the said Governor and Company by the said Letters Patent" was, therefore, apt and sufficient to carry, and we have not the slightest doubt was meant to carry, as *partes soli* the precious metals in the lands surrendered. Such is the literal and legal meaning of the words of the surrender; and that such was the intent with which they were used, having regard to the nature and objects of the agreement pursuant to which the deed of surrender purports to have been made, does not, we think, admit of question.

But, while that may be so as to the surrendered lands in which the Company ceased to have any further interest, it is contended on its behalf that in the lands "retained" by it as posts, and in those to be "selected" as adjacent blocks, and also in the lands agreed to be granted to it as part consideration for the surrender to the Crown, its estate and interest (including the ownership of the precious metals therein) is still the same as that which it formerly held in all the territory of Rupert's Land under the Royal Charter of 1670. These particular lands, it was argued, did not pass from the Company by the surrender, but were either excepted or reserved from it; and much emphasis was placed by counsel on the word "except" in the interjected parenthetical phrase "(except and subject as in the

said terms and conditions mentioned)" in the operative clause of the surrender.

It may be noted *en passant* that the word "except" does not occur in s. 3 of the *Rupert's Land Act, 1868*. It is found, however, in the recital of the deed of surrender made in the Order in Council of the 23rd of June, 1870, and it certainly cannot be ignored. The real question is as to the purview and extent of the exception to which it refers.

The clauses in the terms and conditions set forth in the surrender dealing with the lands in which the Company did not finally relinquish all interest are as follows:

2. The company to retain all the posts or stations now actually possessed and occupied by them or their officers or agents whether in Rupert's Land or any other part of British North America, and may within twelve months after the acceptance of the said surrender select a block of land adjoining each of their posts or stations, within any part of British North America not comprised in Canada and British Columbia in conformity, except as regards the Red River Territory, with a list made out by the Company and communicated to the Canadian Ministers, being the list in the annexed schedule. The actual survey is to be proceeded with, with all convenient speed.

* * *

5. The Company may, at any time within fifty years after the acceptance of the said surrender, claim in any township or district within the fertile belt in which land is set out for settlements, grants of land not exceeding one-twentieth part of the land so set out; the blocks so granted to be determined by lot, and the Company to pay a rateable share of the survey expenses, not exceeding 8 cents Canadian an acre. The Company may defer the exercise of their right of claiming their proportion of each township or district for not more than ten years after it is set out, but their claim must be limited to an allotment from the lands remaining unsold at the time they declare their intention to make it.

6. For the purpose of the last article the fertile belt is to be bounded as follows: On the South by the United States boundary; on the West by the Rocky Mountains; on the North by the Northern Branch of the Saskatchewan River; on the East by Lake Winnipeg, the Lake of the Woods and the waters connecting them.

The posts or stations to be "retained", the blocks of adjacent land to be "selected" and the areas in the fertile belt of which the Company "might claim grants" seem to have been carefully distinguished each from the others, and apparently an attempt was made to apply to each a term deemed apt to express the legal process to which it was designed to be subjected.

The word "retain" no doubt signifies that the particular property to which it refers remained with the Company

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and did not form part of the property surrendered. To property so retained the word "except" in the parenthetical clause of the operative paragraph of the deed of surrender finds appropriate application.

We are, however, here dealing with an exception and it occurs in a transfer, by way of surrender, to the Crown. Because it is an exception it should be taken most strongly against the party for whose benefit it is introduced (Sheppard's Touchstone, 8th ed., p. 100; *Savill Brothers, Ltd.* v. *Bethell* (1) ) and should be allowed to "control the instrument as far as the words of it extend and no further" —*Burnett* v. *Kensington* (2); and the circumstance that the exception occurs in a transfer of property to the Crown by no means weakens the case for the application of this ordinary rule of construction— *Willion* v. *Berkley* (3). The apparent purpose of the exception will be fully met if its operation be restricted to the buildings used as posts and stations (including out-houses, etc.) and, in the lands they occupy, to the fee simple, which the subject ordinarily holds. Ownership of the precious metals in such subjacent soil cannot be regarded from any point of view as necessary to the fullest use and enjoyment of these posts or stations for the trading purposes to which the future activities of the Company were to be confined. Having regard, therefore, to the object of the exception, to the nature and purpose of the instrument in which it occurs, and to the fact that it is an exception out of property being transferred to the Crown, we are satisfied that it should be held not to include the precious metals in the subjacent lands. These were left to pass under the general terms of the surrender to the Crown.

In the case of the lands to be "selected" and in that of the parcels of which the Company was to become entitled to "claim grants" the intent of the instrument would rather seem to be that these lands were to pass to Her Majesty under the general surrender of all the Company's lands, but on the term

(1) [1902], 2 Ch. 523, at pp. 537-8.

(2) (1797), 7 T.R. 210 at p. 216, note (a).

(3) (1561) 1 Plowd, 222a, at p. 243.

or condition that, after they had been transferred to the Dominion of Canada and surveys had been made and the right of "selection" or "claim" had matured, the Crown through the Dominion Government would re-grant or re-transfer to the Company the blocks so to be "selected" and the parcels so to be "claimed". Upon such re-grants or re-transfers, however effected, precious metals in the lands so dealt with would not pass unless specifically mentioned and covered by apt and precise words. When the surrendered lands vested in the Crown and all effects of the earlier grant of them to the Company had been extinguished (the *Rupert's Land Act, 1868,* s. 4), the precious metals in such lands, which had been granted out of the prerogative, again belonged to the Crown by prerogative right (*Attorney General* v. *Trustees of the British Museum* (1)); whereas its title to the lands surrendered (exclusive of such metals) was proprietary.

It may be that upon the necessary surveys being completed, so that the lands which were to pass to the Company—whether as selected blocks or as part of the one-twentieth of the lands opened for settlement in the fertile belt which it was entitled to claim—were designated and definitely located, it immediately acquired title to such lands (*The Queen* v. *Farwell* (2); *Wright* v. *Roseberry* (3)) and that the subsequent grants when taken, and the notification of the surveys when given under s. 21 of the *Dominion Lands Act,* 1872, amounted to nothing more than evidence of titles already vested. Nevertheless, the facts that such grants were provided for and were taken, and that the title defined by s. 21 as being in fee simple was recognized by the Company as the complement of its rights under the "reservation" in the deed of surrender, lose none of their significance. Titles to lands evidenced by grants from the Crown to subjects and estates in fee simple do not, in the absence of explicit words apt and precise to indicate them, carry the prerogative right to the precious metals.

Having regard to the nature and purpose of the agreement between the Hudson's Bay Company, the Canadian

(1) [1903], 2 Ch. 598, at pp. 612-3.

(2) (1887) 14 Can. S.C.R. 392, at p. 425.

(3) (1886). 121 U.S. Reps. 488 at p. 503.

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Government and the Imperial Government (represented by the Colonial Secretary), as a step towards the carrying out of which the deed of surrender was executed, it is scarcely possible to conceive that it was intended that here and there throughout the great territory which it was acquiring the Dominion of Canada should find numerous sections of land in which the prerogative right of the Crown to precious metals had been relinquished in favour of a purely trading company. That it must have been the purpose of the high contracting parties to preserve intact the prerogative rights of the Crown throughout that new part of the Dominion seems to us reasonably certain; and it is satisfactory to find that upon a fair construction the provisions of the deed of surrender now under consideration give effect to that intent.

If, however, notwithstanding its ownership of the soil in which the precious metals in question lay, the right of the Company to them subsisted as a franchise, it is scarcely necessary to observe that the surrender to the Crown by the deed of 1869 of all franchises granted to the Company by the Royal Charter of 1670 is complete and without exception or qualification.

Subject to what is to be said as to the possible effect of subsequent Canadian legislation, we accordingly conclude that after the execution and acceptance of the deed of surrender in 1870 the precious metals in Rupert's Land again belonged to the Crown by prerogative right, as they always had in the North Western Territory, and that, under the Order in Council of the 23rd June, 1870, the beneficial interest in, and the right of governmental control over, them was transferred to and became vested in the Dominion of Canada. *The Trusts and Guarantee Co.* v. *The King* (1); *Attorney General of Canada* v. *Attorney General of Alberta* (2).

The subsequent conduct of the Company in accepting grants from the Dominion of Canada of the "selected" blocks of land (including in the description of them the lands on which the "retained" posts and stations were actually erected) and in assenting to the provisions of the *Dominion Lands Act* of 1872 (ss. 17-21) and of the Canadian Order in Council of the 6th of December, 1872,

(1) 1916) 54 Can. S.C.R. 107. (2) (1927) S.C.R. 136.

being substituted for those of the deed of surrender of Rupert's Land in all matters pertaining to the Company's one-twentieth of the lands within the fertile belt, afford a strong indication, to say the least, that the construction which we have put upon the stipulations of the deed of surrender in regard to the so-called "reservations" in the Company's favour, was that which the Company itself understood them to bear. By taking Crown grants of the selected blocks and of its one-twentieth share in the fractional townships and of substituted lands, where the sections that would have fallen to it were already bona fide settled on, and by acceding to the provisions of s. 21 of the *Dominion Lands Act,* under which it took statutory titles in fee simple, the Company implicitly recognized that its deed of surrender had operated to vest all these lands in the Crown, subject to the Company's right to have them re-granted or re-transferred to it in its new capacity as a purely trading corporation.

Inasmuch as *The Manitoba Act* (33 Vic., c. 3, s. 30), *The Alberta Act,* (4-5 Edw. 7., c. 3, s. 23), and *The Saskatchewan Act* (4-5 Edw. 7, c. 42, s. 23) contain provisions which expressly save the rights and properties of the Hudson's Bay Company from prejudice, nothing in any of these statutes affects the question now before us.

There is, however, a provision of the *Dominion Lands Act* of 1872 which calls for special notice. Section 36 of that Act reads as follows:

> 36. No reservation of gold, silver, iron, copper, or other mines or minerals shall be inserted in any patent from the Crown granting any portion of the Dominion lands.

In the Consolidation of 1879 (42 Vic. c. 31) that section was repeated verbatim as s. 37. By an amending Act of 1880 (43 Vic. c. 26 s. 6) it was repealed. In 1883 (46 Vic., c. 17) there was a new consolidation of the *Dominion Lands Act* which contains the following section:

> (43) It is hereby declared that no grant from the Crown, of lands in freehold or for any less estate, has operated or will operate as a conveyance of the gold and silver mines therein, unless the same are expressly conveyed in such grant.

In the revision of 1886 (c. 54) we find this section substantially repeated, as s. 48, in the following terms:

> No grant from the Crown of lands in freehold or for any less estate, shall be deemed to have conveyed or to convey the gold or silver mines therein, unless the same are expressly conveyed in such grant.

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The section of 1886 was carried verbatim into the subsequent revision of 1906 (c. 55) as s. 161. But in the *Dominion Lands Act,* when again consolidated in 1908 (7-8 Edw. 7, c. 20), no similar section appears. It was strongly pressed upon us that the necessary implication of s. 36 in the Act of 1872 (s. 37 of 1879) is that the gold and silver in all Dominion lands (including those reserved for the Hudson's Bay Company) to be granted should pass to the grantee and it was said that it was upon this basis that the Company had agreed in January, 1873, to substitute the *Dominion Lands Act* and the Order in Council of the 6th of December, 1872, for the provisions contained in the deed of surrender, relating to the Company's one-twentieth of lands set out for settlement within the Fertile Belt, and that it had never assented to any change in the rights thus assured to it.

Under the law of England, as settled in *The Mines Case* (1), and under the well-established rule for the construction of statutes, that it is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms or makes the inference irresistible (Maxwell on Interpretation of Statutes, 6th Ed. pp. 244-5; 31 Vic., c. 1, s. 6 (23) ), we are of the opinion that s. 36 of the *Dominion Lands Act* of 1872 (s. 37 of the Act of 1879) had not the effect contended for. A direction for the omission of a reservation of gold and silver from grants of Dominion lands is not tantamount to an affirmative enactment that the Crown's right to gold and silver shall pass by every such grant. The Crown's prerogative right is not mentioned in the section and it is not a necessary implication from its language that that right was meant to be affected by it. The direction for the omission from the grants of Dominion lands of any reservation of gold and silver may have been inofficious. It is quite probable that it did not occur to anybody at the time when s. 36 was inserted in that statute that the presence in it of the words "gold, silver" might give rise to such a contention as that now put forward. It would appear that when the possibility of such an implication being asserted was brought to the notice of Parliament it passed legislation declaratory of

(1) (1568) 1 Plowd. 310.

its contrary intent in the unmistakeable terms to which reference has been made (s. 43 of c. 17 of 46 Vic.).

There is nothing in this course of legislation which, in our opinion, supports the view that the precious metals (gold and silver) in Dominion lands ever passed to grantees of such lands under Crown grants thereof—unless, indeed, where such grants may have contained express words apt and precise to convey them. We cannot assent to the suggestion that in accepting the provisions of the *Dominion Lands Act* of 1872 and of the Order in Council of the 6th of December, 1872, the Hudson's Bay Company was under the mistaken impression that it would thereby become entitled to the precious metals underlying the lands for which it might subsequently obtain grants or titles by notification under s. 21 of the statute.

For the foregoing reasons we are of the opinion that the series of questions referred to the Court by His Excellency the Governor General in Council should be answered as follows:

Question No. 1.

In whom, after the acceptance of the said surrender and the passing of the said Order in Council of the 23rd day of June, 1870, were vested the precious metals, gold and silver, in, under or upon, the lands in the said area possessed and occupied at the date of the said surrender as posts or stations of the Company, its officers or agents, whether in the Crown represented by the Dominion of Canada, or in the Company?

Answer: In the Crown.

Question No. 2.

In whom were vested the precious metals, gold and silver, in, under or upon the blocks of land adjoining the said posts or stations of the Company and selected by the Company, whether in the Crown represented by the Dominion of Canada, or in the Company:

(*a*) Upon the selection by the Company of the said blocks of land;

(*b*) Upon the issue to the Company of the Crown patents for the said blocks of land?

Answer: (*a*) In the Crown;

(*b*) In the Crown.

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REFERENCE RE PRECIOUS METALS IN CERTAIN LANDS OF THE HUDSON'S BAY COMPANY.

Anglin C.J.C.

Question No. 3.

In whom were vested the precious metals, gold and silver, in, under, or upon, the sections of lands or parts thereof in the said fertile belt which were vested in the Company by notification, upon such notification, whether in the Crown represented by the Dominion of Canada, or in the Company?

Answer: In the Crown.

Question No. 4.

In whom were vested the precious metals, gold and silver, in, under or upon, the land granted to the Company by letters patent from the Crown upon the issue thereof:

(*a*) In satisfaction of the Company's one-twentieth of the land in the fractional townships, or in the townships broken by lakes;

(*b*) In lieu of lands allotted to the Company but found to be settled upon?

Answer: (*a*) In the Crown;

(*b*) In the Crown.

Question No. 5.

In whom were vested the precious metals, gold and silver, in, under or upon, the lands granted to the Company by letters patent in lieu of land in which the Company relinquished and surrendered its rights to the Crown upon the issue of such patents?

Answer: In the Crown.

Question No. 6.

In whom were vested the precious metals, gold and silver, in, under or upon, the land granted to the Company by letters patent in lieu of land conveyed by the Company to the Crown upon the issue of such patents?

Answer: In the Crown.

Question No. 7.

If in any of such cases the precious metals, gold and silver, were vested in the Company, did the repeal of section 37 of the Dominion Lands Act, 1879, Chapter 31 of

42 Victoria, by section 6 of chapter 26 of 43 Victoria, or the enactment of section 43 of chapter 17 of 46 Victoria, or of the Dominion Lands Act, chapter 20 of 7 and 8 Edward VII, or any other enactment affect the ownership of the said precious metals in such case?

Answer: The hypothesis of this question does not arise.

*Questions referred answered accordingly.*

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*

Solicitors for the Hudson's Bay Company: *Munson, Allan, Laird, Davis, Haffner & Hobkirk.*

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1927

THE HOME INSURANCE COMPANY OF NEW YORK (DEFENDANT)..... } APPELLANT;

*May 11, 12.
*June 17.

AND

HARRY GAVEL (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

*Fire insurance—Statutory condition against effecting subsequent insurance with another insurer—Insured subsequently obtaining policy from another insurer which never attaches by reason of statutory condition therein against prior insurance—Insured's right to recover under first policy.*

A statutory condition in a fire insurance policy that the insurer is not liable for loss "if any subsequent insurance is effected with any other insurer, unless and until the insurer assents thereto" contemplates a subsequent insurance which is effective, and is not applicable so as to defeat the insured's claim for loss merely because the insured, without the insurer's assent, subsequently obtains from another company a policy which never attaches by reason of the application of the statutory condition therein that "the insurer is not liable for loss if there is any prior insurance with any other insurer."

*Manitoba Assurance Co.* v. *Whitla*, 34 Can. S.C.R. 191, at p. 206, not followed, in view of *Equitable Fire & Accident Office, Ltd.* v. *The Ching Wo Hong*, [1907] A.C. 96.

Judgment of the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 70) affirmed.

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

1927

HOME INSURANCE CO. OF NEW YORK. v. GAVEL.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing an appeal by the present appellant from the judgment of Harris C.J. (1) in favour of the respondent in an action brought by the respondent on a fire insurance policy issued by the appellant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

The statutory condition contained in the policy and quoted and dealt with in the judgment is the 9th statutory condition in the first schedule to *The Fire Insurance Policies' Act,* R.S.N.S., 1923, c. 211.

*C. J. Burchell K.C.* and *J. A. Hanway K.C.* for the appellant.

*W. A. Livingstone* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from the unanimous decision of the Supreme Court of Nova Scotia *en banc* (1), dismissing an appeal brought by this appellant from the judgment of Harris C.J. (1), who awarded the respondent $8,000 on a fire insurance policy issued by the appellant.

In December, 1923, the respondent effected an insurance against fire with the appellant on a building owned by him at Digby, N.S., and occupied as a garage and dwelling. The policy ran from December 10, 1923, to December 10, 1924, and was for $8,000. On December 3, 1924, the building was greatly damaged by fire, and it is not contended that the loss did not equal the amount insured. The policy contained the following statutory condition:

> The insurer is not liable for loss if there is any prior insurance with any other insurer, unless the insurer's assent to such prior insurance appears in the policy or is endorsed thereon, nor if any subsequent insurance is effected with any other insurer, unless and until the insurer assents thereto, or unless the insurer does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

In November, 1924, the appellant obtained a fire insurance policy from the Northern Assurance Company, Limited, London, England, which I will call the Northern Com-

(1) (1926) 59 N.S. Rep. 70.

pany, for $4,000, being $3,000 on his building and $1,000 on his furniture. This policy was made subject to the same statutory condition.

After the fire, the respondent brought actions against both companies, the action against the Northern Company being apparently the first in time. The plea of the Northern Company is not in the record, but I understood from counsel that, in addition to other defences, the Northern Company disputed liability on two grounds: 1, that the plaintiff had prior insurance with the present appellant, to which the assent of the Northern Company had not been secured; 2, that the plaintiff had failed to disclose to the defendant that, when he obtained insurance from the appellant, he had applied for $12,000 insurance, but was informed that $8,000 only could be placed on the property.

On the second ground Mr. Justice Mellish dismissed the action against the Northern Company, although he did not find the plaintiff's conduct fraudulent. He decided that the policy of the Northern Company had never attached, and that the plaintiff's premium should be returned to him.

In answer to this action of the respondent against the present appellant, the latter set up the same statutory condition and claimed that its policy had become void by reason of the subsequent insurance with the Northern Company.

The only question to be decided on this appeal is whether any such subsequent insurance was effected within the meaning of the condition.

The respondent's answer is that the policy with the latter company never attached and therefore that no subsequent insurance was effected. He relies, and the judgments in his favour were based, on the decision of the Judicial Committee in *Equitable Fire and Accident Office, Limited* v. *The Ching Wo Hong* (1).

In that case the company disputed liability because, it alleged, an additional insurance had been effected in violation of a condition of the policy which stated that no additional insurance was allowed except by consent of the company. The insured had obtained from another insurer a

(1) [1907] A.C. 96.

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HOME INSURANCE CO. OF NEW YORK. v. GAVEL.

Mignault J.

policy of insurance containing a condition that the insurance would not be in force, nor would the company be liable in respect of any loss or damage, before the premium, or a deposit on account thereof, was actually paid. No premium had been paid and the insured did not attempt to collect the insurance. Their Lordships, speaking by Lord Davey, were of opinion that the second insurance had never become effective, and that therefore the condition of the policy sued on had not been infringed.

The appellant relies on several Canadian cases in support of its contention that the mere fact that the respondent obtained subsequently a policy of insurance, however void, annuls its contract of insurance under the statutory condition of its policy. It cites the following language of Mr. Justice Sedgwick, speaking for this Court, in *Manitoba Assurance Co.* v. *Whitla* (1):

> So far as the Manitoba Assurance Co. is concerned it seems to me that there can be but little question as to its non-liability. The effecting of the new insurance in the Royal Co. without its assent gave it the right at its option to void it, and, as has been established by a long series of cases in Canadian courts, whether the new insurance was in the first event valid or invalid, if there was a new contract of insurance in fact, that *de facto* second insurance made void the first.

I think this language can no longer be considered as binding in view of the decision of the Privy Council in *Equitable Fire and Accident Office, Limited* v. *The Ching Wo Hong (ubi supra)* (2). The question to my mind is whether, within the meaning of the statutory condition, "any subsequent insurance was effected with any other insurer." The policy of the Northern Company never attached. Its statutory condition expressly provided that "the insurer is not liable for loss if there is any prior insurance with any other insurer," etc., so that, if there was such prior insurance, the condition applied, and no insurance under the policy was effected. The condition of the appellant's policy does not contemplate a subsequent contract of insurance in fact, but a subsequent insurance which is effective. That is precisely what the Northern Company's contract never was. The attempt now to vivify this con-

(1) (1903) 34 Can. S.C.R. 191 at p. 206.

(2) [1907] A.C. 96.

tract so as to relieve the appellant from liability, in my opinion, must fail.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *James A. Hanway.*

Solicitor for the respondent: *W A. Livingstone.*

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HOUGHTON LAND CORPORATION LIMITED (PLAINTIFF) ..... APPELLANT;

AND

THE RURAL MUNICIPALITY OF RITCHOT AND JOSEPH JOYAL (DEFENDANTS) ..... RESPONDENTS.

1927
*May 5, 6.
*June 17.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Assessment and taxation—Sale of land for taxes—Action to set aside sale —Land admittedly liable for portion of the taxes—Assessment Act, R.S.M. 1913, c. 134, s. 199, as amended (as now found in Consolidated Amendments, 1924, c. 134, s. 198)—Alteration of name on collector's roll invoked as irregularity—Onus of proof as to circumstances of alteration.*

In an action to set aside a tax sale on the ground that certain amounts (claimed under the Man. *Seed Grain Act* for advances of seed grain, and under s. 473 of the Man. *Municipal Act* for boring a well) were wrongfully added on the rolls to the taxes properly payable, it was held (affirming, in the result, judgment of the Court of Appeal for Manitoba, 35 Man. R. 551) that the action was rightly dismissed, in view of s. 199 of the *Assessment Act,* R.S.M. 1913, c. 134, as amended (as now found in s. 198 of c. 134 of the Consolidated Amendments, 1924), over a year having elapsed since the sale and the treasurer's return having been made to the district registrar.

If the land was liable for some portion of the taxes for which it was sold, the ground, left open for setting aside a tax sale under said s. 199, as amended, "that the land was not liable for the taxes, or any portion thereof, for which the same was sold" is inapplicable.

History of the legislation reviewed; *Can. Nor. Ry. v. Springfield,* 30 Man. R. 82, referred to.

Where on the collector's roll it appears that a name has been substituted for that of another, as owner of land, the onus of showing that the change was improperly made rests upon the person invoking it as an irregularity.

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

1927

HOUGHTON LAND CORP. LTD. v. R.M. OF RITCHOT AND JOYAL.

APPEAL (1) from the judgment of the Court of Appeal for Manitoba (2) affirming the judgment of Mathers C.J. K.B. (3) dismissing the appellant's action to set aside a tax sale of land by the defendant municipality to the defendant Joyal. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

*E. K. Williams K.C.* and *E. F. Newcombe* for the appellant.

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

*C. H. Locke K.C.* for the respondent Joyal.

The judgment of the court was delivered by

RINFRET J.—Houghton Land Corporation Limited brought this action to annul the sale of a parcel of land by the Rural Municipality of Ritchot to Joseph Joyal. The plaintiff sought to set aside the sale not only as against the municipality but also as against Joyal.

The land was sold for taxes entered on the collector's rolls of the municipality for the years 1920 and 1921. The Houghton company alleged that certain amounts were wrongfully added on the rolls " to the taxes properly payable " upon the land for the year 1920 and that the effect was to invalidate the sale.

The amounts to which objection was taken came to be due as follows:—

In 1920, one Edward G. McGee was in possession of the land under an agreement for sale from the company. Some time during the year, the municipality, without the knowledge or consent of the company, advanced to McGee seed grain for the farm to the value of $389.81 and bored a well at a cost of $140.70. The municipality took McGee's note for the seed grain account. Under the *Seed Grain Act* (R.S.M. 1913, c. 178, s. 23),

> The amount of * * * such promissory note * * * may be entered in the collector's roll of the municipality against any land therein owned by the maker of such note, and thereafter the amount of such note and interest thereon shall be held to be taxes due and in arrear against such

(1) For report of judgment dismissing a motion to quash the appeal for want of jurisdiction, see [1927] S.C.R. 17.

(2) 35 Man. R. 551; [1926] 2 W.W.R. 51.

(3) 35 Man. R. 331; [1925] 3 W.W.R. 695.

land as if duly levied and in arrear under the provisions of "The Assessment Act."

Likewise, under s. 473 of the *Municipal Act*,

Where a municipality * * * sinks a private well * * * upon lands * * * at the request of the owners of such lands, the amount of the total cost of doing any such work may be collected by the Municipality from the respective owners of the land upon which the said work has been performed, in the same manner and to the same extent as ordinary taxes, and all such amounts, if not paid on demand, shall be entered as extra taxes against the lands of such owners respectively in the then current Collector's Roll of the Municipality and be collectable as if levied under "The Assessment Act."

The point taken by the appellant is that McGee was not the "owner" within the meaning of this legislation and that these advances, made at his sole request, were not therefore properly chargeable against the land.

The decision of that point involved the interpretation of the agreement between the Houghton Land Corporation and McGee and the construction of the relevant sections of the *Seed Grain Act* and the *Municipal Act*. Following its own previous judgment in *Leistikow* v. *Municipality of Ritchot* (1), the Court of Appeal of Manitoba, Perdue C.J. dissenting, confirmed Mathers C.J., who decided against the company's contention and dismissed the action. Dennistoun J.A., however, with whom Fullerton J.A. concurred, also based his judgment upon s. 199 of the *Assessment Act* (R.S.M. 1913, c. 134), which he held applicable in the circumstances.

In our view, this section is sufficient to dispose of the action, without the necessity of construing the other Acts and the agreement.

The sale took place on the 27th day of October, 1922. The action was brought only on the 3rd January, 1924,—or more than a year after.

Under the Manitoba statute, the municipality does not issue a tax sale deed, but a certificate of the sale is delivered to the purchaser; and, if the land is not redeemed within one year thereafter, the treasurer of the municipality forwards to the district registrar for the land titles district in which the land lies a return "showing all lands which were sold * * * and which have not been redeemed, the persons to whom sold, the amounts at which the lands were sold," etc. The purchaser then has the right to apply

(1) (1923) 33 Man. R. 302.

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HOUGHTON LAND CORP. LTD. v. R.M. OF RITCHOT AND JOYAL.

Rinfret J.

to the registrar for title to the land. A notice must be given to all persons interested, who have a further opportunity to redeem; and, if redemption is not made, or the proceedings are not stayed, a certificate of title under *The Real Property Act,* clear of all encumbrances, issues to the purchaser.

In this case, the treasurer made his return in due course to the district registrar and, in November, 1923, Joyal launched his application for title, when certificate of lis pendens was issued and filed by the present plaintiff.

Section 199 of R.S.M. 1913, c. 134, as now found in the Consolidated Amendments of 1924, c. 134, s. 198, is as follows:—

(1) Upon the expiration of one year from the day of sale, and thereafter unless and until the land is redeemed, the tax purchaser or his assignee shall, in all suits or proceedings wherein such tax sale is questioned, be *prima facie* deemed to be owner of the land.

(2) Upon the expiration of said period of one year the treasurer's return to the district registrar hereinafter provided for shall in any proceedings in any court in this province, and for the purpose of proving title under *The Real Property Act,* be, except as hereinafter provided, conclusive evidence of the validity of the assessment of the land, the levy of the rate, the sale of the land for taxes and all other proceedings leading up to such sale and that the land was not redeemed at the end of said period of one year; and, notwithstanding any defect in such assessment, levy, sale or other proceedings, no such tax sale shall be annulled or set aside except upon the following grounds and no other; that the sale was not conducted in a fair and open manner, or that the taxes for the year or years for which the land was sold had been paid or that the land was not liable for the taxes, or any portion thereof, for which the same was sold.

The words: "or that the land was not liable for the taxes, or any portion thereof, for which the same was sold" are not as clear as could be desired. They are possibly susceptible of being construed as meaning: "If any of the taxes for which the land was sold were wrongfully charged, that is a ground for setting aside the sale."

We think, however, those words mean: "The sale cannot be set aside, if the land was liable for some portion of the taxes for which it was sold." Such was the construction put upon them by Dennistoun J.A. and Fullerton J.A., with whom we agree.

The judgment of the Court of Appeal of Manitoba in *Canadian Northern Ry.* v. *Rural Municipality of Springfield* (1) is illuminative on this point.

(1) (1919)30 Man. R. 82.

In that case, land had been sold for taxes for the years 1910 and 1911. It was contended that the taxes had been properly imposed for 1910, but improperly imposed for 1911, and the court so found. Cameron J.A. delivered the judgment and gave as follows, the history of the legislation:—

In the Revised Statutes of 1892, sec. 191, ch. 101, the words setting forth the grounds on which, and no other, a tax sale could be set aside were these:

"That the sale has not been conducted in a fair, open and proper manner; or that there were no taxes due and in arrears upon such land at the time of said sale for which the same could be sold."

The issue of tax-sale deeds by municipalities was abolished and a new method of making title to land sold at tax sales by application to the district registrar was instituted in 1894 by sec. 5, ch. 21, 57 Vict. The district registrar was authorized and bound to proceed in the manner therein prescribed, and issue a certificate of title unless it was shown to his satisfaction that the land was not liable for "the taxes or any portion of the taxes for which the same was sold." This last-mentioned section was repealed by sec. 1 of ch. 21, 60 Vict. (1897) and a new set of sections substituted. By subsec. (9) of said sec. 1, the district registrar was bound to issue a certificate unless it was shown to him that the land was not liable for "any portion of the taxes for which the same was sold." This latest-mentioned section was in its turn repealed by sec. 12, ch. 35, 63-64 Vict. (1900), and another series of subsections substituted, and in subsec. (16) there are set out the only grounds upon which a tax sale can be annulled or set aside, in these words:

"That the sale was not conducted in a fair and open manner, or that the taxes for the year or years for which the land was sold had been paid or that the land was not liable for taxation for the year or years for which it was sold."

These words were carried into the 1902 revision, ch. 117, sec. 202, and appear in the revision of 1913, sec. 199, ch. 134.

The learned judge then goes on to say:—

It appears, therefore, that the words of sec. 199 on which the solution of the question before us depends have been on the statute book since 1900 only. Decisions of our Courts on the validity of tax-sale proceedings prior to that time have, therefore, little application. Apparently if the legislation, above referred to, enacted in 1894 or in 1897, had remained in force, there could have been no question as to the validity of the sale before us. But the wording of sec. 199 is different, and no doubt designedly so, and it is now open to an owner to impeach a tax sale on the ground that the land was not liable to taxation during the year or years for which it was sold. The land in this case was sold for taxes for the years 1910 and 1911, and it was not liable to taxation for those years, but only for one of them.

The holding of the Court was that a tax sale is invalid "for every purpose unless the property was at the time liable for all the taxes for which it was sold."

This judgment was rendered on the 1st December, 1919

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HOUGHTON LAND CORP. LTD. v. R.M. OF RITCHOT AND JOYAL.

Rinfret J.

At the session immediately following the judgment, the Legislature of Manitoba amended s. 199 of c. 134 of the Revised Statutes of 1913. (See Manitoba Statute, 10 Geo. V, c. 84, s. 20). It struck out the words: "or that the land was not liable to taxation for the year or years for which it was sold," on account of which the Court of Appeal had declared the sale invalid in the Springfield case. For these words the Legislature substituted the wording, as we have it now in the section applicable to the present case: "or that the land was not liable for the taxes, or any portion thereof, for which the same was sold."

It is, we think, of the utmost significance that these latter words are precisely those of the legislation of 1894, as to which in *Canadian Northern Ry.* v. *Springfield* (1), the Court of Appeal had stated that, had the law been so expressed, "there could have been no question as to the validity of the sale."

We thus have the Legislature of Manitoba, for the purpose of putting beyond question the validity of sales made for taxes by municipalities, adopting the very words which are now before us in s. 199, as it stood at the material dates of this case, apparently intending them to bear the construction put upon them by the highest court of the province. In our opinion, therefore, the interpretation of the section by Dennistoun and Fullerton JJ.A. was fully justified.

When the present action was brought, more than a year had elapsed since the date of the sale, and the treasurer's return had been forwarded to the district registrar. The Houghton company did not charge "any irregularities of machinery." It did not attack the proceedings of the sale, far less did it invoke any "substantial or fundamental defects" precluding the application of the section as was the case in *Standard Trusts Co.* v. *Municipality of Hiram* (2). It was urged later, although not made a ground of complaint in the statement of claim, that the collector's roll was altered and the name of McGee substituted as owner for that of the appellant. That is based entirely on conjectures. In the absence of any evidence that the change was improperly made, the contrary must

(1) (1919) 30 Man. R. 82. (2) [1927] S.C.R. 50 at p. 56.

be presumed. If the appellant wished to invoke this as an irregularity, it was upon it to show the circumstances. The former secretary-treasurer, Gauthier, who prepared the roll and made the change, was a witness in the case. No question whatever was put to him concerning this entry.

The only grievance against the sale is that the seed grain and the well accounts should not have been added on the collector's roll. None of the grounds set forth in section 199 were invoked here. There being no reason to preclude the application of the section, "no other" ground could be entertained by the courts of Manitoba for the purpose of annulling the sale, after the expiration of one year and after the treasurer had made his return to the district registrar. It is admitted that the land was liable for a large portion of the taxes for which it was sold. This under the statute is sufficient. With such a provision in the law, the decided cases to the effect that the inclusion in a tax sale proceeding of any unlawful amount renders the whole sale void are clearly inapplicable.

We must deal with this case purely and simply as an action to set aside the tax sale, irrespectively of the right of redemption or of any other recourse by the Houghton Land Corporation against the municipality, as to which we express no opinion. We think, in view of s. 199, the sale to Joyal must stand.

The appeal should be dismissed with costs. The respondent Joyal should have his costs against the appellant.

*Appeal dismissed with costs.*

Solicitor for the appellant: *E. Browne-Wilkinson.*

Solicitors for the respondent municipality: *Munson, Allan, Laird, Davis, Haffner and Hobkirk.*

Solicitor for the respondent Joyal: *C. M. Boswell.*

1927

*May 13.
*June 17.

THE DOMINION OF CANADA GUARANTEE AND ACCIDENT COMPANY, LIMITED (DEFENDANT)..... } APPELLANT;

AND

THE HOUSING COMMISSION OF THE CITY OF HALIFAX (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL (PER SALTUM) FROM THE SUPREME COURT OF NOVA SCOTIA (CHISHOLM J.)

*Guarantee—Insurance against embezzlement or theft by employee—Renewal of policy—Statements by insured forming basis of renewal—Statement untrue in fact, though made in good faith and in ignorance of untruth—Conditions of contract—Right of recovery.*

Defendant issued a policy insuring plaintiff against pecuniary loss by embezzlement or theft by an employee in connection with his duties. One of the conditions (expressed to be conditions precedent to plaintiff's right to recover under the policy) was that "This policy may be continued in force by renewal receipt upon the company's form, and, if so continued, the material statements made in writing upon the application for this policy shall be deemed to be repeated at the time of such renewal, and to form the basis of such renewal, together with any further material statements made on the occasion of such renewal." For the purpose of a renewal, plaintiff certified to defendant that the employee "during the year * * * performed his duties faithfully and satisfactorily. He is not at present in arrears or default." The employee was in fact in arrears and default at the time, but the certificate was made without knowledge of this and without fraud.

*Held,* plaintiff could not recover under the policy; it was renewed on the faith of an express declaration, the truth of which was made a condition precedent to liability attaching, and which was untrue in fact; it was no answer to say that the declaration was made in good faith and in ignorance of its untruth. *Railway Passengers Assur. Co.* v. *Standard Life Assur. Co.*, 63 Can. S.C.R. 79, referred to.

APPEAL, *per saltum,* by the defendant from the judgment of Chisholm J. in the Supreme Court of Nova Scotia, holding the plaintiff entitled to recover from the defendant the sum of $3,851.85 on a certain guarantee bond issued by the defendant insuring the plaintiff against pecuniary loss by embezzlement or theft on the part of one of its employees in connection with his duties. The material

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

facts of the case are set out in the judgment of Newcombe J. now reported. The appeal was allowed with costs.

*G. Grant K.C.* and *S. Jenks K.C.* for the appellant.

*F. H. Bell K.C.* for the respondent.

The judgment of Anglin C.J.C. and Mignault and Lamont JJ. was delivered by

MIGNAULT J.—I accept in full the statement of the pertinent facts made by my brother Newcombe in his judgment which I have had the advantage of reading. The policy was renewed on the faith of an express declaration, the truth of which was made a condition precedent to liability attaching, and which is shewn to have been untrue in fact. It is no answer to say that this declaration was made in good faith and in ignorance of its untruth. On the authority of *Railway Passengers Assurance Co.* v. *Standard Life Assurance Co.* (1), the appeal must be allowed and the action dismissed.

The judgment of Newcombe and Rinfret JJ. was delivered by

NEWCOMBE J.—The plaintiff, respondent in this appeal, is the Housing Commission of the City of Halifax, constituted under c. 4 of 1919 of the Statutes of Nova Scotia, an Act to provide for the erection of dwelling houses and incorporation of housing companies. The defendant, appellant, is the Dominion of Canada Guarantee and Accident Company, Limited, which issued a policy dated 28th March, 1921, insuring the good conduct for one year from 18th February, 1921, of Thomas M. Hayes, who was employed by the Commission in the capacity of secretary. It was recited by the policy that the Commission had made certain statements in writing to the company in the application, and it was agreed,

in consideration of the material statements, warranties and conditions contained in the said statements, which it is agreed shall be the basis and form part of this contract of insurance, and of the sum of $25,

to insure the employer, in the sum of $5,000, against pecuniary loss

by any embezzlement or theft on the part of the said employee in connection with any of the duties of the said employee mentioned in said application which shall have been discovered and notified to the com-

(1) (1921) 63 Can. S.C.R. 79.

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pany during the continuance of this agreement, or, in case of the death, dismissal or retirement of the employee, notified to the company, within three months from the death, dismissal or retirement.

The conditions set out are expressed to be "conditions precedent to the right of the employer to recover under this policy." By the 10th of these conditions it is stipulated that

> This policy may be continued in force by renewal receipt upon the company's form, and, if so continued, the material statements made in writing upon the application for this policy shall be deemed to be repeated at the time of such renewal, and to form the basis of such renewal, together with any further material statements made on the occasion of such renewal.

The policy was renewed in the company's form from 18th February, 1922, to 18th February, 1923, and in like manner the policy was again renewed from 18th February, 1923, to 18th February, 1924. During the latter year irregularities and embezzlement or theft on the part of the employee were discovered in connection with his duties. Deficits had been running or accumulating for a considerable period. Hayes had been in the employment of the Commission since 19th June, 1921. The city auditor at Halifax, who was discharging the duties of auditor for the Commission, discovered in October, 1922, that he was not depositing his receipts; the auditor thought the deficiency was about $1,800, but this amount was made up, after some delay, and he did not inform the Commissioners. Hayes was suspended by resolution of the Commission of 21st August, 1923, upon report of the special auditors whom the Commission had employed to investigate his accounts, and it was directed that the defendant company should be notified of a shortage, as then found, of $3,700. The auditors, in their report of 5th October, 1923, which is one of the documents in evidence, state that:—

> A reconciliation of all cash receipts and disbursements as shown by the Cash Book with the deposits and withdrawals as shown by the Bank statements, disclosed the fact that all cash entered in the Cash Book up to October 31, 1922, had not been deposited in the bank as received. The under-deposit in bank was apparently made up in November, 1922, during which month the deposits were approximately $3,300 in excess of the receipts shown by the Cash Book. We understand that the additional deposits were made as the result of the insistence of the City Auditor that the bank deposits should be brought up to date, but so far as we can ascertain the matter was not reported to the Commission.

It appears, however, from a statement of moneys received by Hayes, which have not been restored, that these

include receipts month by month from August, 1922, until August, 1923.

At the trial the plaintiff recovered $3,851.85, and there is an appeal *per saltum* to this Court. The learned trial judge found that the plaintiff Commission had no knowledge of the dishonesty of Hayes until the special auditors made their resport in August, 1923, and it was upon this finding that the judgment proceeded.

Now it is not disputed that the Commission had not been informed of any of these deficits or irregularities, and it is admitted that there is no evidence of fraud against it. My difficulty about the case arises from the contract, and some additional facts which I am going to mention.

For the purposes of the first renewal, Mr. Brookfield, the Chairman of the Commission, certified to the company, under date of 20th February, 1922:—

Bond No. 058054.

I certify that Thomas M. Hayes, of Halifax, N.S., has, during the year ended on the 18th day of February, 1922, performed his duties faithfully and satisfactorily. He is not at present in arrears or default. His accounts have been examined up to the 1st day of December, 1921, and found correct. The examination was made by W. W. Foster, City Auditor, Halifax, N.S.

I know nothing of any habit or past deportment unfavourably affecting his title to general confidence, or why suretyship guaranteeing his honesty should not be granted to him.

And, when the policy came to be renewed the second time, Mr. Healey, the Vice-Chairman of the Commission, gave a certificate to the company, dated 21st February, 1923, in the same terms, with reference to the year ended 18th February, 1923, mentioning 17th February of that year as the date up to which the accounts had been examined by the city auditor. Now according to my interpretation of the contract, these certificates are intended to operate under the 10th clause which I have quoted, and in which it is provided that, if the policy be continued upon the company's form, as it was on both these occasions, the material statements made in writing upon the application, " together with any further material statements made on the occasion of such renewal," shall form the basis of such renewal. I am unable to escape the conclusion that the certificates must be regarded as " further material statements " within the meaning of this clause, and therefore they go to

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constitute the basis of the renewals. It is stated explicitly that "He is not at present in arrears or default." This is the language of warranty. At the argument I was inclined to think that the words might, in the light of the circumstances and context, be held to go no further than the information and belief of the officer who signed, and I was not indisposed to yield to the view that, inasmuch as an employee might be dishonest and would, if he misappropriated money of his employer, endeavour to conceal it, and as therefore there might be default or arrears for the preceding year which had not been discovered, and against which it was a stipulated purpose of the expiring policy to indemnify, it could not reasonably be supposed that the insurer would exact an absolute undertaking, or that the insured would assent to it, or that the Commission, in order to have a renewal of the policy, would make a representation opposed to its right to recover for losses already incurred; the undertaking construed in its strict sense seems to be unreasonable. But, after more careful consideration, the contract of the parties seems to be plainly expressed, and I have come to the conclusion that it admits of only one interpretation. Hayes was in arrears and default on both occasions when these certificates were made. A material condition of the contract was not satisfied. Good faith, even of the utmost, is no defence against a breach of warranty.

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

*Appeal allowed with costs.*

Solicitor for the appellant: *L. A. Lovett.*

Solicitor for the respondent: *F. H. Bell.*

THE ACADIA COAL COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

ANGUS MACNEIL (PAINTIFF) ..... RESPONDENT.

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*May 12.
*June 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

*Negligence—Railways—Children walking on tracks killed by train—Licensees—Duty of railway company—Statutary prohibition to walk on tracks—Nova Scotia Railways Act, R.S.N.S. 1923, c. 180, s. 268 (1).*

Plaintiff occupied a house belonging to defendant in its railway yard. Defendant's train, while working in the yard, ran over and killed two of plaintiff's children who were walking on the tracks on their way to school. The train was moving reversely and there was no one on the car in front to look out. Plaintiff sued for compensation under *The Fatal Injuries Act,* R.S.N.S. 1923, c. 229. The jury found, among other things, that the children were on the tracks by defendant's permission, and that the accident was caused by defendant's negligence, and judgment was entered for plaintiff for damages, which was affirmed on appeal to the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 154). On appeal to this Court it was urged that, by reason of the prohibition in s. 268 (1) of *The Nova Scotia Railways Act* (R.S.N.S. 1923, c. 180) to walk upon the tracks, there could be no lawful permission granted by defendant, and, moreover, that, if the permission found were in any way effective, it conferred on the children no rights beyond those of bare licensees, and therefore there was, in the circumstances, no negligence, as defendant did nothing other than to carry on its shunting operations within its yard in the ordinary and usual manner.

*Held,* that the judgment below should be sustained; conduct which is negligence does not cease to be so if or because it is ordinary and usual; the children's presence on the tracks by defendant's permission was an element which should have influenced the operation of the train; defendant was bound to use ordinary care not to run over them, and that duty it did not fulfil; s. 268 (1) of *The Nova Scotia Railways Act* did not affect the case; the decisions in *G.T.R.* v. *Anderson* (28 Can. S.C.R. 541) and *Maritime Coal, etc., Co.* v. *Herdman* (59 Can. S.C.R. 127), while governing in identical cases, should not be extended; the statutory prohibition should not be taken to have the effect of relieving a railway company from liability for damages caused by negligent operation to persons who would have been entitled in the absence of the clause; if it applied to the children, and if, as found, they had permission to walk along the tracks, defendant ought not to be allowed to maintain trespass against them contrary to the fact, or to escape the responsibility which it incurred by its agreement to treat them as licensees; moreover, the children being only seven and nine years of age, and there being no finding as to their capacity

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

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for crime, the case could not be treated upon the footing that they were bound by the statute, nor could the principle that knowledge of the law is presumed be invoked against them.

APPEAL by the defendant (by special leave granted by the Supreme Court of Nova Scotia *en banc*) from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing its appeal from the judgment entered upon the findings of the jury, in an action, tried before Carroll J. with a jury, to recover from the defendant compensation to the plaintiff and his wife under *The Fatal Injuries Act*, R.S.N.S. 1923, c. 229, for the death of two children of the plaintiff who were run over and killed by a train belonging to the defendant. The material facts of the case are sufficiently stated in the jugdment now reported. The appeal was dismissed with costs.

*S. Jenks K.C.* and *H. Ross K.C.* for the appellant.

*R. Douglas Graham* and *J. Doull* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The Acadia Coal Co. Ltd., engaged in the business of coal mining in Pictou Co., Nova Scotia, operates in connection with its mines, a railway at the town of Stellerton, under the authority of *The Nova Scotia Railways Act*, R.S.N.S., 1923, c. 180. It is the defendant and appellant in this action. Angus MacNeil, the plaintiff, is a coal miner in the employ of the company, and, at the time of the accident, was, and had been for several years, occupying with his family, a miner's house belonging to the company which was situate in the company's railway yard, near the entrance of the Allan shaft of the company's workings at Stellerton. At about, or shortly before, nine o'clock in the morning of 1st December, 1924, a train belonging to the company, in charge of its employees, which was working in the yard, ran over and killed two of the plaintiff's children, Frank and Evelyn, aged respectively seven and nine years, who were passing through the yard on their way to school. The action is brought to recover compensation under *The Fatal Injuries Act*, R.S.N.S., 1923, c. 229.

(1) (1926) 59 N.S. Rep. 154.

The important facts are not in dispute. The plaintiff's house is situate a short distance to the eastward of the most southerly of the tracks. The school which the children attended is to the northward, somewhat beyond the northern limit of the yard, and there is a trail or roadway, leading northwesterly from the house in the direction of the school, which crosses the tracks at a considerable distance from the house and connects with the highway from Stellerton to New Glasgow. It was the habit of the children generally, when late for school, to walk along the tracks from this crossing, as by that way the distance was shorter and they found better walking. On the morning in question they were somewhat late and, approaching the crossing, they turned off the trail to the northward, pursuing their usual course. They were accompanied by an elder sister thirteen years of age. The morning was clear, but there had been a fall of several inches of snow the night before. While the children were on their way, a light shunting locomotive came down the main track of the yard from the northward, passing a switch which is situate between the place of the accident and the crossing. Here the engine stopped and backed into no. 2 track, which runs thence in a northwesterly direction from the main track. On this branch track or siding the tender of the engine was hooked to a large car which is thus described in the evidence:—

Q. When you got up there did you hook on some cars?—A. We hooked on one car.

Q. That is on to the tender end of your engine?—A. Yes.

Q. What would that be, a big gondola?—A. Yes, I call it an iron car.

Q. It is a large coal box car?—A. It is an open car.

Q. It is one of the large varieties?—A. It is a 50-ton car.

Then the engine, thus connected with car, moved forward again on to the main line, passing the switch, where it reversed and proceeded again to the northward upon the main line and continued thereon, headed by the car, until it ran over the children, who were then walking on this line, going northward to school. Wilda MacNeil, the eldest of the three, was thrown from the track and injured, but the two small children who were ahead, walking hand in hand, were both killed. There were a conductor, engineman and fireman on the train, and when the engine was coming down the main track, going southerly, the con-

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ductor, who was in charge, and the fireman had seen the three children on their way, going northward in the yard, near the railway, on the east side. Cummings, the conductor, gives the following evidence:—

Q. When going down and standing on the front of the engine did you see the MacNeil children?—A. Yes, I saw the MacNeil children.

Q. That is the little boy, Frank, and Evelyn and Wilda?—A. Yes, I saw the three of them.

Q. You knew the children, you were familiar with them?—A. Yes.

Q. You knew where they lived?—A. Yes.

Q. I suppose you would be seeing them in the course of your duty nearly every day?—A. Mostly every day, yes.

Q. You would be shunting back and forth there?—A. Yes, most of the time.

Q. The weigh scales are quite handy the MacNeil house almost opposite?—A. Yes, not far from it.

The trouble seems to have been that the large car, which was at the head of the train, obstructed the view of the tracks from the engine, and there was no one on the car to look out. The conductor, instead of going to the front of the car, when the train started to move northerly from the switch, as he should have done, says, speaking of this occasion:—

Q. Then what happened, did you get on the train?—A. I got on the engine, on the side of it.

Q. What do you call that, the steps into the cab?—A. Yes.

Q. When you got on the engine you would then be on the western side of the engine, that is north looking towards New Glasgow, you would be on the western side of the engine?—A. Yes.

Q. The side on which you had seen the children would be the other side, the eastern side?—A. Yes.

Q. When you were then in that position your train would be running reversely?—A. Yes, tender first.

Q. And in front of your tender was your gondola car?—A. Yes.

Q. Was there any person standing on the front end of the gondola car?—A. No.

In another place he explains that he got on the engine in order to give instructions to the engineman as to what was to be done with the car which they were shunting, and it was while he was in conversation with the engineman in the cabin of the locomotive that they felt the shock and realized that an accident had happened.

There was a jury in the case and the learned judge, at the conclusion of his charge, to which no objection is taken before us, submitted questions which the jury answered. The substance of the findings is that the accident was caused by the negligence of the company, which consisted

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in the fact that the conductor, knowing children to be in the vicinity, should have given his engineer instructions, if necessary, before putting his train in motion, and should have taken his place on the gondola, where he could have kept a lookout; that there was no contributory negligence on the part of the deceased children; that, if there were contributory negligence on their part, the defendant could have avoided the accident by the exercise of ordinary care; that the children were at the time of the accident upon the track of the defendant company by permission of the company; that up to the time of the accident the public habitually travelled along the route taken by the children on the morning of their death; that the defendant company had knowledge thereof; and that the damages were $1,250, of which $250 were allowed to the father and $1,000 to the mother. Upon these findings judgment was entered for the plaintiff.

Upon appeal to the Supreme Court of Nova Scotia *en banc* the usual objections were taken. It was alleged that the findings were against the evidence, perverse and unreasonable; that evidence had been improperly received and rejected, and that there was misdirection. A question had been raised at the trial as to the effect of ss. 1 of s. 268 of *The Nova Scotia Railways Act,* which provides that:

> Every person, not connected with the railway, or employed by the company, who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars.

And it was contended that the children must therefore be treated for the purposes of this action as trespassers.

The appeal was heard, *en banc;* the judges were Chisholm, Mellish and Graham JJ., and the appeal was dismissed. Upon the question of contributory negligence Mellish J., who pronounced the judgment, said that there was sufficient evidence that the defendant by the exercise of ordinary care could have avoided the accident, notwithstanding any negligence on the part of the children, and that the real cause of the accident was the negligence of defendant's servants in keeping no lookout, in which case there was no room for a finding of contributory negligence.

Upon the appeal to this Court two questions only were pressed. It was urged that, by reason of the statutory prohibition to walk upon the tracks, there could be no

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lawful permission granted by the company, and the appellant relied upon the cases of *Grand Trunk Ry. Co.* v. *Anderson* (1), and *Maritime Coal, etc., Co.* v. *Herdman* (2). It was contended, moreover, that, if the permission found were in any way effective, it conferred upon the children no rights beyond those of bare licensees, and therefore there was, in the circumstances, no negligence, for it was said that the appellant did nothing other than to carry on its shunting operations within its railway yard in the ordinary and usual manner.

I do not think, however, that conduct, which is negligent, ceases to be so, if, or because, it is ordinary and usual. The presence of the children upon the tracks by the company's permission was an element in the situation which should have influenced the operation of the train, but which seems to have been entirely disregarded. I cannot escape the conclusion that the appellant company owed a duty to the children which, in order to maintain the present judgment, need be put no higher than this, that the company, in the operation of its train upon the track which the children were using by its consent, was bound to use ordinary care not to run over them, and that duty it did not fulfil.

The house in which the plaintiff lived with his family was in the defendant's railway yard. It was not reached by any highway, and the father had to pass through the yard to reach the shaft. His children likewise, if they went to school, had to cross the yard, and could conveniently go by the way which they were using at the time of the accident; this necessarily brought them upon the tracks. There were no signs, fences, or obstructions anywhere in the locality to direct the children in their course or to prevent them choosing their own course. I do not suppose that the family were obliged to live where they did. What the plaintiff says is that he formerly, while in the appellant's employ, lived at Westville, but that he went to the company and rented this house. "I was trying to get a house down there and this is the house they gave me." That was the situation in which the family was placed and which it was permitted to ocupy. The children would naturally take the most convenient way, and if they took the more direct route, which they were following when the accident

(1) (1898) 28 Can. S.C.R., 541. (2) (1919) 59 Can. S.C.R., 127.

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occurred, as was natural and not unusual, they came to a place where their way took them upon the tracks. In these circumstances the appellant's employees projected a blind train to follow the children reversely upon the track which they were pursuing, when they should reasonably have known that the children were there, and that no opportunity could be afforded to see or to warn them, or to stop, if necessary to avoid an accident. This sort of conduct, in the circumstances, is unreasonable and may, I think, be described as negligence of a grave character. One sees in the evidence a case for the application of a very just observation by Mellish J., in delivering the judgment of the Court below, when he said that "a railway company, notwithstanding the duty of all persons not to go upon its line, may so use its premises by not fencing them or otherwise as to practically invite children to use them."

The jury is upheld by the Court of Appeal in its finding that permission of the company to use the tracks is to be inferred from the facts and circumstances of the case, and we cannot justifiably set aside this concurrent finding. Indeed the fact of permission is, as intimated at the hearing, accepted by the appellant for the purposes of the appeal, and therefore, apart from the statute, there is liability.

As to the statute, I do not consider that it affects the case. The decisions of this Court in *Grand Trunk Ry. Co.* v. *Anderson* (1), and *Maritime Coal, etc., Co.* v. *Herdman* (2), to which we are referred, would govern in identical cases, but in my view of the law, I am not disposed to extend them. It seems unlikely that the subsection is framed with the intention of relieving the railway company from the consequences of negligent operation, or from liability for damages thereby caused to persons who would have been entitled in the absence of the clause. If it applied to the children who were killed, and if, as found by the jury, they had permission to walk along the tracks, the company ought not to be allowed to maintain trespass against them contrary to the fact, or to escape the responsibility which it incurred by its agreement to treat them as licensees. There are, I think, as said by Lord Sumner, with reference to a New Zealand statute, in *Rex* v. *Broad* (3), cogent reasons for thinking that the subsection was framed *alio intuitu*.

(1) (1898) 28 Can. S.C.R., 541. (2) (1919) 59 Can. S.C.R., 127.
(3) [1915] A.C. 1110, at p. 1118.

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The present case is, however, readily distinguishable. Children aged seven and nine years have by the common law the benefit of something in the nature of a presumption that they have not sufficient capacity to know that they are doing wrong. The presumption, it is true, may be rebutted by evidence; but although the parents of the children, when endeavouring to establish a case for damages, testified that their children were bright and intelligent, the defendant company neglected at the trial to obtain a finding as to their capacity for crime, and I do not think that we would be justified to make such a finding. Therefore the case cannot be treated upon the footing that they were bound by the statute, or that the principle that knowledge of the law is presumed can be invoked against them. The provision of the Criminal Code of Canada as to the competency of young persons is to be found in s. 18 of the *Criminal Code,* which is thus expressed:—

> No person shall be convicted of an offence by reason of an act or omission of such person when of the age of seven, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

For the reasons stated above, and in the judgment of the Court *en banc,* I am of the opinion that this appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *Hugh Ross.*

Solicitor for the respondent: *R. Douglas Graham.*

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ALFRED C. REYNOLDS AND CLARK WALLACE REYNOLDS, EXECUTORS (PLAINTIFFS) ..... } APPELLANTS;

*May 31.
*June 1.
*June 17.

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

MARY CRAIG (PLAINTIFF) ..... APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

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

*Negligence—Railways—Train striking automobile at highway crossing—Question whether statutory signal given by train—Interference on appeal with jury's findings—Maintaining of bank on side of railway—Contributory negligence—New trial.*

R. and C., while in a motor car driven by R., were injured by defendant's train striking the car at a highway crossing, and sued for damages. The jury found that defendant was guilty of negligence causing the accident, its negligence being "whistle not blown at whistling post, maintaining banks that obstruct view of train coming from south"; that R. was guilty of contributory negligence, being "partially to blame in neglecting to ascertain the time that train was due at crossing," his degree of fault being 25 per cent.; and that C. was not guilty of contributory negligence. Judgment was rendered, on the findings, for damages, those of R. being 75 per cent. of his total damages assessed. The Appellate Division, Ont. (59 Ont. L.R. 396) reversed the judgment, holding that the evidence was overwhelming that the whistle was blown, and it was a proper case to interfere with the jury's finding; that the maintaining of the bank in its original or heightened condition was not negligence in law; and that the whole cause of the accident was the negligence of R. and C. and another occupant of the car. R. and C. appealed to this Court.

*Held:* The evidence was not so overwhelmingly in favour of the view that the whistle was blown at the whistling post that the judgment which set aside the jury's finding to the contrary should be sustained (*Laporte* v. *C.P.R.* [1924] S.C.R. 278). As to the bank, even if its existence along the railway, caused by the cutting made through a hill and any necessary cleaning out of the ditch, and, in normal cleaning, the throwing of materials on the side of the bank, increasing its height, could be regarded as negligence in law, there was no foundation in fact for the finding that it obstructed the view of a

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

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train coming from the south; what obstructed the view was the hill itself. As the wrongful finding of the latter ground of negligence against defendant (in addition to the other ground, sufficient to import liability, that the whistle was not blown at the whistling post) might have influenced the jury in their apportionment of the damages according to the degrees of fault as between R. and defendant, a new trial of R.'s action was directed. Owing to the unsatisfactory character of the jury's answer as to the nature of R.'s contributory negligence, the new trial should not be restricted to apportionment of damages, but should take place generally on all issues. There was nothing to justify a finding of contributory negligence against C., and the judgment at trial in her favour was restored.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which allowed the defendant's appeal, and dismissed the plaintiff Reynolds' cross-appeal, from the judgment entered at trial upon the findings of the jury, in actions brought, one by Reynolds and his wife, and the other by Mary Craig and Jeannette Craig, against the defendant for damages for injuries suffered by the plaintiffs by reason of the motor car in which they were riding, and which was driven by the plaintiff Reynolds, being struck by the defendant's train at a highway crossing. The actions were tried together before Grant J. and a jury. The jury found that the defendant was guilty of negligence causing the accident, its negligence being "whistle not blown at whistling post, maintaining banks that obstruct view of train coming from south"; that Reynolds was guilty of contributory negligence, being "partially to blame in neglecting to ascertain the time that train was due at crossing"; that the degrees of fault were: of Reynolds, 25 per cent., and of the defendant, 75 per cent.; that the other plaintiffs were not guilty of contributory negligence. Judgment was entered in favour of Reynolds for $8,175, being 75 per cent. of the total damages ($10,900) assessed to him by the jury, and in favour of Mary Craig and Jeannette Craig for $1,100 and $50 respectively, the total damages assessed to them. No damages were assessed to Mrs. Reynolds.

On appeal, the Appellate Division (1) held that on the whole the evidence was overwhelming that the proper signals were given by defendant, and that it was a proper case for it to interfere with the jury's findings in this re-

(1) (1926) 59 Ont. L.R. 396.

spect; that the maintaining of the bank in its original or heightened condition was not negligence in law; that the whole cause of the accident was the negligence of Reynolds and the Craigs; and the defendant's appeal was allowed and the actions dismissed. Reynolds' cross-appeal as to the finding of contributory negligence against him was dismissed.

The executors of the estate of the plaintiff Reynolds, who died since the trial (the executors having procured an order of revivor), and the plaintiff Mary Craig, appealed to this Court.

The material facts of the case are sufficiently stated in the judgment now reported.

*A. B. Cunningham K.C.* for the appellants.

*W. N. Tilley K.C., A. MacMurchy K.C.* and *J. D. Spence* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—In this case two actions by the appellants against the Canadian Pacific Railway Company were tried together before Mr. Justice Grant and a jury. The verdict was in favour of the appellants, but was set aside by the Second Appellate Divisional Court and the actions were dismissed.

The plaintiff Reynolds (now represented by his executors, for he died since the trial) was driving a Ford motor car along Craig road in the county of Frontenac, on November 13, 1925, his wife occupying with him the front seat and Mrs. Mary Craig and her daughter the rear one. They all resided in the vicinity, and knew that a train of the defendant company travelling to the north would cross Craig road, at a point called Doucet's Crossing, at about half-past twelve in the afternoon, and they had left their homes shortly before that hour. The railway line (the old Kingston and Pembroke single-track railway, acquired by the defendant in 1913), immediately to the south of the crossing, passes through a cutting made in the side of a hill, the east bank of which, at the time of the accident, was said to have intercepted the view of a train coming from the south, and all the plaintiffs must have known that the crossing was dangerous. Reynolds approached the crossing without reducing

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his speed, which he stated was about twelve miles an hour. When he was twenty or twenty-five feet from the rails, Mrs. Craig called out " There's the train." Reynolds applied the brakes, but the car had almost touched the rails when it stopped, and in Reynolds' endeavour to back it before releasing the brakes, his engine stalled, so that the front part of the car was struck by the pilot of the locomotive and the plaintiffs were injured. They all claimed damages, Reynolds and his wife in one action, and Mrs. Craig and her daughter in another.

Three grounds of negligence were particularized: 1. that the locomotive had not whistled at the whistling post a quarter of a mile from the crossing; 2, that the bell had not rung; 3. that the persons in charge of the railway threw up or maintained an embankment on the east side of the track in a manner to obscure the view of a train coming from the south.

The learned trial judge instructed the jury that if they found both the plaintiffs and the defendant guilty of negligence contributing to the accident they should, under *The Contributory Negligence Act*, Statutes of Ontario, 1924, c. 32, apportion the total amount of the damages according to the degree in which each party was in fault.

The jury answered the following questions put to them by the learned trial judge:—

1. Question: Was the defendant railway guilty of negligence causing the accident?

Answer: Yes.

2. Question: If so, what was that negligence; answer fully, giving every negligence?

Answer: Whistle not blown at whistling post, maintaining banks that obstruct view of train coming from south.

3. Question: Could the plaintiff, Thaddeus L. Reynolds, by the exercise of reasonable care, have avoided the accident?

Answer: Yes.

4. Question: If so, in what respect did he fail to exercise such reasonable care? Answer fully.

Answer: Partially to blame in neglecting to ascertain the time that train was due at crossing.

5. Question: Could the plaintiffs, other than T. L. Reynolds, by the exercise of reasonable care, have avoided the accident?

Answer: No.

The seventh question asked the jury to assess the total damages of each of the plaintiffs. The answer was:—

T. L. Reynolds, $10,900.
Sarah F. Reynolds. No damages given at all.
Mary Craig, $1,100.
Jeannette Craig, $50.

8. Question: If you find that the plaintiffs, or any of them, failed to exercise reasonable care contributing to the accident, what do you find were the degrees of fault?

Answer: (*a*) of the plaintiff T. L. Reynolds—25 per cent.
(*b*) of the other plaintiffs. Nothing.
(*c*) of the defendant railway—75 per cent.

The learned trial judge called the attention of counsel to the unsatisfactory character of the answer to question 4, but neither of them asked the judge to direct the jury to reconsider their answer in order to have the matter made clear.

On the findings judgment was rendered in favour of Reynolds for $8,175, being 75 per cent. of his damages, and in favour of Mary Craig and Jeannette Craig for $1,100 and $50 respectively.

The defendant having appealed to a divisional court, the plaintiff, T. L. Reynolds, cross-appealed seeking to have the finding of contributory negligence against him set aside. The main appeal was allowed and the two actions were dismissed. The cross-appeal of T. L. Reynolds was rejected.

Reynolds' executors and Mary Craig alone have appealed from this judgment. There is no appeal by Jeannette Craig.

With great respect, we think that the judgment of the appellate court setting aside the finding of the jury that the locomotive had not whistled at the whistling post as required by the statute cannot be sustained. Not only was there evidence, usual in such cases, that the whistle had not been blown at the statutory distance from the crossing, given by persons who deposed that they were paying attention and were in a position to hear and would

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have heard had it been sounded, but there was not a little confusion on the part of some of the witnesses—notably Walworth, Margaret Doucet, Clow and wife, and Kenyon —as to whether there had been more than one whistle signal given before the train passed over the crossing and as to whether the signal, if only one, was given at the whistling post or immediately before the accident when the train was only a few yards from the crossing. The questions whether more than one signal had in fact been given and whether a whistle signal had been sounded at the whistling post, as prescribed by the statute, could not properly have been withdrawn from the jury, and the evidence, in our opinion, is not so overwhelmingly in favour of the view that the statutory signal was given that we should sustain the judgment setting aside the jury's finding to the contrary (*Laporte* v. *Canadian Pacific Ry. Co.* (1).) Scores of verdicts based on similar evidence have been sustained on appeal.

As to the other ground of negligence found by the jury, that the defendant had maintained an embankment on the east side of the railway in a manner to obscure the view of a train coming from the south,—after a full hearing and consideration of the evidence relied on by the parties, we incline to the view that even if the existence of the bank along the railway, caused by the cutting made through the hill and any necessary cleaning out of the ditch, could be regarded as negligence in law, there was no foundation in fact for the finding that the bank maintained by the railway obstructed the view of a train coming from the south. The construction of the railway at this point no doubt required that the hill should be cut through. It is true that some witnesses asserted that the east bank of this cutting was increased in height by throwing on it materials taken from the ditch when from time to time it was cleaned out. But we are not in position to say that the defendant company in any way acted negligently with respect to the sides of the cutting, even granting that some material may have been thrown on either bank in the normal cleaning out of the ditches. Moreover the photographs filed at the trial graphically shew that what obstructed the view of the railway from the approach by Craig road, was not the east-

(1) [1924] S.C.R. 278.

ern bank of the cutting, but the hill itself which extends beyond the right of way of the defendant, and is higher on the adjacent property than it is on the railway right of way.

We think that the wrongful finding of this ground of negligence against the defendant (in addition to the other fault found by the jury, sufficient to import liability, that the locomotive had not whistled at the whistling post), may have influenced the jury in their apportionment of the damages according to the degrees of fault as between T. L. Reynolds and the defendant. We have therefore come to the conclusion that a new trial of Reynolds' action must be directed, which shall proceed as if this action had been brought by his executors under the Revised Statutes of Ontario, 1914, c. 151. The unsatisfactory character of the answer of the jury to question 4 renders it advisable that the new trial be not restricted to the apportionment of damages, but should take place generally on all issues. This does not mean that we think that Reynolds should be absolved from contributory negligence in approaching the crossing as he did. We express no opinion on that point which will be a matter for the jury's consideration.

We see nothing that could justify a finding of contributory negligence against Mary Craig, who has obtained leave to appeal, her recovery being under the appealable amount. Her appeal, therefore, will be allowed with costs here and in the appellate court, and the judgment of the trial court in her favour restored.

Reynolds' executors should have their costs in this court but should pay the defendant's costs in the Appellate Divisional Court, with set off. Costs of the abortive trial in Reynolds' case will abide the event of the new trial.

*Appeals allowed with costs. New trial ordered of Reynolds' action.*

Solicitors for the appellants: *Cunningham & Smith.*

Solicitors for the respondent: *MacMurchy & Spence.*

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*May 13, 16.
*June 17.

IN THE MATTER OF THE AUTHORIZED ASSIGNMENT OF HOTEL DUNLOP, LIMITED, DUNLOP BROS., LIMITED, J. T. DUNLOP, DOING BUSINESS UNDER THE FIRM, NAME AND STYLE OF HOTEL DUNLOP, LIMITED, DUNLOP BROS., LIMITED, DUNLOP BROS., DUNLOP HOTEL, OR HOTEL DUNLOP, AUTHORIZED ASSIGNOR.

PAUL C. QUINN, AUTHORIZED TRUSTEE.....APPELLANT;

AND

HERBERT GUERNSEY, LANDLORD.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION, SITTING IN BANKRUPTCY

*Bankruptcy—Landlord and tenant—Bankruptcy of tenant—Extent of landlord's right to priority over other creditors—Bankruptcy Act (D., 1919, c. 36), s. 52, as enacted 1923, c. 31—New Brunswick Act Respecting Landlord and Tenant, ss. 47, 48, 49, 51, as enacted 1924, c. 30—"Trader"—"Retail merchant"—"Ostensible occupation."*

D. conducted and managed an hotel, and in the outer lobby thereof conducted a cigar stand and sold cigars, cigarettes and tobacco, both to guests and to the general public, and at the rear of the premises he sold beer to the general public at a bar. D. made an assignment in bankruptcy. His landlord had previously issued a distress warrant for 11 months rent.

*Held,* D. was a "retail merchant" and also a "person who, as his ostensible occupation, bought and sold merchandise ordinarily the subject of trade and commerce," and was, therefore (under either of such descriptions), a "trader" within s. 47 of the New Brunswick *Act Respecting Landlord and Tenant,* as enacted 1924, c. 30, and, therefore, under the application of s. 48 of said Act and of s. 52 of the *Bankruptcy Act* (D. 1919, c. 36) as enacted 1923, c. 31, his landlord's priority for rent over other debts was limited to three months rent accrued due prior to the date of the assignment.

Judgment of the Supreme Court of New Brunswick, Appeal Division, reversed, and judgment of Barry C.J. restored.

A person may be held to be a "trader" although he has, at the time he carries on his trading, another occupation which is his chief means of livelihood; and, it being shown that D. sold cigars, etc., to the public generally, the *quantum* of his trading therein was immaterial in determining whether or not he was a "trader." Cases reviewed.

An "ostensible occupation" is the employment of a person's time in a certain calling or pursuit so openly and conspicuously that the members of the public coming in contact with him would know that he was following that calling or pursuit. It does not import an exclusive, nor a chief, occupation, but it must be in the general way of business and not an intermittent or spasmodic employment.

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

APPEAL, by special leave granted by the Chief Justice of this Court (1), from the judgment of the Supreme Court of New Brunswick, Appeal Division, which, reversing the judgment of Barry C.J., held that the above named respondent, landlord of J. T. Dunlop, was entitled to be paid by the above-named appellant, authorized trustee in bankruptcy of the said Dunlop, all the money in his hands realized from the sale of Dunlop's property, towards satisfaction of eleven months rent due from Dunlop to the respondent. Barry C.J. had held that the respondent should be paid, in priority to all other debts, three months rent accrued due prior to the date of the assignment, and no more—leaving it to the landlord to prove as a general creditor for the surplus rent, if any, due at the date of the assignment. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed with costs, the judgment appealed from set aside, and the order of Barry C.J. restored.

*H. A. Porter* for the appellant.

*E. P. Raymond K.C.* for the respondent.

The judgment of the court was delivered by

LAMONT J.—The facts of this case are not in dispute. Prior to May 11, 1926, J. T. Dunlop had been conducting and managing an hotel, known as the Dunlop Hotel, on premises owned by the respondent Guernsey. On April 26, 1926, the sheriff, acting under writs of execution in his hands, made a seizure of the goods and chattels of Dunlop in said hotel. On May 4, the landlord Guernsey issued a distress warrant for $3,025, being eleven months' rent at $275 per month, then due in respect of said premises, and sent it to one W. C. Wheaton with instructions to distrain on the goods and chattels of Dunlop in the hotel. On May 5 the sheriff, feeling that the property in the hotel seized by him was no longer safe without a man in possession, employed the said Wheaton and one Gibbons to remain in possession of the goods he had seized. Wheaton and Gibbons went into possession immediately. On May 11 J. T. Dunlop made an assignment under the *Bankruptcy Act* and the

(1) [1927] S.C.R. 134.

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appellant Quinn was appointed trustee. On May 26 Quinn made an application to Chief Justice Barry, as Judge in Bankruptcy, for directions (*a*) as to how much of the bill presented by the sheriff should be paid as a preferred claim, and (*b*) as to what portion of the landlord's claim for rent should be treated as a preferred claim. The learned Chief Justice fixed the amount of the sheriff's bill at $252.21. As to the landlord's claim he held that Dunlop was a trader within the meaning of s. 47 of c. 30 of the Acts of New Brunswick of 1924, entitled *An Act in addition to chapter 153 of the Consolidated Statutes of New Brunswick, 1903, respecting Landlord and Tenant,* and that the landlord was, therefore, only entitled to three months' rent in priority to the other debts, but leaving it to him to prove as a general creditor for the surplus rent due at the date of the assignment. From that part of the order of Barry, C.J., decreeing that the landlord was entitled to only three months' rent an appeal was taken to the Supreme Court of New Brunswick. That court set aside the order appealed against and held that the landlord was entitled to be paid by the trustee the full proceeds of the assets of J. T. Dunlop in the hands of the trustee, as those assets had not realized the amount of the eleven months' rent due when Dunlop made the assignment. The ground upon which the court reversed the order of Barry, C.J., was that, on the evidence, J. T. Dunlop could not be said to be a trader within the meaning of s. 47 above referred to. The trustee now appeals to this Court, and the question we have to determine is: Upon an assignment in bankruptcy by a debtor what priority, if any, has a landlord for rent in arrear of the premises on which were situated the debtor's goods and chattels at the date of the assignment?

By c. 31 of the Acts of 1923 (Can.), s. 52 of the *Bankruptcy Act* was repealed and the following enacted in lieu thereof:—

52. When a receiving order or an assignment is made against or by any lessee under this Act, the same consequences shall ensue as to the rights and priorities of his landlord as would have ensued under the laws of the province in which the demised premises are situated if the lessee at the time of such receiving order or assignment had been a person entitled to make and had made an abandonment or a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province; and nothing in this Act shall be deemed to suspend, limit or affect the legislative authority of any province to enact any law providing for or regulating the rights and priorities of landlords consequent upon any

such abandonment or voluntary assignment; nor shall anything in this Act be deemed to interfere or conflict with the operation of any such provincial law heretofore or hereafter enacted in so far as it provides for or regulates the rights and priorities of landlords in such an event.

The effect of this section is to give to a landlord in bankruptcy proceedings the same priority for rent in arrear as the law of the province would give him if his tenant had made an abandonment or a voluntary assignment of his property for the benefit of his creditors. What rights or priorities do the laws of New Brunswick give to a landlord where his tenant had made such a voluntary assignment?

The *Act respecting Assignments and Preferences by Insolvent Persons* (C.S. c. 141) contains no provision whatever giving a landlord priority for rent in case of an assignment under that Act. It is, however, provided for in the *Act respecting Landlord and Tenant* (C.S. c. 153). Section 21 of the Act provides that where a tenant's goods are seized under an *execution* against the tenant, the goods are not to be removed from the premises unless the execution creditor pays to the landlord the rent in arrear up to one year's rent. Sections 47, 48, 49 and 51 of the Act, which were enacted in 1924 (c. 30) presumably to meet the situation created by the enactment of the new section 52 of the *Bankruptcy Act* in 1923, read as follows:—

47. In this act, unless the context otherwise requires or implies, the word "trader" means and includes retail merchants, wholesale merchants, commission merchants, manufacturers and persons who, as their ostensible occupation, buy and sell goods, wares and merchandise ordinarily the subject of trade and commerce.

48. Where a tenant, having any goods or chattels on which his landlord has distrained or would be entitled to distrain for rent, has made an authorized assignment or has had a receiving order made against him under the Bankruptcy Act, being chapter 36 of the Dominion Statutes of the year 1919, and amendments thereto, the right of the landlord to distrain or realize his rent by distress shall cease from and after the date of the assignment or receiving order and the assignee or trustee under any such assignment or receiving order shall be entitled to immediate possession of the property of the tenant; but in the distribution of the property of the said tenant the assignee or trustee shall pay to the landlord, in priority of all other debts, an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the assignment or receiving order, and the costs of distress, if any.

49. In the case of any such assignment or receiving order, the landlord may prove as a general creditor for—

(*a*) All surplus rent due at the date of the said assignment or receiving order; and

(*b*) Any accelerated rent to which he may be entitled under his lease, not exceeding an amount equal to three months' rent.

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51. Sections 48, 49 and 50 of this Act shall apply only to "traders" as defined by section 47 of this Act.

If, therefore, Dunlop was a trader s. 48 above quoted applies, and the respondent is entitled to priority for three months' rent only. To be a trader he must come within s. 47. The facts as found by Barry, C.J., and which are not disputed, are: That in addition to managing the hotel J. T. Dunlop in the outer lobby of the hotel conducted a cigar stand and sold cigars, cigarettes and tobacco not only to guests of his hotel but to the general public, and that at the rear of the premises there was a bar where he sold beer to the general public. Do these acts constitute him a trader within s. 47? On the facts proven he could not be said to be a wholesale merchant, commission merchant or manufacturer. Can he properly be termed either a retail merchant or a person who as his ostensible occupation buys and sells goods the subject of trade and commerce?

In Comyn's Digest, Vol. 5, at page 65 "Merchant" is defined as follows:—

> And generally every one shall be a merchant who traffics by way of buying and selling or bartering of goods or merchandise within the Realm or in foreign parts.

In Murray's New English Dictionary a "Merchant" is defined as:

> One whose occupation is the purchase and sale of marketable commodities for profit.

A retail merchant is one who deals in merchandise by selling it in smaller quantities than he buys. *U.S.* v. *Mickle* (1). If Dunlop, instead of conducting the cigar stand himself, had done as many hotel proprietors now do and had leased or sold to another the right to conduct the stand, and that other had sold cigars, cigarettes and tobacco to the general public for gain, there could not, in my opinion, be any question that such person would be a retail tobacco merchant within the meaning of s. 47. See *Josselyn* v. *Parson* (2). If that is so would the person conducting the stand be any less a retail tobacco merchant because he managed the hotel as well?

That a person may be an hotel-keeper and also a trader is, I think, well established by the authorities. In the old case of *Mayo* v. *Archer* (3), a farmer bought a quantity of

(1) (1805) 1 Cra. C.C. 268. (2) (1872) L.R. 7 Ex. 127.
(3) 1 Strange 513.

potatoes with the intention of selling them again for profit, which he did. Under the bankruptcy laws in force at the time a farmer could not be declared a bankrupt, but a trader could. It was held that the buying and selling of the potatoes for gain constituted the farmer a trader within the statute. In his judgment the Chief Justice said:—

> I should think that if a Herdfordshire man bought apples to mix with his own and then sold the cider, he would be a trader.

And Mr. Justice Powys said:—

> If a farmer should deal in wool or hops he will be a trader and so will an inn keeper who sells corn in quantities which are not consumed in his house.

The other two justices who comprised the court were of opinion that the quantities bought and sold should be shewn in order to see whether trading or farming was the debtor's chief business. It appears, however, now to be settled that the quantity sold is immaterial. In *Patman* v. *Vaughan* (1), the question was whether or not an inn keeper was a trader within the bankruptcy law. He was conducting an hotel and had on several occasions sold quantities of spirits to persons other than the hotel guests, and his servant testified that "if any person had sent for liquor he might have had it." The learned trial judge left the question to the jury with the direction that "if they were of opinion that the plaintiff had endeavoured to make a profit out of his trading and was ready to sell to anyone who applied to him and not merely as a favour, then the quantum and extent of the trading were immaterial." The jury found in favour of the defendant and the plaintiff moved for a new trial. In giving judgment Ashhurst J. said:—

> I do not now consider the question of law to be governed by the quantum of the trading; but I take the rule to be this, that where it is a man's common or ordinary mode of dealing, or where if any stranger, who applies, may be supplied with the commodity in which the other professes to deal, and it is not sold as a favour to any particular person, there the person so selling is subject to the bankrupt laws.

In *Bartholomew* v. *Sherwood* (2), the question was whether a farmer who bought horses for the purpose of reselling them at a profit was a trader; it was held that he was. In that case Ashhurst J. said:—

> The general principle is right, that a farmer, as such, is not an object of the bankrupt laws; and if a farmer in the course of his business buys a horse and, after using him for some time, sells him again, that will not

(1) (1787) 99 E.R. 1257; 1 T.R. 572. (2) (1786) 99 E.R., 1258 (note).

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subject him to the bankrupt laws. But in this case the evidence is that he bought horses for the express purpose of gaining by it.

And Buller J. said:—

It is like the case of a vintner who if he sell only a few dozen of liquor to particular friends cannot be made a bankrupt. But if he be desirous to sell to every person who applies that will subject him to the bankruptcy laws.

These cases, in my opinion, are instructive in that they shew that a man may be held to be a trader although he has, at the time he carries on his trading, another occupation, which is his chief means of livelihood.

In giving the judgment of the Supreme Court of New Brunswick, on appeal, in the present case, Mr. Justice Grimmer said:—

There can I think be no doubt the question or more properly the occupation of buying and selling must be the determining factor. I cannot conceive that the ostensible occupation of a hotel keeper can be held to be in any sense the buying and selling of goods, wares and merchandise such as is ordinarily the subject of trade and commerce or barter.

With great deference, I am of opinion that this statement begs the question, for it assumes that it was in his capacity as hotel keeper that Dunlop bought and sold cigars and tobacco, while the evidence shews that he sold to the public generally and not merely to accommodate those who patronized his hotel. It could not have been in his capacity as hotel keeper that he sold to the general public. To my mind the question here is not what was Dunlop's ostensible occupation as hotel keeper, for undoubtedly as an hotel keeper his ostensible occupation was managing the hotel. The question is: Was he ostensibly occupied in selling cigars, cigarettes and tobacco? Was that his ostensible occupation?

An occupation signifies the employment of a person's time in some calling or pursuit, not simply periodically or for a special purpose, but more or less continuously and in a general way of business. In *Creighton* v. *Chittick* (1), Strong J. quoted with approval the following statement from Robson on Bankruptcy:

So also the buying and selling ought to be in the general way of business and not in a qualified manner or only for a special purpose.

"Ostensibly" is defined as "open to view; open to public view; conspicuous." As ostensible occupation, therefore, is the employment of a person's time in a certain calling or pursuit so openly and conspicuously that the mem-

(1) (1882) 7 Can. S.C.R. 348, at p. 356.

bers of the public coming in contact with such person would know that he was following that calling or pursuit. It does not, to my mind, import an exclusive occupation, nor yet a chief occupation, but it must be in the general way of business and not an intermittent or spasmodic employment.

While the selling of beer was chiefly done by Dunlop through a bar-tender, the evidence is that the cigar stand was conducted by himself; it was conducted openly and in the general way of business and anyone who desired to do so could buy. It, therefore, seems to me that anyone frequenting the lobby of that hotel and purchasing cigars, cigarettes or tobacco would know that Dunlop was employing his time, or part of his time at least, in selling those articles in the general way of business and to the public. That he was doing it for profit may, I think, be presumed until the contrary is shewn. It was argued that there was here no evidence that he purchased any cigars, cigarettes or tobacco. He must have either purchased or manufactured those he sold. If he manufactured them he comes expressly within s. 47, as a manufacturer.

There is nothing in the material to indicate whether the cigar stand, the bar, or the hotel did the largest business or furnished the greatest profit, even if these could be considered as essential elements in the determination of an ostensible occupation, which I doubt.

Selling merchandise, as he did, openly to the public for the purpose of gain, brought Dunlop, in my opinion, within 1) a retail merchant, and (2) a person who as his ostensible occupation bought and sold merchandise the subject of trade and commerce. He was, therefore, a trader and s. 48 governs the respondent's priority. Having reached the conclusion that Dunlop was a trader it is not necessary to consider the priority, if any, to which a landlord is entitled where the debtor is a non-trader.

The appeal, in my opinion, should be allowed; the judgment appealed from set aside and the order of Barry C.J., restored. The appellant is entitled to his costs both here and on appeal below.

*Appeal allowed with costs.*

Solicitors for the appellant: *Porter & Ritchie.*

Solicitor for the respondent: *Edward P. Raymond.*

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*May 31.
*June 17.

FADA RADIO LIMITED (DEFENDANT) .... APPELLANT;

AND

CANADIAN GENERAL ELECTRIC COMPANY LIMITED (PLAINTIFF) } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Patent—Validity—Alleged material untruth in affidavit verifying petition—Previous issue of patent in foreign country for same invention—Re-issued patent—Patent Act, R.S.C. 1906, c. 69, ss. 8, 10, 24, 29—11-12 Geo. V, c. 44, ss. 6, 7 (1)—Absence of affidavit in support of petition for re-issued patent.*

Plaintiff sued for infringement of a patent granted 25th November, 1924, as a re-issue, under s. 24 of the *Patent Act*, R.S.C. 1906, c. 69, of a patent applied for in 1919 and granted to plaintiff (as assignee of the inventor) on 20th January, 1920. Defendant challenged the validity of the patent, alleging material untruth in the affidavit prescribed by s. 10 of the *Patent Act* in verification of the petition for the original patent, in that the inventor swore that "the same has not been patented to me or others with my knowledge or consent in any country," which, it was alleged, was untrue in view of the issue of a German patent in 1917 for the same invention; and claiming that because of such untruth of a material allegation (*Patent Act*, s. 29) the original patent was invalid, which rendered the re-isued patent likewise invalid. Defendant also alleged, as a ground of invalidity, the absence of any affidavit in support of the petition for the re-issued patent.

*Held*, that, in view of ss. 6 and 7 (1) of 11-12 Geo. V, c. 44 (amending the *Patent Act*), which were applicable to the case, and their effect with regard to the materiality of the impugned statement, and in the absence of fraudulent intent, the attack on the validity of the original patent (and, on this foundation, of the re-issued patent) must fail; that, as to absence of an affidavit in support of the petition for the re-issued patent, any insufficiency in the material on which the Commissioner acts, the entire absence of an affidavit or any defect in the form and substance of that which is put forward as an affidavit in support of the claim, cannot, in the absence of fraud, avail an alleged infringer as a ground of attack on a new patent issued under s. 24; it is not a "fact or default which, by this Act or by law, renders the patent void" (s. 34); the recital of the patent that the applicant had complied with the requirements of the *Patent Act*, was conclusive against defendant in the absence of fraud; (*Whittemore* v. *Cutter*, 1 Gallison, 429, at p. 433; *Seymour* v. *Osborne*, 11 Wallace, 516, at p. 541; *Wayne Mfg. Co.* v. *Coffield Motor Washer Co.*, 227 Fed. Rep. 987 at pp. 990-1; *Hunter* v. *Carrick*, 10 Ont. A.R. 449, at p. 468, cited).

Judgment of the Exchequer Court ([1927] Ex. C.R. 107) affirmed, subject to modification of the formal judgment to restrict it to the claims in issue.

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), in an action for infringement of patent. The only issue on the appeal was as to the validity of the patent in question. The grounds on which its validity was attacked, and the material facts of the case, are sufficiently stated in the judgment now reported.

*E. Lafleur K.C.* and *W. D. Herridge* for the appellant.

*O. M. Biggar K.C., R. S. Smart K.C.* and *J. C. MacFarlane* for the respondent.

The judgment of the court was delivered by

The CHIEF JUSTICE.—The defendant appeals from the judgment of the Exchequer Court (Maclean, P.) (1) holding it liable to the plaintiffs for infringement of Canadian patent no. 244,847, granted on the 25th November, 1924, as a re-issue of Canadian patent no. 196,390, granted on the 20th January, 1920.

The fact of infringement, if the patent in question be valid, is no longer in controversy. The only issue on the present appeal is as to the validity of the patent, which is challenged on these grounds:—

(*a*) Material untruth in the affidavit prescribed by s. 10 of the *Patent Act* (R.S.C., c. 69) in verification of the petition for the original patent no. 196,390, in that a prior patent had, to the knowledge of the affiant, been granted in Germany for the same invention;

(*b*) (1) Invalidity of the original patent because of such untruth of a material allegation (s. 29) rendering the re-issued patent likewise invalid;

(*b*) (2) Absence of any affidavit in support of the petition for the re-issued patent.

The defendant also complains that the declaration and injunction granted by the Exchequer Court are wider than the issues presented to it justified.

By s. 29 of the *Patent Act* a patent is void.

if any material allegation in the petition or declaration [prescribed by s. 10] is untrue.

(1) [1927] Ex. C.R. 107.

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Anglin C.J.C.

We assume that by the "declaration of the applicant" mentioned in s. 29 is meant the affidavit of the "inventor" required by s. 10. We also assume that the German patent of 1917 in fact covered the invention patented by Canadian patent no. 196,390. The statement in the inventor's affidavit verifying the petition on which that patent was granted, which is impugned, is

> that the same [i.e. the invention for which the patent was sought] has not been patented to me or others with my knowledge or consent in any country.

That the issue of the German patent was actually known to the affiant is not, perhaps, as conclusively established as it might have been. We are not disposed to infer fraudulent intent negatived by the trial judge. The materiality of the statement, however, having regard to s. 8 of the *Patent Act*, would admit of little doubt, were it not for the enactment of ss. 6 and 7 (1) of the amending statute, 11 & 12 Geo. V, c. 44, which came into force on the 4th of June, 1921.

Those sections read as follows:—

> (6) The rights provided by section eight of the *Patent Act* for the filing of applications for patents for invention which rights had not expired on the first day of August, 1914, or which rights have arisen since that date shall be, and the same are hereby extended, until the expiration of a period of six months from the coming into force of this Act, and such extension shall apply to applications upon which patents have been granted as well as to applications now pending or filed within said period. Provided that such extension shall in no way affect the right of any person, who, before the passage of this Act, was *bona fide* in possession of any rights in patents or applications for patent conflicting with rights in patents granted or validated by reason of such extension, to exercise such rights himself personally or by such agents, or licensees, as derived their rights from him, before the passage of this Act, and such persons shall not be amenable to any action for infringement of any patent granted or validated by reason of such extension.
>
> (7) (1) A patent shall not be refused on an application filed between the first day of August, 1914, and the expiration of a period of six months from the coming into force of this Act, nor shall a patent granted on such application be held invalid by reason of the invention having been patented in any other country or in any other of His Majesty's Dominions or Possessions or described in any printed publication or because it was in public use or on sale prior to the filing of the application, unless such patent or publication or such public use or sale was issued or made prior to the first day of August, 1913.

It will be noticed that these provisions apply to applications on which patents had already been granted, as well as to applications still pending when the statute came into

force—under s. 6 where the rights provided by s. 8 had not expired on, or had arisen after, the 1st of August, 1914, and under s. 7 (1) where the application for the patent in question was made after the 1st of August, 1914.

The rights of the plaintiffs' assignor (Langmuir) under s. 8, arose after the 1st of August, 1914, and his application for patent no. 196,390, was also made after that date. The present case, therefore, falls within the provisions of those sections and, having regard to them, the untruth of his statement, assuming that the existence of the German patent rendered it untrue, can scarcely now be regarded as material, since under s. 7 (1) of the amending Act the existence of the German patent of 1917 cannot be made a ground for avoiding Canadian patent no. 196,390, applied for in 1919, and issued in January, 1920. At all events, in the absence of proof of fraudulent intent on the part of Langmuir, we are not prepared to hold that his patent no. 196,390 was void.

We accordingly consider that the attack on the validity of the original patent must fail, if it would have been otherwise open to impeachment under s. 29 by an alleged infringer.

The foundation of the attack upon the re-issued patent on ground (*b*) (1) thus also disappears.

Nor can the appellant fare better in regard to ground (*b*) (2). Patent no. 244,847 was a re-issue under s. 24 of the *Patent Act* (now s. 27 of 13-14 Geo. V, c. 23). While no affidavit is prescribed by that section to obtain such a re-issue, it is contended for the appellant that s. 10 applies to a re-issue under s. 24 as well as to the issue of an original patent under s. 7. The respondent, on the other hand, maintains that the Commissioner is authorized to satisfy himself by such means as he deems proper and sufficient, as to the existence of the conditions entitling the applicant to a new patent. However that may be, we are satisfied that any insufficiency in the material on which the Commissioner acts, the entire absence of an affidavit or any defect in the form and substance of that which is put forward as an affidavit in support of the claim, cannot, in the absence of fraud, which in this instance has not been suggested, avail an alleged infringer as a ground of attack on a new patent issued under s. 24. It is not a "fact or

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default, which, by this Act, or by law, renders the patent void" (*Patent Act*, s. 34). The recital of the patent that the applicant as assignee of the Langmuir patent no. 196,390, "has complied with the requirements of the *Patent Act*" is conclusive against the appellant in the absence of fraud. *Whittemore* v. *Cutter* (1); *Seymour* v. *Osborne* (2); *Wayne Manufacturing Co.* v. *Coffield Motor Washer Co.* (3); *Hunter* v. *Carrick* (4).

The appeal, therefore, so far as it depends on the invalidity of patent no. 244,847, fails.

But, having regard to the fact that the allegations of infringement were ultimately confined to claims nos. 3, 6 and 10 of patent no. 244,847, it may be better that the judgment of the Exchequer Court be modified so as to make clearer what we think was by it intended. To that end we would expressly restrict the finding of infringement with which paragraph no. 1 of that judgment concludes, so that it would read as follows:—

and has been infringed as to the claims thereof numbered 3, 6 and 10 by the defendant as alleged in the pleadings;

and the injunction should also be modified accordingly.

Subject to this slight variation, the appeal will be dismissed with costs.

*Appeal dismissed with costs.*

*Injunction modified.*

Solicitors for the appellant: *Henderson & Herridge.*

Solicitor for the respondent: *Russell S. Smart.*

(1) (1813) 1 Gallison, 429, at p. 433.

(2) (1870) 11 Wallace, 516, at p. 541.

(3) (1915) 227 Fed. Rep., 987, at pp. 990-1.

(4) (1884), 10 Ont. A.R., 449, at p. 468.

WENCESLAS DIONNE AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

HENRI N. BIRON AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

1927

*May 3.
*May 30.

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

*Appeal—Jurisdiction—Matter in controversy—Action for damages for breach of contract—Contract price over $2,000—Damages claimed below $2,000.—Supreme Court Act, s. 37 (b).*

The appellants sued for breach of a contract for the delivery of pasteurization machines, the contract price being $2,250, and the appellants claiming the sum of $1,875 as damages for such breach and the annulment of the contract.

*Held* that there was no jurisdiction in the Supreme Court of Canada to entertain the appeal, as the only substantial matter in controversy was the appellant's right to recover damages amounting at the most to $1,875.

MOTION to quash for want of jurisdiction an appeal from a judgment of the Court of King's Bench, appeal side, province of Quebec, dismissing the appellants' action.

*N. A. Belcourt K.C.* for the motion.

*E. F. Newcombe contra.*

The judgment of the court was delivered by

ANGLIN C.J.C.—Motion to quash an appeal from the Court of King's Bench, Quebec, on the ground that the amount or value of the matter in controversy in the appeal does not exceed the sum of $2,000. (*Supreme Court Act*, s. 37 (b).)

The plaintiffs sue for breach of a contract for the delivery of pasteurization machines, the contract price being $2,250, claiming the sum of $1,875 as damages for such breach and the annulment of the contract. No other ground for annulment than the breach in respect of which damages are claimed is alleged.

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

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If the alleged breach is established and the plaintiffs are thereby entitled to recover damages, a necessary consequence is that the contract is no longer binding upon them and a formal declaration of its nullity might follow as a matter of course. There being on this hypothesis no obligation on the plaintiffs from which such declaration of nullity would relieve them, it is impossible to attach to it any money value. On the other hand, if breach of contract by the defendant has not been established, no case is made for annulment, and to grant annulment and thus deprive the defendants of any right of action they may have for failure of the plaintiffs to accept and pay for the pasteurization machines which the defendants supplied under the contract would be unwarranted.

In any aspect of the case the only substantial matter in controversy on the present appeal is the plaintiffs' right to recover damages for breach of contract amounting at the most to the $1,875 claimed.

The motion to quash should therefore be granted with costs.

*Motion granted with costs.*

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1927
*May 27.
June 17.

ROMEO DUBUC (PLAINTIFF) .....APPELLANT;

AND

LA CORPORATION DE LA PARTIE SUD DU CANTON DE MARSTON (DEFENDANT) ..... } RESPONDENT.

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

*Acquiescence—Action by workman under common law—Judgment dismissing same—Second action under Workmen's Compensation Act—Statement of claim alleging res judicata—Attorney ad litem—Appeal from first judgment—Motion to quash.*

Acquiescence in a judgment cannot be presumed and must be unequivocal; it must be made by the party himself or by his attorney specially authorized and it is not binding upon the principal if made by an attorney *ad litem* acting under his general mandate.

Judgment of the Court of King's Bench (Q.R. 42 K.B. 499) reversed.

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

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DUBUC v. CORP. DE MARSTON.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), maintaining a motion to quash the appeal on the ground of acquiescence in the judgment by the appellant.

The appellant, a workman, first took an action in damages against the respondent, his employer, under the common law; but it was dismissed on the ground that it should have been taken under the *Workmen's Compensation Act*. The appellant then took a second action under that Act; and in the statement of claim signed by his attorney, he specially alleged that there was *res judicata* as to his right to claim under that Act. The appellant having subsequently entered an appeal against the judgment rendered in the first case, the appellate court granted a motion to quash on the ground of acquiescence in the judgment by the appellant.

*V. A. De Billy K.C.* for the appellant.

*W. Lazure* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—Il s'agit d'un jugement de la cour du Banc du Roi renvoyant pour cause d'acquiescement un appel que l'appelant avait pris d'un jugement de la cour supérieure siégeant dans le district de Saint-François, Québec (2).

Victime d'un accident alors qu'il travaillait pour le compte de l'intimée, l'appelant s'est pourvu contre cette dernière en réclamation de $6,357.18 de dommages sous l'empire du droit commun, alléguant que ses blessures avaient été causées par la faute de l'intimée. Celle-ci, entre autres moyens, plaida en défense que l'appelant n'avait de recours contre elle qu'en vertu de la Loi des accidents du travail, et pour ce seul motif la cour supérieure renvoya l'action.

Avant l'expiration des délais pour appeler de ce jugement, l'appelant intenta une nouvelle action contre l'intimée, cette fois sous la Loi des accidents du travail, par laquelle il réclamait $9,581.25 d'indemnité, prétendant qu'il y avait eu faute inexcusable de l'intimée.

(1) (1927) Q.R. 42 K.B. 499. (2) (1927) Q.R. 65 S.C. 63.

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Dans sa déclaration, signée par son procureur *ad litem*, l'appelant allégua ce qui suit, après avoir relaté l'accident et les autres faits de l'espèce:—

33. Le demandeur avait intenté une action, pour le dit accident, en vertu du droit commun;

34. La défenderesse, par ses procureurs, a plaidé que l'accident tombait sous le recours de la Loi des accidents du travail de la province de Québec.

35. La Cour Supérieure, présidée par l'honorable juge Archambault, a rendu jugement sur le litige le 14 octobre courant et a jugé que le dit accident tombait sous la Loi des accidents du travail;

36. Il y a donc chose jugée sur ce point, à savoir que le recours pour le dit accident n'en est pas un de droit commun, mais tombe sous la Loi des accidents du travail de la province de Québec:

(Le demandeur produit comme pièce n° 1 copie du jugement de l'honorable juge Archambault, daté du 14 octobre courant, pour valoir, comme s'il était ici récité au long.)

Plus tard, en temps utile, l'appelant interjeta appel du jugement rendu contre lui dans la première cause. L'intimée demanda alors par motion le rejet de l'appel, prétendant que, par les paragraphes rapportés plus haut, l'appelant avait acquiescé au jugement. Cette motion fut accueillie par la Cour du Banc du Roi qui débouta l'appelant de son appel. Il s'agit maintenant de savoir si réellement il y a eu acquiescement valable.

Il est indubitable que l'acquiescement à un jugement adverse, étant la renonciation à tout recours contre ce jugement, ne se présume pas et doit être non équivoque. Avant tout, c'est une affaire de volonté et d'intention, et si cette volonté et cette intention n'apparaissent pas, il n'y a pas d'acquiescement (*Morin* v. *Walter*) (1).

Il faut observer, en outre, que l'acquiescement doit être l'œuvre de la partie elle-même ou de son procureur à ce dûment autorisé; le simple mandat *ad litem* ne suffit pas (Garsonnet, Procédure Civile, 1ère édition, tome 5, n° 1218, à la page 914), surtout quand il s'agit, comme dans l'espèce, d'acquiescer à un jugement rendu dans une instance autre que celle où le procureur *ad litem* occupe. On peut citer dans ce sens l'opinion du juge Sir Elzéar Taschereau dans la cause de *La Société Canadienne Française de Construction de Montréal* v. *Daveluy* (2).

(1) [1923] S.C.R. 678.

(2) (1891) 20 Can. S.C.R. 449.

Du reste, tout ce qui s'est passé depuis la production de la déclaration atteste que l'appelant n'a jamais entendu acquiescer. Il a tenté de retirer ses paragraphes malencontreux par voie d'amendement avant que la défenderesse eût produit de défense. Il est vrai que son amendment a été rejeté pour des motifs que nous n'avons pas à apprécier, mais le fait même de cet amendement, avant que l'intimée eût demandé acte de la déclaration de l'appelant, démontre que l'intention d'acquiescer n'existait pas. Dans les affidavits que l'appelant et son procureur ont produits devant la Cour du Banc du Roi, il est déclaré que l'appelant n'a jamais autorisé son procureur *ad litem* à acquiescer, et avant l'expiration du délai l'appelant a de fait appelé du jugement. Il nous est impossible dans ces circonstances de dire qu'il y a eu volonté ferme de renoncer au droit d'appel.

Avec beaucoup de déférence, nous croyons que l'appel doit être accordé avec dépens et la motion de l'intimée renvoyée aussi avec dépens. La cause retournera devant la Cour du Banc du Roi pour y être procédé sur l'appel de l'appelant.

*Appeal allowed with costs.*

Solicitors for the appellant: *Bernier & de Billy.*

Solicitors for the respondent: *Nicol, Lazure & Couture.*

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JAMES A. HOWLEY .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

*Appeal—Leave to appeal—Evidence—Admissibility—Privileged communication as between solicitor and client—Conflict with a judgment of another court of appeal.—Article 1024a Cr. C.*

The appellant was convicted on an indictment charging him with having, with intent to defraud and by false pretences, obtained from one Mrs. Falardeau and one Mrs. Cirkel valuable securities of about $404,000, by inducing them to transfer property to appellant's wife in consideration of an annuity of $400 monthly during their lives. At the trial, the appellant sought to prove certain conversations between Mrs. Cirkel and Mr. R. G. de Lorimier K.C., his intention being to

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show that the deeds of transfer were passed at the request and in compliance with the importunities of Mrs. Cirkel with whom the suggestion of an annuity, he claimed, had originated. The trial judge, having convinced himself by questions put by him to Mr. de Lorimier that the latter had acted as legal adviser of these ladies, refused to allow the evidence on the ground that these communications between client and solicitor were privileged and could not be disclosed without the consent of Mrs. Cirkel, which consent she refused to give. The appellant's conviction was affirmed by the appellate court; and the appellant now moves for leave of appeal to this court under article 1024a of the Criminal Code, on the ground that the judgment to be appealed from conflicts with the judgment of the Alberta appellate court in *Rex* v. *Prentice and Wright.* ( (1914) 7 Alta. L.R. 479.)

*Held* that there is no possible conflict between this decision and the one from which the appellant seeks leave to appeal to this court. The Alberta court fully recognized the rule that relevant communications between solicitor and client are privileged unless the client consents to their disclosure; all that was decided in that case was that the client had agreed to this disclosure when he instructed his solicitor to communicate to the opposite party or his solicitor something *prima facie* privileged and that, under these circumstances, the communication which the solicitor was instructed to make to the solicitor of the adverse party was not privileged.

MOTION for leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the conviction of the appellant on an indictment charging him with having obtained certain property by false pretences.

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

*N. K. Laflamme K.C.* and *Lucien Gendron* for the appellant.

*A. R. Macmaster K.C.* for the respondent.

MIGNAULT J.—The appellant, on September 15th, 1926, was convicted before Victor Cusson, a magistrate sitting as a judge of the Court of Special Sessions at Montreal, on an indictment charging him with having, with intent to defraud and by false pretences, obtained from Dame Angélique Leduc, widow of C. B. Falardeau, and Dame M. L. Falardeau, widow of Fritz Cirkel, various stocks and bonds and titles to immovable properties, shares, hypothecs, moneys, and other valuable securities, the whole of a total value of about $404,000.

The complaint against the appellant in short was that by making false representations to these ladies he had induced them to transfer property to his wife in consideration of an annuity of $400 monthly during their lives. These representations were that the deceased, C. B. Falardeau (who had appointed his wife his universal legatee, the latter being also owner of one-half of the estate as having been in community of property with her husband) had neglected to make proper returns of income under the War Income Tax Act, especially in connection with a company known as the Canada Industrial Company of which he had virtually the ownership and control; that the deceased and his estate had thereby incurred large penalties; and that the appellant was in position to settle this liability. The transfers were made by four deeds passed before Mr. Lavimodière, notary, on December 24th, 1924.

At the trial, the appellant sought to prove certain conversations between Mrs. Cirkel, a daughter of the deceased, and Mr. R. G. deLorimier K.C., his intention being to show that these deeds were passed at the request and in compliance with the importunities of Mrs. Cirkel with whom the suggestion of an annuity, he claimed, had originated. The learned trial judge having convinced himself by questions put by him to Mr. deLorimier that the latter had acted as legal adviser of these two ladies, refused to allow the evidence on the ground that these communications between client and solicitor were privileged and could not be disclosed without the consent of Mrs. Cirkel, which consent she refused to give. The appellant was convicted and sentenced to three years' imprisonment in the penitentiary.

The appellant appealed from the conviction to the Court of King's Bench on several questions of law, the only one with which I am concerned being the exclusion of the evidence to which I have referred. The Court of King's Bench (Guerin, Bernier and Hall, JJ.), on April 25th, 1927, unanimously dismissed his appeal. The judgment of the court was delivered by Mr. Justice Hall. On the question of the legality of the evidence sought to be obtained from Mr. deLorimier, the judgment is as follows:

The last ground of the appeal is that based on the objection to the evidence of Mr. deLorimier. If he were not the solicitor of the Falardeaus, it can hardly be doubted that the accused was entitled to offer

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evidence of the conversations he had with Mrs. Cirkel. But it is impossible for me to interpret his relations with Mrs. Cirkel in any other light than that of solicitor and client. He himself says, that he was not consulted "*en ma qualité d'avocat,*" but he admits that he made entries in his books against the estate.

Mr. deLorimier, like Howley, was an old friend of the family, and had been solicitor for the Canada Industrial Company for some years. When Falardeau died, he attended on Mrs. Falardeau and, at Mrs. Cirkel's request, consented to look after her interests.

Howley himself reports that Mrs. Cirkel had seen deLorimier and arranged for him to look after her affairs, and again, "deLorimier was representing the Falardeau interests."

Then Ouimet, the man Howley appointed secretary of the company, says that Mrs. Cirkel declared: "*deLorimier est notre aviseur légal.*" Janssen reports that, on Mrs. Cirkel's representation, he went to deLorimier to get advice.

I conclude, therefore, that Mr. deLorimier was acting for Mrs. Cirkel in his quality of advocate, and that his evidence was properly excluded.

The appellant now comes before me asking for leave to appeal from the unanimous judgment of the Court of King's Bench. His petition is founded on article 1024A of the Criminal Code and can only be granted if the judgment appealed from conflicts with the judgment of some other court of appeal in a like case. Subject to a judicial exercise of any discretion conferred by that article, I am in no way concerned with the merits of the appeal, or with the legality or illegality of the evidence tendered, but only with the question whether such conflict exists.

The decision on which the appellant relies as being in conflict with the judgment of the Court of King's Bench is a decision of the appellate division of the Supreme Court of Alberta in *Rex* v. *Prentice and Wright* (1), decided on October 23rd, 1914.

The judgment of the Alberta court was rendered on a case stated by the trial judge, referring to three points, the only one which need be considered here being the following:

1. In the course of the cross-examination of George Brown (the complainant), counsel for Prentice directed certain questions to him on the subject of when he first considered commencing criminal proceedings, and inquired whether it was not at about the time certain civil proceedings were commenced by Prentice against Brown, in which Prentice made large claims in respect of certain building contracts. Counsel for Prentice then asked the witness: "You remember instructing your solici-

(1) (1914) 7 Alta. L.R. 479; 23 Can. Cr. Cas. 436.

tors to communicate with Prentice's solicitors at that time?" I instructed the witness not to answer, and the following discussion then took place:—

"Mr. Biggar: If the solicitor can communicate to other people and the person who moves him cannot be asked if it was on his authority, it puts the solicitor in a very happy position. I am asking if he authorized his solicitor to do something, some particular thing.

"The Court: If you show first that he later did a certain thing.

"Mr. Biggar: I cannot interpose a witness.

"The Court: All right, you cannot ask the question.

"Mr. Biggar: Does your Lordship think I am at liberty to interpose a witness?

"The Court: No, I do not think so.

"Mr. Biggar: Your Lordship suggested that if I prove if the solicitor had done something, I can ask the witness if he authorized it. Now, I am simply suggesting, even if there is a way to interpose, that your Lordship's suggestion should be given effect to in anticipation of the question.

"The Court: No, I am merely holding that you cannot ask the question that you are now putting.

"Mr. Biggar: Well, perhaps I am putting it in that form. What I want to inquire is whether he authorized his solicitor to take certain steps with regard to the institution of inquiries for the purpose of instituting criminal proceedings against the present defendant. Your Lordship rules against me. Very good. My friend, Mr. Ford, asks that your Lordship would at this stage rule against him on exactly the same point.

"The Court: Yes.

"Was I right in excluding the evidence?

The Alberta court decided that the trial judge should have allowed the question to be put to Brown. Mr. Justice Beck, with whom Mr. Justice Stuart concurred on this point, said:

The first question raises this point: Can a witness, on the ground of privilege, be allowed to refuse to answer the question whether he authorized or directed his solicitor to make a certain communication to the solicitor for the opposite party in anticipated or pending litigation? The learned judge's ruling is distinctly placed on the ground of privilege in the witness, not on the ground that the question was irrelevant or vexatious (Rule 199). The whole question of privileged communications between client and solicitor is discussed at great length in Wigmore on Evidence, ch. LXXX. The rule is there formulated, par. 2292, with, I think, sufficient accuracy:—

"Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the client waives protection."

It surely is beyond question that the contents of the communication itself from the witness's solicitor to the solicitor for the opposite party which, in order to avoid confusion I shall call the letter, do not come under the privilege, for the contents of the letter were *ex hypothesi*

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intended to be made known to a third party in adverse interest, and therefore neither the contents nor the actual letter itself can possibly be said to have been communicated by the client to the solicitor in confidence. It seems almost, if not equally, plain that the authorization or direction to send the letter does not come under the privilege, for the mere authorization or direction is not a statement made for the purpose of obtaining advice. The question of fact whether or not the authorization or direction was given "is not within the mischief which that rule is intended to guard against; and, therefore, is not within the rule": *Desborough* v. *Rawlins* (1). I, therefore, think the ruling of the learned trial judge in respect of the first question reserved was wrong.

The third judge, Mr. Justice Simmons, concurred. He quoted the following statement of the law by Jessel, M.R., in *Anderson* v. *Bank of British Columbia* (2):

> That, as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights, or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and, it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret unless with his consent (for it is his privilege and not the privilege of his confidential agent), that he should be enabled properly to conduct his litigation.

And Mr. Justice Simmons added:

> The client can remove the privilege by consent, and in the case under consideration the question is based upon the assumption that the witness did consent to removal of the privilege by instructing his solicitor to communicate something *primâ facie* privileged.
>
> I conclude, therefore, that the ruling of the learned trial judge was incorrect.

I take it therefore that the Alberta court fully recognized the rule as stated by Wigmore and Sir George Jessel that relevant communications between solicitor and client are privileged unless the client consents to their disclosure. All that was decided in that case was that the client had agreed to this disclosure when he instructed his solicitor to communicate to the opposite party or his solicitor "something *primâ facie* privileged," and that under these circumstances the communication which the solicitor was instructed to make to the solicitor of the adverse party was not privileged.

(1) 3 Myl. & Cr. 515; 40 E.R. 1025.

(2) L.R. 2 Ch. 644.

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There is therefore no possible conflict between this decision and the one from which the appellant seeks leave to appeal.

The application is dismissed.

*Motion dismissed.*

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*May 19.
*June 17.

LA CITE DE MONTREAL (DEFENDANT) . . APPELLANT;

AND

PHILIPPE BELEC (PLAINTIFF) . . . . . RESPONDENT.

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

*Labour union—Federation of municipal employees—Police employees—Resolution by municipality forbidding membership—Threat of dismissal—Validity—"Municipal Strike and Lock-out Act" (Q.) 11 Geo. V, c. 46, now R.S.Q. [1925], c. 98, sections 2520 oc, 2520 od, 2520 oj.*

The respondent is the secretary of a branch of the Federation of Municipal Employees, formed by the police employees of the city of Montreal. The municipal council passed a resolution that no member of the police force would be allowed to be a member of the police union and authorized the chief of police to act accordingly. The latter issued an order that it was "strictly forbidden for all officers or men to belong to the police union as constituted and they have eight days from to-day to dispose of all money," etc. The respondent asked by his action that the resolution and the order be annulled and set aside as being in contravention with the provisions of the "Municipal Strike and Lock-out Act."

*Held* that, even if the resolution and the order constituted a threat of dismissal in case of non-compliance with them, the city of Montreal did not contravene the Act, as the legislative intention was to limit its application to cases in which there had been an actual dismissal of an employee before submitting the dispute to a board of arbitration.

Judgment of the Court of King's Bench (Q.R. 42 K.B. 335) reversed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the Superior Court at Montreal, Coderre J., and maintaining the respondent's action.

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

(1) (1927) Q.R. 42 K.B. 335.

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LA CITÉ DE MONTRÉAL v. BÉLEC.

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

*C. Laurendeau K.C.* and *G. St. Pierre K.C.* for the appellant.

*E. Lafleur K.C.* and *J. Sullivan K.C.* for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal by the city of Montreal against the judgment of the Court of King's Bench (appeal side) confirming a judgment of the Superior Court which declared illegal and void certain resolutions passed by the city and a certain order of the chief of police based thereon.

For some time prior to July, 1922, friction had existed between the city council and the Federation of Municipal Employees. This federation was a labour union including among its members the police employees of various cities and municipalities in the Dominion. In 1918 a branch of the union, known as branch no. 62, was formed by the police employees of Montreal. The plaintiff was the secretary of this branch. The union desired the city to recognize its existence and to deal with it through its duly appointed representatives in case of any dispute between the city and any of the members of the union employees of the city. This the city would not do. On July 13th, 1922, the union passed a resolution in which their grievances, so far as they related to the police force, were set out in the following words:—

Considérant: que les employés de la cité de Montréal se plaignent de souffrir depuis longtemps de nombreux griefs dont les principaux sont:

Chez les policiers: refus de la part du comité exécutif du conseil que l'arbitrage qu'ils ont demandé et qui leur a été accordé par le ministre des Travaux publics et du Travail suive son cours;

A copy of this resolution was forwarded to the city council and was by it referred to a special committee which reported as follows:—

1. Votre commission se déclare opposée à l'union de la police telle qu'elle existe actuellement.

2. Votre commission est d'opinion qu'aucune fédération des employés municipaux ne doit exister en ce qui concerne les membres du corps de police, des pompiers et les employés du département de l'aqueduc; la

commission n'a cependant aucune objection à l'existence de l'Association de Bienfaisance de la Police, de celle des pompiers, et d'une autre semblable dans le département de l'aqueduc.

This report was unanimously adopted by the council on September 15th, 1922. On November 28th, 1923, the council passed the following resolution:—

Résolu

Vu que l'union des policiers n'est pas reconnue par la cité;

Qu'aucun membre de la force constabulaire ne peut faire partie de telle société; et que le chef de police soit autorisé à prendre les mesures disciplinaires nécessaires pour que l'on se conforme aux résolutions adoptées par le conseil et le comité exécutif.

Instructions were given to the chief of police in accordance with this resolution. On November 29th the chief of police issued the following order:—

That it is strictly forbidden for all officers or men to belong to the police union as constituted and they have 8 days from to-day to dispose of all money, etc.

Order of the executive board.

Per Chief Bélanger.

Considering that the resolutions and order above referred to contravened the provisions of the *Municipal Strike and Lock-out Act*, c. 46, 11 Geo. V (now [1925] R.S.Q., c. 98), the plaintiff, on March 31st, 1924, brought this action, and asked that the resolutions of September 15th, 1922, and November 28th, 1923, and the order of the chief of police of November 29th, 1923, be annulled and set aside on the ground that they were *ultra vires* of the city council and contrary to law. He further asked that an injunction issue restricting the city from enforcing the said order. The learned trial judge upheld the plaintiff's claim and declared illegal and void the said resolutions and order; and he granted the injunction restraining the city from proceeding to enforce them. On appeal the Court of King's Bench (Dorion and Tellier JJ. dissenting) affirmed the judgment of the Superior Court. The city now appeals to this court.

The pertinent provisions of s. 2520 *o*, are as follows:—

2520 *oc*. This section shall apply to any claim or dispute between employers and employees in connection with the following matters:

*a*. The price to be paid for work done or in course of being done, whether the disagreement has arisen with respect to wages, working hours, by night or by day, or the length of day or night work;

*b*. The dismissal of one or more employees on account of membership in any labour union.

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2520 *od*. It shall be unlawful for an employer to declare or cause a lock-out, or for employees to strike, on account of any dispute mentioned in the foregoing article before such dispute has been submitted to a board of arbitration.

2520 *oj*. Any employer who declares or who is the cause of a lock-out in contravention of the provisions of this section, shall be liable to a fine of not less than one hundred nor more than one thousand dollars, for every day or part of a day that such lock-out lasts.

It is admitted that there is no claim or dispute under sub. s. (*a*) of 2520 *oc*. The action, therefore, if it can be maintained, must come within sub. s. (*b*).

For the city it is contended that the action is premature in that there can be no claim or dispute in connection with the dismissal of an employee on account of membership in a labour union until an employee has been actually dismissed because of such membership. While for the respondents it is contended that the resolutions of November 28th, 1923, passed by the city, and the order of the chief of police based thereon, constituted a clear threat of dismissal in case of non-compliance with the order; that such threat, even without a dismissal, created between the city and its police employees, who desired to maintain their membership in the union, a dispute which could properly be said to be

a dispute in connection with the dismissal of one or more employees;

that the dismissal of those employees would amount to a lock-out within the meaning of 2520 *od*, and that as the declaring or causing of a lock-out would be unlawful before such dispute had been submitted to arbitration, the legislature must have intended that resort should be had to arbitration in order to forestall and prevent the threatened lock-out. This contention was given effect to in the courts below.

With great deference I am of opinion that the judgments below cannot be upheld. It is quite clear that there was a difference of opinion between the city council and the union as to the desirability of having the city recognize the union. Such a difference of opinion, however, the legislature has not seen fit to bring within the purview of the Act. As an employer who declares or is the cause of a lock-out in contravention of the section is liable to a penalty for so doing, the section must be strictly construed and must be limited in its application to such matters as clearly come within the language used.

The section, in so far as this action is concerned, is limited to a

claim or dispute in connection with the dismissal of one or more employees.

Now it will be observed that there is no intimation in the language of the resolutions or order that a failure to comply with the order will be followed by dismissal. There is, therefore, no express threat of dismissal. It is, however, contended that as the exercise of the power of dismissal is the only means which the city has of compelling obedience to the order, the language of the order implies that non-compliance therewith will be followed by dismissal, and that it was so understood by the employees. Even if that be so it is not, in my opinion, sufficient to constitute

a claim or dispute in connection with the dismissal of one or more employees.

Until an employee has been dismissed I am unable to see how any claim or dispute can arise in connection with his dismissal. Upon this point I find myself in harmony with the reasons given by Mr. Justice Dorion and Mr. Justice Tellier.

In his judgment Mr. Justice Dorion says:—

Je crois que déclarer la grève, ou la contre-grève, c'est la faire. La contre-grève c'est le renvoi des employés. Or la cité n'a démis aucun policier. Et si les policiers persistent dans leur refus de quitter l'union, la cité peut encore se conformer à la loi (c'est précisément le temps où cela doit se faire) et demander la création d'un conseil d'arbitrage suivant l'article 2520 *c.f.*

And Mr. Justice Tellier says:—

Il n'y a qu'au cas où le conseil s'aviserait de sévir contre les réfractaires et de recourir à la contre-grève ou au renvoi des policiers qu'il violerait la loi. Jusque là, il est dans son droit, et la loi des grèves et contre-grèves municipales est sans application, parce que le cas qu'elle prévoit ne se présente pas.

The resolutions and order under attack in this action were declarations of policy on the part of the city council. They constituted an expression of the council's intention. The council, however, was always in a position to review its expressed intention and to alter its policy at any time before carrying it into effect. And that is evidently what took place here. The eight days specified in the order of the chief of police expired, but their expiration was not followed by any dismissal. The council stayed its hand as it had a perfect right to do and its implied threat of dis-

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missal never amounted to more than a threat. Wherein then did the city contravene the Act? If the legislature had intended the Act to apply to a claim or dispute in connection with a threat of dismissal as well as to a claim or dispute in connection with the dismissal itself, it could and doubtless would have said so. Not having said so I am of opinion that the legislative intention was to limit the application of the Act under sub. s. (*b*) to cases in which there had been an actual dismissal.

That such was the legislative intention is, I think, supported by the language used in s. 2520 *oj*, above quoted.

If the city had been prosecuted for declaring or causing a lock-out under the circumstances existing in this case, could it have been subjected to the penalty mentioned in that section? In my opinion it could not. It would, in my opinion, have been a sufficient answer on the part of the city to have shewn that its police employees were at work in the performance of their duties on the days on which the city was charged with having locked them out. Where the employees continue to perform their duties under their employment a lock-out cannot, in my opinion, be said to exist. As no policeman was dismissed on account of membership in any labour union, the city has not, in my opinion, contravened the provisions of the Act. The plaintiff's action must therefore fail.

I would allow the appeal, set aside the judgments in the courts below and enter judgment for the city with costs in all courts.

*Appeal allowed with costs.*

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

Solicitors for the respondent: *Mercier & Sullivan.*

RENE CARDINAL .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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*May 14.
*May 28.

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

*Appeal—Leave to appeal—Criminal law—"Knowingly"—Burden of proof—Conflict of decisions—Article 1024a Cr. C.—Customs Act, (R.S.C. (1906), c. 48, s. 219 (as enacted by 15-16 Geo. V, c. 39) and s. 264).*

The appellant was convicted for having "knowingly" harboured and kept an automobile of a value exceeding $200 whereon the customs duty lawfully payable had not been paid (*Customs Act*, s. 219). The conviction was affirmed by the appellate court holding, under section 264 of the *Customs Act*, that the appellant had failed to discharge the onus of proving his innocent possession. The appellant now moves for leave to appeal to this court, on the ground that this decision conflicts with the judgments in *The King* v. *Beaver* (9 Can. Cr. Cas. 415) and *The King* v. *Macdougall* (15 Can. Cr. Cas. 466) where it was held that when under a statute the crime or offence consists in "knowingly" doing a certain thing, the onus of proof of the knowledge of the accused is upon the Crown.

*Held* that leave to appeal must be refused. The above judgments are not decisions "in a like case" within the meaning of section 1024a Cr. C., and they are not in conflict with the present judgment which is based on section 264 of the Customs Act.

MOTION for leave to appeal to this court from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the conviction of the appellant (1).

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

*Gustave Monette* for the motion.

*F. Monet contra.*

MIGNAULT J.—This is an application for leave to appeal under section 1024a of the Criminal Code from the unanimous judgment of the Court of King's Bench (province of Quebec) dismissing an appeal by the appellant from his conviction before Mr. Justice Wilson and a jury for having "knowingly" harboured and kept an automobile of a value

*PRESENT:—Mr. Justice Mignault in Chambers.

(1) (1927) Q.R. 43 K.B. 110.

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exceeding $200 whereon the customs duty lawfully payable had not been paid, the complaint having been laid under section 219 of the *Customs Act* (R.S.C. [1906], c. 48) as enacted in 1925 by 15-16 Geo. V, c. 39. This enactment merely added a third subsection to the two others which were already in the Act, and it is under this third subsection that the appellant was convicted.

In dismissing the appellant's appeal, Mr. Justice Guerin, on behalf of the Court of King's Bench, said:

> It was proved at the trial that this machine had been smuggled into Canada and found in the possession of the appellant.
>
> Thereupon it devolved upon the defendant to prove his innocent possession. This the defendant failed to do. Under section 264 of the *Customs Act* the burden of proof was upon the appellant to show that the proper duties payable were in fact duly paid and that all the requirements of the *Customs Act* had been fulfilled.

The appellant alleges three grounds of appeal, but on one only, the question of the onus of proving guilty knowledge, did he claim before me that there was any conflict between the judgment of the Court of King's Bench and a judgment of any other court of appeal in a like case.

In short, the appellant contends that in view of the word "knowingly" in section 219 of the *Customs Act* the onus was on the Crown to show that he, the appellant, knew that the customs duties had not been paid on the automobile in question.

In his reasons for judgment, Mr. Justice Guerin relies on section 264 of the *Customs Act* as obliging the appellant to shew that the proper duties payable were in fact duly paid.

The appellant referred me to a number of cases wherein it was held that when, under the statute, the crime or offence consists in "knowingly" doing a certain thing, the onus of proof of the knowledge of the accused is upon the Crown.

I need instance but two decisions of courts of appeal on which the appellant relies: *The King* v. *Beaver* (1), a judgment of the appellate court for Ontario in 1905; and *The King* v. *Macdougall* (2), a judgment of the Supreme Court of New Brunswick en banc in 1909.

(1) 9 Can. Cr. Cas. 415.

(2) 15 Can. Cr. Cas. 466.

In both these cases the prosecution was under section 207 of the Criminal Code (at the time of the first case, that section was section 179 of the same code), for having "knowingly, without lawful justification or excuse," circulated or distributed (I abbreviate) an

obscene book or other printed, typewritten or otherwise written matter.

It was held, in the language of Maclaren J.A., in the first case, at p. 423, as follows:

With regard to the second point reserved, it was urged on behalf of the defendant, that it was not proved that she knew of the contents of the document she was distributing, and that consequently it was not done "knowingly." This brings up the question, whether the onus of proof on this point was on the prosecution or the defence. In my opinion, the insertion of the word "knowingly" in the place where it is found makes it incumbent on the prosecution to give some evidence of knowledge.

In the second case, the sixth item of the reporter's headnote shews that the same opinion was expressed as to the onus. It reads as follows:

6. The onus is upon the Crown to shew that the accused as editor and proprietor of a paper had "knowingly" published the obscene matter, but knowledge may be inferred, in the absence of evidence to the contrary, from proof that he had full control as to what should be published or not published, and that he published the paper under an assumed name.

In both cases, while the court expressed this opinion as to the burden of proof, the conviction was affirmed on the ground that knowledge of the accused could be inferred from the facts in evidence.

The question now is whether these decisions are decisions "in a like case" within the meaning of section 1024a of the Criminal Code. If they are, and if section 219 of the *Customs Act* were the only enactment to be considered in connection with the complaint brought against the appellant, I would hold, on the authority of *The King* v. *Boak* (1), that they are in conflict with the decision from which the appellant seeks leave to appeal.

It is to be observed however that while in section 219 of the *Customs Act* and in section 207 of the Criminal Code the word "knowingly" is used in the definition of the offence, the *Customs Act* contains a section (not to be found in the Criminal Code in connection with section 207), namely section 264, dealing specially with the burden of proof.

(1) [1926] S.C.R. 481.

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Section 264 of the *Customs Act*, which was not altered at the time of the enactment of section 219 in 1925, is as follows:

> 264. The burden of proof that the proper duties payable with respect to any goods have been paid, and that all the requirements of this Act with regard to the entry of any goods have been complied with and fulfilled shall, in all cases, lie upon the person whose duty it was to comply with and fulfill the same, and, without restricting the generality of the foregoing provision, if any prosecution or suit is brought for any penalty or forfeiture for (*sic*) the recovery of any duty under this Act, or any other law relating to the customs, or to trade or navigation, or if any proceeding is taken against the Crown or any officer for the recovery of any goods seized or money deposited under the authority of this Act, or any other such law, and if any question arises as to the identity or origin of the goods seized, or as to the payment of the duties on any goods, or as to the lawful importation thereof, or as to the lawful lading or exportation of the same, or as to the doing or omission of any other thing by which such penalty or forfeiture or liability for duty would be incurred or avoided, the burden of proof shall lie on the owner or claimant of the goods seized or money deposited, and not on the Crown or on the party representing the Crown.

The judgment of the Court of King's Bench is clearly founded on section 264, under which the court held that the burden of proof was upon the appellant to shew that the proper duties had been paid. It may perhaps be open to question whether section 264 of the *Customs Act* applies to a prosecution under the third subsection of section 219 added by the 1925 amendment, but even were it without application, the decision of the Court of King's Bench would not be in conflict with the decisions above referred to where no question could arise as to such an enactment as section 264. These judgments, and the other English cases cited by the appellant to which I need not refer, were therefore not decisions "in a like case," and are not in conflict with a judgment based on section 264.

Leave to appeal must be refused.

*Motion dismissed.*

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QUEBEC RAILWAY, LIGHT & POWER COMPANY (RESPONDENT). } APPELLANT;

AND

MONTCALM LAND COMPANY (PETITIONER) .....

AND

THE CITY OF QUEBEC (INTERVENANT) ..... } RESPONDENTS.

*May 27.
*June 17.

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

*Railway—Street railway company—Originally a provincial body—Incorporated by Dominion Act—Provincial public service commission—Board of Railway Commissioners for Canada—Jurisdiction—Constitutional law—B.N.A. Act (1867) s. 91, sub. 29; s. 92, sub. 10—Art. 114 C.P.C.*

A street railway company operating within a province, originally incorporated by a provincial legislature but whose undertaking was subsequently declared by a Dominion Act to be a work for the general advantage of Canada, is not subject to the jurisdiction of a public service commission created by the province, but the execution of its powers is, by the provisions of the *Railway Act*, within the jurisdiction of the Board of Railway Commissioners for Canada.

*Per* Anglin C.J.C. and Mignault, Newcombe and Lamont JJ.—The *Railway Act* of Canada applies in the present case notwithstanding an agreement between the railway appellant and the city of Quebec providing for the reconciliation of differences between them by way of appeal to the Quebec Public Service Commission; such a clause cannot be interpreted to confer authority on the commission to regulate and direct works and operations which are within the exclusive powers of the Dominion Parliament. Rinfret J. expressed the opinion that this point raised the question of the constitutionality of a provincial statute and could not therefore be heard unless a notice has been previously given to the Attorney-General (Art. 114 C.P.C.)

*Per* Anglin C.J.C. and Mignault, Newcombe and Lamont JJ.—It was in the exercise of exclusive legislative authority that the Parliament of Canada enacted the provisions of the *Railway Act* authorizing the Board to regulate the operations of railway companies: this plainly follows from the constitutional distribution of legislative powers by the *British North America Act* (s. 91, sub. 29, and s. 92, sub. 10). Moreover, the Quebec legislature has expressly limited the jurisdiction of the Quebec Public Service Commission to matters falling under the legislative authority of the province.

*Per* Rinfret J.—The intervention of the city of Quebec in support of the land company's complaint against the railway appellant before the Public Service Commission did not confer on the latter a jurisdiction which did not exist *ab initio*.

Judgment of the Court of King's Bench (Q.R. 43 K.B. 338) reversed.

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

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QUEBEC R.L. & P. Co. v. MONTCALM LAND CO.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1) affirming a decision of the Quebec Public Service Commission and dismissing a declinatory exception as to the jurisdiction of the Commission to hear a complaint by the Montcalm Land Company against the appellant railway.

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

*L. A. Cannon K.C.* for the appellant.

*O. L. Boulanger K.C.* and *Auguste Lemieux K.C.* for the respondent Montcalm Land Company.

*Auguste Lemieux K.C.* for the respondent the city of Quebec.

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

NEWCOMBE, J.—The Montcalm Land Company, petitioner, now respondent, by its petition, dated 3rd June, 1926, to the Quebec Public Service Commission, sought to obtain from the Commission an order that the Quebec Railway Light and Power Co., now the appellant, should cause its tramcars to run more frequently, alleging that the appellant company was a public service within the meaning of the *Public Service Commission Act* of Quebec; that by contract of 24th March, 1925, between the city and the railway company, which was confirmed and validated by Act of the legislature of Quebec, c. 91 of 1926, the city had granted to the company, upon conditions provided by the contract, the renewal of its railway franchise within the city, upon the streets traversed at the date of the contract, or to which the company should extend its system with the consent of the city; that among these conditions was one which required the tramcars to run at intervals of not more than five minutes until 8 o'clock in the evening; that, subject to the contract and the statute, the appellant company carried on in the city, as part of its system, a service, known as St. Sacrement or Marguerite Bourgeoys, to serve that part of the city situated in the parish of St. Sacrement;

(1) (1927) Q.R. 43 K.B. 338.

that this was a growing and important part of the city; that the petitioner had large interests there, possessing taxable property valued at $51,650; that the appellant was bound by law and by its contract to provide on that circuit a five minute service as in other parts of the city; that it had failed to give such a service, and that it was in the general interest of the inhabitants of the district, and of the petitioner especially, that the appellant should be compelled to fulfil its obligations essential to the development and progress of that quarter of the city, and to give there a five minute service; and the petitioner submitted, by way of conclusion, that the Commission should order the appellant to provide upon the circuit in question a service at intervals of not more than five minutes up to 8 o'clock in the evening, and thereafter at intervals of not more than ten minutes. The appellant company pleaded a declinatory exception, dated 23rd June, alleging that the matter was not within the jurisdiction of the Quebec Public Service Commission because it (the appellant) was a corporation under the laws of the Dominion, by which its undertaking had been declared to be a work for the general advantage of Canada, and moreover that, by provision of the contract, it was stipulated that breaches of the appellant's obligations arising under it should be submitted to the Recorder's Court of the city of Quebec; that the city had not complained of the tramway service upon the St. Sacrement circuit, and that the petition should be dismissed.

The declinatory exception was heard before the Commission on 29th June. Subsequently the city pleaded an intervention, dated 30th June, though not served until 7th July, by which the city declared in support of the petition. The intervention referred to the appellant's contention that the matter was not within the jurisdiction of the Commission, and submitted that, by clause 59 of the contract, which will presently be quoted, the appellant company had accepted the Commission as the tribunal chosen for the decision of all questions relating to the interpretation and to the execution of the contract, and, moreover, repeated in substance the allegations of the petition, concluding as follows:

Pourquoi l'intervenante déclare appuyer la demande de la Montcalm Land Company Limited, afin de faire disparaitre tout doute quant

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Newcombe J.

à la juridiction de la Commission des Services Publics en la présente cause, et elle demande que les conclusions de la requête de la Montcalm Land Co. Ltd. soient accordées, et que la Quebec Railway Light & Power Company soit enjointe, par une ordonnance de cette Commission, à faire circuler ses tramways à des intervalles de pas plus de cinq minutes (sauf de huit heures du soir à une heure du matin, alors que le service se fera à des intervalles de pas plus de dix minutes) sur le circuit "Marguerite-Bourgeois," le tout avec dépens.

Apparently there was no further hearing before the Commission, but on 16th July it issued an order dismissing the declinatory motion. The order, after referring to the appellant company's Act of incorporation and to clauses 32 and 59 of the contract between it and the city, concludes as follows:

Lorsque cette motion a été présentée, la cité de Québec n'avait pas encore pris position dans cette cause et le président de la Commission, qui doit décider des questions de droit et de compétence, aurait été d'opinion que la motion de l'intimée était bien fondée, mais depuis cette date, savoir le 7 juillet, la cité de Québec est intervenue dans la cause et elle déclare appuyer la demande de la requérante afin de faire disparaître tout doute quant à la jurisdiction de la Commission. Les allégués de l'intervention sont au même effet que ceux de la requête, de sorte que la cité de Québec se joint à la requérante pour nous demander de rendre l'ordonnance indiquée aux conclusions de la requête.

La loi de la Commission, qui est le chapitre 17 des statuts refondus de 1925, a été amendée par le statut 16 Geo. V, chapitre 16. En vertu de cet amendement, il est déclaré à l'article 28h, paragraphe 12, que la Commission a jurisdiction sur toute matière référée à la Commission par entente entre un service public et une municipalité.

En présence de l'intervention de la cité de Québec, le président de la Commission est d'opinion que la Commission a jurisdiction pour entendre la présente demande et, en conséquence, la Commission renvoie la dite motion d'exception et ordonne aux parties de procéder au mérite dans le délai ordinaire.

I apprehend that the city must be taken to have intervened as a person interested in the event of the proceedings between the land company and the railway company, and that the intervention is admissible and affects those proceedings only in so far as the intervenant's presence and allegations are material to maintain the petitioner's case. It is the formal and declared purpose of the intervenant to support the petitioner's conclusion, and the intervention introduces no variation of the issue, although it is perhaps suggested by the order of the Commission that, in view of the intervention, the Commission has a jurisdiction which otherwise it would not have had. It is apparent that the sole project of the proceedings, both petition and intervention, is to make use of

the mandatory powers of the Commission to compel the railway company to render the service claimed, and it seems to be true, as averred in the joint factum of the two respondents, that

> the subject matter of the petition submitted to the Quebec Public Service Commission concerns nothing but the operation of the tramways in the streets of Quebec city exclusively.

From the order of the Commission the appellant appealed to the Court of King's Bench where different opinions were expressed. The appeal was heard before Greenshields, Dorion, Flynn, Allard and Howard JJ. Greenshields and Allard JJ. affirmed the jurisdiction of the Commission, holding that, in respect of the matter of complaint, the Commission had jurisdiction, notwithstanding the fact that the appellant company was incorporated by and derived its powers from the Parliament of Canada. Dorion J. considered that the decision of the Commission was not final, and therefore not appealable under the statute, and that the appeal should for that reason be rejected; while Flynn and Howard JJ. were of the opinion that the Commission was without jurisdiction and that the exception should be upheld. In the result, by the formal judgment it was found that there was no error in the judgment rendered by the Commission, and its decision was affirmed.

In considering the question of the jurisdiction of the Commission which is thus presented it becomes necessary to refer to the legislation affecting the case, and I shall endeavour to do so with as much brevity as possible. There are no admissions in the record, nor is there any evidence, except as arising from the statutes and the scheduled contract.

It appears that the Quebec, Montmorency and Charlevoix Railway Company was incorporated by the legislature of Quebec, by c. 44 of 1881, with power to build and work a railway from a point in the city of Quebec to the Saguenay river, and to construct and work branch lines, also to build bridges, wharves and all other works necessary for the construction and working of its line. Additional powers were conferred by subsequent Acts of the province, including power to sell, lease or amalgamate with any other railway company, to use electricity or other motive power besides steam, to extend the line of

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its railway westerly towards St. Sauveur, and, by c. 71 of 1894,

to extend and operate its railway in the city of Quebec and the neighbourhood thereof by building branch and connecting lines in connection with its main line, and for this purpose to cross or run along any of the streets of the city of Quebec or roads in the neighbourhood thereof, and for the purpose thereof, to erect above ground all necessary constructions, including posts and other supports essential for the working of an electric railway, the whole to be subject to the consent of the council of the city of Quebec and of the Quebec North Shore Turnpike Road Trustees, and upon the conditions to be agreed upon between them and the company, with respect to the streets and roads under their respective control.

In the following year, c. 59 of 1895 of the Dominion, upon the recitals that the Quebec, Montmorency and Charlevoix Railway Company had been incorporated by Act of the legislature of Quebec, 44 and 45 Vict. c. 44, and that this Act had been amended by the Acts to which I have referred; that it was expedient to embody in one Act the provisions remaining in force and applicable to the company, and that the company had by its petition prayed for such consolidation, and that it be declared a body corporate within the jurisdiction of the Parliament of Canada, the undertaking of the Quebec, Montmorency and Charlevoix Railway Company was declared to be a work for the general advantage of Canada, and

the company as now organized and constituted under the said Acts of the province of Quebec is hereby declared to be a body corporate and politic within the legislative authority of the Parliament of Canada; and this Act and *The Railway Act* of Canada shall apply to the company and its undertaking, instead of the said Acts of the province of Quebec and *The Railway Act* of Quebec; provided that nothing in this section shall affect anything done, any rights or privileges acquired, or any liability incurred under the said Acts of the province of Quebec prior to the time of the passing of this Act,—to all which rights and privileges the company shall continue to be entitled and to all of which liabilities the company shall continue to be subject.

It is also enacted that the company may use and employ electricity and provide for the operation and maintenance of its line as an electric system, either in whole or in part; and may lay out, construct, equip and operate the lines of railway along, over and throughout all or any of the streets in the city of Quebec, or roads in the neighbourhood thereof, or in the adjoining parishes on the north shore of the river St. Lawrence, but that no such power is to be exercised within the limits of the jurisdiction of the city of Quebec, the Quebec North Shore Turnpike

Trustees or any municipality, except with the prior consent of the city, trustees or municipality respectively, and upon such conditions as they may severally consent to and agree upon. It is moreover provided, by s. 15, that

the company may enter into an agreement with the city of Quebec for the acquiring of the franchises, rights, immunities and privileges necessary for the construction and maintenance of a system of electric railway upon and throughout the streets of the said city;

also that

the company may acquire the privileges, franchises, railways, works, plant, equipment and materials, of the Quebec Street Railway Company and the St. John Street Railway Company, and may convert the lines of the said companies into an electric system, and may conduct and manage their affairs in such manner not inconsistent with the provisions of this Act, as appears to the company most advantageous, and as is sanctioned by the city of Quebec.

Section 17 provides that:

17. The municipal council of any city, town, village or municipality through which the said railway is constructed may, subject to the provisions of this Act, make and enter into an agreement with the company relating to the construction of the said railway, for the paving, macadamizing, repairing and grading of the streets or highways occupied by the line of railway and the construction, opening of and repairing of drains or sewers, and the laying of gas and water-pipes in the said streets and highways, the location of the railway and the particular streets along which it shall be laid, the pattern of rails, the time and speed of running the cars, the amount of fares to be paid by passengers, and the rates to be paid on freight, the time in which the works are to be commenced, the manner of proceeding with the said works and the time for completion, and generally for the safety and convenience of passengers.

By c. 85 of 1899 of the Dominion, the name of the Quebec, Montmorency and Charlevoix Railway Company was changed to "The Quebec Railway, Light and Power Company", and the statute of 1895 was further amended; also the acquisition by the company of the Quebec District Railway, by deed of 29th June, 1898, and of the Montmorency Electric Power Company's property was ratified and confirmed.

By notarial contract of 24th March, 1925, between the city of Quebec and the Quebec Railway, Light and Power Company, which is ratified and confirmed by and made part of c. 91 of 1925 of Quebec, entitled an Act to amend the charter of the city of Quebec, it is recited that the company has built, operates and maintains a system of tramways in the city of Quebec in accordance with the

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provisions of a contract of 17th July, 1895, and that it is proposed to renew the franchises of the company, and it is agreed that it

> shall be lawful for the company to operate, maintain and extend under the conditions hereinafter set forth, a railway to carry passengers run by electricity or otherwise, except by steam, in the streets or parts of the streets where the tramways are presently running.

Many details are set forth in the contract affecting the construction and operation of the company's railway, and the relations between the company and the city touching the terms and conditions of renewal of the franchise. These include, among other terms, provisions for the extension of the railway lines to other streets at the request of the city; the carriage of freight; supervision and approval by the city engineer of construction upon the streets; guage of the railway; approval of the pattern of rails to be used; removal of excavated material; indemnity to the city for costs of repair to the streets; removal of excavated material; expedition in the performance of any works undertaken by the company upon the streets; removal of snow and ice; to ensure that the cars shall not be obstructed by other vehicles; double tracks where necessary; to prevent the crowding of cars; time tables; protection against accidents; light and heat; fares; the use of Montmorency Park for the construction and working of an elevator for the company's purposes; preference in the company's employment of resident taxpayers of the city; that the company's wages shall be paid every two weeks; hours of labour; conformity to city by-laws; establishment of work-shops within the city; manufacture of rolling stock within the city; that the company shall not transfer its railway or franchises without consent of the city; that the city shall not authorize competing lines within the city; the privileges granted by the contract to endure for thirty years; procedure and expropriation in case of renewal, or failure to renew, the franchises; insolvency of the company; payment to the city every year of 5 per cent. of the company's gross receipts within the city; water and school taxes; free carriage of members of the city police force, fire brigade and signal service; transfer to the city of a parcel of land which is described, also of a public right of way upon another parcel.

Clauses 31 and 32 contain the stipulations for the alleged breach of which the proceedings were taken; they provide that:

31. The cars shall run from 5 o'clock a.m. until 1 o'clock a.m. on all the company's lines.

32. The cars shall follow each other at intervals of not more than five minutes, except from 8 o'clock at night until 1 o'clock in the morning, during which space of time they shall follow each other at intervals of not more than 10 minutes. The council may by resolution modify the hours fixed for the tramway service in the various sections. This last provision shall be applicable only in the parts of the city where such circulation is required for the needs of the public.

By clause 54, if the company neglect to comply with or infringe any of the conditions or obligations imposed by the contract, it shall incur a penalty not exceeding $100 for every day of neglect, or during which it shall infringe, and it is provided that the penalty shall be recovered before the Recorder's Court of the city in the same manner as any other fine or penalty.

By clause 13 it is recited that the company is using the system known as the trolley system and provided that in the event of a better system coming into general use the company shall, at its expense, be bound to adopt it, subject to the decision of three arbitrators to be named.

By clause 50 it is provided that the company shall be entitled to renewal of its contract for a further period of thirty years, unless the city prefer to expropriate the railway system by paying the value, plus 10 per cent, which is to be ascertained by arbitrators to be appointed. The city relies upon clause 59 to justify its intervention; it is thereby provided as follows:

59. Unless it is expressly provided for in one of the clauses of the present deed, it is expressly understood that in the event of any difficulty or difference of opinion arising between the parties, or in the event of any disagreement between them, with reference either to this deed, or to any one or all the conditions herein stipulated, or with reference to the interpretation thereof, or with reference to the execution of any or all the obligations assumed by the parties respectively, or with reference to any cause or matter relating thereto, be it foreseen or not foreseen by the present deed, the parties shall go before the Quebec Public Service Commission which they choose as a court elect, and to whose jurisdiction they shall be submitted for all the purposes hereinabove set forth.

Should this court cease to exist, and in the event of another court being established to take its place, the latter court shall have the powers and jurisdiction of the former for the purposes of these presents.

If from now until then a tramway commission for the city is established, or if a provincial tramway commission is established, either one or the other of these tribunals shall have jurisdiction.

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It is in my view of the case unnecessary to determine precisely the application and effect of this clause. It is preceded by two clauses stipulating for the determination of questions of fact by arbitrators, and it is intended I think to provide for the reconciliation of differences which may arise between the railway company and the city within the scope of the capacity or powers with which the Commission is, by the provincial statute, competently endowed; there can be no doubt that, within these limits, the variety of the provisions of the contract, which I have endeavoured briefly to outline, affords material for the working of the clause; but it cannot be assumed, nor scarcely imagined, that the parties or the legislature intended, in framing or sanctioning such a clause, to confer authority to regulate and direct works and operations which are within the exclusive powers of Parliament. Indeed, as will presently appear, the legislature has expressly limited the jurisdiction of the Commission to matters falling under the legislative authority of the province.

The provisions with regard to the constitution and jurisdiction of the Quebec Public Service Commission are to be found in the *Public Service Commission Act* of Quebec, R.S.Q., 1925, c. 17, as amended by c. 16 of 1926. The Commission is a body consisting of not less than three nor more than four members, appointed by the Lieutenant Governor in Council, and it has enumerated powers of regulation and control over public services within the province. "Public Service", within the definition of the statute, includes every corporation other than a municipal or school corporation, that owns, operates, manages or controls any system, works, plant or equipment for the conveyance of passengers or goods over a railway or tramway; but it is declared that the application of the Act, and the jurisdiction of the Commission, extend only to matters falling under the legislative authority of the province. By division IV of the Act, as enacted by c. 16 of 1926, no public service is to begin the construction or operation of any line, plant or system without first having obtained the approval of the Commission, which is to be granted whenever, after investigation, it finds that such construction or operation is necessary or convenient for the public benefit. Charges demanded or received by any

public service shall be just and reasonable, and schedules of rates, fares and tolls, and classifications and rules pertaining to the service, are to be forwarded to the Commission. The Commission has power to regulate or determine these, also the extent of the services to be rendered, and the terms and conditions upon which a public service may enter or do business within a municipality, also contestations between a public service and a municipality with regard to the performance of agreed terms and conditions; the commission having authority to change such terms and conditions as may be in its opinion necessary or desirable. The Commission also has jurisdiction in any dispute relating to tramway rates and operations that a tramway company, other than the Montreal Tramways Company, and one or more municipalities agree by resolution to submit to it, whether or not a contract exist between them, also

in all matters referred for the decision of the Commission by agreement between any public service and any municipality or other interested party, and the decision of the Commission shall then be binding upon the parties.

Generally it is enacted that the Commission shall have supervision over all public services as defined by the statute

and may make such orders regarding quality of service, equipment, appliances, safety devices, extension of works or systems, reporting, rules, regulations, requirements and practices affecting or pertaining to its charges or service and other matters, as are necessary for the safety or convenience of the public, or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

The Commission may also conduct all inquiries necessary for the obtaining of information as to the manner in which any public service complies with the law, or as to any other matter or thing within the jurisdiction of the Commission.

Rigorous powers are conferred upon the Commission for the enforcement of its orders, and it may for this purpose forcibly or otherwise enter upon, seize and take possession of the whole or part of the moveable or immoveable property of a disobedient public service, with its books and offices; assume and take over the powers, rights and functions of the directors and officers of the public service, including powers of employment and dismissal of officers and servants, for such time as the Commission continues

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to direct the management, and all officers and servants are required to render obedience to the Commission, or those whom it places in authority in the management of all departments of the undertaking. Moreover, if it be proved that a public service has not complied with an order given by the Commission, and if the Commission be of the opinion that there are no effectual means of compelling the public service to obey such order, it shall transmit to the Attorney General a certificate of default, which, after public notice in the Quebec Official Gazette, shall be ground for an action to dissolve the public service, or to annul the letters patent incorporating it.

The decision of the Commission upon any question of fact within its jurisdiction is final, but, by leave of a judge, an appeal lies to the Court of King's Bench, in conformity with art. 47 of the Code of Civil Procedure, from any final decision of the Commission upon any question as to its jurisdiction or upon any question of law, except in expropriation matters.

The *Railway Act* of the Dominion, c. 68 of 1919, applies to all railway companies and railways, except government railways, within the legislative authority of the Parliament of Canada, and the word "railway" is by this Act defined to mean any railway which the company has authority to construct or operate, and, except when the context is inapplicable, includes street railway and tramway. It provides for the constitution of the Commission known as the Board of Railway Commissioners for Canada. Jurisdiction is conferred upon this Board to enquire and to hear and determine any application by or on behalf of any party interested complaining that any company or person has failed to do any act, matter or thing required to be done by this (the general) Act or the special Act. There are comprehensive provisions authorizing the Board to regulate the operations of railway companies subject to the legislative authority of Canada, including, among others, s. 35 whereby it is provided that:

35. Where it is complained by or on behalf of the Crown or any municipal or other corporation or any other person aggrieved, that the company has violated or committed a breach of an agreement between the complainant and the company—or by the company that any such corporation or person has violated or committed a breach of an agreement between the company and such corporation or person,—for the provision, construction, reconstruction, alteration, installation, operation, use

or maintenance by the company, or by such corporation or person, of the railway or of any line of railway intended to be operated in connection with or as part of the railway, or of any structure, appliance, equipment, works, renewals or repairs upon or in connection with the railway, the Board shall hear all matters relating to such alleged violation or breach, and shall make such order as to the Board may seem reasonable and expedient, and in such order may, in its discretion, direct the company, or such corporation or person, to do such things as are necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as constitute a violation or a breach thereof.

Decisions or orders of the Board may be made a rule, order or decree of the Exchequer Court, or of any superior court of any province of Canada, and shall be enforced in like manner as any decree or order of such court, and any rule, regulation, order or decision of the Board shall, when published by the Board, or by leave of the Board, for three weeks in the Canada Gazette, and while the same remains in force, have the like effect, as if enacted in the *Railway Act,* and all courts shall take judicial notice thereof.

Therefore, if the appellant company have the powers which the respondents are endeavouring to compel it, by the authority of the Quebec Public Service Commission, to execute, the execution of these powers by the company is, by the provisions of the *Railway Act,* within the jurisdiction of the Board of Railway Commissioners for Canada to direct and regulate subject to the provisions of that Act. It was in the exercise of exclusive legislative authority that the Parliament of Canada enacted these provisions of the *Railway Act;* this plainly follows from the constitutional distribution of legislative powers. It was said by Lord Atkinson, pronouncing the judgment of the Judicial Committee of the Privy Council in *City of Montreal* v. *Montreal Street Railway,* (1),

> Now the effect of subsection 10 of s. 92 of the *British North America Act* is, their Lordships think, to transfer the excepted works mentioned in sub-heads (*a*), (*b*) and (*c*) of it into s. 91, and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament.
>
> These two sections must be read and construed as if these transferred subjects were especially enumerated in s. 91, and local railway as distinct from federal railway were specifically enumerated in s. 92.

See also *Madden* v. *Nelson and Fort Sheppard Railway Company* (2); *Toronto* v. *Bell Telephone Company* (3),

(1) [1912] A.C. 333, at p. 342. (2) [1899] A.C. 626.
(3) [1905] A.C. 52, at p. 57.

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Moreover, not only are the works, including railways, described in clause 10 of s. 92 of the *British North America Act, 1867,* thus affirmatively declared to be within exclusive Dominion authority, but it is expressly provided by clause 29 of s. 91 that they are excluded from the matters assigned to the legislatures.

Now the principal argument of the respondents rests upon the ground that, when, in 1895, by c. 59 of the Dominion, the undertaking of the Quebec, Montmorency and Charlevoix Railway Company was declared to be a work for the general advantage of Canada, the Quebec Electric Street Railway did not, it is said, form part of that undertaking or work, and that the tramway, being in its nature a local work, was not affected by the declaration, and therefore never became subject to the legislation or powers of Parliament. I find it difficult to realize however that the operation of any street railway at Quebec which the company was authorized to construct or acquire was not intended to be embraced in the declaration. It is certainly not open to question that at the time of the declaration the provincial undertaking of the company included powers to construct and operate by electricity a railway upon the streets of Quebec, and it appears by recital in the scheduled contract that the system of appellant's tramways had been built and was being operated and maintained under the provisions of a contract of 17th July, 1895, a date five days antecedent to the Act, c. 59 of 1895 of Canada, by which the company became a Dominion corporation, and by which its undertaking was declared to be a work for the general advantage of Canada.

But I do not find it necessary to determine the scope of these powers, or the extent of the declaration, or whether it includes the tramway as subsequently acquired or constructed. The Dominion statutes relating to the appellant company are so expressed as to confer or recognize the electric tramway powers which the appellant company is exercising, and, by the legislation of 1895, the company had acquired Dominion capacity and powers with which the provincial legislature could not interfere.

Now, as I have said, the object of the respondents proceedings is to invoke the statutory powers of the Public Service Commission of Quebec for the purpose of com-

pelling the appellant railway to operate its trams in accordance with the requirements of the local Act of 1925, as interpreted by the Commission. The jurisdiction invoked is that of the local statutory Board, not that of the ordinary tribunals, and that jurisdiction, with the extraordinary powers which the Commission possesses, is set in motion against the Dominion corporation for the regulation of railway powers conferred by the Dominion, or which Parliament professes to confer. If, as would seem to follow from the respondent's argument, these tramway powers be *ultra vires* of the Dominion, the petition and intervention fail because the appellant company cannot, by authority of a statute of Quebec, be compelled to execute powers which do not belong to it; while, if the powers exist and may be exercised, they are Dominion powers and not within the authority of the legislature of Quebec. There is an apposite passage in the judgment of the Lord Chancellor in *Madden* v. *Nelson and Fort Sheppard Railway Company* (1),

> It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the provincial parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them and is, therefore, manifestly *ultra vires*.

One must look to what the respondents' claim involves; it is nothing less than provincial statutory compulsion of a Dominion railway corporation, either to exercise powers which Parliament has not conferred, or, in the exercise of its competent Dominion powers, to submit to provincial review and regulation, followed in either case by the consequence that, for failure to comply with the provincial order, the company may forcibly be deprived of its property, powers, rights and management, and ultimately subjected to an action for its dissolution; and this notwithstanding what is undoubtedly true that neither the constitution and powers of the company nor its authorized undertaking is subject to the legislative authority of the province. It is needless to say that these things cannot be done.

This conclusion disposes of all the grounds upon which the respondents rely in support of the petition, and it is

(1) [1899] A.C. 626, at p. 628.

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unnecessary to make any observations upon that part of the appellant's case which is concerned with the Recorder's Court of Quebec.

The respondents raised a preliminary point that this Court had not jurisdiction to entertain the appeal. It was said that the judgment of the Court of King's Bench was not pronounced in a judicial proceeding, and was not final. The answer is to be found in the definition of "judicial proceeding" and of "final judgment" as contained in the *Supreme Court Act,* see c. 32 of 1920, s. 1. The Court of King's Bench in disposing of the appeal from the Public Service Commission was not exercising merely regulative, administrative, or executive jurisdiction, and the judgment of that court determined a substantive right of the appellant which was in controversy in that proceeding.

The appeal should be allowed and the petition and intervention should be dismissed, with costs throughout.

RINFRET J.—The Quebec Railway, Light & Power Company est une corporation fédérale soumise à l'autorité législative du Parlement du Canada et, en particulier, au contrôle de la Commission des Chemins de fer du Canada.

The Montcalm Land Company, par voie de requête, s'est adressée à la Commission des Services Publics de Québec pour obtenir de cette dernière un ordre enjoignant à The Quebec Railway Company de faire circuler ses tramways sur un circuit désigné à

des intervalles de pas plus de cinq minutes, sauf de huit heures du soir à une heure du matin, alors que le service se fera à des intervalles de pas plus de dix minutes.

La Commission des Services Publics de Québec, qui est un corps créé par la législature de Québec et investi de pouvoirs exclusivement provinciaux (R.S.Q. 1925, c. 17), n'avait pas juridiction pour connaître de cette requête.

The Quebec Railway Company déclina donc la compétence de la Commission par voie d'exception déclinatoire.

Là-dessus, la cité de Québec, invoquant un contrat entre elle et The Quebec Railway Company, intervint volontairement dans l'instance pour

appuyer la demande de The Montcalm Land Company Limited, afin de faire disparaître tout doute quant à la juridiction de la Commission des Services Publics en la présente cause,

et demanda

que les conclusions de The Montcalm Land Company Limited soient accordées.

Sur quoi le président, au nom de la Commission des Services Publics, rendit une ordonnance en date du 16 juillet 1926 déclarant que, sans l'intervention de la cité de Québec, il eût

été d'opinion que l'exception déclinatoire était bien fondée,

mais que l'intervention de la cité de Québec avait remis les choses au point.

Le contrat entre la cité et The Quebec Railway Company prévoit que.

les parties devront s'adresser à la Commission des Services Publics de Québec, qu'elles choisissent comme tribunal élu et à la juridicition de laquelle elles seront soumises pour toutes les fins ci-haut exprimées.

En plus, depuis le statut 16 Geo. V, chapitre 16, la Commission a juridiction

sur toutes matières référées à la commission par entente entre un service public et une municipalité ou autre partie intéressée, et sa décision est alors obligatoire pour les parties.

Le président décida donc que, en présence de l'intervention de la cité de Québec, la Commission avait juridiction en l'espèce.

Cette décision ne fut pas mise de côté par la Cour du Banc du Roi par suite des circonstances suivantes: un juge fut d'avis que la décision n'était pas finale et que le droit d'en appeler n'existait pas. Deux des juges furent d'avis que la Commission était compétente sur la requête de la seule compagnie Montcalm et indépendamment de l'intervention de la cité. Les deux autres juges, au contraire, exprimèrent l'opinion qu'il y avait défaut absolu de juridiction sur la requête de la compagnie Montcalm, même avec l'appui de la cité de Québec.

La question nous est maintenant soumise, à la suite d'une permission spéciale octroyée par la Cour du Banc du Roi.

Je suis d'avis que le pourvoi en appel de The Quebec Railway Company doit être accueilli pour la raison qui suit:

La Commission des Services Publics de Québec n'est pas compétente à connaître de la requête de la compagnie Montcalm, parce qu'elle prend des conclusions et demande des injonctions contre une compagnie fédérale et en des matières qui relèvent de l'autorité législative fédérale. Il

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ne s'agit ici nullement de la référence à la commission par entente entre un service public et une municipalité prévue au paragraphe 12 de l'article 28h de la loi de 1926 (16 Geo. V, c. 16). Cet article ne pourrait d'ailleurs avoir son effet qu'entre le service public et la municipalité qui auraient convenu de la référence.

L'intervention de la cité de Québec n'a pu modifier le caractère originaire de l'instance. D'une requête concluant à l'émission d'ordres impératifs, elle n'a pu faire une référence. Et si la commission manquait de la juridiction nécessaire pour connaître de l'instance originaire, l'intervention de la cité de Québec à l'appui de cette instance et pour faire accorder les conclusions de la requête de la compagnie Montcalm n'a pu conférer à la Commission une juridiction qui faisait défaut *ab initio*. L'intervention n'a pas transformé la nature de la demande.

Ainsi, (dit Glasson, Procédure Civile, éd. de Tissier, vol. 1, p. 940), si l'instance principale est annulée, par exemple pour nullité de l'ajournement ou pour cause d'incompétence, l'intervention tombe avec l'instance principale.

De même Japiot, dans son Traité de Procédure, p. 517, no. 828:

*L'intervention* est une demande *principale*, mais *non introductive d'instance*, et par suite non soumise au préliminaire de conciliation. Mais elle suppose un procès déjà engagé et constitue un développement, une extension de l'instance pré-existante; elle en implique la validité; les juges ne pourraient pas prononcer sur la prétention de l'intervenant, si la demande originaire était repoussée pour incompétence du tribunal ou pour vice de forme antérieur à l'intervention.

Pour ces raisons, je crois que l'intervention de la cité de Québec n'a pu apporter à la Commission des Services Publics une juridiction qui lui faisait défaut dès le début de l'instance. La requête de la compagnie Montcalm devait être rejetée faute de compétence et l'intervention tombait avec elle.

Je crois donc l'appel bien fondé. Il devrait être accordé avec dépens devant cette cour et devant la Cour du Banc du Roi et l'exception déclinatoire devrait être maintenue.

Le jugement ainsi formulé ne prononce pas sur une simple question de procédure. Il s'agit ici d'une question de juridiction. Et la solution est suffisante pour trancher le point en litige.

J'ai pris connaissance du jugement de mon collègue, M. le juge Newcombe, auquel j'ai compris que la majorité de la cour avait décidé de se rallier. A mon humble avis,

ce jugement exprime des vues sur la validité de la clause de référence contenue dans le contrat entre la cité et la compagnie (clause 59) et dans la loi de la Commission des Services Publics (16 Geo. V, c. 16, art. 28h, par. 12).

Le contrat entre la cité de Québec et la Quebec Railway Company est devenu loi de la province (1925, c. 91, art. 5). Cette cour, exerçant sa juridiction d'appel, doit rendre le jugement qui aurait dû être prononcé par le tribunal dont est appel (Loi de la Cour Suprême, art. 51). Dans le présent cas, la Cour du Banc du Roi de la province n'aurait pu adjuger sur la validité de l'article discuté de la Loi des Services Publics ou de la clause du contrat sans qu'un avis fût donné au Procureur-Général, conformément au Code de Procédure Civile, art. 114. La prescription est impérative (*Le Roi* v. *Carrier*), (1) et n'a pas été suivie en l'espèce. Très respectueusement, je crois que l'avis au Procureur-Général était une condition préalable obligatoire, avant de mettre en question la validité de ces lois.

*Appeal allowed with costs.*

Solicitors for the appellant: *Taschereau, Cannon, Parent & Taschereau.*

Solicitor for the respondent Montcalm Land Company: *Oscar Boulanger.*

Solicitors for the respondent The City of Quebec: *Chapleau & Thériault.*

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DAME D. RODRIGUE (PLAINTIFF).....APPELLANT;

AND

THOMAS DOSTIE (DEFENDANT) AND PHILIAS VACHON (MIS-EN-CAUSE). } RESPONDENTS.

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*Feb. 18.
*Apr. 20.

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

*Married woman—Wife separated as to property—Sale of property—Pledge—Debts of the husband—Validity.—Art. 1301 C.C.*

R., a married woman separated as to property, sold land and buildings to D. for $8,000 which she acknowledged in the deed of sale as having already been paid to her. But the facts were that the amount of

(1) L.R. 23 K.B. 368.

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

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$8,000 was formed by a sum of $6,000 then due to D. by the husband of R. and $2,000 to be advanced in the future by D. and used "in the construction of buildings on the property" sold. In a counter-letter signed on the same date as the deed of sale, R., falsely admitting that she was indebted to D. in a sum of $8,000 on promissory notes, declared that she was selling the above property to D. in payment of that debt; and it was further stipulated that the property would be returned to R. when reimbursed, by R. or her husband, of the moneys advanced by him, including the sum of $8,000.

*Held* that the deed of sale was void and of no effect under the terms of article 1301 C.C. No sale was ever intended between the parties and R. never had the intention of selling her property and using the proceeds to pay immediately the debts of her husband, as she had the right to do; but she in fact pledged her property in order to obtain delay from the creditor of her husband and was thus binding herself to pay his debts in the future.

*Held,* although it has been decided that the nature or form of an agreement should be considered by the courts without looking into the motives or purposes which the parties may have had in view (*Salvas* v. *Vassal* (27 Can. S.C.R. 68) and *Booth* v. *McLean* ( [1923] S.C.R. 243) ), that principle of law does not apply to persons incapable of contracting and specially to a married woman binding herself in a contract with or for her husband, as otherwise the parties would be able to evade the prescriptions of article 1301 C.C. by giving an apparent valid title to a transaction forbidden by law.

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.

On 24th January, 1920, the appellant, Dame Desilda Rodrigue, wife separated as to property of Philibert Fortin, sold a property situated in the township of Dudswell, in the county of Wolfe, in the district of St. Francis, to the respondent, Thomas Dostie, for a price stated in the deed of sale to be $8,000 and for which a general acquittance was given. As a matter of fact, the true consideration was a discharge given by Dostie to Fortin for $6,000 which Fortin owed Dostie, and the promise of a further loan by Dostie to Fortin of $2,000, which the latter required to enable him to build a barn and a house on the property.

On the same day the parties executed a counter-letter, from which it appears that the appellant had given to Dostie promissory notes aggregating what Dostie is said to have paid for the property ($8,000) maturing at different dates; that in payment of said notes the appellant

had that day sold the property to Dostie; and that Dostie agreed to cede it back to her if and when she or her husband repaid to him the $8,000 with interest at 8 per cent. per annum, and any other advances that he might make to either of them up to the time of the redemption of the property. This counter-letter was not registered.

By her action appellant alleged that the sale by her to Dostie of the 24th January, 1920, was absolutely null, as being against public order, because a wife cannot obligate herself for her husband.

*R. Beaudoin K.C.* for the appellant.

*Léon Faribault K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET J.—Il s'agit d'une action où une femme mariée, Dame Desilda Rodrigue, l'appelante, invoque, l'article 1301 du code civil pour conclure à la nullité d'un acte de vente à Thomas Dostie, l'un des intimés, en date du 24 janvier 1920. Après avoir fait enregistrer cet acte de vente en sa faveur, Dostie a accordé une hypothèque à Vachon, l'autre intimé. L'appelante a également demandé la radiation de l'enregistrement de cette hypothèque, parce qu'elle aurait été consentie frauduleusement et par une personne qui n'était pas légalement propriétaire de l'immeuble. L'appelante prétend, en effet, que si l'acte de vente à Dostie était contraire à l'ordre public et, par suite, frappé de nullité absolue, Dostie, n'ayant aucun droit de propriété, ne pouvait affecter l'immeuble d'une hypothèque. L'action réclame, en outre, l'annulation de certaines obligations et le remboursement de certains paiements qui furent la conséquence de l'acte de vente dont elle invoque la nullité.

Le jugement de première instance fut à l'effet que la preuve et le plaidoyer de Dostie démontraient clairement que la vente du 24 janvier 1920 avait pour but de faire garantir par l'appelante la créance de Dostie contre son mari, dont elle est séparée de biens. Il en résultait que l'obligation ainsi souscrite était illégale comme se trouvant en contravention à l'article 1301 du code civil.

Partant, l'hypothèque enregistrée le 21 août 1923 * * * en faveur du mis-en-cause Vachon était nulle et sans effet en autant qu'elle peut affecter les dits biens.

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L'action fut maintenue sur ces deux points, la cour considérant qu'il ne paraît pas opportun de statuer présentement, et dans cette instance, sur les autres conclusions de l'action.

La Cour du Banc du Roi a infirmé ce jugement, sauf la dissidence de monsieur le juge Létourneau qui partageait l'opinion de la Cour Supérieure. Monsieur le juge Dorion vit, dans la transaction dont il s'agit, une véritable aliénation de la propriété faite par l'appelante en paiement des dettes de son mari, sans enfreindre l'article 1301 du code civil, qui défend les obligations contractées par la femme avec ou pour son mari, mais nullement l'emploi qu'elle peut faire du prix de vente. Les trois autres juges, formant la majorité, considérèrent que l'appelante était sans intérêt à demander l'annulation de la vente et la radiation de l'hypothèque. En effet, le 20 août 1923, Dostie avait revendu la propriété à l'appelante et, depuis lors, cette propriété avait été saisie et adjugée en justice par le shérif. La vente originaire était donc devenue sans effet et l'hypothèque avait été purgée.

Il ne subsistait même pas l'utilité de faire reconnaître l'inexistence de l'hypothèque, puisque le rapport de distribution avait été fait à la suite de la vente du shérif et le créancier Vachon n'y était pas colloqué. Il est vrai que Vachon contestait le rapport de distribution; mais, dans ce cas, c'était en intervenant dans cette contestation que l'appelante devait faire reconnaître ses droits.

L'action de la demanderesse devait donc être rejetée faute d'intérêt.

Cette raison, qui fut celle de la majorité des juges, n'est pas consignée dans le jugement de la Cour du Banc du Roi. Cette cour,

procédant à rendre le jugement qui aurait dû être rendu, renvoie l'action de l'intimée avec dépens (parce que) la dite vente à réméré du 24 janvier 1920 n'est pas un acte simulé mais une véritable aliénation de la propriété de l'intimée * * * que le paiement de la dette de son mari par l'intimée ne rend pas nulle l'aliénation de la dite propriété * * * que la prohibition contenue dans l'article 1301 du Code Civil s'applique aux obligations contractées par la femme, mais nullement à l'emploi qu'elle peut faire du prix de vente, même si cet emploi est prévu par l'acte argué de nullité.

L'intimé Vachon, qui n'avait pas produit de plaidoyer devant la Cour Supérieure, s'était joint à Dostie pour demander à la Cour du Banc du Roi l'infirmation du jugement qui avait déclaré son hypothèque nulle et sans effet.

D'autre part, il est ici, devant la Cour Suprême, pour appuyer le jugement que nous venons de résumer.

Il sera plus avantageux de prendre en considération séparément la contestation avec Dostie et la contestation avec Vachon.

Le contrat de l'appelante en faveur de Dostie est en apparence une vente pure et simple de trois lots dans le canton de Dudswell. Le prix est

de $8,000 que la demanderesse reconnaît avoir reçues du dit acquéreur par avances faites avant ce jour, dont quittance générale.

Il est établi—il est, de fait, implicitement admis par Dostie—que cette déclaration est inexacte. L'appelante n'avait absolument rien reçu de Dostie avant la passation de l'acte de vente. La somme de $8,000, ainsi que l'admet le plaidoyer amendé, avait été formée d'un montant de $6,000 dû à Dostie par le mari de l'appelante et d'une somme additionnelle de $2,000 que Dostie devait fournir de temps à autre pour " servir à la construction de bâtisses sur le terrain." Il est donc indiscutable, même si l'on envisage le contrat de vente seul, qu'il fut consenti en grande partie pour les affaires du mari. Quant aux $2,000 qui devaient être employées à des constructions, la preuve n'indique pas que cette somme particulière a été fournie par Dostie. Il a payé des traites et des chèques après la vente. Ils sont d'ailleurs à l'ordre du mari de l'appelante et il n'a pas été démontré de quelle manière on en avait utilisé le produit.

Cependant, en même temps que le contrat de vente, les parties signèrent une contre-lettre. Cette dernière débute comme suit:

Attendu que la dite dame Fortin (l'appelante) était endettée envers le dit Thomas Dostie d'une somme de $8,000 qu'elle lui devait par divers billets promissoires payables à la date indiquée en chacun des dits billets promissoires.

C'était, là encore, une fausse déclaration. Nous avons déjà vu que l'appelante n'était nullement endettée envers Dostie. En plus, si l'on prenait cette affirmation à la lettre, il s'ensuivrait que l'appelante aurait souscrit des billets promissoires à Dostie pour la dette de son mari; et ce serait là, à sa face même, une obligation assumée par la femme à l'encontre de l'article 1301 du code civil. En s'arrêtant uniquement à cette partie du préambule de la contre-lettre, la transaction apparaîtrait viciée à sa base.

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Poursuivons cependant l'examen de cette contre-lettre. Elle déclare ensuite que " pour se libérer du paiement des dits billets promissoires " l'appelante, autorisée de son époux, a vendu à Dostie les trois lots du canton de Dudswell ainsi que le roulant de sucrerie et les effets mobiliers dont elle a la possession.

Dostie consent à ce que ces biens soient rétrocédés à l'appelante

lorsqu'il aura été payé par la venderesse ou par le dit Philibert Fortin de la dite somme de $8,000 prix de vente stipulé en la vente, en date de ce jour, avec intérêt au taux de huit pour cent par an, payable annuellement à compter de ce jour et de toutes autres avances d'argent qu'il pourrait faire à l'un ou à l'autre, d'hui au rachat des susdits biens;

Convenu que le dit Thomas Dostie, pour lui et ses ayants-droits, s'engage à rétrocéder les dits biens, meubles et immeubles, et à en signer un acte notarié, à la demande de l'un d'eux, aussitôt qu'il aura été intégralement payé, en capital et intérêts, au taux de huit pour cent tant de la susdite somme de $8,000, prix de vente sus-mentionné, que de toutes autres avances en argent qu'il pourra leur avoir faites, d'hui à ce que la demande lui soit faite, par l'un ou par l'autre, de leur signer un acte de rétrocession des biens sus-mentionnés.

Il est évident que les parties ont voulu que le contrat de vente et la contre-lettre ne forment qu'une seule convention. Cela est d'ailleurs clairement démontré par les admissions du plaidoyer, par les circonstances et par la preuve.

La Cour du Banc du Roi, qui a maintenu la validité de la transaction, la considère comme une " vente à réméré," ce qui ne peut exister qu'en envisageant la vente et la contre-lettre comme un seul contrat.

D'après les termes mêmes de la convention, l'appelante aurait donc engagé ses immeubles de façon à ne pouvoir les racheter que moyennant le remboursement des avances d'argent que Dostie pourrait faire à elle-même ou à son mari; et la stipulation est que Dostie rétrocèdera les biens à la demande de l'un d'eux.

Cette constatation n'est pas décisive; mais, en vue des autres faits qui ont été prouvés, elle est un élément important pour démontrer qu'il s'agissait dans l'espèce d'une obligation par une femme mariée " avec ou pour son mari " autrement qu'en sa qualité de commune en biens.

Ce contrat ne changea rien à la situation de l'appelante, Dostie lui laissant la libre possession de ses immeubles. Elle continua de les cultiver à sa guise et d'en retirer les fruits. Elle y fit d'importantes coupes de bois; elle en

enleva les bâtisses et en construisit de nouvelles. C'était d'ailleurs la convention entre les parties; et l'indication la plus positive qu'il ne s'agissait pas d'une véritable vente et que Dostie n'avait pas l'intention de prendre possession de la propriété, c'est justement sa prétention que l'une des considérations du contrat était qu'il devait fournir de l'argent à l'appelante et à son mari pour leur permettre de construire de nouvelles bâtisses sur les terrains. Un acheteur ne fournit pas, comme partie de son prix d'achat, les fonds nécessaires pour permettre au vendeur de faire sur la propriété vendue de nouvelles constructions qui appartiendront à ce vendeur.

Il convient de signaler, en outre, que la contre-lettre ne fixe aucun délai dans lequel il sera permis à l'appelante ou à son époux de racheter les biens qui en font l'objet. Sans doute la loi limite le droit de réméré à dix ans; mais cette absence d'une stipulation formelle n'en sert pas moins à souligner davantage que les parties n'avaient pas en vue une véritable translation de propriété.

C'est d'ailleurs ce que l'appelante a déclaré à l'enquête, sans objection ni contradiction. Après avoir affirmé qu'elle ne devait rien à Dostie, on lui demande comment Dostie s'y est pris pour l'induire à faire ce contrat. Elle répond:

> Il m'a dit que c'était pour garantir l'argent que mon mari pouvait lui devoir * * * Je ne l'ai pas fait beaucoup de bon coeur * * * C'est parce qu'il me forçait de lui donner des garanties.

La fausseté des déclarations contenues dans les documents écrits et la conduite des parties viennent confirmer les affirmations de l'appelante et justifient la décision du juge du procès que véritablement les parties n'ont eu en vue qu'une garantie par la femme mariée des dettes de son mari. Toutes les circonstances démontrent que c'était là leur intention et tous les participants semblent avoir compris que la propriété était donnée simplement en garantie. A tout événement, ce sont certainement là les représentations que l'on a faites à l'appelante, qui l'ont induite à signer les contrats, et sans lesquelles elle n'y aurait jamais consenti.

En ce qui la concerne, elle n'a pas eu l'intention de vendre ou de donner ses immeubles en paiement des dettes de son mari. Elle n'a vu dans toute cette transaction que la mise en gage ou le nantissement de ses biens pour

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empêcher un créancier de son mari de sévir contre ce dernier et obtenir un répit pendant lequel les dettes pourraient être acquittées.

C'est précisément pour éviter une situation de ce genre et pour protéger la femme mariée en pareille occurrence que l'article 1301 C.C. a été inséré dans le code civil. L'on permet à la femme mariée de donner ou de payer immédiament; on lui défend de s'obliger à payer à une date future. Elle peut aliéner ses biens, mais elle ne peut les engager; et la raison en est, d'après Pothier, qui s'inspire d'Ulpien, que s'il s'agit de se dépouiller immédiatement la femme mariée y songera sérieusement, tandis qu'elle se laissera persuader assez facilement de prendre une obligation pour l'avenir;

il est plus facile d'obtenir de la femme une promesse qu'une donation.

C'est bien par là que pèchent, nous semble-t-il, les conventions attaquées par l'appelante. La loi défend à la femme mariée de s'obliger avec ou pour son mari. C'est une législation inspirée dans un but de protection pour la femme. Ce n'est pas parce que les parties auront donné à leur convention la forme d'un achat, d'une vente, d'un échange d'immeubles ou d'un bail emphythéotique qu'elle pourront ainsi se soustraire à la prohibition de la loi.

La Cour du Banc du Roi et le Conseil Privé, dans la cause de *Trust & Loan* v. *Gauthier* (1), ont établi que la règle d'ordre public contenue dans l'article 1301 C.C. ne saurait être frustrée d'une manière indirecte et que, quels que soient les moyens détournés employés pour l'éluder, dès que les faits viendront à la connaissance du tribunal, il annulera toute obligation contractée directement ou indirectement par la femme en violation de cet article. C'est un principe que cette cour a elle-même affirmé dans la cause de *Klock* v. *Chamberlin* (2). En pareille matière, l'enquête du juge ne saurait être limitée par les énonciations du contrat, ni se laisser arrêter par les expressions contenues dans les actes. Au delà des termes, il recherchera si la convention ne constitue pas une violation déguisée.

Tout démontre que nous sommes ici en présence d'un cas de ce genre. Il n'y a pas eu de vente *bona fide;* il n'y a pas même eu de vente à réméré. Les contrats ne dévoi-

(1) Q.R. 13 K.B. 281; [1904] A.C. 94.

(2) (1887) 15 Can. S.C.R. 325, at p. 335.

lent pas les véritables intentions des parties. S'il faut, comme cette cour l'a fait dans la cause de *Salvas* v. *Vassal* (1) et plus récemment encore dans la cause de *Booth* v. *McLean* (2), éviter de rechercher les motifs ou le but immédiat ou ultérieur ainsi que les résultats possibles et probables que les parties avaient en vue et se borner à considérer

la nature de la convention qu'elles avaient l'intention de faire et qu'en réalité elles ont faite,

cela ne peut s'entendre que de la convention entre personnes capables de contracter et qui ont voulu donner à une transaction licite la forme qu'elles ont librement décidée entre elles. Il est exact de dire que, dans ce cas, un emprunt sous forme d'une vente à réméré sera toujours une vente entre les parties et sera envisagée comme telle par les tribunaux, sauf le cas de fraude à l'égard des tiers.

Mais il est évident que si l'on appliquait ce principe aux contrats consentis par la femme mariée avec ou pour son mari, l'on permettrait aux parties d'éluder la loi en donnant toute créance à des actes en apparence valides mais qui sont faits en réalité dans le but de dénaturer les transactions.

Quelles que soient les voies indirectes qui sont employées pour obtenir l'obligation de la femme mariée, la nullité d'ordre public édictée par l'article 1301 C.C. doit recevoir tout son effet du moment qu'il est démontré d'une façon satisfaisante que les parties contractantes ont cherché à enfreindre la loi.

Nous sommes donc d'accord avec le juge de première instance et monsieur le juge Létourneau pour voir une pareille infraction dans la convention dont il s'agit dans cette instance; et c'est avec raison, suivant nous, que l'acte de vente du 24 janvier 1920 entre l'appelante et l'intimée Dostie a été déclaré nul et sans effet et a été mis de côté.

Nous croyons également que l'appelante avait intérêt à faire constater et déclarer la nullité de cette vente afin de se faire libérer de toutes les obligations qui en ont été la conséquence.

Par l'acte du 20 août 1923, Dostie a remis à l'appelante le titre de propriété aux biens qui avaient fait l'objet de

(1) (1896) 27 Can. S.C.R. 68. (2) [1927] S.C.R. 243.

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la première vente. Mais, pour rentrer en possession de son titre, l'appelante a dû signer en faveur de Dostie un billet de $4,000, lui faire payer par le mis-en-cause Beaudoin une autre somme de $2,000 et assumer d'autres obligations personnelles. Par suite de l'illégalité et de la nullité du contrat consenti le 24 janvier 1920, ces paiements et obligations étaient sans considération. Elle n'avait pas besoin de se faire rétrocéder le titre à des biens dont elle n'avait jamais légalement cessé d'être propriétaire. Le jugement qui a été prononcé par la Cour Supérieure lui est utile pour servir de base à un refus de payer le billet de $4,000, à une répétition du paiement de $2,000, qui a été fait pour l'appelante et à son acquit (*Buckley* v. *Brunelle*) (1), et à une attaque contre la revente du 20 août 1923, si cela devient nécessaire, ainsi que contre les conséquences de l'hypothèque consentie par Dostie à Vachon.

Elle n'a pas demandé, il est vrai, dans la présente action, l'annulation de l'acte du 20 août 1923. Ce n'est pas une raison pour lui refuser une déclaration de nullité de l'acte du 24 janvier 1920, qui peut servir de base à l'annulation de l'acte subséquent.

Elle aurait pu réunir ces demandes dans les conclusions d'une seule action. Elle s'est peut-être exposée par là à se voir refuser les frais d'une seconde action pour faire mettre de côté l'acte de revente, si jamais cette action est rendue nécessaire. Elle ne saurait cependant être privée de son droit de faire déclarer la nullité de l'acte originaire parce qu'elle ne demande pas en même temps une déclaration de nullité contre le second acte. L'absence de conclusion à cet égard ne peut pas, en effet, être tenu pour un acquiescement puisqu'il s'agit d'une nullité d'ordre public que rien ne peut ratifier, ni confirmer.

Elle avait d'ailleurs tenté, par les conclusions de sa déclaration, la répétition de la somme de $2,000 payée pour elle par Beaudoin. Si cette demande eût été considérée par la Cour Supérieure, elle eût pu entraîner l'amendement requis pour faire annuler le contrat du 20 août 1923 en vertu duquel cette somme de $2,000 avait été payée. C'est peut-être pour cela que le juge de première instance a cru qu'il n'était

(1) 21 L.C.J. 133.

pas opportun de statuer présentement et dans cette instance sur les autres conclusions de l'action.

Mais l'on voit qu'il n'a pas rejeté cette partie des conclusions; et il serait inexact de dire que là-dessus il existe chose jugée. Tous les droits de l'appelante relativement aux obligations résultant de la revente de 1923 sont préservés et maintenus intégralement par le jugement de la Cour Supérieure. Déclarer, comme l'auraient voulu trois des juges de la Cour du Banc du Roi qu'elle n'avait aucun intérêt à faire mettre de côté l'acte de vente originaire à cause des événements qui sont survenus depuis et rejeter son action serait, au contraire, prononcer contre elle un jugement qui l'empêcherait pour toujours de se faire relever des conséquences de cet acte initial.

A plus forte raison, doit-on reconnaître l'intérêt de l'appelante et rétablir en sa faveur le jugement de première instance si l'on considère le jugement de la Cour du Banc du Roi tel qu'il est rendu et qui a maintenu l'acte du 24 janvier 1920, comme légal et valide.

Pour ces raisons, nous faisons droit à l'appel quant à Dostie, et cette partie du jugement de la Cour Supérieure qui a déclaré que le contrat consenti le 24 janvier 1920 par l'appelante à Dostie est nul et sans effet est rétabli et confirmé avec dépens dans toutes les cours contre l'intimé Dostie.

En ce qui concerne l'intimé Vachon, la situation est tout à fait différente. Devant la Cour Supérieure, Vachon avait simplement comparu comme mis-en-cause et n'avait pas produit de plaidoyer. Le jugement déclara son hypothèque nulle et sans effet, sur le motif unique que Dostie, qui l'avait consentie, n'avait lui-même aucun titre valable sur la propriété qu'il avait prétendu hypothéquer. Vachon se pourvut devant la Cour du Banc du Roi, qui infirma la première décision purement et simplement et rejeta l'action de l'appelante. La raison donnée dans la minute du jugement, en appel, est, comme nous l'avons déjà vu, que la vente du 24 janvier 1920 était une véritable aliénation qui ne venait pas à l'encontre de la prohibition de l'article 1301 du code civil. L'hypothèque de Vachon, sinon expressément du moins implicitement, se trouva par là confirmée et reconnue efficace.

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En déclarant à notre tour que le titre de Dostie était illégal et nul, nous ne croyons pas cependant devoir rétablir quant à Vachon le jugement de première instance. Voici pourquoi:

Le bref introductif de cette instance est en date du 26 mars 1925 et fut émis dans le district de Beauce. A cette date, à savoir depuis le 22 janvier 1925, les immeubles sur lesquels portait l'hypothèque de Vachon avaient été vendus par le shérif, dans une cause instruite dans le district de Sherbrooke.

Au moment de l'institution et de la signification de l'action de l'appelante, cette hypothèque était éteinte par le décret forcé (art. 2081 C.P.C., par. 6), qui avait purgé tous les droits réels (art. 781 C.P.C.). L'appelante n'avait donc plus aucun intérêt à prendre des conclusions contre Vachon à cet égard et à demander, comme elle l'a fait,

que l'enregistrement de l'hypothèque consentie par le défendeur Dostie à Philias Vachon soit aussi déclaré nul et de nul effet.

Cette hypothèque ne comportait pour l'appelante aucune obligation personnelle; seul son enregistrement pouvait affecter l'appelante. Or cet enregistrement était disparu par l'effet du décret. Il n'y avait donc plus lieu d'en demander la radiation. Il ne subsistait plus en faveur de Vachon qu'un privilège sur les deniers provenant de la vente judiciaire et le droit d'être colloqué conformément à ce privilège. Les deniers étaient alors entre les mains du shérif du district de Sherbrooke et c'était là que, de ce moment, il fallait aller engager toute contestation à ce sujet.

Le rapport de distribution de ces deniers a été versé au présent dossier. Vachon n'y est pas colloqué. Cela démontrerait davantage le défaut d'intérêt de l'appelante sur ce point. Vachon admet cependant qu'il conteste le rapport et il appert au dossier que cette contestation est encore pendante. L'appelante, si elle le juge à propos, n'a qu'à y intervenir pour lier partie avec Vachon et l'empêcher de toucher des deniers à son préjudice. Sur l'appel de Vachon, nous partageons donc l'avis de MM. les juges Allard, Tellier et Howard. Seulement, ce n'est pas le motif sur lequel est fondé le jugement de la cour qui, au contraire, a pour effet de maintenir la validité de l'enregistrement de l'hypothèque. L'appelante, par là, fut forcée

de se pourvoir devant la Cour Suprême contre les conséquences de ce jugement, qui aurait autrement constitué chose jugée et l'aurait empêchée, au besoin, de faire valoir ses moyens sur la contestation du rapport de distribution à Sherbrooke. Son appel devant cette cour était donc justifié et lui donne droit à ses frais contre Vachon, qui est venu ici défendre le jugement de la Cour du Banc du Roi. Chaque partie cependant paiera ses frais, dans cette contestation, devant les autres cours. A la Cour Supérieure, la cause quant à Vachon s'est instruite *ex parte;* et le jugement de la Cour du Banc du Roi a maintenu son appel, mais pour un motif que nous trouvons mal fondé.

Nous ferons donc droit à l'appel également sur la contestation avec Vachon et le jugement attaqué sera infirmé avec dépens de l'appel devant cette cour. Mais le jugement de la Cour Supérieure, dans ce cas, devra être modifié. La déclaration qui a trait à l'hypothèque de Vachon en sera retranchée et il sera simplement décidé que l'appelante n'avait pas d'intérêt dans la présente action à prendre ses conclusions sur ce point contre Vachon, tous ses droits sur la contestation du rapport de distribution à Sherbrooke étant sauvegardés.

*Appeal allowed with costs.*

Solicitor for the appellant: *Rosaire Beaudoin.*
Solicitors for the respondent: *Morin & Vezina.*

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CANADIAN NATIONAL RAILWAYS COMPANY (DEFENDANT) ..... APPELLANT;

AND

DAME ALBERTINE LEPAGE (PLAINTIFF ..... RESPONDENT.

1927
*May 25.
*June 17.

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

*Railways—Negligence—Station—Waiting-room—Door leading to cellar—Unlocked and no sign—Accident—Person falling down—Liability of railway company.—Art. 1053 C.C.*

A station owned by the appellant railway company contained a waiting-room inside of which were four doors: one leading to, or from, the platform on the track side; a second to the office of the station master

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

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from which tickets were sold; a third bearing on a metal sign "Water closet," and a fourth, unmarked, situated at the rear, was giving access to a landing place at the head of the stairs leading to the cellar. At night, the waiting-room was well lighted while the landing and the staircase were dark. The respondent's husband, after sitting in the waiting-room for some time, was seen to get up, to walk towards the rear and to open the door leading to the cellar stair-case. He was heard to fall to the floor below and, being found lying unconscious, died the next evening from a fracture of the skull. The respondent took the present action in damages, alleging fault under art. 1053 C.C. consisting in the neglect of the railway company to indicate that ingress through that door was forbidden and in the omission of its employees to keep the door locked.

*Held,* reversing the judgment of the Court of King's Bench (Q.R. 43 K.B. 342), that the railway company was not liable. Besides the accommodation and facilities provided for its passengers in a station, a railway company can also have rooms and offices for the exclusive use of its employees, and the public cannot assume that access is allowed through all the doors opening into or leading out of a waiting-room. When the doors intended for public use are indicated, failure to put on the other doors notices that ingress through them is forbidden does not amount to negligence; on the contrary, the absence of any notice should put the public upon inquiry whether it should attempt to open these doors and to proceed further into a place where it has no business. But, even if the failure to keep the door locked would amount to legal negligence on appellant's part, the latter is still free from liability, as the cause of the accident was the deceased's own want of caution in proceeding beyond the door in the dark and in a strange place.

*Knight* v. *Grand Trunk Pacific Ry. Co.* ([1926] S.C.R. 674) and *Walker* v. *Midland Ry. Co.* (55 L.T.R. 489) discussed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the Superior Court at Rimouski, D'Auteuil J. and maintaining the respondent's action in damages for $11,413.80.

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

*C. V. Darveau K.C.* and *I. C. Rand K.C.* for the appellant.

*L. St. Laurent K.C.* and *A. Taschereau* for the respondent.

The judgment of the court was delivered by

RINFRET J.—Some few minutes after nine o'clock in the evening the respondent's husband, Alphonse Talbot, was in the waiting-room of the station owned by the appellant

(1) (1927) Q.R. 43 K.B. 342.

railway company, at Mont Joli. Although the train he intended to take was due only at 11.50 p.m., it is not disputed that Talbot stayed where he was with the acquiescence of the company.

The waiting-room had four doors: one leading to, or from, the platform on the track side; a second to the office of the station-master, from which, as usual, tickets were sold through the wicket; a third bore on a metal sign fastened to it the inscription in large yellow letters: "Water Closet" —"*Chambre de toilette*"; and the fourth, unmarked, was at the rear to the right hand of one entering the waiting-room from the station platform. This latter door opened inwards and gave access to a landing place at the head of the stairs leading to the cellar, which stairs descended at right angles to the doorway. In stepping on the landing, one found a blank wall in front of him; so that, in order to descend the steps, he had first to turn to his right and then go down. The top landing was thus encased on three sides by the walls of the building and the door, with a floor space of 3 feet 10 inches wide between the latter and the wall opposite and extending on the stair side (as the evidence shows) from one to two feet beyond the door. There was nothing unusual about these stairs. They were just ordinary stairs (*comme un autre escalier*). It was suggested that two employees had already fallen when descending, but no proof was made of the actual occurrences, far less of the surrounding circumstances, and no conclusions can be derived therefrom relevant to the present action.

The station-master tells us the use to which the cellar was put:—

> Il y a la fournaise, du charbon, des affaires, du matériel pour les employés, les lampes, des chambres pour le *supply* électrique, différentes choses, des batteries dans une autre chambre, une autre chambre pour le laveur, celui qui balaye, séparément, et ça passe par cette porte-là.
>
> Q. Est-ce qu'il y avait beaucoup de circulation dans cet escalier-là?
>
> R. Oui, passablement: 3 porteurs, 2 baggage-men, l'homme des lampes, 2 baggage-men et l'homme de la station, 4 *trans-shippers* qui prennent leurs quartiers là, et quand on a besoin d'eux autres, on va les chercher là, ils ont soin de la fournaise.

None but employees of the company had any business in the cellar and it was common ground that the door leading to it was not intended to be used by the public. For

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the last three years it had been the habit to leave it unlocked, and it was so on the night in question.

Talbot had been sitting in the waiting-room for some time, on a seat facing the toilet-room, his travelling bag beside him. He was seen to get up (although he left his bag by the seat), to walk towards the rear, to open the door leading to the cellar stair-case and to pass through it. Then he was heard to fall to the floor below. Those who had been in the waiting-room at once went down to the cellar, where he was found lying unconscious. He died the following evening from a fracture of the skull caused by the fall.

The waiting-room was well lighted, while the landing and the stair-case were dark. All these facts are undisputed and liability admittedly depends exclusively upon the inference to be drawn from them.

The widow and the children brought action against the company. The only charge of negligence in the declaration was:—

Les employés de la défenderesse, par leur faute et leur négligence grossière, avaient omis de fermer cette porte à clef.

The case was tried without a jury and the trial judge held that the door (which he found to be for the exclusive use of the employees) should have been locked, but had been left ajar, so that Talbot evidently believed and had reason to believe that this door was an exit or, at least, was intended to be used by the public. He thought the company had been negligent.

dans le fait d'avoir laissé cette porte ouverte sans indication que l'usage en est interdit au public.

Three of the judges of the Court of King's Bench adopted the reasoning of the trial judge, while the two others, Dorion and Allard JJ., were of the contrary opinion and would have dismissed the action.

The respondent's case is rested on fault consisting not in any positive act or imprudence, but in the neglect of the company and its employees (art. 1053 C.C.). The fault ascribed to the employees is their omission to keep the door locked, and to the company, its failure to indicate that ingress through that door was forbidden.

It is a familiar principle that neglect may, in law, be considered a fault only if it corresponds with a duty to act.

What, then, was the duty of the company towards the deceased?

No doubt, if the door had been locked, the accident would not have happened. Such, however, is not the test, and the duty must be made out upon legal grounds.

Railway companies must maintain and operate stations and provide them with accommodation and facilities for their passengers; but these stations are their private property, and it is necessary and proper that the companies should operate them also for their own convenience and the carrying out of their work and duties. A waiting-room is, of course, one of the facilities expected in a railway station, and an intending passenger is entitled to the use of it. In some stations, but not by any means in all of them in the country districts, a toilet-room connecting with the waiting-room is also provided. This was the case at Mont Joli. Usually several doors open into or lead out of the waiting-room. The public may not assume that access is allowed through all these doors. The company must have rooms and offices for the exclusive use of its employees and the efficient conduct of its business. These rooms and offices may, and often must, open on to the waiting-room.

We know of no reason why the company should expect intending passengers to be likely to open these doors or why the passengers should believe that they are entitled to do so. Generally speaking, and in the absence of some sign or indication from the lay-out, a door leading out of a public room is in itself a warning that access beyond it may be restricted. Passengers at the Mont Joli station were shown by appropriate notices what doors were intended for their convenience and accommodation. The absence of any notice on the door in question should at least have put the deceased upon inquiry whether he should attempt to open it and (more particularly) to proceed further into a place where he had no business. The question for Talbot was not whether there was anything to indicate to him that he should not use the door and stair-way, but rather whether there was anything to indicate to him that he might do so. There may be peculiar circumstances where leaving a door ajar ("entr'ouverte") is an invitation to enter. More often it is as indiscreet to

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open a door wider, when it is almost closed, as it would be, were it completely closed, to open it at all. Moreover, that, on the night in question, this particular door was ajar is not established. The only evidence upon the point is that of one Lebrun, who says:—

Il a ouvert la porte, elle avait un petit slack, elle n'était pas fermée à net * * *

Q. La porte était entre-baillée?

R. En tout cas, elle n'était pas barrée certain, il l'a ouverte.

We cannot, as a general principle, accept the proposition that, in the waiting-room of a railway station, where the doors intended for public use are indicated, failure to put on the other doors notices that ingress through them is forbidden is negligence.

It was argued, however, that the duty of the appellant was to guard against any mistake which a man might naturally make. Evidence was offered that, to the knowledge of at least one of the employees of the company, there were instances where people had walked to the door and opened it, apparently in the mistaken belief that it led to the toilet-room. That is the strongest point made in support of the respondent's case and was, no doubt, the reason which induced the trial judge to hold

que Talbot * * * avait raison de prendre cette porte comme une porte de sortie ou du moins une porte destinée au public.

The argument is fortified by the fact that this was also the view taken by three judges of the Court of King's Bench. The consequence, it is said, must follow that, in order to guard against this possible mistake, the company should have kept the door locked.

A duty such as this could perhaps be cast upon the company if, beyond the door, a condition of unusual danger was to be found, as, for example, a hole, a precipice, an open trap-door. But such things differ *toto coelo* from this staircase. The basis of a charge of negligence in omitting to lock the door is lacking. There was no duty owing to the deceased to keep it locked.

Counsel have not brought to our attention any decision, under the law of Quebec or of France, applicable to this case. The general principle is laid down in Sourdat, *De la Responsabilité*, 6e éd., vol. 1, no. 661. But the case bears a strong resemblance to *Toomey* v. *London and Brighton Railway Co.* (1), which, although decided under the English

(1) 3 C.B.R., n.s., 146.

law, may be usefully cited as an illustration. On the platform of a railway station, there were two doors in close proximity to each other. One had painted over it the words: "For gentlemen" and the other: "Lamp-room." The plaintiff, being unable to read, inquired from a stranger where he would find the urinal. Having received a direction, he by mistake opened the door to the lamp-room, fell down some steps and was injured. Upon action being brought, the ground taken was that the door should have been kept locked. The plaintiff was non-suited by the trial judge, who said that, in the absence of evidence that the place was more than ordinarily dangerous, no negligence could be found on the part of the company. This judgment was affirmed by the Court of Common Pleas.

But, should we have regarded the failure to keep the door locked as something amounting to legal negligence in the premises, the respondent, in our view, would still fall short of proving that the unfortunate accident was due to this omission. The cause of the accident was Talbot's own want of caution in proceeding beyond the door in the dark and in a strange place. In the previous instances told about in the evidence, where strangers opened this door by mistake, they perceived the imprudence of advancing and they went no further. In the words of one of the witnesses:—

Ils ouvraient la porte, il faisait noir et ils arrêtaient.

We have there a vivid illustration of what a careful and reasonable person would do under these circumstances and what Talbot should have done. Unfortunately, he chose to run the risk of going ahead in the dark and through his own carelessness in so doing he fell down the stairs.

The judgment of the Court of Appeal proceeds largely upon a discussion of the judgment of this court in *Knight* v. *Grand Trunk Pacific Ry. Co.* (1), and the case of *Walker* v. *Midland Ry. Co.* (2), which are the only cases referred to in the reasons of the judges.

*Knight* v. *G.T.P. Ry.* (1) was a case from the province of Alberta and, although the circumstances were somewhat different, many of the principles there laid down are familiar rules of the civil law applicable here.

As for *Walker* v. *Midland Ry. Co.* (2), we are forcibly reminded of the words of the Earl of Selborne (with whom

(1) [1926] S.C.R. 674. (2) 55 L.T.R. 489.

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Lord Bramwell and Lord Watson concurred) in his speech before the House of Lords. They seem peculiarly apposite and no exception can be taken to them in a case which must be decided upon the law of Quebec. The facts were these: A guest in an inn, the property of the respondent company, left his bedroom in the middle of the night to go to a water-closet. There were properly lighted and easily accesible closets in the same corridor, but he went into a dark "service-room," the door of which was shut, but not locked, and fell down the unguarded well of a lift at the end of the room and was killed. The "service-room" was not lighted or used at night and boarders had no business there at any time. In an action brought by the personal representatives of the deceased, the House of Lords, affirming the judgment of the court below, held that there was no evidence of negligence on the part of the defendant company to go to a jury. After having stated the facts and pointed out the particular circumstances, Lord Selborne said:—

> At the most, these circumstances might explain his first act, in opening the door to see what (if anything) might be discernable within; but when he had done this, and found the room quite dark, I cannot regard either of them alone, or both together, as furnishing reasonable ground for his going forward in the dark to the place where he fell, instead of proceeding a little further along the corridor, where proper water-closets, with proper light, might have been found. Would the respondents have been wrong-doers towards him (all other circumstances being the same) if he had come to a steep staircase instead of the unguarded well of a lift, and had fallen down it? I think not.

The appeal should, therefore, be allowed and the action dismissed. The appellant is entitled to its costs throughout if it elects to claim them.

*Appeal allowed with costs.*

Solicitor for the appellant: *C. V. Darveau.*

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

THE MINISTER OF CUSTOMS AND EXCISE (PLAINTIFF) ..... APPELLANT;

AND

THE DOMINION PRESS LIMITED (DEFENDANT) ..... RESPONDENT.

1927

*June 10.
*June 17.

ON APPEAL PER SALTUM FROM THE SUPERIOR COURT, AT MONTREAL, PROVINCE OF QUEBEC

*Sales tax—Job printer—Material supplied by client—Contract—Lease and hire—Sale—Special War Revenue Act (1914), 5 Geo. V, c. 8; (1922) 12-13 Geo. V, c. 47; (1923) 13-14 Geo. V, c. 70.*

The transactions of a job printer, who contracts to deliver printed business cards, labels, order forms, price lists and statements, on material supplied by him, constitute sales by a producer within the meaning of the *Special War Revenue Act* (1918) and its amendments.

Whether a job printer may or may not be styled a manufacturer or a producer according to the conception of these words in the commercial or ordinary sense, the intention of Parliament to include a job printer in the class of producers for the purposes of the sales tax is clearly indicated by the wording of the Act and its amendments.

*The King* v. *Crain Printers Ltd.* ([1925] 3 D.L.R. 291) approved.

APPEAL *per saltum* from the judgment of the Superior Court, at Montreal, province of Quebec, Duclos J., dismissing the appellant's action.

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

*A. Geoffrion K.C.* and *P. Lanctot K.C.* for the appellant.

*E. Lafleur K.C.* and *Jacob De Witt K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The Minister of Customs and Excise claims from the Dominion Press Limited the sum of $3,684.20 for sales taxes from April, 1923, to October, 1924, under the provisions of the *Special War Revenue Act,* 1915, and amendments. The transactions took place in Montreal.

It was agreed, for the purposes of the present litigation, that the Minister was to be regarded as having the

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

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same right to bring action as the King and that the judge should take judicial notice of the departmental circulars.

It was further agreed that the business of Dominion Press Limited, for the relevant period, exceeded $10,000 *per annum.*

The amount claimed is not disputed. Only the liability for the tax is in issue.

The first statute applicable in point of time is chapter 47 of 1922 (12-13 Geo. V.) which came into force on the 21st May, 1922. By section 13 of this statute, a new subsection 1 of s. 19BBB is enacted. The material part provides for the imposition of

an excise tax of 2½ per cent. on sales and deliveries by Canadian manufacturers or producers and wholesalers or jobbers * * * but in respect of sales by manufacturers or producers to retailers or consumers, the excise tax shall be 4½ per cent * * *

Under the fourth paragraph of the subsection,

the taxes specified in this section shall not apply to sales or importations of * * * (then follows a long enumeration of articles, among which appears:) job printed matter produced and sold by printers or firms whose sales of job printing do not exceed $10,000 per annum.

Then the subsequent paragraph reads:

Provided further that the excise taxes specified in this section shall not be payable on goods exported, or on sales of goods made to the order of each individual customer by a business which sells exclusively by retail, under regulations by the Minister of Customs and Excise who shall be sole judge as to the classification of a business; and provided that the tax as specified in this section shall be payable on sales of goods manufactured for stock by merchants who sell exclusively by retail.

On the 1st January, 1924, came into force an amending statute and ss. 1 of s. 19BBB was then made to read:

* * * there shall be imposed, levied and collected a consumption or sales tax of 6 per cent. on the sale price of all goods produced or manufactured in Canada * * * which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him.

The new statute also struck out from the exemption in the fourth paragraph of ss. 1 the words above quoted:

Job printed matter produced and sold by printers or firms whose sales of job printing do not exceed $10,000 per annum;

but the exemption was extended to all manufacturers or producers whose sales did not exceed $10,000 per annum.

The respondent pleads that it is

a contracting printer who prints by special contract to the order of each individual customer for whose purposes alone the work done is suitable and useful, and it in no sense manufactures or produces any merchandise for sale nor does it sell any goods inasmuch as the business carried on by it is one of lease and hire of work and service and not one of the sale of goods.

The evidence is that Dominion Press Limited does "general job printing and lithographing * * * on special orders only." It makes "no goods for stock." It does "nothing but contract work." Its general way of doing business is described as follows by the manager of the defendant corporation:

Q. And you generally supply the paper?

A. That is a question. If it is a matter of supplying it from stock, we do not supply 1 per cent. A customer will come to us and ask us what is the most suitable paper for the job, and we tell him to the best of our knowledge. Almost invariably he will ask us to get it for him, because we know something about the quality and will see there is nothing put over. He will pay us precisely the same price for the paper as if he went to the jobbing house, but the jobbing house in consideration of saving a salesman going around allows us a commission of 20 per cent.

Q. On the paper?

A. Yes, for securing them that customer. They understand they are supplying the customer with the paper, but as part consideration for the 20 per cent. we collect the amount for them with our bill for the labour.

Q. You are liable for the price towards the manufacturer?

A. Yes.

Q. A customer comes to you and says: "I want some letter-heads, or envelopes (as for example) printed for me on this certain paper" and as you have not that paper in stock you go to the paper dealer and buy the paper. Do you mention to the dealer the name of the person for whom you are buying the paper?

A. Not necessarily.

Q. Is the paper invoiced to him?

A. No. It is invoiced to the printer. That is part of the consideration.

Q. So far as the paper seller knows, it is simply a matter of your going to him and getting the paper, which is invoiced to you, and paid by you?

A. That is true.

Q. You get the paper, print it, and deliver the printed product to the particular customer who has ordered it?

A. Yes.

Q. And he pays you for the paper and printing combined, but you do not charge him more for the paper than if he had bought it directly? Your profit on the paper is the lesser price—call it commission, or what you will—that the paper maker has allowed you on the invoice?

A. Yes. Of course, that is not every transaction.

Q. But, that is a typical transaction?

A. No. A customer may want us to print some government postcards for him. He does not go to the trouble of getting the cards and we go to the post office and get them, and include the amount in his bill. We are not competing with the post office. In the same way, a man may be getting out a prospectus, and will ask us if we will distribute this prospectus for him, and mail it to his customers. We sometimes have a bill for $50 or $75 or $100 for postage. We simply get the

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postage stamps. We call these things disbursements. Our costs are invariably computed on the labour alone, those other things we regard as outside.

Q. But, the profit on those things enters into your receipts?

A. The commission we get for that service helps pay our expenses.

Q. Leaving aside exceptional cases, the general way of doing business is the one you have just described?

A. Yes.

On this evidence, the contract between the respondent and its customers is not one of lease and hire, but one of sale. It is a contract for the sale of a thing to be made (" *chose à faire* " or " *chose une fois faite* ").

Such is the solution of the Roman law and of the old French law which the Commissioners have embodied in the Civil Code of Quebec. On this subject, a quotation from Pothier (Bugnet, 3rd edition, vol. 4, no. 394) is strictly in point:

Ce contrat (de louage d'ouvrage) a aussi beaucoup d'analogie avec le contrat de vente.

Justinien en ses *Institutes,* au tit—*de Loc.* cond., dit qu'on doute à l'égard de certains contrats, s'ils sont contrats de vente ou contrats de louage, et il donne cette règle pour les discerner: "lorsque c'est l'ouvrier qui fournit la matière, c'est un contrat de vente; au contraire, lorsque c'est moi qui fournis à l'ouvrier la matière de l'ouvrage que je lui fais faire, le contrat est un contrat de louage."

Par exemple, si j'ai fait marché avec un orfèvre pour qu'il me fasse une paire de flambeaux d'argent, et qu'il fournisse la matière, c'est un contrat de vente que cet orfèvre me fait de la paire de flambeaux qu'il se charge de faire; mais si je lui ai fourni un lingot d'argent pour qu'il m'en fît une paire de flambeaux, c'est un contrat de louage.

Observez que, pour qu'un contrat soit un contrat de louage, il suffit que je fournisse à l'ouvrier la principale matière qui doit entrer dans la composition de l'ouvrage; quoique l'ouvrier fournisse le surplus, le contrat n'en est pas moins un contrat de louage.

On peut apporter plusieurs exemples de ce principe.

Lorsque j'envoie chez mon tailleur de l'étoffe pour me faire un habit: quoique le tailleur, outre sa façon, fournisse les boutons, le fil, même les doublures et les galons, notre marché n'en sera pas moins un contrat de louage, parce que l'étoffe que je fournis est ce qu'il y a de principal dans un habit.

Pareillement, le marché que j'ai fait avec un entrepreneur pour qu'il me construise une maison, ne laisse pas d'être un contrat de louage, quoique par notre marché il doive fournir les matériaux, parce que le terrain que je fournis pour y construire la maison, est ce qu'il y a de principal dans une maison, *quum aedificium solo cedat.*

The modern doctrine and jurisprudence in France should perhaps be accepted with caution, because article 1711 of the Code Napoléon contains the following definition:

Les devis, marchés, ou prix faits pour l'entreprise d'un ouvrage moyennant un prix déterminé sont aussi un louage lorsque la matière est fournie par celui pour qui l'ouvrage se fait;

which is not to be found in the Civil Code of Quebec. But the preponderating opinion is that the above passage of Pothier well expresses the state of the old law (Fuzier-Herman, Répertoire, *verbo* Louage d'ouvrage, de services et d'industrie. no. 1105). Planiol (Droit Civil, 6th ed. vol. 2, no. 1902) calls it the "*solution traditionnelle*". On the authority of *Clay* v. *Yates* (1) the situation would be the same under the common law.

According to the evidence before us, the respondent does not undertake to print on material (such as tags, cards, or paper generally) supplied by the client. It contracts to sell and deliver printed business cards, labels, order forms, price lists, statements and general stationery. The transactions described in the evidence and in respect of which the Minister seeks to recover taxes are sales. In the words of Pothier, "elles participent du contrat de vente."

We must decide moreover that they are sales by a producer within the meaning of the statute. For the question is not whether a job printer may or may not be styled a manufacturer or a producer, according to the conception of these words in the commercial or even in the ordinary sense. What we have to enquire is whether it was the intention of Parliament, for the purposes of the sales tax, to include a job printer in the class of producers. This intention, we think, is clearly indicated by the exclusion of:

job printed matter produced and sold by printers or firms whose sales of job printing do not exceed $10,000 *per annum*

from the imposition of the sales tax. The use of the word "produced" shows that, in the mind of the legislator, job printing done in pursuance of a contract of sale (such as the evidence shows the respondent to have done here) was the work of a "producer." This view is also supported by the fact that, if such had not been the intention of the legislator, there would have been no necessity for the special exemption of

job printed matter * * * sold by printers or firms whose sales * * * do not exceed $10,000 *per annum.*

We agree with the appellant that the repeal of this exception the following year cannot alter its effect upon the

(1) 1 H. & N. 73; 156 E.R. 1123.

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meaning of the general words, especially as the repeal was mainly for the purpose of extending the exemption to all manufacturers and producers.

We now have to consider the proviso

that the excise taxes specified in this section shall not be payable on sales of goods made to the order of each individual customer by a business which sells exclusively by retail, under regulations by the Minister of Customs and Excise who shall be sole judge as to the classification of a business; and provided that the tax as specified in this section shall be payable on sales of goods manufactured for stock by merchants who sell exclusively by retail.

There is no doubt that the sales in respect of which taxes are claimed by the Minister in this action were, according to the evidence before us,

sales of goods made to the order of each individual customer by a business which sells exclusively by retail.

We find moreover that, on the 18th August, 1921, the Minister of Customs adopted the following regulation:

Job printers, or newspaper publishers who also do job printing, may be classed as retailers when selling exclusively, by retail, goods made to the order of each individual customer.

Goods made for stock, or sold to customers for resale, are held to be subject to the sales tax.

Concerns covered by the first paragraph will not be required to secure sales tax licenses, nor collect sales tax.

This ruling in effect from the 10th May, 1921, inclusive.

This was a classification of the business of the respondent, pursuant to the proviso of the statute. As a result, sales of the character of those made by the respondent became exempt from excise taxes, while the regulation remained in force. Upon this point, we are in accord with the views expressed by Rose J. in *The King* v. *Crain Printers Limited* (1). This judgment went to the Appellate Division, but the appeal was dismissed by default.

But, on the 13th July, 1922, the Minister of Customs and Excise, issued another regulation reading as follows:

OTTAWA, 13th July, 1922.

Under authority of the provision of section 19BBB, of the 1922 amendment to the *Special War Revenue Act*, the following businesses are hereby classified as manufacturers, subject to the payment of sales tax on their sales:—

Job printers whose sales of printed matter are ten thousand dollars *per annum* or more;

Manufacturers of loose-leaf systems or devices;

Pipe organ builders;

Boat builders.

(1) [1925] D.L.R. 291.

Except perhaps in its attempt to define job printers as "manufacturers"—which was quite unnecessary and ineffective—this regulation does not do more than repeat, in different words, the enactment of the statute that

> the taxes * * * shall not apply to sales * * * of * * * job printed matter produced and sold by printers or firms whose sales of job printing do not exceed $10,000 per annum.

In terms, it restores the liability to the payment of the sales tax already imposed by the statute upon all job printers whose sales of printed matter are $10,000 or more, and, in effect, it does away with the exemption in favour of

> job printers * * * when selling exclusively, by retail, goods made to the order of each individual customer

—resulting from the regulation of the 18th August, 1921. The latter must therefore be held to have been superseded by the regulation of the 13th July, 1922. We know of no subsequent regulation and none was invoked by the respondent. It follows that during the period extending from April, 1923, to October, 1924, in respect of which the arrears of sales taxes are claimed to be due by the respondent, no exemption was in force in favour of job printers who sold

> exclusively by retail * * * goods made to the order of each individual customer,

on account of the absence of the regulation necessary to give effect to the exemption and without which the proviso could not apply.

It may further be said that, after the 1st January, 1924, when section 6 of c. 70 of the statute of 1923 came into force, no regulation of the kind could have been issued, because the proviso was then repealed and the power of classification by the Minister was taken away by Parliament.

For these reasons, we think the appeal should be allowed, and the action maintained, with costs throughout.

*Appeal allowed with costs.*

Solicitors for the appellant: *Marcotte & Lanctot.*

Solicitor for the respondent: *Jacob De Witt.*

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*Feb. 15.
*Apr. 20.

R. E. GUY SMITH (PLAINTIFF).....APPELLANT;

AND

CONRAD COMTOIS (DEFENDANT).....RESPONDENT.

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

*Principal and agent—Sale—Company—Real estate company being agent for both buyer and seller—Purchase by president of company—Action for loss of profit against client of company.—Arts. 1484, 1706, 1735 C.C.*

P., a real estate company, was instructed by D., acting for the owner, to sell two apartment houses in Montreal for $175,000, the buyer to assume payment of $140,000 mortgages and make a cash payment of $20,000 to $25,000. C., having had previous dealings with P., was looked for as a prospective buyer and he finally authorized P. as his agent to make an offer for the property at the price asked for, but comprising, instead of cash, mortgages and real estate estimated at $35,000. This offer was refused by D. who, at the same time, advised P. that he would reduce the purchase price to $160,000, the cash payment being then $20,000. The refusal of D. and the change in the conditions of sale were not made known to C.; but, later on, S., the president of the company, undertook to accept for himself both the offer of C. to buy and the second offer of D. to sell. C. subsequently refused to purchase on the terms of his offer, and S., having sold the property for $160,000, sued C. for $15,000 as damages or loss of profits.

*Held,* that P., having assumed the mandate of buying the property for the benefit of C., could not accept for itself the second offer of D. without notifying C. of the new conditions of sale and could not have any claim against C. for loss of profit; and that S., as president of the company, was by law bound to act for it in the performance of its mandate towards C. and could not therefore have more rights than the company itself.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, at Montreal, and dismissing the appellant's action.

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

*Eug. Lafleur K.C.* for the appellant.

*J. C. Lamothe K.C.* for the respondent.

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

The judgment of the court was delivered by

RINFRET J.—Une dame Maria Gori, veuve résidant en Italie, était en 1924 propriétaire de deux conciergeries situées à Montréal et connues sous les noms de Marlowe Apartment et King Emmanuel Apartment. John Dominique était son fondé de pouvoirs.

Dans le cours du mois d'octobre, Dominique avait confié à The Prudential Realty & Investment Company, Limited, agence d'immeubles, la vente de ces conciergeries. Il en demandait $175,000, comprenant les hypothèques au montant de $140,000, que l'acquéreur aurait à assumer, et $35,000 en argent, dont il exigeait que $20,000 à $25,000 fussent payés comptant. Conrad Comtois, l'intimé, était depuis plusieurs mois en relations d'affaires avec The Prudential Company. Il avait déjà utilisé ses services pour tenter l'acquisition d'autres propriétés. Il possédait des logements de rapport et des créances hypothécaires. Il offrit, par l'entremise de cette agence d'immeubles, d'acheter les conciergeries Marlowe et King Emmanuel pour le prix de $175,000, en prenant charges des hypothèques, mais en effectuant le paiement de la balance par le transport de ses créances hypothécaires, mentionnées en détail, et par la dation ou échange de ses logements de rapport.

Cette proposition fut soumise à Dominique qui la refusa; mais qui, en même temps, autorisa The Prudential Company à vendre pour la somme de $160,000, formée toujours des hypothèques et d'un montant de $20,000 comptant. La compagnie omit d'informer Comtois à la fois du refus et de la contre-proposition de Dominique. Au lieu de cela, elle fit accepter par M. Guy Smith, l'appelant, les offres respectives d'achat et de vente qu'elle détenait entre ses mains de la part de Comtois et de Dominique. Smith était le président de The Prudential Realty and Investment Company, Limited. Les autres directeurs étaient ses deux fils; et Grimaldi, le gérant, était son gendre.

L'acceptation par Smith de l'offre de Dominique prête fortement au soupçon de simulation, car il fut prouvé que Smith n'a pas fait le paiement de $20,000 porté à l'acte de vente qui s'ensuivit, et qu'il se fit remettre une contre-lettre par laquelle Dominique s'engageait à reprendre les deux conciergeries si Comtois ne donnait pas suite à sa proposition d'achat.

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C'est ce qui arriva. Comtois refusa de conclure avec Smith. Ce dernier réussit à trouver un autre acquéreur pour le prix que Dominique consentait à accepter; et il réclame maintenant, à titre de dommages-intérêts, la somme de $15,000 pour le prétendu bénéfice qu'il aurait réalisé si Comtois avait acheté au prix qu'il avait offert. Il réclame, en outre, les frais incidents.

Il est loin d'être certain que le bénéfice de Smith eût été vraiment de $15,000. Les deux propositions n'étaient pas semblables. Celle de Dominique exigeait $20,000 comptant. En vertu de l'offre de Comtois, aucune partie du prix n'était payable en argent. En outre des hypothèques qui affectaient les conciergeries, ce prix était formé de créances hypothécaires avec échéances réparties sur plusieurs années et dont le capital, pour deux d'entre elles, était remboursable par versements annuels ou semi-annuels. De plus, les logements de rapport et les autres immeubles offerts en échange étaient portés dans l'offre à une valeur fixée par Comtois lui-même et que nul, au cours de l'enquête, ne s'est chargé d'apprécier.

En somme, les parties se sont bornées à discuter la question de la responsabilité en dommages. Elles ne se sont pas préoccupées de la preuve de ces dommages. Aucune d'elles n'a songé à établir la valeur respective des offres. Il eût peut-être été difficile de trouver dans le dossier les données nécessaires pour fixer d'une façon précise la somme du profit que Smith a réellement perdu. Ce profit ne s'établit pas nécessairement par la différence entre les chiffres mentionnés dans les deux propositions.

Mais la Cour Supérieure et la Cour du Banc du Roi n'ont pas déterminé de quelle manière il eût fallu procéder à ce calcul, parce qu'elles ont été d'avis que, dans les circonstances, l'appelant ne pouvait être admis à réclamer de l'intimé des dommages-intérêts. En fait, la Cour Supérieure a jugé que Comtois avait constitué The Prudential Company sa mandataire pour acheter les deux conciergeries. Nous ne saurions décider que, en cela, elle n'a pas fait une juste appréciation des circonstances prouvées à l'enquête et des termes de l'offre du 11 novembre 1924.

Sans doute, la compagnie était déjà la mandataire de Madame Gori, par délégation de Dominique; mais le courtier peut quelquefois être le mandataire des deux parties

(art. 1735 C.C.). A tout événement, nous ne nous demandons pas si The Prudential Company aurait dû refuser le mandat de Comtois parce qu'il pouvait entrer en conflit avec celui de Dominique. Nous ne discutons, pour le moment, qu'une question de fait. La compagnie a effectivement accepté de se charger d'acquérir les conciergeries pour le compte de l'intimé. Il lui incombait, dès lors, d'exécuter son mandat de la meilleure manière possible (*Lamarre* v. *Clairmont* (1); *Aubut* v. *Gareau* (2) ), en toute diligence et loyauté, et suivant la plus entière bonne foi. C'est en présentant l'offre de Comtois à Dominique que, à la suite du refus de ce dernier, le gérant de The Prudential Company reçut la contre-proposition qui a donné lieu au litige.

L'appelant ne saurait prétendre que cette contre-proposition n'était pas avantageuse, puisqu'il allègue qu'elle représente pour lui un bénéfice de $15,000. Il était donc du devoir de The Prudential Realty and Investment Company, chargée par Comtois d'acquérir les conciergeries et qui avait accepté ce mandat, de communiquer à Comtois le refus de Dominique, ainsi que les conditions nouvelles auxquelles ce dernier était prêt à se soumettre. Au lieu d'en agir ainsi, The Prudential Company a offert à Smith les avantages qui pouvaient résulter de la nouvelle offre de Dominique. Elle a ainsi failli à ses obligations envers son mandant. Il parait clair qu'il ne saurait en résulter en sa faveur le droit de réclamer de ce dernier, sous forme de dommages-intérêts, le bénéfice que, précisément, il lui incombait de mettre à la portée de ce mandant.

Mais, dans le cas actuel, la mandataire est une compagnie incorporée. Elle ne peut agir que par l'entremise de ses officiers. Le devoir envers Comtois devait ici être rempli par les officiers de la compagnie. Smith, son président, occupait vis-à-vis de Comtois la position de celui qui avait accepté, au nom de la compagnie, d'exécuter le mandat qui avait été confié à cette dernière. Il serait inadmissible qu'il pût, dans les circonstances, avoir contre Comtois une réclamation en dommages qui serait niée à la compagnie elle-même.

Cela nous amène au second argument qui milite contre l'action de l'appelant. Les mandataires ne peuvent se

(1) (1915) Q.R. 48 S.C. 461. (2) (1918) Q.R. 27 K.B. 474.

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rendre acquéreurs, ni par eux-mêmes, ni par parties interposées, des biens qu'ils sont chargés de vendre (art. 1484 C.C.). Ce principe, qui est general pour les administrateurs au sujet des biens qui leur sont confiés, a été étendu encore dans le cas du mandat; et la loi de la province de Québec énonce une règle, tirée de la loi romaine, qui ne se trouve pas dans le Code Napoléon en défendant à un " agent employé pour acheter ou vendre quelque chose " d'en être " l'acheteur ou le vendeur pour son compte " (art. 1706 C.C.).

Il s'ensuit que The Prudential Realty & Investment Co. Ltd. n'aurait pu, en l'espèce, accepter pour elle-même, sans en avoir pleinement informé l'intimé, l'offre que Dominique lui remit le 11 novembre 1924, parce qu'elle avait assumé le mandat d'acquérir les propriétés pour Comtois.

Si The Prudential Company ne pouvait ainsi devenir l'acheteur, elle n'aurait pu évidemment réclamer de l'intimé les bénéfices qu'elle aurait realisés au moyen d'un pareil achat. Le motif de cette prohibition est notoire:

> L'on n'a pas voulu mettre l'intérêt personnel aux prises avec le devoir, sans doute parce qu'on a craint que dans ce conflit le devoir ne fût sacrifié à l'intérêt (24 Laurent, n° 53).

Or, comme nous venons de le dire, une compagnie ne fait rien par elle-même. Le devoir de la compagnie est rempli par ses officiers. Dans le cas actuel, Smith, président de The Prudential Company, était personnellement au courant du mandat que sa compagnie détenait de l'intimé. Il en connaissait tous les détails puisqu'il a mis sa signature au bas de l'offre de Comtois. Cette obligation de diligence, de loyauté et de bonne foi que doit tout mandataire à son mandant, c'est Smith, comme président, de concert avec le gérant et les autres officiers, qui devait nécessairement l'accomplir.

Il était donc véritablement l'un de ceux qui devaient exécuter le mandat. Comme conséquence, le principe fondamental de moralité édicté par les articles 1484 et 1706 du code civil s'étendait à lui et aux relations qu'il pouvait avoir avec Comtois. On doit assimiler sa situation à celle de l'inspecteur dans un cas de cession de biens, à qui cette cour a nié le droit d'acquérir pour son propre compte l'actif du débiteur insolvable, pour la raison que

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no one having duties of a fiduciary character to discharge should be allowed to put his duties in conflict with his interest (*Castonguay* v. *Savoie* (1).

Smith ne peut donc être accueilli dans sa demande de dommages-intérêts représentant la perte d'un prétendu bénéfice acquis en contravention de ce principe.

C'est pourquoi nous sommes d'avis de confirmer avec dépens les jugements qui ont débouté l'appelant de son action.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Beauregard & Labelle.*

Solicitors for the respondent: *Lamothe, Gadbois & Charbonneau.*

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CONFEDERATION LIFE ASSOCIATION (DEFENDANT) ..... APPELLANT;

AND

J. T. BERRY (PLAINTIFF) ..... RESPONDENT.

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*May 9, 10.
*May 31.

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

*Agency—Insurance—Agency agreement—Construction—Right to discharge agent—Commission on renewal premiums paid after discharge.*

The judgment of the Appellate Division of the Supreme Court of Alberta, 22 Alta. L.R. 360, was reversed, the Court holding, on construction of the agreement in question, that the defendant insurance company had the right to terminate, as it did, the plaintiff's agency under the agreement, and that the plaintiff was not entitled to commission on renewal premiums paid after such termination.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta (2) which, by a majority, allowed the plaintiff's appeal from the judgment of Boyle J., and ordered a new trial.

Among other claims between the parties were claims by the plaintiff for damages for wrongful dismissal and for other breaches of contract, and a claim for commissions in

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

(1) (1899) 29 Can. S.C.R. 613.

(2) 22 Alta. L.R. 360 1 [1926] 3 W.W.R. 670.

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respect of renewal insurance premiums. Boyle J., who withdrew the case from the jury, held against the plaintiff on the said specified claims.

By agreement dated 1st October, 1922, the plaintiff agreed to act as the defendant's district manager during the continuance of the agreement, and the defendant agreed "that while the [plaintiff] is acting for the [defendant] as such agent as aforesaid, and complying with the terms and conditions herein, on his part, which said terms and conditions are hereby made a condition precedent, he will be paid the following remuneration for his services." Then followed the provisions for commissions to be paid, including an item "Renewals participating 5 per cent.; Renewals, non-participating 2½ per cent." The agreement contained the following clause: "This agreement may be terminated at any time by [the defendant] giving [the plaintiff] notice in writing, terminating same, and [the plaintiff] agrees with [the defendant] forthwith, after receiving said notice, to render an account of and pay [the defendant] all moneys, and deliver up all notes, securities, papers and supplies held by him * * *."

By letter dated 14th June, 1924, written from Toronto, Ontario, by the defendant's general manager of agencies to the plaintiff at Red Deer, Alberta, the defendant notified the plaintiff of termination of the agreement.

Boyle J. held that, under the terms of the agreement, the defendant was at liberty to terminate the agreement without giving any reasons; that the plaintiff was entitled to credit for all commissions, renewal commissions and bonus on all insurance premiums falling due and paid by either cash or note to and including the 14th June, 1924, but refused to hold that the plaintiff was entitled to commissions on renewal premiums paid after that date.

In the Appellate Division (1) the majority of the Court (Harvey C.J., Beck and Mitchell JJA.) held that, in construing the agreement, the words "while the [plaintiff] is acting for the [defendant] as such agent" should not be taken as attached to the word "paid," but to the word "services," the sense thus being that the plaintiff was to be paid for his services performed while he was agent; hence, if there were no services which the agent was bound

(1) 22 Alta. L.R. 360; [1926] 3 W.W.R. 670.

to perform with regard to the renewal of insurance policies, his services in procuring the insurance originally were the services which entitled him to the agreed commission on the renewal premiums, and, in such case, it was a reasonable construction to say that the meaning was that the agent would be entitled to commission on renewal premiums when paid and so long as they continued to be paid; that, in this regard, there were questions of fact which the plaintiff was entitled to have submitted to the jury, and there should be a new trial. Hyndman and Clarke JJA., dissenting, held, on construction of the agreement, that the plaintiff was not entitled to commission on renewal premiums payable after the termination of his agency, but, making allowance for time for the letter terminating the agency to reach the plaintiff, they would fix the 20th June, rather than the 14th June, 1924, as the date of termination of the agency.

From the judgment of the Appellate Division the defendant appealed to the Supreme Court of Canada.

*W. N. Tilley K.C.* for the appellant.

*E. Lafleur K.C.* and *W. E. Payne K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff's rights are governed by the terms of his contract of employment and we are, with respect, unable to find in those terms anything uncertain or equivocal. Termination of the contract at any time by notice is expressly made optional with the Association. Whether there existed good ground for the termination is quite irrelevant. On such notice being duly given, the plaintiff's services forthwith came to an end. He was thereupon made accountable to the Association for all "monies, documents," etc., in his hands relating to its business and he thereafter ceased to act for the Association.

His right to recover "remuneration for his services," i.e., commissions on new insurance and renewal premiums, is likewise expressly restricted by the words,

> while he is acting for the said Association as such Agent as aforesaid, and complying with the terms and conditions herein, on his part, which said terms and conditions are hereby made a condition precedent.

There is nothing ambiguous in this contract. Its plain terms must be given effect to regardless of any consideration of harshness or unfairness or of supposed intentions of

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Anglin C.J.C.

the parties other than those expressed therein. With the learned trial judge (Boyle, J.) and Hyndman and Clarke, JJ.A., we are of the opinion that the plaintiff is entitled to commissions only in respect of premiums paid, whether in cash or notes, prior to his discharge. We would, however, for the reasons indicated by Clarke, J.A., fix the date of discharge at the 20th of June, 1924, rather than the 14th of June, 1924.

For these reasons the appeal should be allowed with costs here and in the Appellate Division and, with the slight modification suggested, the judgment of the learned trial judge should be restored.

*Appeal allowed with costs.*

Solicitors for the appellant: *Carson & Carson.*
Solicitors for the respondent: *Payne & Graham.*

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*May 25, 26.
*June 17.

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

AND

L. E. KIMPTON (DEFENDANT IN SUB-WARRANTY) ..... RESPONDENT;

AND

THE BANK OF NOVA SCOTIA (PRINCIPAL DEFENDANT AND PLAINTIFF IN WARRANTY);

AND

F. D. WATERMAN AND ANOTHER (DEFENDANTS IN WARRANTY AND PLAINTIFFS IN SUB-WARRANTY).

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

*Principal and agent—Real estate—Sale—Commission—Agent the efficient cause of the sale effected—Practice and procedure—Principal action and actions in warranty and sub-warranty—Judgment maintaining them—Appeal by defendant in sub-warranty—Res judicata—Appellate court reversing judgment—Appeal to this court—Plaintiffs in warranty and sub-warranty not parties to either appeals—Right of the Supreme Court of Canada to restore judgment of trial judge—Supreme Court Act, s. 51—Art. 1084 C.C.*

A real estate agent who brings his principal into relation with the actual purchaser is the effective cause of the sale, although the principal sells "behind the back of the agent and unknown to him" (*Burchell*

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

v. *Gowrie* [1910] A.C. 614); and he is entitled to his commission, although the price paid by the purchaser is less than the sum at first demanded by the principal.

Even when actions in simple warranty are joined to the principal action for purposes of hearing and of judgment, they remain distinct from it and are not merged by the joinder; if the defendant in sub-warranty, who intervened in the principal action, alone appeals from a judgment maintaining the principal action and the actions in warranty, confining his appeal to his intervention, this judgment becomes *res judicata* as to the principal defendant and the plaintiffs in warranty and sub-warranty, and the judgment of the appellate court, reversing it as to the parties who did not appeal, is *ultra vires* and quasi non-existent as to them.

Upon an appeal to this court between the same parties who were before the appellate court, although the principal defendant and the plaintiffs in warranty and in sub-warranty were not made parties to it, the whole judgment appealed from is open for discussion and disposal; and this court can deal with that decision as irregular and *ultra vires* and give the judgment which should have been given by the appellate court, so as to leave its full effect to the judgment of the trial court, thus reversed illegally and without right. (*Supreme Court Act*, s. 51.)

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, at Montreal, Lane J. and dismissing the principal action and the action in warranty and sub-warranty.

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

*G. H. Montgomery K.C.* and *E. Cate* for the appellant.

*A. Wainwright K.C.* for the respondent.

*N. A. Belcourt K.C.* for the Bank of Nova Scotia.

The judgment of the court was delivered by

RINFRET J.—The Bank of Nova Scotia, being the owner of a certain immovable property on St. James street, Montreal, agreed, if the sale of that property were effected by the appellant The Montreal Agencies Limited, to pay it a commission of 2½ per cent. on the sale price. The bank fixed that price at $300,000.

The respondent, L. E. Kimpton, approached the Montreal Agencies and intimated that he had a prospective purchaser. The company promised that, in the event of his being able to bring this sale to a successful issue, it would divide its commission of 2½ per cent. equally with him. Whereupon Kimpton disclosed the intended pur-

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MONTREAL AGENCIES LTD. v. KIMPTON.

Rinfret J.

chaser as being The L. E. Waterman Company Limited, and submitted the latter's offer to the Montreal Agencies, which in turn placed it before the bank. The offer however was only for $250,000, partly cash and partly in deferred payments and, for the moment at least, did not prove acceptable to the bank. The parties went on negotiating through the Montreal Agencies, to which the bank wrote, on the 25th September, 1916:—

> In any event, if you will keep us advised of how the matter goes, we will do everything possible to strengthen your hands.

On October 4, Kimpton notified the Montreal Agencies that the Waterman company had withdrawn its offer "on account of it not being acceptable to you" and that the negotiations in connection with the same should be considered cancelled.

This was not, in fact, true. Lane J., who tried the case, found—and we agree with him—that Kimpton wrote this letter to the Agencies company in bad faith, for the purpose of carrying the deal through on his own account and of securing for himself the whole instead of one-half only of the commission. He sought, at the trial, to explain that Kissock, the assistant manager of the Montreal Agencies, had deceived him by falsely telling him that his company held an exclusive right of sale. This was denied by Kissock; no such reason was assigned by Kimpton in his letter of the 4th October and the trial judge disbelieved his story.

In reality, the offer of the Waterman company to the bank was never withdrawn. The very next day after his notification to the Montreal Agencies, Kimpton wrote to the bank about the matter. Although without the participation of the Montreal Agencies, the negotiations continued and their outcome was an agreement of sale between the bank and the Waterman company signed on the 7th March, 1917, for $250,000 cash.

On this state of facts, Lane J. held the Montreal Agencies entitled to its commission from the bank and we think rightly so. No doubt the Waterman company was originally Kimpton's client. But Kimpton agreed that it should be introduced to the bank by the Montreal Agencies. That he, Kimpton, would "bring this sale to a successful issue" and that, in consideration for same, he would expect his remuneration not from the bank but from the Mont-

real Agencies, was precisely the bargain he made on the 19th May, 1916. So far as the bank was concerned, the appellant found the purchaser and brought the parties together as buyer and seller. This was done not only with the full consent of Kimpton, but as part of the agreement which he had made with the Montreal Agencies.

Against the bank, therefore, that company is entitled to the commission. The agent who brings his principal into relation with the actual purchaser is the effective cause of the sale, although the principal sells "behind the back of the agent and unknown to him." (*Burchell* v. *Gowrie* (1). The commission is due even if the price paid be less than the sum at first demanded by the principal, especially if the price finally accepted by him is that which he had originally refused, when the buyer was introduced by the agent. It would not lie within the power of the principal, by his initial refusal, thus to prevent the agent from receiving his commission (Art. 1084 C.C.).

In the deed of sale, the Waterman company assumed payment of all commissions. Both the company and F. D. Waterman personally undertook to indemnify the bank against any such charges, if asserted. The Waterman company obtained from Kimpton a guarantee against the payment of any remuneration other than to him.

Upon learning of the sale, the Montreal Agencies claimed its commission and, the bank having refused to pay it, the present action was brought. The bank called Waterman and the Waterman company in warranty and they, in turn, called Kimpton in sub-warranty. No plea was fyled by the bank, sole defendant in the principal action; nor did Waterman and the Waterman company contest the action in warranty. But Kimpton intervened under Art. 186 of the Code of Civil Procedure, which reads as follows:—

> 186.—In cases of simple or personal warranty, the warrantor cannot take up the defence of the defendant, but can merely intervene and contest the principal demand, if he thinks proper.

The judgment of the Superior Court dismissed the intervention and maintained the principal action together with the actions in warranty and in sub-warranty.

Kimpton alone appealed from this judgment and only upon his intervention. The consequence was that the

(1) [1910] A.C. 614 at p. 625.

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judgment declaring the action well founded as against the bank became absolute. So did the decision on the actions in warranty and in sub-warranty. This situation is well explained by Glasson (Précis de Procédure Civile, 2e éd., vol. I, no. 875):—

* * * de même encore l'acquiescement d'une partie au jugement n'empêche pas l'intervenant d'interjeter appel de son chef, et ainsi il pourra arriver que le jugement acquière chose jugée vis-à-vis de l'une des parties et soit réformé sur l'appel de l'intervenant ou réciproquement.

Nevertheless, by a majority of three to two, the Court of King's Bench reversed the judgment of the Superior Court *in toto*. It dismissed the principal action against the principal defendant (who had acquiesced) with costs against the plaintiff and also the actions in warranty and in sub-warranty with costs of both actions against Waterman and the Waterman Company. This the Court of King's Bench clearly could not do. There was no appeal on those issues. The judgment of the Superior Court, to that extent, had become *res judicata*. Moreover, the bank, Waterman, and the Waterman company were not parties to the appeal and were not before the court. Even when they are joined to the principal action for purposes of hearing and of judgment, the actions in simple warranty remain distinct from it and are not merged by the joinder.

This doctrine is expounded with great lucidity by Japiot (Traité de Procédure Civile, p. 631, no. 1024):—

Supposons qu'en première instance figuraient plusieurs demandeurs ou plusieurs défendeurs, originaires ou intervenants. La question se pose alors de savoir si l'appel, interjeté par l'une des parties qui ont succombé, va produire son effet et permettre de réformer le jugement vis-à-vis de la partie seulement qui l'a interjeté, ou, en outre, vis-à-vis des autres parties qui sont dans la même situation qu'elle.

Par exemple, à l'égard de quelques-uns d'entre eux, le délai d'appel est expiré; ils ne peuvent plus personnellement interjeter appel; mais le délai court encore à l'égard de l'un d'eux. Celui-ci interjette appel en temps utile. Les autres demandeurs ou défendeurs vont-ils être relevés de la déchéance par eux encourue, en ce sens qu'ils pourront figurer dans l'instance d'appel, y conclure et demander la réformation du jugement dans leur intérêt?

Le sens commun indique que celui-là seul sauvegarde son droit et le met à l'abri des causes d'anéantissement, qui l'exerce avec les formalités prescrites et dans les délais impartis par la loi: *Jura vigilantibus subveniunt, non dormientibus.* Chacun des plaideurs, en principe, ne sauvegarde par ses actes que son propre intérêt. En règle générale,

l'appel ne profite qu'à l'auteur de l'appel; le jugement ne peut être réformé qu'à son profit. Voilà une première règle.

The author then points out that there are exceptions to this rule in cases where the obligation is joint and several or indivisible. The exception does not apply here.

We also find the same doctrine in Dalloz, Répertoire Pratique, verbo *Appel en matière civile,* no. 322:—

L'application des règles qui précèdent a donné lieu à certaines difficultés dans le cas où l'instance s'est trouvée compliquée par une demande en *garantie.* Il y a lieu, pour les résoudre, de distinguer suivant que le demandeur originaire a obtenu gain de cause ou a perdu son procès contre le garanti.

Si le demandeur originaire a obtenu gain de cause contre le *garanti,* il est certain que celui-ci peut et doit appeler contre lui. Il en est ainsi, tant en matière de garantie simple qu'en matière de garantie formelle, et, dans ce dernier cas, alors même que le garanti se serait fait mettre hors de cause, en vertu de l'art. 182 C. proc., car, en pareil cas, bien que n'étant pas resté dans l'instance, il a intérêt à appeler, puisque la condamnation doit s'exécuter contre lui (Chauveau et Carré, t. 4, q. 1581 *quater;* Boitard, Colmet-Daage et Glasson, t. 2, n° 672; Garsonnet, t, 5, n° 694).

The Court of King's Bench also maintained the intervention, which was the only matter properly involved in the appeal.

We have already indicated that, in our opinion, the intervenant was wrong and, on that point, the judgment of the Superior Court ought to have been confirmed. The difficulty lies in the fact that the Montreal Agencies alone appealed to this court and its notice of appeal was only against Kimpton. At first, we had some doubt whether, under these circumstances, without having the bank and the other parties before us as respondents, our view being in favour of restoring the judgment of the Superior Court on the intervention, we could deal with that part of the judgment of the Court of King's Bench which dismissed the principal action against the defendant as well as the action in warranty (save for costs) and the action in subwarranty.

We have come to the conclusion that we can.

The judgment of the Court of King's Bench was rendered upon an appeal exclusively between Kimpton and the Montreal Agencies. This judgment is *ultra vires,* so far as the bank, Waterman and the Waterman company are concerned. It is therefore quasi non-existent and cannot

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affect them, as they were not parties to the appeal. This judgment can neither avail against them, nor can they claim any right under it. We have before us the same parties who were before the Court of King's Bench and as to whom alone the appeal was heard and could be decided. We think therefore the whole judgment open for discussion and disposal by us. By force of section 51 of the *Supreme Court Act*, this court may

> give the judgment and award the process or other proceeding which the court whose decision is appealed against should have given or awarded.

The decision appealed against was the outcome of an appeal to the Court of King's Bench, in which the Montreal Agencies Limited and Kimpton alone participated. Upon the appeal to this court between the same parties, we can deal with that decision as irregular and *ultra vires* and give the judgment which should have been given by the Court of King's Bench, so as to leave its full effect to the judgment of the Superior Court, thus reversed illegally and without right.

The judgment of the Court of King's Bench will therefore be set aside with costs against Kimpton and the judgment of the Superior Court will be restored.

The result is that the Montreal Agencies Limited is declared entitled to the full amount of the commission it claimed from the bank and the actions in warranty and in sub-warranty are maintained. The appellant may yet have to account to Kimpton for half of the commission. This question does not arise now and will be left for decision upon an issue properly raised between the Montreal Agencies and Kimpton. The issue here was, and could only be, whether the bank owed that commission to Montreal Agencies.

As regards the position of the warrantors, had the intervention been successful in this court, while the judgment of the Superior Court had been allowed to become *res judicata* on the actions in warranty and in sub-warranty, we refer the parties to *Archibald* v. *Delisle* (1), where it was held that actions to enforce simple or personal warranties issued before judgment upon the principal action,

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

are brought at the risk of the warrantees, and fall if the principal action be subsequently dismissed.

*Appeal allowed with costs.*

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Wainwright, Elder & McDougall.*

Solicitors for the Bank of Nova Scotia: *Atwater, Bond & Beauregard.*

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*May 17, 18.
*Oct. 4.

LANDRY PULPWOOD COMPANY, LTD. (DEFENDANT) ..... APPELLANT;

AND

LA BANQUE CANADIENNE NATIONALE (PLAINTIFF) ..... RESPONDENT.

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

*Sale—Pulpwood—Unfinished product—Loan by a bank—Valid lien—Measuring and stamping by purchaser—Transfer of ownership—Bank Act, s. 88—Arts. 1026, 1027, 1474, 1488, 1489, 1684, 2268 C.C.*

Under section 88 of the *Bank Act*, a bank, as security for advances made, may acquire a lien on "products of the forest" as defined by section 2, subsection (*m*) or on goods, wares and merchandise, as defined by section 2, subsection (*g*), to be manufactured, or in process of manufacture, although the finished product will come into existence only after the process of manufacture is completed.

Therefore, the owner of a timber license, who proposes to go into the forest to cut down the trees and transform them into what is commercially known as pulpwood and who may require financial assistance from a bank before the pulpwood is produced in its commercial form, can give the bank which assists him a valid lien on the finished product, although not in existence as such at the time of the loan.

In the present case, the measuring and stamping of the wood done in the forest by the purchaser, while the wood remained in the possession of the seller, did not amount to a sufficient determination of the subject matter of the contract or to a taking of actual possession of the wood, so as to enable the purchaser to claim ownership of the wood against a valid lien obtained by a bank for advances made to the seller.

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

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To determine the effect of a lien acquired by a bank under section 88 of the *Bank Act*, the provisions of that Act, and not those of the Quebec Civil Code, should be looked at.

No opinion expressed whether a purchaser in good faith of particular goods, in the usual course of business, such as a table bought from a furniture manufacturer or dealer, acquires a valid title as against a bank's lien.

Judgment of the Court of King's Bench (Q.R. 43 K.B. 435) aff.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, at Quebec, Pouliot J., and maintaining the respondent's action.

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

*J. P. A. Gravel K.C.* for the appellant.

*E. Baillargeon K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—In 1923 and 1924, one Silvio Gendron was a lumber merchant dealing in pulpwood. He had obtained timber licenses and his mode of operation was to cut down the trees and saw them into four foot lengths of a diameter of not less than four inches. Either before or after the sawing, the bark was peeled off, and all the contracts filed in the case deal with the pulpwood as peeled pulpwood.

Gendron started cutting operations some time in the summer of 1923 (the evidence does not shew the exact date) on, among other lots, nos. 39 and 40 of the fourth range of the township of Chabot, in the county of Frontenac, in the province of Quebec, being there represented by his brother, who appears to have very grossly exaggerated the quantity of pulpwood he reported as having been manufactured.

Dealing with the facts chronologically, as far as possible, we find Silvio Gendron soliciting, on June 8, 1923, from La Banque Nationale (hereinafter called the bank, and now represented by the respondent) a line of credit of $15,000. On that date, Gendron signed an application to the bank for this line of credit on the security of all the pulpwood peeled or unpeeled, "*brut ou pelé,*" of four feet lengths, belonging, or which might belong to him, on these lots and

(1) (1927) Q.R. 43 K.B. 435.

some others, promising to furnish to the bank from time time, and when requested, all security demanded under the form of transfers, according to section 88 of the *Bank Act,* covering in whole or in part the pulpwood in question. At the same time, Gendron signed an agreement with the bank, defining its powers when making advances, and a demand note for $2,400, dated June 8, 1923, was discounted by him with the bank, accompanied by an hypothecation, under section 88 of the *Bank Act,* of the products of the forest described as

le bois sur le lot 39-40 rg. 4 Chabot * * * et sont les suivants: 500 cds. bois pelé et assuré lot 39-40 Chabot.

Undoubtedly the intention was to give the bank the security mentioned in section 88 of the *Bank Act,* and I do not understand the appellant to question the regularity in form of the hypothecations of the pulpwood which Gendron then and subsequently made in favour of the bank. What the appellant contends as to the lien asserted by the bank will be explained later.

The bank subsequently made advances to Gendron and obtained from him similar letters of hypothecation. These advances may be conveniently divided into three series:

*First series.* The bank advanced $2,400 on June 8, 1923 (this is the advance referred to above), $900 on June 28, and $2,100 on July 10, in all $5,400.

*Second series.* The bank advanced $1,350 on August 17, 1923, $600 on September 9, $600 on September 27, and $450 on October 10, in all $3,000.

*Third series.* The bank advanced $450 on November 13, 1923, $1,600 on December 12, $100 on December 26, and $274.15 on January 3, 1924, in all $2,424.15.

It is conceded that the bank cannot assert a lien for its second series of advances, no notice of Gendron's intention to hypothecate his pulpwood having been given and registered as required by section 88*a* of the *Bank Act,* which came into force on August 1, 1923, and does not apply to the first series of advances. No similar objection exists as to the third series, for the necessary notice was registered in due time.

Referring now to the first and third series, each advance made by the bank to Gendron was contemporaneously secured by the hypothecation of a specific number of cords of pulpwood said to be lying on these lots. For instance,

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for it is not necessary to particularize each hypothecation, when the bank advanced $2,100, on July 10, 1923, Gendron hypothecated 700 cords of peeled pulpwood. It is not seriously contended on behalf of the bank that at that time any such quantity of peeled pulpwood existed on the lots. In fact, Mr. Justice Greenshields, referring to the sale made by Gendron to the appellant, on September 12, 1923, of 1,500 cords of peeled pulpwood, finds that the wood was not then in existence other than in standing trees. He also finds that up to the 19th or 20th November there had been manufactured by Gendron 817 cords of pulpwood on lots 39 and 40 of the 4th range of Chabot. On paper, Gendron hypothecated to the bank, to secure the first series of advances, 1,500 cords of peeled pulpwood said to be then on lots 39 and 40, and 3,200 cords to secure the third series. Having carefully read the testimony, I am convinced that at no time during the first or third series of advances was there any such quantity of peeled and sawn pulpwood on the lots. The cutting of the trees began during the summer, and on September 14, the appellant's inspector Turbide stamped with the latter's initials, 176 cords of sawn and corded wood, 100 cords (estimated) not corded, and 925 cords (also estimated) in lengths, and therefore not sawn. My conclusion is that when the bank, on June 8, June 28, and July 10 (to mention only the hypothecations made on these dates), acquired on paper liens on peeled pulpwood stated to aggregate 1,500 cords, no more than a very small quantity, if indeed any at all, of the pulpwood can be said to have been cut, peeled, sawn and corded. Whether this conclusion in fact militates against the lien the bank asserts on the pulpwood which was subsequently hauled from the lots, is a question which will be considered later.

On September 12, Gendron entered into a written contract with the appellant whereby he purported to sell and undertook to deliver to the latter on cars, at Picard station on the Transcontinental Railway, or at any other place where the freight rates were the same, 1,500 cords of pulpwood, free from any government or other dues, the pulpwood to conform to all conditions prescribed by law for its export to the United States, and to be made from living trees and peeled during sap time of the then present season.

It was agreed that the measuring and inspection would be made by the inspectors of the mills to which the appellant would sell the wood, such measuring to be final as to both parties. The shipment of the wood was to begin on the 1st of December, 1923, and to be completed on the 1st of July, 1924, according to shipping instructions to be furnished by the appellant, but all the wood was to be brought to the place whence it was to be shipped not later than the 1st of April, 1924. The sale price was $11.25 per cord, and it was to be paid as follows: An advance of $4 per cord was stipulated payable up to November 15, that is to say $4,000 if all the wood was peeled and 500 cords sawn and corded, and the balance (of such $4 per cord) on the 15th of November if all the wood was sawn and corded at that date. Another advance of $6 per cord was to be made on the bills of lading as the shipping proceeded, but if the shipment could not be effected during the winter,

ce montant de $6 sera payable à terre sur estimé de la partie de seconde part (the appellant) une fois par mois. La balance le 15 de chaque mois pour le bois reçu au moulin le mois précédent.

It was agreed that during the carrying out of the contract the appellant would have the right to stamp the wood at any place where it might be, in its name, or in the name of any person or bank with whom it might have dealings, so as to secure the advances, and that until the wood was delivered on cars, it would be at the sole risk of the seller. By an addition to the contract, it was stipulated that if the wood was not shipped prior to the 15th of April by reason of the purchaser not furnishing shipping instructions, the insurance would be payable by the purchaser but otherwise it would be at the seller's charge.

Immediately after the signing of the contract, the appellant sent its inspector, Turbide, to the lots where the wood was being cut, and on September 14, Turbide, as above stated, stamped with the appellant's initials, 176 cords sawn and corded, 100 cords sawn but not corded, and in lengths, that is to say in trees that had been cut down but not sawn, about 925 cords. The measuring and stamping, Turbide explains, was done as well as was possible, and he did not consider it a final measuring, for "le bois était mal cordé pour être mesuré finalement."

Before entering into the contract, the appellant was assured by Gendron that there were no bank liens on the

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wood, and it demanded a letter to that effect from Gendron's bankers. Gendron furnished the appellant with a letter from the manager of the branch of the Hochelaga Bank (with whom he had not dealt for some time) at Sainte Marie de Beauce, stating that, as far as his branch was concerned, the bank had no lien on the wood. The dealings of Gendron with La Banque Nationale were carried on at its branch office at St. Evariste Station, and of these dealings, or of any lien obtained by La Banque Nationale, the appellant had no knowledge, but effected its purchase in absolute good faith.

After the contract and stamping of the wood, the appellant made the following advances on the contract price to Gendron, who represented that he required the money to pay his men; $3,000 on September 15, $500 on October 29, $656 on November 22, and $500 on December 1, in all $4,656. Previously to the two latter advances, on November 19, the appellant's inspector, C. Landry, measured, and he states that he stamped with the appellant's initials, on lots 39 and 40, 817 cords of pulpwood, sawn and corded, and at Rivière Bleue 46 cords sawn and corded, and 250 cords in lengths. It may be taken, I think, that this represented all the pulpwood that had been manufactured and corded by Gendron and his representatives up to that date.

On January 14, 1924, Gendron admitted his inability to carry out his contract with the appellant, and he then stated that he had in the woods for delivery under that contract, about 1,400 cords, of which 1,100 were deliverable at Picard Station and 300 at Rivière Bleue, but that he could not haul the wood to the stations for want of money. An agreement was therefore made between the appellant and Gendron on that date whereby the former undertook the hauling of the wood, but at Gendron's expense.

Under this agreement the appellant started hauling the pulpwood in January, 1924, and had hauled some 200 cords of wood when, on the 12th or 13th of February, the bank sent two inspectors to stamp the wood in its name. It was only then that the appellant learned that Gendron had pledged the pulpwood to the bank.

Both the appellant and the bank realized that it was of prime importance that the wood should be hauled to the railway station, and on February 16, 1924, they entered into

a contract whereby, while saving their respective rights, it was agreed that the appellant should continue hauling the wood, the expense to be borne, including the 200 cords already hauled, by the party who finally would be held entitled to a first lien on the wood. The appellant completed the hauling, the quantity hauled amounting to 840 cords, and sold the wood for $9,388.45. The actual cost of hauling, as admitted by the respondent and allowed by the Court of King's Bench, was $5,542.79, and the respondent claims the difference, $3,845.66, alleging that it has a valid lien on the wood. On the other hand, the appellant contends that it acquired the ownership of the wood as well by the purchase it made from Gendron, as by its having stamped the wood with its initials. It further argues that when the wood was hypothecated to the bank in June and July, 1923, there was no pulpwood in existence, and no lien could be created, and that any lien acquired by the bank by reason of the third series of advances was subject to the appellant's acquired rights.

The trial court dismissed the respondent's action on the ground that, as to the first series of advances, there was no evidence that the pulpwood hypothecated was in existence, and that at the time of the third series of advances the appellant had an acquired right to the wood. The learned trial judge disregarded the second series of advances for the reason already stated that no notice of intention to hypothecate the wood had been registered as required by section 88*a* of the *Bank Act*.

This judgment was set aside by the Court of King's Bench, which awarded $3,845.66 to the present respondent, that is to say the amount realized by the sale of pulpwood, less the cost of hauling. The majority of the learned judges (Greenshields, Bernier and Hall JJ.) were of opinion that the bank had a valid lien on the wood, except as to the second series of advances, and that the appellant had never become owner thereof. Dorion and Rivard JJ. dissented. They considered that although the present appellant had not acquired the ownership of the wood by the contract of sale, the subsequent stamping by it of the wood with its initials had sufficiently identified the subject matter of the sale, so that the present appellant become thereby vested with a right of ownership or at least a right of pledge over

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the wood. The learned dissenting judges, however, thought that the appellant was not entitled to more than the 276 cords of pulpwood which had been sawn into four foot lengths, corded and uncorded, when Turbide stamped the wood on September 14, 1923. They would have granted the present respondent judgment for $2,568.62, representing 541 cords out of the total quantity, 817 cords, measured by C. Landry on November 19. In their opinion the bank acquired a lien on the wood not stamped by Turbide by virtue of its third series of advances, but not under the first series, the pulpwood not being then in existence.

This appeal brings up two questions:—

1. Did the bank acquire under section 88 of the *Bank Act* a valid lien on the 840 cords of pulpwood hauled by the appellant from lots 39 and 40 of the fourth range of the township of Chabot?

2. Did the appellant acquire ownership of the pulpwood by virtue of its purchase from Gendron or at least by its stamping of the wood, so as to take it free from the bank's lien?

The first and certainly the most important question involves the construction and application of section 88 of the *Bank Act*.

Briefly, this section permits a bank to lend money to, *inter alios*, any dealer in products of the forest upon the security of such products (subs. 1), or to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him (subs. 3). This security confers on the bank the same rights and powers in respect of the products, goods, wares and merchandise, stock or products thereof, as if it had acquired the same by virtue of a warehouse receipt (subs. 7).

The expression "products of the forest" is defined by s. 2, subs. (*m*) as including *inter alia*, bark, logs, pulpwood, piling, spars, railway ties, poles, mining and all other timber, shingles, laths, deals, boards, staves, and all other lumber. Subsection (*i*) of the same section defines "manufacturer" as including manufacturers of logs, timber or lumber, etc. And "goods, wares and merchandise" include "products of the forest" (s. 2, subs. (*g*) ).

With respect I am unable to concur in the opinion expressed by Mr. Justice Dorion as follows:

Il est donc nécessaire, pour que la banque ait acquis un droit de gage pour les avances faites le 8 juin, le 28 juin et le 10 juillet, 1923, au montant de $5,400, que ce gage ait eu un objet, c'est-à-dire, qu'il y ait eu, à ces différentes époques, du bois coupé sur les lots 39 et 40 du rang 4 du canton Chabot, comme il est dit dans le contrat: 500 cordes de bois pelé et assuré sur ces lots le 8 juin; 300 cordes sur le lot 40 le 28 juin; et 300 cordes sur le lot 40 le 10 juillet, 1923.

Unquestionably the bank's lien must have an object, but in my opinion it had an object in the three instances mentioned by the learned judge. As I read section 88, a bank, for its advances, may acquire a lien on the products of the forest (as defined) or on goods, wares and merchandise (also as defined) to be manufactured, or in process of manufacture, although the finished product will come into existence only after the process of manufacture is completed.

The present case affords an apt illustration of the object Parliament undoubtedly had in view when it enacted section 88, this object being to come to the assistance both of the manufacturer of goods, and of the bank which lends him money for the purposes of his business. Thus the owner of a timber license proposes to go into the forest, to cut down the trees and transform them into what is commercially known as pulpwood. Before the pulpwood is produced in its commercial form, considerable expense is necessary to cut the trees, peel off the bark and saw them into the required lengths. The manufacturer of pulpwood therefore requires financial assistance from the outset, and unless he can give the bank that assists him a lien on the finished product, although not then in existence, his business cannot be carried on.

This, in my opinion, is a reasonable construction of section 88, and it is not unsupported by authority (see *Royal Canadian Bank* v. *Ross*) (1). It follows that by the first series of its advances and the contemporaneous hypothecation of the pulpwood (and I need not consider the third series), the bank acquired a valid lien on the pulpwood manufactured on these lots. Whether it can set up this lien against the appellant is the second question which must now be considered.

(1) 40 U.C.R. 466, at p. 475.

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Mignault J.

I think that the sale by Gendron to the appellant of 1,500 cords of sawn and peeled pulpwood, taken by itself, did not vest in the appellant the ownership of any specific pulpwood. On this point, all the learned judges of the Court of King's Bench have agreed. At the time the sale was made no such quantity of pulpwood was in existence. The most that can be said is that it was then in process of manufacture, and the place where it was to be manufactured was not even mentioned in the contract. Of this there can be no doubt. See articles 1026, 1474 and 1684 of the Civil Code.

Such measuring and stamping of the wood as were done by Turbide, on September 14, and by C. Landry, on November 19 (and Landry's testimony is rather unsatisfactory as to this stamping, the only statement that he then stamped the wood being at the close of his cross-examination), did not, in my opinion, amount to a sufficient determination of the subject matter of the contract, or to a taking of actual possession of the pulpwood. Neither Turbide nor Landry considered that they had finally measured the wood. At the most, what they did was a precautionary measure which later would help to identify the wood on which the appellant had made advances. According to the contract, the object of the marking was not to constitute a delivery into the actual possession of the purchaser, but " afin de garantir les avances faites sur le dit bois." The parties however could not create a lien or pledging outside of the conditions prescribed by law, and the circumstances were not those required by the code to confer on the appellant such a right on the pulpwood which remained, after the stamping, in Gendron's possession.

The appellant at the hearing, urged that at least it had taken actual possession of the 200 cords of pulpwood which it removed from the lots, and with respect to this wood it relied on the second paragraph of article 1027 of the civil code as to the effect of actual possession of one of two competing purchasers on the title derived from a party who has successively obliged himself to both to deliver to each of them a thing which is purely movable property. The appellant also referred to articles 1488, 1489 and 2268 of the Civil Code.

There is no doubt, however, that we must look solely to the *Bank Act* to determine the effect of a lien acquired by a bank by virtue of section 88. Since the enactment of section 88*a* persons dealing with a merchant or manufacturer are protected by the notice which must now be given and registered of the intention to create a lien under section 88. In this case we do not have to determine whether a purchaser in good faith of particular goods, in the usual course of business, such as a table bought from a furniture manufacturer or dealer, acquires a valid title as against the bank's lien. No such case has been made out here. Gendron's undertaking was to sell to the appellant what turned out to be in excess of his whole output, and the appellant realized that it should obtain from him some evidence that there was no banker's lien on the pulpwood. Gendron dishonestly deceived the appellant, but for that the bank was in no way to blame. The lien it acquired was a valid lien which, I think, can be set up against the appellant, even as to the 200 cords which the latter hauled from the lots.

The result is that the appellant is accountable to the respondent for the price it obtained by the sale of the pulpwood, less the cost of the hauling which has been credited to it.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Drolet & Tardif.*

Solicitors for the respondent: *Belleau, Baillargeon, Belleau & Hudon.*

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HYMAN BLOOM AND ISIDORE DWORKIN (DEFENDANTS) ..... } APPELLANTS;

AND

JACOB AVERBACH (PLAINTIFF) ..... RESPONDENT.

1927
*May 10. 11
*May 30.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Partnership—Sale of partners' interests to remaining partner—Good-will—Contract—Alleged uncertainty and insufficiency of terms—Evidence to ascertain what was covered by terms used—Specific performance.*

Where a partner for a specific consideration agrees to retire and assigns all his interest in the partnership business to the remaining partners, that assignment conveys to the remaining partners the retiring part-

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

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ner's interest in the good-will without express mention, and, unless it has been specifically agreed that the remaining partners shall pay for it separately, they cannot be called upon to make any additional payment for the good-will, for it belongs to them by virtue of their ownership of the business. (*Gray* v. *Smith*, 43 Ch. D. 208; *Shipwright* v. *Clements*, 19 W.R. 599; Lindley on Partnership, 9th Ed. 541, referred to).

Plaintiff claimed specific performance of an alleged agreement by defendants to sell to plaintiff their interests in a manufacturing business carried on by plaintiff and defendants as partners. The agreement was contained in letters between the parties' solicitors, and the consideration was expressed to be "on the basis of taking the valuation of the building, machinery and fixtures at $15,000" and "stock, etc., to be taken at 100 cents on the dollar." The partnership assets consisted of the factory, including the land on which it stood, the machinery therein, and the articles affixed thereto, the tools, furniture and equipment used, two motor trucks, the stock in trade, and the book accounts. Defendants contended that the good-will also was to be considered as an asset.

*Held:* The letters showed an agreement sufficiently certain and unambiguous in its terms that the obligations of the parties could be clearly ascertained; on the evidence, including the firm accounts, the parties meant by the words "building, machinery and fixtures," to cover all the physical assets except the stock and the trucks; and by the words "stock, etc.," to cover the stock in trade, the book accounts, and the trucks; and by the words "100 cents on the dollar" that plaintiff was to pay the full present value, as shown on the books. Under the language of the agreement the $15,000 should be taken to include the amount of an existing mortgage on the building. No allowance should be made for good-will, the letters not mentioning it, and the Court finding, on the evidence, that, when authorizing their solicitor to state their terms, defendants had no intention of asking additional consideration for it.

Judgment of the Court of Appeal for Manitoba (36 Man. R. 193), granting plaintiff specific performance of the agreement, affirmed, with a slight variation increasing the amount payable by plaintiff.

APPEAL by the defendants from the judgment of the Court of Appeal for Manitoba (1) which, reversing the judgment of Galt J., granted to the plaintiff specific performance of an alleged agreement by the defendants to sell to the plaintiff their interests in the partnership business carried on by them. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs, with a variation of the judgment below by adding the price of certain motor trucks to the amounts payable by the plaintiff.

*C. H. Locke K.C.* for the appellants.

*E. Lafleur K.C.* and *S. Abrahamson* for the respondent.

(1) 36 Man. R. 193; [1926] 3 W.W.R. 741.

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The judgment of the court was delivered by

LAMONT J.—In this action the plaintiff claims specific performance of an agreement made with the defendants for the sale by them of their respective interests in the Chicago Kosher Sausage Manufacturing Company. This company was a partnership in which the plaintiff and defendants were the sole partners. The partnership agreement was a verbal one and was entered into on April 15, 1924. The terms of the agreement appear to have been that the profits should be divided equally; that if any partner desired to withdraw from the partnership he might do so by giving thirty days' notice and he could take with him his share, and that in other respects the terms were to be those embodied in a former agreement between the plaintiff, the defendant Bloom and one Schulman. That agreement contained the following clause:

> In case of any disagreement between the parties as to any matters in connection with the said business or the division of the property, effects or profits or losses in connection with the said partnership, the same shall be determined by Arbitration * * *

Trouble arose among the partners and, about December 1, 1925, Dworkin notified his partners that he wished to withdraw from the partnership. A couple of days later, during a discussion of their affairs, Bloom also signified his desire to withdraw. Dworkin urged the appointment of arbitrators at once; Bloom was willing, but the plaintiff thought it was not necessary until near the expiration of the thirty days set out in the notice. The result of this discussion was that they all agreed to go to the office of the firm's solicitor, Mr. Hyman, on the following Saturday, December 5. This they did. Hyman advised against dissolution but finding it impossible to reconcile the differences existing between the partners he sent them home to think it over and requested each partner to see him privately. They did so but nothing came of it.

On December 12, according to the evidence of defendants and Hyman, there was another meeting in Hyman's office at which all the partners were present and at which the question of arbitration was discussed at length and during which they say the question of the good-will was also brought up. The plaintiff denies being at that meeting. Whether or not he was present is, in my opinion, immaterial, for it is admitted that nothing was accomplished by it.

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The partners were not reconciled nor did they arrive at any agreement as to what was to be done with the business. Hyman testified that it was not decided at the meeting on December 12 who was to continue the business or who was to retire therefrom. Dworkin testified that after the meeting his impression was that they were going to appoint arbitrators. That was the last meeting of the partners. On December 16 the plaintiff engaged the firm of Abrahamson & Greenberg as his solicitors, and the following correspondence took place between that firm and Mr. Hyman's firm which was acting for the defendants.

(1)

December 18, 1925.

Messrs. Hyman & Hestrin,
Barristers, etc.,
McIntyre Block, Winnipeg.

Dear Sirs:

*Re Jacob Averbach, Hyman Bloom and Isadore Dworkin and Chicago Sausage Mfg. Co.*

In this matter we were retained by Mr. Averbach. We understand from our client that Messrs. Dworkin and Bloom have expressed their desire to retire from the firm known as Chicago Sausage Manufacturing Co.

Will you be kind enough to let us know on what terms the said parties are prepared to retire, and we will endeavour to have the matter amicably adjusted as far as Mr. Averbach is concerned.

Yours truly,
Abrahamson & Greenberg. Per S.G.

(2)

19th December, 1925.

Messrs. Abrahamson & Greenberg,
Barristers, etc.,
205 Confederation Life Bldg., City.

Dear Sirs:

*Re Averbach, Bloom & Dworkin.*

We beg to acknowledge receipt of your letter of the 18th inst. and we have taken up its contents with Messrs. Dworkin and Bloom.

Mr. Dworkin is prepared to retire on the basis of taking the valuation of the building, machinery and fixtures at $15,000, the figures suggested by your client. Stock, etc., to be taken at 100 cents on the dollar.

So far as Mr. Bloom is concerned we are not authorized to make any proposal.

In the event of your client not consenting to the above suggestion, the only alternative remaining is arbitration under the partnership agreement.

Our client insists on an early settlement in any event.

Yours truly,
Hyman & Hestrin. Per M.H.

(3)

December 22, 1925.

Messrs. HYMAN & HESTRIN,
Barristers, etc.,
McIntyre Block, Winnipeg.

DEAR SIRS:

*Re Averbach, Bloom & Dworkin.*

Pursuant to the conversation which the writer had with your Mr. Hyman over the telephone, we hereby, on behalf of Mr. Averbach beg to accept the offer submitted by you on behalf of Mr. Dworkin in your letter of the 19th inst. We also beg to state that the offer is accepted on the understanding that you obtain Mr. Bloom's consent to Mr. Averbach buying out Mr. Dworkin's interest in the business, which consent you undertook to obtain for us.

In regard to our conversation relative to Mr. Bloom, we would request that you let us have his offer in writing, when same will be dealt with. Our client will be prepared to take stock as soon as you advise us of the date acceptable to Mr. Dworkin.

Yours truly,
ABRAHAMSON & GREENBERG. Per S.G.

(4)

23rd December, 1925.

Messrs. ABRAHAMSON & GREENBERG,
Barristers, etc.,
City.

DEAR SIRS:

*Re Averbach, Bloom & Dworkin.*

We beg to acknowledge receipt of your letter of yesterday's date, in which you, on behalf of Averbach accept the offer submitted on behalf of Dworkin that Averbach pay out Dworkin's interest in the Chicago Kosher Sausage Company.

We must object to the statement in your letter that the offer is accepted "on the understanding that you obtain Mr. Bloom's consent." We undertook to obtain no such consent. What our Mr. Hyman said was that he did not think that Mr. Bloom would have any objection or that any difficulty would arise therefrom.

On behalf of Bloom we are instructed to say that he will retire from the business on the same basis as Dworkin, namely that the building, machinery and fixtures be valued at $15,000.

We take it that inventory of the stock will be taken forthwith by arrangement between the parties.

Yours truly,
HYMAN & HESTRIN. Per M.H.

(5)

December 26, 1925.

Messrs. HYMAN & HESTRIN,
Barristers, etc.,
McIntyre Block, City.

DEAR SIRS:

We beg to acknowledge receipt of your letter of the 23rd inst. and contents noted. In reply, on behalf of our client, we beg to accept the offer submitted by you on behalf of Mr. Bloom. In view of the fact that

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Mr. Bloom is disposing of his interest of the business to our client, it is unnecessary to pursue the controversy raised in your letter in regard to Mr. Bloom's consent. We are prepared to have the matter closed at any day suitable to yourselves.

Yours truly,

ABRAHAMSON & GREENBERG. Per S.G.

The plaintiff offered to complete the purchase on the terms contained in the above letters but the defendants refused to carry out the agreement. The plaintiff then brought this action. The trial judge dismissed the action on the ground that the partners were never *ad idem,* in that the defendants had always insisted on their right to receive consideration for their interest in the good-will of the business, and that the letters made no provision therefor. The Court of Appeal (Macdonald J., K.B., *ad hoc,* dissenting) reversed this decision and directed that the agreement be specifically performed (1). The defendants now seek to set aside the judgment of the Court of Appeal and to restore that of the trial judge, on the following grounds:

1. That the defendants' solicitors had no authority to make the offers contained in the letters.

2. That the agreements contained in the letters are too uncertain to be enforced in that they do not specify what assets were to be included in "building, machinery and fixtures" nor whether the $15,000 to be paid therefor was to be exclusive of the mortgage on the building.

3. That the agreement does not cover all the assets.

4. That in agreeing to the terms contained in the letters, if they did so agree, the defendants understood that the good-will was to be valued and paid for.

In my opinion Mr. Hyman, who wrote the letters of December 19 and December 23, on behalf of the defendants, had from each authority to do so. The defendant Bloom on his examination for discovery admitted that Hyman told him of the letter of 22nd December from the plaintiff's solicitors, and also of the reply of December 23. As to the reply he says he consented to its terms and that the contents of the letter were correct. The defendant Dworkin on his examination for discovery admitted having seen the letter of December 18. He says he did not see Hyman's letter of

(1) 36 Man. R. 193; [1926] 3 W.W.R. 741.

December 19 until after it was mailed, but when he did see a copy of it he approved of its contents. In view of these admissions it is, in my opinion, idle for the defendants now to contend that they did not authorize the offers made on their behalf respectively.

Then do the letters shew an agreement so certain and unambiguous in its terms that the obligations of the parties can be clearly ascertained?

It is suggested that had the letters been handed to a lawyer to prepare a formal contract therefrom, he would not have been able to determine what assets were to be included in the term "building, machinery and fixtures," or what were to be covered by "stock, etc." It may be that he would not, but that is not the test. The test is, did the parties themselves clearly understand what was comprised in each. In other words were their minds *ad idem* as to these expressions?

It is common ground that the partnership assets consisted of,

1. The factory, including the partnership land upon which it was situated, the machinery therein, and the articles affixed thereto, the tools, furniture and equipment used in the factory, and two motor trucks.

2. The stock in trade.

3. The book accounts.

In addition the defendants contend that the good-will was to be considered as an asset.

It is admitted by all parties that by the word "building" they intended to include not only the buildings on the partnership land, but the land as well. As to "machinery" no question arises. "Fixtures" ordinarily mean something attached or affixed to the soil, or to a building forming a part thereof. Here, however, evidence was put in which shews that in the minds of the partners the word "fixtures" had a wider meaning. The defendants put in evidence a loose leaf ledger account shewing a valuation of the physical assets of the partnership, other than the stock-in-trade, under the following heads: "Building Account," "Machinery Account," "Office Fixtures" "Factory Fixtures," and "Cars Account."

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Dworkin in his evidence testified that the "office fixtures" consisted of a safe, two typewriting machines, adding machine, two desks, two chairs, stationery and things of that kind.

In the account of "factory fixtures" were entered such transactions as the sale of a horse and wagon; the purchase of a kettle; the sale of a sleigh, and a slicer.

This evidence, in my opinion, establishes that the term "fixtures" in the minds of the partners covered not only such things as were affixed to the factory, but all the furniture, tools and equipment contained therein, or used therewith. It did not, however, include the two motor trucks which were entered separately under "Cars Account," and were valued at $475.

By the term "building, machinery and fixtures," therefore, the partners meant all the physical assets except the stock and the trucks.

The term "stock, etc.," would clearly include the stock in trade.

As to the book accounts the plaintiff testified that they were "stock," and both defendants admitted that the plaintiff was to pay 100 cents on the dollar for the book accounts. They must, therefore, have understood that they came under the term "stock, etc."

The only remaining assets were the two motor trucks and, as the defendants admit that it was intended that all their interest in the partnership should pass to the plaintiff, they must have understood that the trucks came in under the same heading.

What the partners meant by "100 cents on the dollar" is, I think, also clear. At the trial the defendant Bloom gave the following testimony.

Q. You say you set the $15,000 as the valuation of the building, machinery and fixtures. How were you going to settle on the value of the rest of the things?

A. That is just according to the books.

The books contained a valuation of the various assets of the firm made when the partnership began. This was brought up to date each year by adding thereto the value of additional assets secured, and by deducting therefrom the value of assets no longer in the firm's possession. They shewed the amount allowed in 1924 for depreciation and also the present value of the assets under each account at

the end of the year. When, therefore, the defendant Bloom says they were going to fix the value of the assets, other than the building, machinery and fixtures, according to the books, that, in my opinion, meant that the plaintiff was to pay the full present value, that is the value as set out in the books for 1924, with such deductions for depreciation for the year 1925 as would be reasonable. What these should be the parties themselves have shewn by the entries under date of December 31, 1925, which, for the purposes of computation may, I think, be accepted. It was contemplated that stock would be taken, and they took stock, setting down the raw material on hand and its cost to the firm. They did not reach the point of computing the additional cost to be added for such goods as had been manufactured, but the evidence is that such cost is shewn in the books.

As that is certain which can be made certain by a reference to the books I do not find any uncertainty or ambiguity in the agreement, for the argument that the mortgage on the building was not to be deducted from the $15,000 is, I think, completely answered by the language of the offer itself, and the further contention that Bloom offered to sell only his interest in the building, machinery and fixtures, is answered by his own admission. Unless, therefore, the parties understood and intended that the good-will should be valued and paid for, the agreement covered all the assets and should be specifically performed.

With reference to the good-will, I think it is clear law that where one partner for a specific consideration agrees to retire and assigns all his interest in the partnership business to the remaining partners, that assignment conveys to the remaining partners the retiring partner's interest in the good-will without express mention, and, unless it has been specifically agreed that the remaining partners shall pay for it separately, they cannot be called upon to make any additional payment for the good-will, for it belongs to them by virtue of their ownership of the business. *Gray* v. *Smith* (1); *Shipwright* v. *Clements* (2); Lindley on Partnership, 9th ed., 541.

The agreement as contained in the letters makes no mention of good-will. It is, however, said that it was in the

(1) (1889) 43 Ch. D. 208. (2) (1871) 19 W.R. 599.

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Lamont J.

contemplation of the parties that it should be paid for, because at every meeting they discussed the question of arbitration. I have no doubt they did discuss the question of arbitration at each meeting. Dworkin insisted on the partners appointing arbitrators and Bloom agreed thereto. Dworkin, however, in his evidence stated the purpose for which they were to be appointed as follows:

> Q. You say the appointment of arbitrators was for what purpose?
> A. For the purpose of dissolution—winding up the partnership and bringing the whole thing to a head.

The arbitration, therefore, which the parties had in view in their discussions was not, as the defendants tried to make it appear at the trial, for the purpose of valuing the good-will, but it was for the purpose of securing a dissolution of the partnership. It must necessarily have been so. Dworkin had the right to withdraw and get his share. If neither of his partners would purchase his interest the only way Dworkin could get his share was by a dissolution of the partnership and a distribution of the assets. The arbitrators had no power to compel any one partner to purchase another partner's interest. If the partnership was dissolved there could be no question of valuing the good-will, for there would be no good-will to value.

Now on December 12 it was admitted by the defendants and Hyman that no agreement had been reached as to who would buy the others out and that they could see nothing for it but arbitration. That this meant dissolution seems to be borne out by the letter of Mr. Hyman of December 19, where he says:

> In the event of your client not consenting to the above suggestion the only alternative remaining is arbitration under the partnership agreement.

Here arbitration is declared to be an alternative to purchase by the plaintiff. It was an intimation to the plaintiff that if he did not accept the offer there must be a dissolution.

A perusal of the evidence for the defence satisfies me that when the defendants authorized Hyman to state the terms upon which they would retire from the business they had no intention of asking any additional consideration for the good-will.

I am, therefore, of the opinion that the judgment of the Court of Appeal should be affirmed with the variation I have mentioned in respect to the trucks. For these the

plaintiff should pay the value set out in the books under date of December, 1925. The costs of this appeal should be borne by the defendants.

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*Appeal dismissed with costs.*

*Judgment below varied.*

Solicitors for the appellant Bloom: *Machray, Sharpe, Locke, Parker & Crawley.*

Solicitors for the appellant Dworkin: *Hyman & Hestrin.*

Solicitors for the respondent: *Abrahamson & Greenberg.*

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CANADIAN WESTINGHOUSE COMPANY, LIMITED (PLAINTIFF)..... APPELLANT;

1927

*June 8, 9.
*Oct. 4.

AND

WILLIAM W. GRANT (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Patent—Infringement—Patent Act, R.S.C. 1906, c. 69, and amendments—Application for patent within extended period allowed by article 83 of Treaty of Peace (Germany) Order, 1920—Patent issued after amendment to Patent Act in 1921, c. 44—Question whether terms of article 83 or of ss. 6 and 7 of c. 44 of 1921 applicable as to parties' rights—"Right of industrial property" (article 83)—Construction of statutes—Repeal by implication—Vested rights.*

A. (plaintiff's assignor), a citizen of the United States of America, patented a device there on October 6, 1914. He failed to apply for a Canadian patent within the year allowed by s. 8 of the *Patent Act* (R.S.C. 1906, c. 69), but applied for it on July 10, 1920, just before the expiry of the extended period allowed therefor by article 83 of the Treaty of Peace (Germany) Order, 1920. The letter accompanying the petition stated it was filed under the provisions of that Order. The patent was not issued until March 7, 1922. In the meantime c. 44 of 1921, amending the Patent Act, was passed. The patent recited compliance with the requirements of the *Patent Act* (R.S.C. 1906, c. 69) and amendments thereto, and was granted "subject to the conditions contained in the Act aforesaid." Defendant, as a private citizen, had manufactured, used and sold the device prior to January 10, 1920, and continued to do so, and was sued for infringement of the patent.

*Held,* the patent was not "granted or validated under the provisions" of s. 6 or s. 7 of c. 44 of 1921, and, therefore, defendant could not invoke the conditions in subs. 2 of s. 7; the patent issued under authority of said article 83, under the terms of which the defendant was not protected, as he could not claim, by virtue of his manufacture, use

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

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and sale of the device prior to January 10, 1920, to have acquired and be in possession of a "right of industrial property" within the meaning of that article; to speak of a right open to be exercised by any person outside the United States as a "right of industrial property" subsisting in an individual who happened to exercise it, involves a wrong conception of "property."

Said article 83 was not repealed by implication by s. 6 or s. 7 of c. 44 of 1921. Moreover, A. had a vested right prior to that Act, by virtue of his application under article 83, to obtain a patent under, and subject only to conditions imposed by that article; and it would require clear language, even were there an express repeal, to warrant the conclusion that A.'s acquired rights under article 83 were thereby so seriously impaired as they would be if defendant and others in a like position should be entitled to the wider protection afforded by s. 7 (2) of c. 44 of 1921 (*Interpretation Act*, R.S.C. 1906, c. 1, s. 19; *Lewis* v. *Hughes* [1916] 1 K.B. 831).

The phrase in the patent "subject to the conditions contained in the Act aforesaid," while no doubt referring to the *Patent Act* as then amended, imported only that the patent was subject to such of the provisions of the amended Act as were upon their proper construction applicable to it.

*Held,* further, that defendant did not come within the terms of subs. 2 of s. 8 of the *Patent Act*.

Judgment of the Exchequer Court of Canada (Maclean J.) ([1926] Ex. C.R. 164) reversed in part.

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada (1) dismissing, as against the defendant Grant, the plaintiff's action for infringement of patent. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

*O. M. Biggar K.C.* and *R. S. Smart K.C.* for the appellant.

*J. B. Barron* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff company, as holder of a patent, appeals from the judgment of the Exchequer Court dismissing its action for infringement against the defendant W. W. Grant. The respondent Grant, without cross-appeal, asks that the injunction granted against his co-defendant, W. W. Grant Ltd., be modified so as to permit of its purchasing the device in question from him.

(1) [1926] Ex. C.R. 164.

That the manufacture, use and sale by the defendant Grant, in his private capacity, of which the plaintiff complains, amounted to infringement of its patented device, unless protected by one or other of the enactments presently to be discussed, is admitted. The questions presented are—which of these protective provisions is applicable, and whether that which applies affords the protection claimed.

The plaintiff's assignor, Armstrong, as inventor, patented the device in the United States of America on the 6th of October, 1914. He failed to make application for a Canadian patent within the year allowed by s. 8 of the *Patent Act* (R.S.C., c. 69). He applied, however, for a Canadian patent on the 10th of July, 1920—one day before expiry of the extended period for such application allowed by article 83 of the Treaty of Peace (Germany) Order, 1920 (*a*), hereinafter called Article 83, made under the authority of the Dominion Statute of 1919, 2nd session, chapter 30.

The letter of Armstrong's solicitors, accompanying his application for the Canadian patent, explicitly states that the application is filed "under the provisions of the Treaty of Peace (Germany) Order, 1920."

In the ordinary course the patent so applied for would have issued some time before the 4th of June, 1921, when the *Patent Act* was amended (11-12 Geo. V, c. 44) by the

(*a*) The Treaty of Peace (Germany) Order, 1920.

83. The rights of priority, provided by Article 4 of the International Convention of Paris for the Protection of Industrial Property, of March 20, 1883, revised at Washington in 1911, or by any other Convention or Statute, for the filing or registration of applications for patents or models of utility, and for the registration of trade-marks, designs and models which have not expired on the first day of August, 1914, and those which have arisen during the war, or would have arisen but for the war, shall be extended in favour of all nationals of Germany, and of the Powers allied or associated during the war with His Majesty, until the 11th day of July, 1920.

Provided, however, that such extension shall in no way affect the right of Germany or of any of the powers allied or associated during the war with His Majesty or of any person who before the tenth day of January, 1920, was bona fide in possession of any rights of industrial property conflicting with rights applied for by another who claims rights of priority in respect of them, to exercise such rights by itself or himself personally, or by such agents or licensees as derived their rights from it or him before the tenth day of January, 1920; and such persons shall not be amenable to any action or other process of law in respect of infringement.

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addition of a number of sections, including those under which the respondent claims protection, and which are numbered 6 and 7. (*b*).

The delay in issuing the patent was caused by some uncertainty in the Patent Office as to the proper interpretation of article 83, which was then the subject of litigation in the Exchequer Court. The plaintiff's patent eventually issued on the 7th of March, 1922. It recited his application and his compliance with the other requirements of the *Patent Act* of Canada (R.S.C., 1906, c. 69) and amendments thereto; and the grant made "is subject to the conditions contained in the Act aforesaid."

The learned President of the Exchequer Court held that Armstrong's patent had issued on the authority of s. 8 of the *Patent Act,* as modified by article 83, and subject to the terms and conditions of that article, and was not granted under the authority of ss. 6 and 7 of the statute of 1921

(*b*) 11-12 George V, c. 44.

6. The rights provided by section eight of the *Patent Act* for the filing of applications for patents for invention which rights had not expired on the first day of August, 1914, or which rights have arisen since that date shall be, and the same are hereby extended, until the expiration of a period of six months from the coming into force of this Act, and such extension shall apply to applications upon which patents have been granted as well as to applications now pending or filed within said period. Provided, that such extension shall in no way affect the right of any person, who, before the passage of this Act, was *bona fide* in possession of any rights in patents or applications for patent conflicting with rights in patents granted or validated by reason of such extension, to exercise such rights himself personally or by such agents, or licensees, as derived their rights from him, before the passage of this Act, and such persons shall not be amenable to any action for infringement of any patent granted or validated by reason of such extension.

7. (1) A patent shall not be refused on an application filed between the first day of August, 1914, and the expiration of a period of six months from the coming into force of this Act, nor shall a patent granted on such application be held invalid by reason of the invention having been patented in any other country or in any other of His Majesty's Dominions or Possessions or described in any printed publication or because it was in public use or on sale prior to the filing of the application, unless such patent or publication or such public use or sale was issued or made prior to the first day of August, 1913.

(2) No patent granted or validated under the provisions of the next preceding section or of this section shall abridge or otherwise affect the right of any person, or his agent or agents, or his successor in business, to continue any manufacture, use or sale commenced before the coming into force of this Act by such person nor shall the continued manufacture, use, or sale by such person, or the use or sale of the devices resulting from such manufacture or use constitute an infringement.

(11-12 Geo. V, c. 44). It was, therefore, not subject to the terms and conditions set forth in subsection 2 of section 7 of the latter statute. He, however, also held that the respondent Grant had by his manufacture, use and sale of the patented device prior to the 10th of January, 1920, acquired, and was in possession of, a "right of industrial property" which conflicted with the rights applied for by Armstrong and that the continued exercise of such right by Grant was protected by article 83.

The following admissions were made by the parties:

1. The defendants, prior to June 4, 1921, commenced to manufacture and sell, and have since continued to manufacture and sell, radio receiving sets embodying the inventions described in the patents referred to in the statement of claim.

2. The defendants, prior to and after the issue of the said letters patent, and prior to the institution of this action, have manufactured, used, and sold radio receiving sets having the electrical characteristics indicated by the attached current diagram.

The evidence of the respondent establishes the actual manufacture, use and sale by Grant, as a private citizen, of the device in question prior to the 10th of January, 1920. Armstrong is an American citizen and it is common knowledge that the United States of America was a "Power allied or associated with His (Britannic) Majesty during the war."

With great respect, we are of opinion that the learned trial judge was mistaken in regarding the respondent Grant as in possession of a "right of industrial property." What he did in manufacturing, using and vending the Armstrong device, then patented only in the United States of America, was merely what any other person might have done. To speak of a right thus open to be exercised by all the world outside the United States as a "right of industrial property" subsisting in an individual who happened to exercise it involves a conception of "property" which we are unable to accept.

On the other hand, we think it beyond doubt or cavil that Grant had manufactured and sold the device before the 4th of June, 1921, within the meaning of those words in subs. 2 of s. 7 of c. 44 of the statute 11-12 Geo. V, so that the continuation by him of such manufacture, use and sale would not constitute an infringement of the Armstrong Canadian patent, if it was "granted or validated under the provisions of" s. 6 or s. 7 of that statute. The principal

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question for determination, therefore, is whether the learned judge was right in holding that this latter statute is inapplicable because the plaintiff's patent was not "granted" under it and that the respondent's rights (if any) must be measured by the terms of the proviso to article 83, under the authority of which, in his opinion, the Armstrong Canadian patent issued.

We find nothing in s. 6 or s. 7 in the Act of 1921 so inconsistent with or repugnant to article 83 that the enactment of the former should be held to imply the repeal of the latter. Repeal by implication is never favoured. *Foster's Case* (1). Revocation or supersession of an earlier enactment as the result of implication arising out of a later statute occurs only when the words of the latter cannot otherwise be given reasonable effect. *Kutner* v. *Phillips* (2); Maxwell, on Statutes, (6th Ed), pp. 280 *et seq.* Moreover, the presence in the Act of 1921 of s. 9, which expressly provides for the continuation in force for one year of certain orders of the Minister affecting patents, aids the view that repeal of article 83 was not intended. There appears to be no real difficulty in both these provisions operating on parallel lines. Armstrong's application was made within the delay provided for by article 83, and was otherwise in conformity with its requirements, and the patent applied for might still be granted under its authority, although its actual issue should be deferred until after the coming into force of the Act of 1921; and such a patent would, of course, be subject to the conditions imposed by article 83. But, if for any reason, the applicant could not bring himself within article 83 and therefore found himself obliged to invoke the aid of s. 6 or s. 7 of the Act of 1921—then his patent "granted or validated under the provisions of" one or other of those sections would equally clearly be subject to the wider restrictions contained in para. 2 of s. 7. It is only if the patent be "granted or validated" under one or other of those sections, i.e., if to sustain its existence as a patent one or other of them must be invoked, that the patentee, as a condition of obtaining the further indulgence which those sections afford, is subjected to the greater curtailment in his rights for which s. 7 (2) provides.

(1) 11 Co. Rep., 56b, at p. 63a. (2) [1891] 2 Q.B. 267, at p. 272.

The plaintiffs are not driven to claim the aid of either s. 6 or s. 7. Their assignor's right arose and was perfected under the authority of article 83, and in that article must be found the terms and conditions to which that right is subject.

Moreover, the plaintiff had a vested right prior to the coming into force of the Act of 1921, by virtue of his application under article 83, to obtain a patent under and subject only to conditions imposed by that article. By s. 19 of the *Interpretation Act* (R.S.C., 1906, c. 1) it is provided that

> 19. Where any Act or enactment is repealed, or where any regulation is revoked, then, unless the contrary intention appears, such repeal or revocation shall not, save as in this section otherwise provided,—
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked;

It would require clear language in the statute of 1921, even though it contained an express repeal of article 83, to warrant the conclusion that the acquired rights of Armstrong under that article were thereby so seriously impaired, as they would be if the respondent and others in a like position should be entitled to the wider protection afforded by subs. 2 of s. 7. *Lewis* v. *Hughes* (1). *A fortiori* would it be difficult to attach such a consequence to a repeal by mere implication of article 83.

The phrase in the patent "subject to the conditions contained in the Act aforesaid" no doubt refers to the *Patent Act* as then amended, but it imports only that the patent is subject to such of the provisions of the amended statute as are upon their proper construction applicable to it.

It has also been suggested that the defendant Grant comes within the provisions of subs. 2 of s. 8 of the *Patent Act* (R.S.C., 1906, c. 69), because Armstrong did not, "within three months after the date of the issue" of his American patent in 1914, give notice to the Canadian Commissioner of his intention to apply for a patent in Canada. The evidence does not disclose any manufacture of the Armstrong device by Grant prior to 1919, whereas, under subs. 2 of s. 8, protection is afforded only if the manufacture of the device has begun within the period of one year after the issue of the foreign patent, within which, under s. 8,

(1) [1916] 1 K.B. 831.

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the inventor may obtain a Canadian patent. Grant's case, therefore, is not within the terms of subs. 2 of s. 8. Nor can the period fixed by that subsection be prolonged to cover the extended time during which the inventor was allowed to obtain a patent under article 83 of the Treaty of Peace (Germany) Order, 1920. There is no express extension by that Order of the period of one year named in subs. 2 of s. 8 of the Revised Statute and implication of such an extension is excluded by the fact that article 83 itself contains a specific protective proviso, which, while allowing a more extended period for its operation, restricts the protection it affords to persons "*bona fide* in possession of any rights of industrial property."

For these reasons we are of the opinion that the learned President of the Exchequer Court was right in holding that the only protection which the respondent can invoke is that afforded by the proviso to article 83, but, as already stated, he had, in our opinion, acquired no "right of industrial property" within the meaning of that proviso.

The appeal will accordingly be allowed with costs. The judgment dismissing the action as against W. W. Grant will be set aside and judgment will be entered for the plaintiff, appellant, in terms similar to those in which it has already been entered against his co-defendant corporation, infringements found to have been committed by him being restricted, however, to his manufacture, use and sale of the patented device in his capacity as a private citizen.

The suggested modification in the judgment as against the defendant corporation need not be further considered.

*Appeal allowed with costs*

Solicitor for the appellant: *Russel S. Smart.*

Solicitors for the respondents: *Barron & Barron.*

BARTLETT J. BROOKS.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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*Oct. 31.
*Nov. 2.

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

*Criminal Law—Conviction on charge of using means to procure abortion (Cr. Code, s. 303)—Judge's charge to jury—Misdirection in a material matter—Appeal—Onus of Crown—Miscarriage of justice (Cr. Code, s. 1014 (1) (c) ).*

The judgment of the Appellate Division of the Supreme Court of Ontario, 61 Ont. L.R. 147, affirming appellant's conviction on a charge of using means to procure abortion, contrary to s. 303 of the *Cr. Code,* was reversed, and the conviction was set aside and a new trial ordered, on the ground that there was non-direction, tantamount in the circumstances to misdirection, in a material matter, in the trial judge's charge to the jury, in that he cast doubt, unwarranted on the evidence, upon the fact of the girl's menstruation shortly before the time of the acts charged, and failed to direct their attention to its possible significance (as bearing on the appellant's defence that he was never aware of the girl's pregnancy) and also to the motives, consistent with innocence, which might have actuated the girl in consulting one W., a physician and surgeon, rather than the family physician, and in presenting herself to him under an assumed married name.

Misdirection in a material matter having been shown, the onus was upon the Crown to satisfy the court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty (*Gouin* v. *The King,* [1926] S.C.R. 539, at p. 543; *Allen* v. *The King,* 44 Can. S.C.R. 331, at p. 339; *Makin* v. *Att. Gen. for New South Wales,* [1894] A.C. 57, at p. 70). That onus was not discharged.

APPEAL by the accused from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, by a majority, dismissed his appeal from his conviction, upon trial by Logie J. and a jury, on the charge of using means to procure abortion, contrary to s. 303 of the *Criminal Code.*

By the judgment now reported, the appeal was allowed, the conviction set aside and a new trial ordered, on the ground of misdirection in the trial judge's charge to the jury in certain respects indicated in the judgment.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

(1) (1927) 61 Ont. L.R. 147.

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*I. F. Hellmuth K.C.* and *R. H. Greer K.C.* for the appellant.

*E. Bayly K.C.* for the respondent.

THE COURT.—A majority of the Court is of the opinion that, in view of the unfortunate failure of the learned trial judge to present to the jury the principal ground of defence put forward by the appellant, his conviction cannot be sustained. As there is to be a new trial, it is inadvisable to discuss the evidence in detail or to do more than indicate what is regarded as the fatal defect in the charge.

The appellant is shewn by the evidence to have been more or less connected with two occasions on which the girl, Ruth Dembner, was " treated " by Dr. Withrow. He accompanied her to the doctor's residence on the evening of Tuesday the 8th of February, 1927, when the doctor states that he made a physical examination, using a " dilator." The appellant also brought the girl to the Strathcona Hospital on the night of Friday, the 11th of February, and she was admittedly operated on by Dr. Withrow on the following (Saturday) morning.

That Ruth Dembner was in fact pregnant from some time in January is clearly established; and that she was in fact operated on by Dr. Withrow with intent to bring about an abortion is not open to question here.

The defence of the appellant is that he was never aware of Ruth Dembner's pregnancy. There is no direct testimony that he ever learned that fact, circumstantial evidence being relied upon by the Crown to justify an inference of such knowledge. The appellant, on the other hand, points to his knowledge that the girl had menstruated on the 28th of January (deposed to by his father) as importing ignorance by him of the vital fact that she had conceived. The fact of her menstruation is established by the uncontradicted testimony of her mother and sister, called as crown witnesses, and whose credibility is unimpeached. The medical testimony is that menstruation during pregnancy is not uncommon.

The fair inference from these facts, it is argued for the appellant, is that both he and the girl did not believe that she was pregnant when she first visited Dr. Withrow on the evening of the 8th of February. At all events, the fact of the menstruation and the significance attached to it by the

appellant should have been placed before the jury by the learned trial judge in his charge at least as fairly and as clearly as were the circumstances relied on by the Crown as implying guilty knowledge and intent. Yet, while some emphasis was laid in the charge on the facts that Ruth Dembner had passed over her family physician and had gone to Dr. Withrow, an utter stranger, to be treated, as the defence claims, for dysmenorrhoea, and that she had given her name to Dr. Withrow as "Mrs. Brooks," nothing was said of the suggested explanation offered for the appellant that she probably wished to conceal the loss of her virginity from the family physician and that, as that fact would be apparent to Dr. Withrow, she might have thought it would be more convenient for her to give the name of a married woman.

The learned judge, instead of telling the jury, as the evidence clearly warranted, that they should accept as undisputed the girl's menstruation in the end of January, cast doubt upon that fact, saying: "The evidence, if any, was of menstruation," and then, suggesting the possibility of the issue of blood on the 28th of January having been due to some earlier unlawful operation (of which there is not a scintilla of evidence), he added:

> The weight of that evidence (as to menstruation); the credibility of it is for you; you are the judges of that.

After the jury had retired, counsel for the appellant objected to the charge in these terms:

> In charging the jury as to the evidence of menstruation I was struck by the fact that you brushed it aside; you covered it in such a way that you in effect used this expression in regard to that; you must consider the weight of the evidence. You did not perhaps have present in your mind at that time that the evidence consisted of the mother's testimony and the sister's testimony.

Instead of recalling the jury and specifically directing their attention to this matter as requested, the learned judge said:

> But that was impressed upon the jury again and again by you and Mr. Roebuck. Of course there was evidence that blood had been seen on a pad, but all the girl said to her mother was—"It is the usual."
>
> Mr. GREER: I have it down that the mother actually saw it.
>
> HIS LORDSHIP: It may be so but I do not think any miscarriage will occur from that, because counsel reiterated that only this morning to the jury.
>
> Mr. GREER: Well you charged very carefully, and it struck me that perhaps a proper sense of proportion . . . .
>
> HIS LORDSHIP: Any objection, Mr. Roebuck?
>
> Mr. ROEBUCK: I intend to make none.

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And yet the learned judge had, early in his charge to the jury, said:

> It is my duty, gentlemen, to lay the defence fairly and completely before the jury, and I will do that a little later * * *

To avoid any possible misapprehension, it should be stated that, in the opinion of the Court, but for the defects in the charge the appellant could not have successfully attacked his conviction. There was quite enough evidence to warrant the jury upon an adequate charge, had they seen fit to do so, drawing the inference of guilty knowledge and intention on his part. But it is impossible to gauge the effect on the jury's mind of casting doubt upon the fact of the girl's menstruation and of failing to direct their attention to its possible significance and also to the motives, consistent with innocence, which might have actuated the girl in consulting Dr. Withrow rather than the family physician and in presenting herself to him as "Mrs. Brooks." If the jury, properly instructed as to these points, regarded the first visit to Dr. Withrow on the 8th of February as made for an innocent purpose and in ignorance by the girl and the appellant of her pregnancy, as the Deputy Attorney General admitted they might, they would be obliged to infer from what subsequently occurred that the appellant's state of mind and his intention changed and that when he brought the girl to the hospital on the Friday evening (February 11) he did so with the object of furthering a design on her part to undergo an operation to procure an abortion. That it may seem probable to an appellate court perusing the record that the jury would have reached that conclusion, does not warrant affirming the conviction. That would, in effect, be to substitute the verdict of the court for that of a jury properly instructed, to which the appellant was entitled. Misdirection in a material matter having been shewn, the onus was upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty. *Gouin* v. *The King* (1); *Allen* v. *The King* (2); *Makin* v. *Att. Gen. for New South Wales* (3). That burden the Crown, in the view of the majority of the Court, has not discharged. There was non-direction by the learned trial judge in a vital matter, tantamount in

(1) [1926] S.C.R., 539, at p. 543. (2) (1911) 44 Can. S.C.R. 331, at p. 339.

(3) [1894] A.C. 57, at p. 70.

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the circumstances of this case to misdirection, and constituting a miscarriage of justice within subs. 1 (*c*) of s. 1014 of the *Criminal Code*. Upon the whole case, and taking into consideration the entire charge, the majority of the Court, with respect, finds itself unable to accept the view expressed by the learned judge who delivered the majority judgment in the Appellate Division that "no substantial wrong or miscarriage of justice can have occurred" at the trial. (*Criminal Code*, s. 1014 (2)).

*Appeal allowed, conviction set aside and new trial ordered.*

Solicitors for the appellant: *Smith, Rae & Greer.*

Solicitor for the respondent: *Edward Bayly, Deputy Attorney-General for the Province of Ontario.*

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*April 20, 21, 22, 23, 25.
*Oct. 10.

IN THE MATTER OF A PETITION OF RIGHT

THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR SCHOOL SECTION NUMBER TWO IN THE TOWNSHIP OF TINY, AND THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF PETERBOROUGH, ON BEHALF OF THEMSELVES AND ALL OTHER BOARDS OF TRUSTEES OF ROMAN CATHOLIC SEPARATE SCHOOLS IN THE PROVINCE OF ONTARIO (SUPPLIANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... RESPONDENT.

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

*Constitutional Law—Education—Roman Catholic separate schools in Ontario—Rights as to courses of study and grades of education in such schools—Rights at Confederation—B.N.A. Act, s. 93 (1)—Validity of Ontario statutes and regulations—Taxation for support of continuation schools, collegiate institutes and high schools—Rights of separate schools as to share in legislative grants.*

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

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The suppliants claimed: (1) The right to establish and conduct courses of study and grades of education in Roman Catholic separate schools in Ontario such as are conducted in continuation schools, collegiate institutes and high schools; and that all regulations purporting to prohibit, limit, or in any way prejudicially affect such right are *ultra vires;* (2) The right of Roman Catholics in Ontario to exemption from taxation for the support of continuation schools, collegiate institutes and high schools not conducted by their own boards of trustees; (3) A share in public moneys granted by the Ontario legislature for common school purposes computed in accordance with what they asserted to have been their statutory rights at the date of Confederation; and asked for a declaration that certain Ontario statutory enactments prejudicially affected their rights as granted by the *Separate Schools Act,* 26 Vic. (1863), c. 5, and secured by s. 93 of the *B.N.A. Act,* and, in so far as they affected such rights, were *ultra vires.* The Appellate Division of the Supreme Court of Ontario (60 Ont. L.R. 15), affirming judgment of Rose J. (59 Ont. L.R. 96), held against their claims. On appeal to this Court, three of the six judges hearing the appeal held it should be dismissed, and it was dismissed accordingly. Anglin C.J.C. and Rinfret J. held in the suppliants' favour on all said claims. Mignault J. held in their favour except, in part, as to their claim in regard to legislative grants. Duff, Newcombe and Lamont JJ. held against them on all claims. As to a certain sum sued for, the Court unanimously held that the appeal failed.

The *Separate Schools Act,* 26 Vic. (1863), c. 5; the *Common Schools Act,* C.S.U.C. 1859, c. 64; the *B.N.A. Act,* s. 93; and other statutes, and official reports and documents, extensively reviewed and discussed.

*Per* Anglin C.J.C., Mignault and Rinfret JJ.: Any statute or regulation that would materially diminish or curtail the scope of the education which denominational schools were, at Confederation, legally entitled to impart, or that would tend to restrict the period during which supporters of such schools were then legally entitled to have their children's education subject to the influence of denominational control and instruction, would "prejudicially affect a right or privilege with respect to denominational schools" within s. 93 (1) of the *B.N.A. Act.* The remedy is to invoke the ordinary tribunals; the right of appeal to the federal executive under s. 93 (3) does not apply. S. 93 (3) has to do with acts of provincial authorities which, although not *ultra vires,* so affect rights and privileges theretofore enjoyed by a religious minority as to constitute, in the opinion of the Governor in Council, a grievance calling for federal intervention (*Brophy* v. *Att. Gen. of Manitoba* [1895] A.C. 202).

The effect of the legislation in force at Confederation, construing it without the aid of any extraneous evidence, was to confer on all separate school trustees, as part of, or incident to, the management and control of the schools entrusted to them, the right to determine the subjects of instruction in, and the grading of, such schools. They had the legal right to provide therein for secondary education. Curtailment of such rights was not within the regulative powers of the Council of Public Instruction. The above view as to the effect of the legislation is *prima facie* supported by the fact that it was the view accepted and acted upon by the educational authorities, as indicated by the official reports and documents in evidence. (*Clyde Navigation Trustees* v. *Laird,* 8 App. Cas. 658, at p. 670).

By virtue of the exemption to separate school supporters under s. 14 of the *Separate Schools Act* of 1863, and from the fact that the Ontario continuation schools, high schools and collegiate institutes are now doing work which formed part of that formerly legally done, or which might have been so done, by the common schools, it follows that separate school supporters are entitled to exemption from rates for the support of such continuation schools, etc. To compel Catholic separate school supporters to support the last-mentioned schools, and to use them, if they would give their children up to 21 years of age a secondary education, is prejudicially to affect the right or privilege enjoyed by Roman Catholics as a class at the Union of having such education given to their children under denominational influence and in separate schools managed by their own trustees (*Barrett* v. *Winnipeg*, 19 Can. S.C.R. 374, at p. 424, referred to).

*Per* Anglin C.J.C. and Rinfret J.: Every Ontario legislative enactment involving a departure from the principle of apportionment between common and separate schools *pro rata* on the basis of average attendance, as provided by s. 20 of the *Separate Schools Act* of 1863, of all legislative and municipal grants of public moneys for any purpose that was, under the law at Confederation, a common school purpose, (saving grants to high schools in continuation of former grammar school appropriations), would, if valid, prejudicially affect a right or privilege with respect to their denominational schools which Roman Catholics had by law at the Union and is, therefore, *ultra vires*. Every grant for a common school purpose, whether made for a particular school or schools, or made subject to some restrictive term or condition, is covered by s. 20 of the *Separate Schools Act*, 1863, and therefore comes within the ambit of the protection of s. 93 (1) of the *B.N.A. Act*, and cannot be made so as to preclude the right of separate schools to share therein unless compensation to them for their proportion thereof is otherwise provided. The Common and the Separate Schools Acts alike were continued in force after the Union by s. 129 of the *B.N.A. Act* as provincial legislation of Ontario, subject to repeal and amendment by the legislature, as to common schools without restriction, and as to separate schools within the limitations imposed by s. 93 (1) of the *B.N.A. Act* (*Dobie* v. *The Church Temporalities Board*, 7 App. Cas. 136, at p. 147; *Att. Gen. for Ontario* v. *Att. Gen. for Canada*, [1896] A.C. 348, at pp. 336-7). The presence of the words "this Province" and "the Province" in s. 20 of the *Separate Schools Act* of 1863 did not render that provision inapplicable after Confederation. Those terms meant after Confederation the new province of Ontario. The words "and not otherwise appropriated by law," appended in s. 106 of the *Common Schools Act*, C.S.U.C. 1859, c. 64, to the description of the legislative grants to be apportioned, do not present a formidable difficulty. S. 20 of the Act of 1863 is subsequent legislation, and, so far as there may be inconsistency, its terms must prevail over those of s. 106 of the Act of 1859. S. 20 of the Act of 1863 precludes an appropriation by law of any grants made for common school purposes which would prevent the separate schools sharing proportionately in them.

*Quaere*, whether the legislature could validly formulate a scheme or impose conditions for the distribution amongst the separate schools themselves, other than on the basis of average attendance, of the proportion of the total grants for common school purposes, as under-

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stood at Confederation, to which the separate schools as a whole are entitled.

*Per* Duff and Newcombe JJ.: Under the legislation existing at Confederation, Roman Catholic separate schools were subject to regulation by the Council of Public Instruction for Upper Canada. Giving their natural sense to the words of s. 26 of the *Separate Schools Act* of 1863, the Council had a general power of regulation. This power would be subject only to relevant enactments of the separate school law and to the limitations necessarily implied in the fact that the power was given for the purpose of enabling Roman Catholics to carry on more satisfactorily their system of denominational schools. Subject as aforesaid, there is no good reason for restricting the natural sense of the words of s. 26. Another possible view is that s. 26 subordinated separate schools to regulation by the Council in respect of all subject matters which might from time to time fall within the ambit of its jurisdiction in relation to common schools, under the existing Common School Acts or subsequent amending legislation. In any case, and even assuming (but not accepting) that the Council's regulative powers as to separate schools could be taken as confined to the subject matters which were within the field of its authority in relation to common schools at the date of the passing of the *Separate Schools Act* of 1863, those powers (even if so confined as last mentioned) covered regulation as to scope and conduct of instruction, including courses of study and text-books. Not only does this appear on a proper construction of the common school legislation itself, but it was the view which, as shown by the documents in evidence, dictated the practice of the Council in exercising its functions under the Common School Acts of 1850 and 1859, in which practice, carried out under circumstances of the greatest publicity, the legislature, in view of its re-enactments without pertinent change in the Act of 1859, and the unqualified language of ss. 26 and 9 of the Act of 1863, must be presumed to have acquiesced.

In scope of instruction common schools or Roman Catholic separate schools were not, at Confederation, on the same footing as collegiate institutes, high schools or continuation schools to-day. Viewing the school legislation as a whole as it stood at Confederation, its history, and the official acts of those charged with administration of the school law, as shown by official documents in evidence and having regard especially to the required qualifications of teachers, the provision made for training them, the programs of studies officially promulgated, and the character of the authorized text-books, it is plain that such schools were intended to be elementary schools only.

The principle of division laid down by s. 20 of the *Separate Schools Act* of 1863 assumed the existence of a fund which had been appropriated for the benefit of the common schools generally in each municipality. It was upon this fund, so appropriated for a given municipality, that the section operated; it operated only after the fund for each municipality had been ascertained under the distribution provided for in ss. 106, 120, 121 and 122 of the *Common Schools Act* of 1859. The legislature did not intend to tie its hands by s. 106 (1) of the Act of 1859 in such a way as to necessitate the apportionment of all moneys voted for common schools, according to a fixed arithmetical ratio. The qualification "not otherwise expressly appro-

priated" sufficiently manifests its intention to reserve its freedom of action. Assuming s. 20 to have created a legal "right or privilege" within s. 93 (1) of the *B.N.A. Act*, it was not a right "by law" to require the legislature to refrain from granting appropriations for special purposes or for the aid of schools reaching a certain standard of excellence or of school sections conforming to a certain standard of expenditure. There has been no deprivation of anything to which any "right or privilege" under s. 20 or under s. 20 combined with s. 106 could attach. Nor is there any evidence that the alleged right or privilege has been rendered less valuable by the impeached legislation (assuming that to be a legitimate ground of complaint under s. 93 (1)). There is no reason for supposing that the existing grants, if distributed according to the arithmetical ratios of ss. 106 and 20, would yield a larger sum for Roman Catholics as a whole. But, more important still, it is impossible to know, if under compulsion of a constitutional limitation the legislature were obliged to follow an unwise and wasteful plan of distribution, whether the grants would be as generous as they now are. There is no suggestion that by the statutes now in force Roman Catholics are placed upon a footing of inequality with the public schools. Grants are shared by all schools alike, upon identical conditions.

*Quaere* as to suppliants' right by petition of right to obtain a declaration that certain Ontario statutes are *ultra vires*.

*Per* Mignault J.: The legislative grant which the Chief Superintendent was to apportion under s. 106 (1) of the *Common Schools Act* of 1859, and of which he subsequently was to pay a share to the trustees of each separate school, was a general grant for the support of common schools or for common school purposes. A special grant, say for the rebuilding of a particular school destroyed by fire, would be "otherwise appropriated by law," and he could not deal with it in his apportionment. Such special grants could not be said to be grants "for common school purposes" within the meaning of s. 20 of the *Separate Schools Act* of 1863.

Conditions in excess of those laid down by s. 20 cannot be imposed on the separate schools to entitle them to share in the grants to which it applies. Any statute purporting to impose such conditions, as well as all statutes and regulations contravening the suppliants' first two claims, are *ultra vires*.

*Per* Newcombe J.: The powers of regulation which, within the scope of the Acts of 1859 and 1863, the province possessed at the Union were not reduced by the *B.N.A. Act*. The denominational schools to which s. 93 (1) refers, so far as they were Roman Catholic separate schools of Upper Canada, were regulated schools, and the provisions to which the suppliants object are within the powers of regulation which the province had in 1863, and continued to possess at and after the Union.

There is nothing in the *B.N.A. Act* to compel the legislature to make a grant, or to avoid conditions prescribed for earning it, or to prevent a specific appropriation.

*Per* Lamont J.: At Confederation the Council of Public Instruction had authority to make regulations, including the prescribing of the courses of study, for the common and separate schools. This appears on the proper construction of the *Separate Schools Act* of 1863 and

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the *Common Schools Act* of 1859, from the history of the legislation, and from the accepted practice carried on. It was the trustees' right to manage their separate schools subject to the Council's said regulative powers, that was confirmed by s. 93 (1) of the *B.N.A. Act*. The Council's powers would not enable it to make regulations which would wipe out, wholly or partially, the common or the separate schools. The common schools, at Confederation, had a distinct and definite place in the educational system of Upper Canada. They were intended to be the primary schools, furnishing elementary instruction, with the grammar schools as intermediate between them and the University; and the Council's duty was to make regulations prescribing courses of study which would enable the schools to provide effectively instruction covering the field which the legislature intended they should occupy. The separate schools, as to secular education, were intended to be simply common schools under denominational management, and covered the same field as the common schools. The line of demarcation between the primary and intermediate schools may not always have been definitely drawn or closely adhered to; there may have been some overlapping in instruction, due to the exigencies of particular localities; but the legislature's intention as disclosed in the various Acts, and not the manner in which the system worked out in actual practice, should be the guide in determining the sphere of operation. It cannot be said that, under the impeached legislation, the separate schools of to-day have lost their status as primary schools of the class to which the Act of 1863 intended them to belong.

The "public grants * * * for common school purposes" in which, under s. 20 of the Act of 1863, every separate school was entitled to share, were general or unconditional grants in which all schools were to share. They did not include moneys appropriated by the legislature to specific purposes, or to grants for apportionment among schools attaining a certain standard of efficiency or equipment, or made payable upon the performance of a condition. "Grants * * * for common school purposes" meant "grants for the purposes of all common schools." These would include conditional grants for the same purpose once the condition had been performed. But, as the legislature's authority to say whether or not any grant at all shall be made, or to specify the conditions upon which public moneys shall be devoted to school purposes, is supreme, the only limitation imposed by s. 20 upon the legislature's exercise of its authority, so far as conditional grants are concerned, is that the separate schools must be given the same right as the common (now public) schools, to perform the conditions and earn the grant.

APPEAL (by leave of the Appellate Division of the Supreme Court of Ontario) from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing the suppliants' appeal from the judgment of Rose J. (2) dismissing the petition of right.

(1) (1926) 60 Ont. L.R. 15. (2) (1926) 59 Ont. L.R. 96.

The original suppliant was the board of trustees of the Roman Catholic separate schools for school section no. 2 in the township of Tiny, on behalf of itself and all other boards of trustees of Roman Catholic separate schools in Ontario. At the hearing in the Appellate Division leave was given to the original suppliant to add as a party suppliant the board of trustees of the Roman Catholic separate schools for the city of Peterborough, an urban board, the latter's consent being filed; the petition of right and statement of defence were amended; and the fiat of the Lieutenant-Governor was granted to the amended petition.

The petition of right (as amended) set out, in effect, as follows:

1. Each of the suppliants is a body corporate under and by virtue of "The Separate Schools Act," R.S.O. 1914, c. 270, s. 21, ss. 3, and as such conducts a Roman Catholic separate school.

2. Under and by virtue of s. 20 of 26 Vic. (1863), c. 5, being an Act of the then Parliament of Canada entitled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools" each of the suppliants is entitled to receive from and be paid by the respondent a share in the fund annually granted by the Legislature of Ontario for the support of common schools and is entitled also to a share in all other public grants investments and allotments for common school purposes then made or thereafter to be made by the province according to the average number of pupils attending such school during the twelve next preceding months, as compared with the whole average number of pupils attending school in the township of Tiny, and in the city of Peterborough respectively.

3. (Said s. 20 of 26 Vic. c. 5 is set out).

4. (S. 22 of 26 Vic. c. 5 is set out).

5. (S. 106 (1) of c. 64 of C.S.U.C., 1859, an Act entitled "The Upper Canada Common School Act" is set out).

6. That this Act of 1859 including s. 106 was in full force and effect in the year 1863 and in the year 1867 and continued to be the law applicable to the matters referred to therein for several years subsequent to 1867; and the

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grants annually made by the Legislature were so apportioned down to and including the year 1907.

7. (S. 93 (1) of the *B.N.A. Act* is set out).

8. That the right of each of the suppliants under and by virtue of the Act of 1863, c. 5, ss. 20 and 23 thereof, and further secured to it by the *B.N.A. Act,* 1867, c. 5, s. 93, (1), to a share in the fund annually granted by the Legislature of Ontario according to the average number of pupils attending its school as compared with the whole average number of pupils attending school in the said township of Tiny and in the said city of Peterborough respectively was prejudicially affected by the following Acts of the Legislature of Ontario:

(*a*) 6 Edward VII (1906), chapter 52—The Department of Education Act, section 23.

(*b*) 7 Edward VII (1907), chapter 50, an Act entitled "An Act to amend the Department of Education Act," section 4, subsection 3.

(*c*) 9 Edward VII (1909), chapter 88, an Act entitled "The Department of Education Act," section 6.

(*d*) 10 Edward VII (1910), chapter 102, section 1.

(*e*) R.S.O. 1914, chapter 265, section 6—an Act entitled "The Department of Education Act."

(*f*) 12-13 George V (1922), chapter 98, sections 2 and 3—an Act entitled "The School Law Amendment Act, 1922."

(*g*) 14 George V (1924) chapter 82, section 2—an Act entitled "The School Law Amendment Act, 1924."

9. That so far as the said Acts purport to enact a different method for apportioning the share of the fund annually granted for common school purposes to which the separate schools conducted by the suppliants are or may be entitled other than the average attendance basis as enacted in the *Separate School Act* of 1863, c. 5, and such different method results or may result in a smaller share of said annual fund being paid to the suppliants than would be payable on the basis of average attendance of pupils, the said Acts are *ultra vires* of the Legislature of Ontario.

10. That in and for the year 1922, out of the fund granted by the Legislature of Ontario for common school purposes for the year 1922 there was paid to the various school boards or schools in Ontario, according to the report for the year 1923 of the Minister of Education, the amount of $3,401,818 under various titles as follows:

| | |
|---|---|
| (1) To Public and Separate Schools (p. 87 of report)..... | $2,976,712 00 |
| (2) To Continuation Schools (p. 90 of report) ..... | 148,217 00 |
| (3) To Collegiate Institutes and High Schools (p. 91 of report). | 276,889 00 |
| | $3,401,818 00 |

11. That the said total sum of $3,401,818 was a fund granted by the Legislature for the support of common schools and for common school purposes within the meaning of s. 20 of 26 Vic. (1863), c. 5, and that the schools conducted by the suppliants were entitled to share in such fund according to the provisions of said Act, 26 Vic. (1863), c. 5.

12. That as to continuation schools and collegiate institutes and high schools above referred to in par. 10, the same are common schools within the meaning of c. 64 of C.S.U.C., 1859—an Act entitled "The Upper Canada Common School Act" and of c. 5 of 26 Vic. 1863—an Act entitled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools."

13. That under and by virtue of the Act of 26 Vic. (1863), c. 5, s. 14, and of the *B.N.A. Act* of 1867, c. 3, s. 93 (1), the class of persons being separate school supporters represented by the suppliants are exempted from payment of all rates imposed for the support of common schools, and that it is *ultra vires* of the Legislature of Ontario to impose or attempt to impose upon such persons payment of rates for the support of common schools now known and designated as either continuation schools, collegiate institutes or high schools and which are not established and conducted by the suppliants.

14. That in so far as the Act of 34, Vic. (1870-1871), c. 33, entitled "an Act to improve the Common and Gram-

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mar Schools of the Province of Ontario", and subsequent Acts respecting high schools, including c. 268 of R.S.O., 1914, ss. 33, 34, 37, 38 and 39, an Act entitled "The High Schools Act," purport to impose upon the class of persons being separate school supporters represented by the suppliants payment of rates for the support of high schools and collegiate institutes not established and conducted by the suppliants, the same are *ultra vires* of the Legislature of Ontario.

15. That each of the suppliants is, and in any event the board of trustees of Roman Catholic separate schools in every city, town and village in Ontario is entitled as of right to establish and conduct in its separate schools the courses of study and grades of education that are carried on in such so-called continuation schools and collegiate institutes and high schools, and the fact is such courses of study and grades were established and conducted by certain boards of trustees of the Roman Catholic separate schools from in or about the year 1841 up to and including the year 1915 when certain regulations were enacted by the respondent under which the respondent claimed and still claims the right to limit the range and grade of the courses of study and grades of education, all of which said regulations are in derogation of the rights of the suppliants and are invalid and *ultra vires.*

16. That the respondent has no right nor authority as claimed to limit or confine the common school courses of study or grades of education which may be established and carried on by either of the suppliants in the schools conducted by the suppliants respectively.

17. That according to the last census of Ontario made in 1921, the population of the province as of the year 1921 was 2,933,622 persons, and according to the same census the population of the township of Tiny for the year 1921 was 4,026 persons.

18. That the share of the fund mentioned in par. 10 which should have been allotted to the common schools of the said township of Tiny on the basis of the proportion of the population of the said township as compared with the total population of the province was $4,669.00.

19. That the average attendance of the common schools including both common public schools and common sep-

arate schools of the said township of Tiny for the year 1922 was 629 pupils, and the average attendance for the same period of pupils of Roman Catholic school section no. 2 of the said township, being the school conducted by one of the suppliants, was 159 pupils.

20. That under and by virtue of the right granted the suppliants by the Act of 1863, s. 20, the suppliant, the board of trustees of the Roman Catholic separate school for school section no. 2, township of Tiny, was entitled in and for the year 1922 to such a share of the said sum of $4,669 mentioned in par. 18 as the average number of pupils attending the suppliant's school, namely, 159 pupils, compared with the whole average number of pupils attending school in the said township of Tiny, namely, 629 pupils;

21. That by reason of the facts referred to in par. no. 20 the said suppliant was entitled as of right to be paid the amount of $1,116 out of the said sum of $4,669.

22. The said suppliant was unlawfully held to be entitled only to and was paid the amount of $380 only out of the said sum of $4,669 and thereby suffered for the year 1922, a pecuniary loss of $736.

23. If, notwithstanding said suppliant's submission and contention as set out above, it should be held that it is not entitled to a share of the sums of $148,217 and $276,889 paid respectively to continuation schools and collegiate institutes and high schools as set out in par. 10, but is entitled only to its proportion of the sum of $2,976,712 also referred to in said par. 10 (which said suppliant does not admit but denies), then, and in such event, the said suppliant submits that on the said basis of average attendance as referred to in par. 19 it was entitled to receive from and be paid by the respondent for the said year 1922 the sum of $1,027 instead of only the said sum of $380, whereby it suffered a pecuniary loss for the year 1922 of $647.

The suppliants therefore pray:

(1) That there be paid the sum of $736 to the board of trustees of the Roman Catholic separate schools for school section no. 2, township of Tiny.

(2) That it may be declared that the Acts or parts of Acts following:

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(a) Sections 36 (subsection 1) and 40 of 34 Victoria (1870-1871) chapter 33—an Act entitled "An Act to improve the Common and Grammar Schools of the Province of Ontario."

(b) Section 23, subsection 6, of 6 Edward VII (1906), chapter 52—an Act entitled "The Department of Education Act."

(c) Section 4, subsection 3 and 4, of 7 Edward VII (1907), chapter 50—an Act entitled "An Act to amend the Department of Education Act."

(d) Section 6 of 9 Edward VII (1909), chapter 88—an Act entitled "The Department of Education Act."

(e) Section 1 of 10 Edward VII (1910), chapter 102—an Act entitled "An Act to amend the Department of Education Act."

(f) Section 6 of chapter 265 of the Revised Statutes of Ontario, 1914—an Act entitled "The Department of Education Act."

(g) Sections 33, 34, 37, 38 and 39 of chapter 268 of the Revised Statutes of Ontario (1914) and amendments thereto—an Act entitled "The High Schools Act."

(h) Sections 2 and 3 of 12-13 George V (1922), chapter 98, an Act entitled "The School Law Amendment Act, 1922."

(i) Section 2 of 14 George V (1924), chapter 82—an Act entitled "The School Law Amendment Act, 1924."

prejudicially affect the suppliants' rights as granted by 26 Vic. (1863), c. 5, and secured by the *B.N.A. Act*, 30-31 Vic. (1867), s. 93 and are *ultra vires* in so far as they affect the rights of the suppliants.

(3) That it may be declared that the suppliants and each of them have the right to establish and conduct courses of study and grades of education such as are now conducted in what are designated as continuation schools, collegiate institutes, and high schools, and that any and all regulations pur-

porting to prohibit, limit or in any way prejudicially affect such right are invalid and *ultra vires*.

(4) That it may be declared that the class of persons being separate school supporters represented by the suppliants are exempt from payment of rates imposed for the support of so-called continuation schools, collegiate institutes and high schools not established or conducted by the suppliants or by other boards of trustees of Roman Catholic separate schools.

(5) (Further or other relief).

In the statement of defence (as amended) the Attorney-General for the Province of Ontario, in answer to the Petition of Right and on behalf of His Majesty the King, said, in effect, as follows:

1. He admits the allegations contained in par. 1 of the Petition of Right, but except as hereinafter expressly admitted denies all other allegations in the Petition of Right contained and puts the suppliants to the proof thereof.

2. He denies that any right of either of the suppliants within the meaning of s. 93 of the *B.N.A. Act,* 1867, as claimed in par. 8 of the Petition of Right, has been, or is, prejudicially affected by any of the several Acts of the Legislature of Ontario as in the said par. 8 alleged.

3. He denies that any of the said Acts in said par. 8 prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law in the said Province on 1st July, 1867, when the *B.N.A. Act,* 1867, went into effect (hereinafter referred to as "at the Union") within the meaning of s. 93 of the said *B.N.A. Act,* or that any of the said Acts or any part thereof is *ultra vires* the Legislature of the Province as alleged in par. 9 of the Petition of Right.

4. By a series of legislative acts from 1843 to 1863 inclusive, the law relating to the establishment, maintenance, regulation and control of common schools, including separate schools, in Upper Canada was from time to time altered; and at the Union the law governing the establishment, maintenance, regulation and control of Roman Catholic separate schools was contained in an Act of the

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Parliament of Canada passed in 1863 (26 Vic., Canada, c. 5) and in an Act of the said Parliament entitled "The Upper Canada Common School Act" (C.S.U.C., 1859, c. 64) together with the Regulations in force made pursuant to the last-named Act.

5. In and by the said Act of 1863 relating to Roman Catholic separate schools, which recites that it is just and proper to bring the provisions of the law respecting separate schools more in harmony with the provisions of the law respecting common schools, it was, among other provisions for that purpose enacted that:

(*a*) The trustees of separate schools should perform the same duties and be subject to the same penalties as trustees of common schools (s. 9);

(*b*) The teachers of separate schools should be subject to the same examinations and receive their certificates of qualification in the same manner as common school teachers generally (s. 13);

(*c*) All judges, members of the Legislature, the heads of the municipal bodies in their respective localities, the Chief Superintendent and Local Superintendent of common schools and clergymen of the Roman Catholic Church, should be visitors of separate schools (s. 23); and—

(*d*) The Roman Catholic separate schools (with their registers) should be subject to such inspection as may be directed from time to time by the Chief Superintendent of Education, and should be subject also to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada (s. 26).

6. The duties and penalties of trustees of separate schools, the qualification of teachers, and the rights and obligations of supporters of Roman Catholic separate schools in respect of the general conduct, management and control of the said separate schools, were determined and prescribed at the Union by the said "The Upper Canada Common School Act" (C.S.U.C., 1859, c. 64) and by the Regulations made and imposed in pursuance thereof by the Council of Public Instruction for Upper Canada then in force.

7. The only distinction in the law governing common schools in general at the Union and that governing the Roman Catholic separate schools related to religious instruction. In all other respects the law and regulations were the same. Any part of a legislative grant to which any school would otherwise be entitled which was not earned or was forfeited because the school was not conducted according to the School Law and Regulations remained the property of the Province.

8. In 1896 the functions formerly vested in the Council of Public Instruction and in the Chief Superintendent of Education were suspended by an Act of the Legislature of Ontario (39 Vic. 16) and vested in a Department of the Provincial Government called the Department of Education and the Minister of Education of the said Province respectively.

9. Subject to the limitation provided by s. 93 of the *B.N.A. Act,* the Legislature of Ontario may exclusively make laws in relation to education, and the several Acts referred to in the Petition of Right and alleged by the suppliants to be *ultra vires* of the Legislature are amendments to the school law made from time to time in the interests of primary education in the Province.

10. All of the said Acts are within the competence of the Province and none of the said grants authorized by or made pursuant to any of the said Acts mentioned in par. 8 of the Petition of Right are legislative grants within the meaning of s. 20 of the *Separate Schools Act* of Upper Canada of 1863 (26 Vic., c. 5).

11. He denies that the total sum of $3,401,818 mentioned in pars. 10 and 11 of the Petition of Right was or is a fund granted by the Legislature for the support of common schools and for common school purposes within the meaning of s. 20 of the above-mentioned Act (26 Vic., c. 5) as claimed in par. 11, or that the schools conducted by the suppliants were entitled to share in such fund according to the provisions of the said Act, or that the continuation schools or collegiate institutes or high schools, referred to in par. 10 thereof, are common schools within the meaning of the said Act or of the *Upper Canada Common School Act* (C.S.U.C., 1859, c. 54) as claimed in par. 12 of the Petition of Right.

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12. The high schools of the Province are in substitution for the grammar schools of the late Province of Upper Canada as re-organized and modified by Ontario legislation from time to time. The said grammar schools were not "common schools" or schools within the meaning of the *Upper Canada Common School Act,* but were secondary schools. Collegiate institutes are high schools having a prescribed number of teachers and pupils which, on complying with the Regulations of the Department of Education with respect thereto, may be raised to the rank of a collegiate institute.

13. Continuation schools, which were inaugurated in Ontario by an Act entitled "An Act respecting Continuation Schools" (1909, 9 Edward VII, c. 90) are not common schools, within the meaning of either the Upper Canada Common Schools Act or the Act relating to Separate Schools of 1863, but are intermediate schools for secondary education designed to give instruction in the courses of study prescribed for high schools in order to relieve congestion or to provide high school education where not otherwise available.

14. He denies that under and by virtue of the abovementioned Act of 1863 (26 Vic., c. 5, s. 14) and of the *B.N.A. Act,* 1867 (s. 93) the separate school supporters represented by the suppliants are exempted from payment of the rates imposed for the support of common schools or that it is *ultra vires* of the Legislature of Ontario to impose on such persons payments and rates for the support of continuation schools, collegiate institutes or high schools as alleged and claimed by the suppliants in pars. 13 and 14 of the Petition of Right. He submits that none of the said schools are "common schools" within the meaning of s. 14 of the said Act of 1863 (26 Vic., c. 5).

15. He further denies that either of the suppliants or the boards of trustees of Roman Catholic separate schools (urban) is or are entitled to establish and conduct in separate schools the courses of study and grades of education that are carried on in continuation schools, collegiate institutes and high schools, or any of them, as alleged in par. 15 of the Petition of Right, and also denies that such courses of study and grades of education were ever established by

law in connection with Roman Catholic separate schools prior to 1st July, 1867, as in said paragraph alleged.

16. He submits that the suppliants are not entitled to any of the declarations or other relief as prayed in the Petition of Right and that it should be dismissed.

*I. F. Hellmuth K.C.* and *T. F. Battle* for the appellants.

*W. N. Tilley K.C.* and *McGregor Young K.C.* for the respondent.

ANGLIN C.J.C.—This proceeding was instituted in order to determine the validity of three claims of "Roman Catholics" in the province of Ontario with respect to Education:—

(A) Their claim "to establish and conduct courses of study and grades of education in Catholic separate schools such as are now conducted in continuation schools, collegiate institutes and high schools"; and that "all regulations purporting to prohibit, limit or in any way prejudicially affect such right or privilege are invalid and *ultra vires;*"

(B) Their claim to exemption from taxation for the support of continuation schools, collegiate institutes and high schools not conducted by their own boards of trustees;

(C) Their claim to a share in public moneys granted by the Legislature of the province of Ontario "for common school purposes" computed in accordance with what they assert to have been their statutory rights at the date of Confederation.

After a long and somewhat bitter struggle, the *Separate Schools Act* of 1863 (26 Vic., c. 5) was enacted by the Legislature of the province of Canada. That statute, the appellants maintain, re-established the rights and privileges now in question. It was intituled: "An Act to restore to the Roman Catholics in Upper Canada certain Rights in respect to Separate Schools," and remained in force at Confederation. Whatever rights and privileges the Catholics of Upper Canada enjoyed under it in respect to their separate schools were made permanent by s. 93 (1) of the *British North America Act,* 1867. That section, authoritatively designated a code of legislative jurisdiction

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on the subject of Education for the older provinces of Canada (*Brophy* v. *Att. Gen. of Manitoba* (1) ), reads, in part, as follows:—

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education * * *

As put by Magee J.A., in the present case, the safeguarding provisions of s. 93 "should be interpreted and effectuated in abounding good faith." (2) So to construe and apply sub-s. 1 of s. 93 that its manifest purpose shall not be defeated is the function of the courts.

The rights and privileges which sub-s. 1 of s. 93 of the *B.N.A. Act* protects are rights and privileges "with respect to denominational schools" which "any class of persons have by law in the Province at the Union." It is well established that the "class of persons" whose legal rights and privileges are thus safeguarded is to be determined according to religious belief and that "Roman Catholics together" form such a class. As trustees, vested in their representative character with rights and privileges of members of that class, vindication of which is sought in these proceedings, the status of the appellants to maintain their petition of right was conceded at bar. *Ottawa S.S. Trustees* v. *Ottawa Corporation* (3); *Ottawa S.S. Trustees* v. *Mackell* (4).

It is, no doubt, also abundantly clear that only "rights or privileges" which existed "by law" at Confederation are protected by s. 93 (1). The statute expressly so states;

(1) [1895] A.C., 202, at pp. 222-3.
(2) 60 Ont. L.R., at p. 24.
(3) [1917] A.C., 76, at p. 81.
(4) [1917] A.C., 62, at p. 69.

and it has been so determined by the highest authority. *Maher* v. *Portland* (1).

> Any practice, instruction or privilege of a voluntary character, which, at the date of the passing of the Act, might be in operation

is not a "legal right or privilege" (2).

On the other hand, the "rights or privileges" within s. 93 (1) are not only those "in respect to denominational teaching," as some casual expressions of Lord Buckmaster in the *Mackell case* (3) might suggest. There is no allusion in the *Separate Schools Act* of 1863 to religious instruction. There may be an invasion of a "right or privilege *with respect to denominational schools*" which, although most prejudicial to those schools, does not directly affect them in their "denominational aspect." The decision in *Ottawa S.S. Trustees* v. *Ottawa Corporation* (4), likewise delivered by Lord Buckmaster, makes this abundantly clear. A statute substituting a commission composed of Catholics, but nominated by the Government, to manage the Ottawa separate schools in lieu of the elected board of trustees was there held *ultra vires* as prejudicially affecting the right or privilege of the supporters of Catholic separate schools to have them managed by their own elected trustees.

The appellants submit that the Provincial Courts have misapprehended the scope and purpose of the Act of 1863 and also the effect upon it of sub-s. 1 of s. 93 of the *B.N.A. Act*. The view taken below is thus expressed by Hodgins J.A. (5).

> The rights in respect of *denominational schools*, generally speaking, were the establishment and conduct of them by and under the immediate supervision of the Church which desired them, either in Quebec or Ontario, subject to regulations made pursuant to statute law. Rights and privileges in such schools, so far as they were "in relation to education" (as carried on by them), if affected, were to be dealt with by the Legislatures of the Provinces, subject to an appeal, not to the Courts, but to Federal authority, which was to correct any infringement of those rights and privileges. These belonged not to a denomination as the creator and guardian of separate schools, but to the schools themselves, as part of a system of education. It was to the Provinces that education was committed and it is right that the systems of education established by them and the rights flowing therefrom, should be governed by their Legislatures and not by the Courts.

(1) (1874) Wheeler's Confederation Law, 338, at p. 367.
(2) [1917] A.C., at p. 69.
(3) [1917] A.C., 62.
(4) [1917] A.C., 76.
(5) 60 Ont. L.R. at p. 30.

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The appellants point out that there is no reference in the statute of 1863 to "immediate supervision of the Church" and contend that the view that the redress of separate school supporters against provincial legislation adversely affecting their pre-Confederation legal rights and privileges is confined to an appeal to the federal authority ignores the provisions of sub-s. 1 of s. 93 of the *B.N.A. Act.* The idea that the denominational school is to be differentiated from the common school purely by the character of its religious exercises or religious studies is erroneous. Common and separate schools are based on fundamentally different conceptions of education. Undenominational schools are based on the idea that the separation of secular from religious education is advantageous. Supporters of denominational schools, on the other hand, maintain that religious instruction and influence should always accompany secular training.

Any statute or regulation that would materially diminish or curtail the scope of the education which denominational schools were, at the date of Confederation, legally entitled to impart, or that would tend to restrict the period during which supporters of such schools, Catholic or Protestant, were then legally entitled to have the education of their children subject to the influence of denominational control and instruction, would "prejudicially affect a right or privilege with respect to denominational schools" enjoyed by the class of persons of which such supporters form a section. Catholics deem it of vital importance that denominational influence over, and instruction of, their children should continue during the period of their secondary education. Any attempted interference with such educational rights or privileges, whether by statute or by regulation purporting to be made under statutory authority, contravenes sub-s. 1 of s. 93; the remedy is to invoke "the jurisdiction of the ordinary tribunals of the country"; the right of appeal to the federal executive under sub-s. 3 does not apply. This latter subsection has to do with acts of the provincial authorities, which, although not *ultra vires,* so affect rights and privileges theretofore enjoyed by a religious minority, Protestant or Catholic (it may be under post-Confederation legislation), as to constitute, in the opinion of the Governor in Council, a griev-

ance calling for Federal intervention. (*Brophy* v. *Att. Gen. of Manitoba* (1) ).

It would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision 1, and if the (statutes or) regulations impeached do prejudicially affect any such right or privilege, to that extent they are not binding on the appellants. The *Mackell Case,* (2) *ubi sup.*

It was held by Rose J. (3), with the approval of the Appellate Divisional Court, that, because the rights or privileges of the separate schools at Confederation in regard to legislative money grants depended upon legislation of the former province of Canada and such grants were therein (26 Vic., c. 5, s. 20) described as "the fund annually granted by the Legislature of *this Province*" and "all other public grants, investments and allotments for common school purposes now made, or hereafter to be made by *the Province,*" the Province of Ontario, newly created in 1867, was unaffected by any obligation in regard thereto and Catholic separate school supporters were not assured of a legal right to share in any appropriations or grants to be made by Ontario for common school purposes. This view is utterly at variance with the spirit and intent of s. 93 (1) of the *B.N.A. Act.* Unless the legislatures of Ontario and Quebec are debarred from prejudicially affecting the rights and privileges of the respective religious minorities in regard to maintenance and support which their denominational schools enjoyed at Confederation under legislation of the former Province of Canada, the protection of such rights and privileges afforded by sub-s. 1 of s. 93 becomes illusory and the purpose of the Imperial legislation is subverted.

Moreover, by s. 129 of the *B.N.A. Act,* the *Separate Schools Act* of 1863 was continued in force "as if the Union had not been made," subject only to a power of repeal or alteration "according to the authority * * * of the Legislature under this Act." That power of repeal or alteration is, like all other provincial legislative jurisdiction over education, subject to the restriction imposed by sub-s. 1 of s. 93. That the deprivation or diminution of a right to share in financial aid out of public moneys assured by law to their denominational schools at Con-

(1) [1895] A.C., 202. (2) [1917] A.C., 62.
(3) 59 Ont. L.R., at p. 150.

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federation would prejudicially affect a privilege of Roman Catholics in regard to those schools seems incontrovertible.

It is also urged that inherent in the conception of a legislature is the untrammelled right to make or withhold grants of public moneys and to attach thereto such conditions as it may see fit. That is, no doubt, true of every sovereign Parliament whose powers are unrestricted; it was true of the Legislature of the Province of Canada up to 1867; and it is likewise true since Confederation of a Canadian Provincial Legislature, save as otherwise provided in the *B.N.A. Act*. But, as Lord Herschell said, speaking for the Judicial Committee, in *Brophy* v. *Att. Gen. of Manitoba* (1):

> It must be remembered that the Provincial Legislature is not in all respects supreme within the province. Its legislative power is strictly limited. * * * In relation to the subjects specified in sect. 92 of the *British North America Act*, and not falling within those set forth in sect. 91, the exclusive power of the Provincial Legislature may be said to be absolute. But this is not so as regards education, which is separately dealt with and has its own code * * * in the *British North America Act*. * * * It may be said to be anomalous that such a restriction as that in question should be imposed on the free action of a Legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the Legislature to the Executive Authority? And yet this right is expressly and beyond all controversy conferred.

To impugn the efficacy of a restriction placed by s. 93 of the *B.N.A. Act* on the control of a provincial legislature over rights in regard to aid out of public moneys for denominational schools existing by law at Confederation would be to challenge the power of the Imperial Parliament, when creating a legislature, to impose on the exercise of one or more of its functions such limitations as, in its discretion, it may deem advisable.

(A) While the right of the trustees to determine the courses of study in separate schools rests primarily on the duty of management expressly imposed on them, a much discussed issue on this branch of the case was whether, in affording the secondary education undoubtedly imparted, as will presently appear, at and prior to Confederation, by schools established under the *Common Schools Act* and conducted as common schools (and not improbably in some Catholic separate schools), trustees were exercising powers

(1) [1895] A.C., 202, at p. 222.

conferred on them by law, or whether their doing so was merely a practice lacking legal sanction, but tolerated by the educational authorities.

The Trustees of a Catholic separate school, under the Act of 1863, were elected

> for the management of such separate school (s. 3)

and had (s. 7)

> all the powers in respect of separate schools that the Trustees of Common Schools (had) and (possessed) under the provisions of the Act relating to Common Schools (C.S.U.C., 1859, c. 64);

and they were required (s. 9) to

> perform the same duties and (were) subject to the same penalties as Trustees of Common Schools.

The teachers of separate schools were required to have the same qualifications (s. 13) and were liable to the same obligations as teachers of the common schools (s. 9).

The preamble of the Act of 1863 states its purpose to have been

> to restore to Roman Catholics in Upper Canada certain rights which they formerly enjoyed in respect to Separate Schools and to bring the provisions of the Law respecting Separate Schools more in harmony with the provisions of the Law respecting Common Schools.

It is, therefore, abundantly clear that, if, in 1867, trustees of common schools in Upper Canada had, by law, the right to provide in their schools for the secondary education now in question, Catholic trustees had, in the management of their separate schools, the same legal right.

Turning to the *Common Schools Act* in force in 1867 (C.S.U.C., 1859, c. 64), we find that it contains no limitation upon the scope of the education to be imparted or upon the courses of study to be conducted in the common schools.

In rural school sections school trustees were required *inter alia* (s. 27) to provide school premises; to contract with, employ and pay teachers; to permit all residents between the ages of 5 and 21 to attend their schools (sub-s. 16); to exclude unauthorized text-books; and to report the number of children over 5 years of age and under 16 years of age in the school section and the number of "children and young persons" taught (distinguishing the sexes and those over and under 16 years of age), the average attendance, the branches of education taught with the numbers in each branch, and the text-books used.

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By s. 32 provision was made for the inclusion of all the school sections of a township under a single board of five trustees, who

shall be invested with the same powers and be subject to the same obligations as Trustees (of schools) in Cities and Towns, by the seventy-ninth section of this Act.

Urban school trustees were required, *inter alia*, (s. 79 (8))

to determine (*a*) the number, sites, kind and description of schools to be established and maintained in the City, Town, or Village; also (*b*) the Teacher or Teachers to be employed; the terms of employing them, the amount of their remuneration, and the duties which they are to perform; (and) also (*c*) the salary of the local Superintendent of Schools appointed by them, and his duties;

(sub-s. 11) to lay before the municipal councils an estimate of the sums required for purchasing or renting school premises, buildings, sites, etc., and (sub-s. 17) to report as in the case of rural trustees.

While there was no express statement of the ages of children eligible for attendance at urban common schools, the provision of sub-s. 16 of s. 27 conferring a right of attendance on all residents up to 21 years of age, was made applicable by sub-ss. 17 and 18 of s. 79.

Every common school teacher employed by the trustees (s. 27 (8) ), on terms and for a remuneration and to perform duties to be determined by them (s. 79 (8)), was obliged

to teach diligently and faithfully all the branches required to be taught in the School according to the terms of his engagement with the Trustees and according to the provisions of this Act (s. 82 (1) ).

The same obligations were imposed on teachers of separate schools (26 Vic., c. 5, s. 9).

Local superintendents were required to see that the common schools were conducted according to law (s. 91 (6) ) and to report to the Chief Superintendent (sub-s. 12) the branches taught, the number of pupils in each branch, the text-books used, the average school attendance, etc.

County and Circuit Boards were also provided for and were empowered

to select (if deemed expedient) from a list of text-books recommended or authorized by the Council of Public Instruction, such books as they may think best adapted for use in the Common Schools of the County or Circuit (s. 98 (3) ).

A Council of Public Instruction, constituted in 1850 (13-14 Vic., c. 48, s. 36), was continued (s. 114) and was empowered, *inter alia*, (s. 119 (4) )

to make such regulations from time to time, as it deems expedient, for the organization, government and discipline of Common Schools, for the classification of Schools and Teachers * * *

and (sub-s. 5)

to examine, and at its discretion, recommend or disapprove of text-books for the use of schools. * * *

It is noteworthy that these powers were conferred in the *Common Schools Act;* and sub-s. 4 of s. 119 of that Act appears to have been the *only* statutory provision giving jurisdiction to the Council of Public Instruction to make regulations affecting common (or separate) schools. The language of sub-s. 4 may be compared with the wider terms in which the Board of Education, the predecessor of the Council of Public Instruction, had been empowered by the statute of 1846 (9 Vic., c. 20, s. 3)

to make from time to time all needful rules and regulations for the *management* and good government of such School (s).

By s. 26 of the *Separate Schools Act* of 1863 separate schools were declared to be

subject to such regulations, as may be imposed, from time to time, by the Council of Public Instruction for Upper Canada.

These regulations were, no doubt, such as the Council of Public Instruction might legally make in exercising the power conferred upon it by s. 119 (4) of the *Common Schools Act* (the only provision which purports to confer, and define the subjects of, its jurisdiction to regulate), without derogating from the rights of management and control conferred on trustees by the *Separate Schools Act.* The *Separate Schools Act,* 1863, contained nothing corresponding to sub-s. 5 of s. 119 of the *Common Schools Act* which expressly gave supervision over text-books for common schools to the Council of Public Instruction.

Such appear to be the relevant statutory provisions on this branch of the appeal.

The trustees of all separate schools were elected for their "management." The trustees of urban common schools were explicitly required to determine the kind and description of schools to be carried on under their charge since 1847 (10-11 Vic., c. 19, s. 5 (3) ), when the Legislature appears to have thought it advisable to make some distinct provisions for cities and towns, which were extended to villages in the C.S.U.C. of 1859, c. 64, s. 79 (8). In our opinion the effect of the legislation in force at Confederation, construing it without the aid of any extraneous evi-

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dence, is that it conferred on all separate school trustees, as part of, or incident to, the management and control of the schools entrusted to them, the right to determine the subjects of instruction in and the grading of such schools. In the cases of urban trustees, and of township boards, constituted under s. 32 of the C.S.U.C., 1859, c. 64, this right is expressly conferred. (C.S.U.C., 1859, c. 64, s. 79 (8); 26 Vic., c. 5, s. 7.)

There is, moreover, no doubt, as appears from the following extracts, that this view of the scope of the trustees' powers and duties was acted upon from 1847 by the provincial authorities. Indeed most of the official statements to be quoted were made after 1850, when the respondent asserts that the duty of school trustees to determine the courses of study and the books to be used in the schools under their charge, imposed by the statutes of 1841 (4-5 Vic., c. 18, s. 7 (4) ) and of 1843 (7 Vic., c. 29, s. 44 (7) ), was transferred to the Council of Public Instruction under the power to regulate common schools then given to it. (13-14 Vic., c. 48, s. 38 (4); C.S.U.C., 1859, c. 64, s. 119 (4) ). Following a suggestion of their Lordships of the Privy Council in *Citizens' Insurance Co.* v. *Parsons* (1), we make of the official reports and documents in evidence the use indicated by Lord Blackburn in *Clyde Navigation Trustees* v. *Laird* (2). See, too, *Assheton Smith* v. *Owen* (3); *Goldsmiths' Company* v. *Wyatt* (4); and *Dunbar* v. *Roxburghe* (5). Reference may also be made to *Van Diemen's Land Co.* v. *Table Cape Marine Board* (6), and to some observations of the Lord Chancellor in delivering the report of the Judicial Committee in the recent *Labrador Boundary Case* (7).

Dr. Egerton Ryerson, from whose reports and official circulars the extracts about to be quoted are taken, had been assistant superintendent prior to 1846 and was chief superintendent of the schools of Upper Canada from that time until 1876. His statutory duties were, *inter alia,* (C.S.U.C., 1859, c. 64, s. 106)

(1) (1881) 7 App. Cas., 96, at p 116.
(2) (1883) 8 App. Cas., 658, at p. 670.
(3) [1906] 1 Ch., 179, at p. 213.
(4) [1907] 1 K.B., 95, at p. 107.
(5) (1835) 3 Cl. & F., 335, at p. 354.
(6) [1906] A.C., 92, at p. 98.
(7) (1927) 43 T.L.R., 289, at pp. 297, 298 and 299.

(5) To prepare suitable forms, and to give such instructions as he may judge necessary and proper, for making all reports and conducting all proceedings under this Act, and to cause the same, with such general regulations as may be approved of by the Council of Public Instruction for the better organization and government of Common Schools, to be transmitted to the officers required to execute the provisions of this Act;

(6) To cause to be printed from time to time, in a convenient form, so many copies of this Act, with the necessary forms, instructions, and regulations to be observed in executing its provisions, as he may deem sufficient for the information of all officers of Common Schools, and to cause the same to be distributed for that purpose;

Dr. Ryerson would appear to have used the Journal of Education, constituted by His Excellency the Governor General in Council for that purpose (Ex. 34, p. 100, n. 4.), as a medium of communication with trustees and teachers.

In his report to the Governor for the year 1847, at p. 118 (Journal of Education, 1849, Vol. II), the Chief Superintendent said, referring to conditions existing prior to the legislation of that year (10-11 Vic., c. 19):—

The statistics afford a clear but painful proof of the very elementary character of the Common Schools, and the absolute necessity of employing every possible means of elevating it.

In enumerating the number of pupils in the different branches, he said that

the 1,773 reported as pursuing "other studies" seem to have been pursuing "*higher* studies," for under this head in Abstract C will be found 41 Common Schools in which Latin and Greek were taught, 60 in which French was taught, and 77 in which the elements of Natural Philosophy were taught;

and, citing a New York report shewing the schools of that State to be more advanced in their studies, he proceeded—

The introduction of these studies into our Common Schools has been sanctioned by the Legislative department of the Government.

In his Circular of 1848, explaining the objects of the Act of 1847 in regard to cities and towns and suggested general regulations, the Chief Superintendent said, at p. 197 (Exhibit 6):—

The Board of Trustees will, of course, determine the age at which pupils will be admitted in each kind, or class, of schools, or in each department of a School comprising more than one department; the particular School which pupils in the different localities of a City, or Town, shall attend; the condition of admission and continuance in each School; the subjects of instruction and the text-books to be used in each School, and in each department; * * *

Page 6, paragraph V of the Chief Superintendent's report of 1849, dealing with the "Classification of Pupils, and Subjects taught in the Schools" shews that these subjects included:

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Mensuration, Algebra, Geometry, Elements of Natural Philosophy, Vocal Music, Linear Drawing, and other Studies, such as the Elements of the Latin and Greek Languages, etc. * * * which are taught in some of the Common Schools.

In the same report, at p. 14, we are told by the superintendent of common schools for the Simcoe District that in the schools in seven townships (which he names) including the township of Tiny,

the teachers are capable of imparting a thorough English, and, in some instances, a good classical education.

And, at p. 50 of the same report, the Chief Superintendent said:

It is also worthy of remark, that the Board of Trustees in each city and incorporated town in Upper Canada, has authority to establish Male and Female Primary, Secondary and High Schools, adapted to the varied intellectual wants of each city and town; while in each country School Section, it requires the united means of intelligence of the whole population to establish and support one thoroughly good School.

At p. 18 of his report of 1850, the Chief Superintendent said:

The board of trustees in each city, town and incorporated village, having the charge of all the schools in such municipality, is able to establish and classify them in such manner as to meet the wants of all ages and classes of youth. This is done by the establishment of primary, intermediate and high schools. In some instances, this system of the classification or gradation of such schools has been commenced by establishing a large central school under the direction of a head master, with assistants, having a primary and intermediate, as well as high school department—the pupils being promoted from one department to another according to their progress and attainments. In other instances the same object is pursued by having one high school and intermediate and primary schools in different buildings and parts of the city or town. These schools can also be male, or female, or mixed, as the board of trustees may judge expedient.

At p. 204 the Chief Superintendent repeated the observations already quoted from p. 50 of his report of 1849. At p. 309 of the same report, 1850, (Exhibit 9), speaking of cities, towns and incorporated villages, he said:

Each Board has the charge of all the Common Schools in the municipality, determines their number and kind, whether primary, intermediate or high schools, whether classical or English, whether denominational or mixed,

and, at p. 310:

In regard to the large central school houses in cities, towns, and villages, after the noble examples of the boards of trustees in Hamilton, London, Brantford, Brockville, and Chatham, etc. * * * It may often be found more economical to bring all grades of schools into one building.

In the annual report of 1852, at p. 41, Table B, is given the list of higher subjects taught in the common schools

and at p. 43, Table C, the text-books, which include Latin, Greek and Euclid. In 1863 the annual report shews 20,991 pupils over 16 years of age attending the common schools and 12,094 in "other studies", which, no doubt, included Latin and Greek.

As has been already stated, the trustees of separate schools were granted the same powers as trustees of common schools (26 Vic., c. 5, s. 7).

In *Ottawa Separate Schools Trustees* v. *Mackell* (1), their Lordships of the Judicial Committee, discussing the legal rights and privileges of separate school trustees, say that

> the "kind" of school referred to in sub-s. 8 of s. 79 (C.S.U.C., 1859, c. 64) is, in their opinion, the grade or character of school * * *

The provisions of the *Common Schools Act* were generally understood to contemplate that, at all events in cities, towns, and villages, and in rural districts where s. 32 of the Act of 1859 applied, the trustees should determine, according to their conception of local educational requirements, the subjects to be taught and the scope of the education to be imparted in the school or schools under their charge and would appear to confer upon them the legal right to do so. It was a statutory duty in 1867 to provide in all common schools education suitable for pupils ranging from 5 to 21 years of age and of both sexes.

With the law in the state thus indicated it is not surprising that in many of the larger centres, where higher educational standards were necessary to meet local requirements, common schools, at and prior to Confederation, were carrying on, with the approval and encouragement of the provincial educational authorities, courses in practically all the branches of learning now included in the curricula of high schools as well as public schools and were imparting to their pupils the education requisite to enable them to matriculate into the University, to enter the Normal School, and to take up the studies prescribed for the "learned professions".

From the official documents in evidence we learn that such secondary education—apparently a complete high school course—was being given before Confederation in the central common schools of the cities of Hamilton and

(1) [1917] A.C., 62, at p. 71.

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London, that similar courses for girls were recommended for the city of Toronto, and were contemplated for the cities of Kingston and Guelph by the common school trustees of each of those three cities—all with the endorsation and active encouragement of the Chief Superintendent of Education and, presumably, with the knowledge and sanction of the Legislature, to which his annual reports were submitted.

In the annual report of 1852 (already referred to) in Appendix A, at p. 132, the Chief Superintendent, referring to the city of London, says:

> The board of trustees deeming it proper to place within the reach of every class of the community, and of every child who might evince a taste and talent for a more extended range of studies than are generally pursued at common schools, facilities for the acquisition of literary and scientific attainments, equal to those afforded by the higher order of academies, directed the principal to introduce, in addition to the other studies, that of classics, and during the past year about twenty-five pupils have availed themselves of the advantages thus offered in the abstract sciences.

In the annual report of 1855 (Exhibit 12) the local superintendent of schools at Hamilton says, at p. 282:

> Any child under twenty-one years of age, whose parents reside within the city limits, and who is qualified for admission into the junior class, can, by applying, gain an entrance into the Central School, and can remain there, free of charge, until he has passed through the various classes, and, if desirous, qualify himself for matriculation at the University. The course of instruction includes reading, writing, arithmetic, geography, grammar, history (Canadian, English and general), history of English literature, linear drawing, vocal music, book-keeping, human physiology, astronomy, elements of natural philosophy and chemistry, algebra, Euclid and mensuration, natural history, botany and geology, and the Latin, Greek and French languages. * * * The teachers at present engaged in the city schools number thirty, and include a principal, a classical master, a French master, a writing master, a music school master, thirteen division teachers in the Central School, and thirteen primary teachers.

And, in the annual report of 1863, the Honourable Mr. Justice John Wilson, who had been local superintendent at London, at p. 154, reporting on the London common schools, says:

> The board was unwilling to be connected with the County Grammar School. At the date secondly mentioned (1855), which I look upon as a turning point in our educational affairs in this place, something was added to the English course, with a few boys in the elements of the Latin language, forming merely a classical nucleus. * * * Now the English course is at once extensive and thorough, embracing every subject of importance to the mechanic, the merchant or the professional man. The classical department has been extended so as to embrace Latin,

Greek and French, and made comprehensive enough to qualify students for entering upon the study of any of the learned professions, or to matriculate in any college or university in the province.

The annual report for 1867 (p. 89), showed in the counties, cities, towns and villages 31,132 common school pupils over 16 years of age, 72,987 doing high school work and 8,019 in the "higher studies".

While our attention was not drawn to any explicit evidence to that effect, there is little room for doubt that the attendance of pupils at the common schools who were taking the courses of high school work was included in the returns made for the purpose of ascertaining the proportion of the legislative grants to which the several school sections in which such schools were carried on were entitled (C.S.U.C., c. 64, ss. 106 (1) and 91 (1)); and also in determining the amount of public moneys to be apportioned to the separate schools (26 Vic., c. 5, s. 20). That could properly be done only if the trustees of common schools had the legal right to conduct the classes in which high school or classical education was given.

In the Journal of Education for September, 1865, (Exhibit 37), commenting on the new *Grammar Schools Act*, Dr. Ryerson (at p. 132) says:

> The Common School law amply provides for giving the best kind of a superior English education in the *High Schools*, in the cities, towns and villages, with primary ward schools as feeders (as in Hamilton); while to allow Grammar Schools to do Common School work is a misapplication of Grammar School funds to Common School purposes; Common Schools are already adequately provided for. * * *

Again, in the issue of the same Journal for May, 1867, at p. 81 (Exhibit 38)—only two months before Confederation, Dr. Ryerson writes:

> And according to the best opinions any course of studies which would attempt to be equally excellent for the higher education of both boys and girls, would be simply worthless for either. * * * It therefore becomes advisable to discourage the present unusual attendance of girls at the Grammar Schools.
>
> But it is often urged that "if our girls do not go to the grammar school there is no other provision made for their receiving an advanced education in our public schools." This is a mistake. The Consolidated Common School Act, section 79, subsection 8, authorizes the Common School Trustees of every city, town, or incorporated village "to determine (*a*) the number, sites, *kind and description* of schools to be established and maintained in the city, town or village (whether they be high schools for boys and girls, or infant schools, etc.), also (*b*) the teacher or teachers to be employed; the terms of employing them; the amount of their remuneration; and the *duties which they are to per-*

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*form.*" There is thus every legal facility for the establishment of high schools for girls throughout the country, and it is in such institutions that those pupils ought to find the means of prosecuting the advanced studies which they now seek in the grammar schools, and which if they find there, it is at the expense of not employing their time to the best advantage, and of studying some subjects which are of very little use to them. (Italics appear in the original.)

The law in force at Confederation was continued by s. 129 of the *British North America Act* and remained practically unchanged until 1871.

In the Journal of 1868, p. 84 (Exhibit 24), Dr. Ryerson says:—

> I regret to observe that the evil of inducing girls to enter the Grammar Schools, with the apparent object of unduly swelling the number of pupils, has not diminished but has increased, although there are still several schools which are not open to this reproach. It therefore becomes the duty of the Department, in its administration of the law, to take care that no encouragement is offered to a course of action which is contrary to the intention of the Grammar School Law and Regulations, and injurious to the best interests of the schools and pupils.
>
> The law invests School Trustees with ample powers for the establishment and maintenance of schools or departments of schools in which girls, who have passed through the elementary Common School studies, may obtain that higher culture and instruction which they may require. But the organization and studies of the Grammar Schools are not adapted for mixed classes of grown up girls and boys, nor is it desirable that such mixed classes should exist.
>
> The matter is of so serious an aspect, that I felt it my duty to consult the Principal Law Officer of the Crown in this province as to the proper interpretation of the Law, and the following is the opinion he has given:—
>
> "My interpretation of the Grammar School Act in relation to the question submitted by you is that boys alone should be admitted to those schools, and that consequently, the Grammar School Fund was intended for the classical, mathematical and higher English education of boys."
>
> It therefore became my duty, as thus instructed, to apportion the grant of 1868 on the basis of the boys' attendance.

As against all this evidence indicative of the view current and acted upon by the provincial educational authorities about the time of Confederation, that trustees of common and separate schools had the legal right to provide for the secondary education of pupils attending their schools up to matriculation, the only document in the printed record on which the respondent relies shews the adoption by the Council of Public Instruction in 1858 of a regulation prescribing the courses of study for common schools, which was declared in the Separate School Manual of 1863, issued by the provincial educational authorities, to be applicable to Roman Catholic separate schools

(Exhibit 5A). These "prescribed studies" may be regarded as those "*required* to be taught" in the common schools (Exhibit 34 (1864), p. 75), i.e., as a minimum and not exclusive. While the curriculum of studies so prescribed was comparatively restricted, it included the first six books of Euclid and mensuration of surfaces and solids, and, for boys, trigonometry, and other matters in the discretion of the trustees. Indeed it comprised most, if not all, that is obligatory in the curriculum prescribed for high schools to-day.

Our attention has been drawn to extracts (not printed in the Record) from a letter of the Chief Superintendent, published in *The Globe* newspaper of the 27th of March, 1866, copied in the Journal of Education and reprinted in Exhibit 33, intituled "Grammar School Manual" (compiled by J. George Hodgins, LL.B., Deputy Superintendent), at pp. 73-4. The main purpose of this letter was, as indicated by its heading in the Manual, to emphasize "The Necessity for Uniform Text-books in all Common Schools." Incidentally the writer alludes to the power and duty of the Council of Public Instruction

> to prescribe the subjects of instruction in the public schools and the text-books which shall be used in giving that instruction.

It is then pointed out that

> teachers of public schools are not employed, therefore, to teach what subjects or books they please, but to teach those subjects and books which are prescribed by law.

The Statute (C.S.U.C., 1859, c. 64, s. 79 (8) ) declares it to be the duty of the trustees "to determine * * * the duties which (teachers) are to perform" and (s. 82 (1) ) of the teacher

> to teach diligently and faithfully all the branches required to be taught * * * according to the terms of his engagement with the trustees and according to the provisions of this Act.

If, upon a proper construction of the statutory law (C.S.U.C., 1859, c. 64, ss. 27 (8) and (16), 79 (8) and 82 (1), and s. 32, and 26 Vic., c. 5, ss. 3, 7, 9), separate school trustees were given the right, as part of the management of the schools entrusted to them, to determine that secondary education should be given in their schools, the power of regulation conferred on the Council of Public Instruction could not be utilized to prevent or restrict the exercise of that right. The subjects of that power were confined (C.S.U.C., 1859, c. 64, s. 119 (4) ) to "the organization,

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government, and discipline of Common Schools" and "the classification of Schools and Teachers. * * *" We assume a like power of regulation over separate schools. The Council was not empowered to curtail the courses of studies to be pursued or to determine the extent of the education to be imparted in the schools. "Organization, government and discipline" are not apt terms to confer such jurisdiction; and "classification" does not imply anything of the kind. It had reference rather to the distribution of the pupils in classes according to the degree of advancement each had attained in his education and to the due arrangement of the courses of study so as to provide for the teaching which the several boards of trustees might deem suitable for local requirements and to ensure that the time of both teacher and pupil might be utilized to the best advantage, that there should be no overlapping in the work and that for each class and for each term of the course there should be provided a sufficient, but not an excessive, amount of work.

The system was voluntary; local self-determination was fundamental in it; there was the minimum of governmental control.

> The character of the instruction given in every educational establishment is an expression of the people themselves upon the question of education. * * * The system begins and ends with the people. No school-house can be built, no teacher employed, no rate levied, except by the concurrence of the people. It was true that it was not voluntary as to the individual, but it was certainly voluntary in regard to the municipality. (Journal of Education, March, 1860, p. 34.)

It is significant that while the cognate matter of the recommendation and disapproval of text-books for use in common schools is entrusted to the Council (s. 119 (5)), the delimitation of courses of study in those schools is not mentioned in the enumeration of its functions. When the Legislature intended to give the Council the right to determine the courses of study it readily found language apt for that purpose, as in the case of the grammar schools, for which the Council was empowered to "prepare and prescribe a list of text-books, programme of studies, etc. * * *" (C.S.U.C., 1859, c. 63, s. 15.)

More noteworthy still is the fact that the recommendation and disapproval of text-books is treated as something not comprised within the power of regulation. The two matters are kept distinct, being dealt with in different sub-

sections (s. 119, sub-ss. 4-5). While the Act of 1863 subjected the separate schools to regulations to be imposed by the Council of Public Instruction (s. 26), it contained no provision committing to that body any supervision over the text-books to be used in those schools. In the selection of text-books, as in the determination of the courses of study to be pursued in each separate school, the discretion of the trustees elected for its management was untrammelled.

The statutes which entitled pupils up to the age of 21 years to attend the common and separate schools were certainly not designed to enable the Council of Public Instruction, under the guise of regulation, so to restrict the courses of studies for which the trustees might provide that they would be suitable only for pupils up to the age of, say, 12, or even 16 years.

As was forcibly pointed out during the argument, that would be to prohibit, not to regulate. (*Corporation of City of Toronto* v. *Virgo* (1). If the power of regulation of the Council of Public Instruction could be so exercised, the work of the schools could be indefinitely cut down. No doubt, in the case of common schools, that might since Confederation be done directly by provincial statutes, or by regulations authorized by them, because as to schools other than denominational schools legally established no limitation is imposed on the jurisdiction of the Legislature. But that an emasculation of the courses of study which Catholic separate school trustees were at the Union entitled to provide in their denominational schools for pupils up to 21 years of age would prejudicially affect a right or privilege with respect to such schools legally enjoyed by them is indisputable; and it would also affect the privilege of denominational teaching in separate schools, because parents desirous of having their children receive such training in those schools up to the age of 21 years would be obliged to submit to the hardship of their obtaining only an inferior secular education. Legislation purporting to authorize such an injustice would contravene s. 93 (1) of the *British North America Act;* and it is obvious that what the legislature cannot do by direct action its creature may not do by regulation.

(1) [1896] A.C., 88.

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For the respondent it is contended that in the pre-Confederation public school system of Upper Canada the legal right to give secondary education was vested solely in the grammar schools—that they were designed to be the intermediate schools between the common schools and the university; and that if the common schools carried on "high school" work it was only by toleration and not by legal right.

The latter part of this argument has already been dealt with.

The grammar schools were classical schools, Latin and Greek being compulsory subjects in their courses; but, while they were, no doubt, designed to impart secondary education, they also did primary and elementary school work. They were not really a part of the public school system. In 1867 they were governed by the provisions of the C.S.U.C., 1859, c. 63, which embodied, without material change, the Acts of 1853 (16 Vic., c. 186) and of 1855 (18 Vic., c. 132). The grammar schools were intended for boys only (Journal of Education, 1868, p. 84; Exhibit 24); when united with common schools (16 Vic., c. 186, s. 11 (4); C.S.U.C., 1859, s. 64, s. 27 (7) and s. 79 (9)) children of separate school supporters could not attend them (C.S.U.C., 1859, c. 64, s. 27 (16) )—and there was no provision for the union of grammar schools and separate schools. The more advanced common schools refused to unite with the grammar schools and themselves carried on "high school" work with official approval. Unions were discouraged. Grammar schools were departmentally controlled as to their courses of study (16 Vic., c. 186, s. 6); there was no statutory right to attend them—they were in fact select schools; and in many localities in Upper Canada, where secondary education was necessary, grammar schools were not accessible, and, if such education was to be available in those places, the common schools must impart it—as in fact they did.

Matters continued in that position for several years after Confederation, the changes complained of by the appellants having begun only in 1871. The common schools and the grammar schools then disappeared *nominatim* and there came into existence high schools (including collegiate institutes) for secondary education and public schools for

primary and elementary education solely. It is now very generally assumed by "the man in the street" that the public school of to-day has replaced the common school and that the high school is the successor of the grammar school. But that is only partially true. At Confederation the common schools were by law unrestricted in their courses of study and were obliged to provide for pupils up to 21 years of age, and in many cases, furnished secondary education suitable for pupils proceeding to matriculation. The public schools, when created in 1871 (34 Vic., c. 33), were obliged to provide education only for children up to the age of 12 years (s. 3) and were required to comply with regulations (s. 37), which restricted the courses of study to primary or elementary education. The high schools (including collegiate institutes) since 1871 do not engage in primary or elementary work; on the other hand Latin and Greek are not compulsory subjects in them (59 Ont. L.R., at p. 126, and Exhibit 21; Document No. 4, "Book of Pamphlets", pp. 7, 8, 9); boys and girls alike have a statutory right to attend them (R.S.O., 1914, c. 268, s. 24 (c)); they are not select schools, but are common schools in the proper sense of that term.

From this brief statement it is clear that, while the public schools of to-day do that part of the work formerly done in the lower classes of the common schools, i.e. the work of primary or elementary education, and the high schools (including collegiate institutes) have taken over the work of secondary education formerly done by the grammar schools, they have also taken over the same class of work which was concurrently done in the upper or high school classes of the more advanced pre-Confederation common schools, in which 72,987 pupils were being trained in 1867, of whom 8,019 pursued "the *higher* studies". (Ex. 14 pp., 88-9). In many particulars the high schools of to-day have the characteristics of the old common school. They are in fact quite as much the successors of those schools as they are of the superseded grammar schools. In so far as the legislation and the regulations governing high schools may interfere prejudicially with the rights and privileges legally enjoyed in 1867 by the Roman Catholic separate schools they are *ultra vires*.

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It is not surprising that the Chief Superintendent of Education, when transmitting to trustees, inspectors and teachers, in 1872, the regulations made under, and his instructions for the carrying out of, the Act of 1871, warned them that the

> new School Act and Regulations do *not* in any way affect the Separate Schools. It was not intended to affect them when the Act was passed; and it would be unjust to the supporters of these schools thus to legislate for them indirectly, and without their knowledge. The Inspectors will, therefore, be particular not to apply the Act, or any of the new Regulations to Separate Schools. (Exhibit 52, p. 64.)

The rights and privileges of Roman Catholic separate school supporters and the scope, intent and effect of the perpetuation of them by s. 93 (1) of the *B.N.A. Act* were probably better understood and appreciated by the provincial educational authorities in 1872 (five years after Confederation) than they are now. Emphasis was given to the above-quoted warning by its repetition in 1873 (Exhibit 23, p. 80); and the Minister of Education expressed the same view in 1876. (Exhibit 49).

Inasmuch as continuation schools were the outgrowth of the continuation classes provided for long after Confederation in connection with the public schools, they do not call for any special consideration.

It would, therefore, seem to be abundantly clear that in 1867 the trustees of Catholic separate schools, charged with their management and clothed with the powers of trustees of common schools, had the right by law to provide in them the secondary education requisite to enable the children of their supporters to matriculate, to enter the Normal School, or to take up the study of any of the "learned professions". Such education, then imparted by many common schools, included most, if not all, of the obligatory work now done in the Ontario high schools and was designed to meet the requirements of ordinary pupils up to the age of 21 years. While the obligation of the trustees to provide for pupils up to that age is set forth in the current Ontario *Separate Schools Act* (R.S.O., 1914, c. 270, s. 45 (d)), the present law and regulations would restrict the teaching to be given in Catholic separate schools to what is prescribed for the public schools of to-day, which are not required to provide for pupils over the age of 16 years. (R.S.O., 1914, c. 266, s. 73 (d)). (Under the Act

of 1871 the public school obligatory age limit was 12 years of age). In other words, the present law and regulations of Ontario forbid Catholic separate schools to impart the high school education which they were legally entitled to furnish at Confederation. Under them, if Catholic pupils are to remain subject to the religious control and influence of their denominational schools, as in pre-Confederation days, until they reach the age of 21 years, it must be at the cost of acquiring in those schools only such education as is deemed suitable for pupils not over 16 years of age attending the public schools. (59 Ont. L. R. p. 133). It would seem to be very plain that a right or privilege enjoyed at Confederation by the Roman Catholics of Ontario in respect of their denominational schools is thus prejudicially affected.

(B) The exemption of the separate school supporters under s. 14 of the Act of 1863 (26 Vic., c. 5) was

> from the payment of all rates imposed for the support of Common Schools, and of Common School Libraries, or for the purchase of land or erection of buildings for Common School purposes, within the City, Town, Incorporated Village or section in which he resides.

From the fact that the Ontario continuation schools, high schools and collegiate institutes are now doing work which formed part of that formerly legally done, or which might have been so done, by the common schools, it follows that separate school supporters are entitled to exemption from rates for the support of such continuation schools, high schools and collegiate institutes. To compel Catholic separate school supporters to support the Ontario high schools, etc., and to use them, if they would give their children up to 21 years of age a secondary education, is prejudicially to affect the right or privilege enjoyed by Roman Catholics as a class at the Union of having such education given to their children under denominational influence and in separate schools managed by their own trustees. As put by Patterson, J., in *Barrett* v. *Winnipeg* (1).

> The right of a class of persons with respect to denominational schools is injuriously affected if the effect of a law passed on the subject of education is to render it more difficult or less convenient to exercise the right to the best advantage.

(C) Sections 20, 21 and 22 of the *Separate Schools Act* of 1863 (26 Vic., c. 5) read as follows:

(1) (1891) 19 Can. S.C.R., 374, at p. 424.

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20. Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township.

21. Nothing herein contained shall entitle any such Separate School within any City, Town, Incorporated Village or Township to any part or portion of school moneys arising or accruing from local assessments for Common School purposes within the City, Town, Village or Township, or the County or Union of Counties within which the City, Town, Village or Township is situate.

22. The Trustees of each Separate School shall, on or before the thirtieth day of June, and the thirty-first day of December of every year, transmit to the Chief Superintendent of Education for Upper Canada, a correct return of the names of the children attending such school, together with the average attendance during the six next preceding months, or during the number of months which have elapsed since the establishment thereof, and the number of months it has been so kept open; and the Chief Superintendent shall, thereupon, determine the proportion which the Trustees of such Separate School are entitled to receive out of the Legislative grant, and shall pay over the amount thereof to such Trustees.

Section 33 of the *Separate Schools Act* in the C.S.U.C., 1859, c. 65, which embodied the material parts of s. 13 of the Taché Act of 1855 (18 Vic., c. 131), was in these terms:

33. Every such Separate School shall be entitled to a share in the fund annually granted by the Legislature of this province for the support of Common Schools, according to the average number of pupils attending such School during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township.

There is a striking difference between this provision and s. 20 of the Act of 1863. The basis of division remained the same—*pro rata* according to the average attendance. But the Taché Act of 1855 and the C.S.U.C., 1859, c. 65, both gave the right to share only in "the fund annually granted by the Legislature of this Province for the support of Common Schools" (i.e. the fund known as "The Common School Fund"), while by the Act of 1863 the like right is given to

share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities.

All three statutes pointedly distinguish legislative and municipal grants of public moneys (which belonged to supporters of common schools and separate schools alike) from moneys raised for common school purposes by local assessments, to which separate school supporters did not contribute because they were exempt. In the former only were separate school supporters given the right to share. The policy of the Legislature up to Confederation plainly was to put both kinds of schools on an equal footing in regard to sharing in the appropriation of public money.

The language of s. 20 of the Act of 1863 is most comprehensive in describing the public grants in which the right to share was assured to the separate schools. Formerly restricted to a right to share in "The Common School Fund" (a well-defined annual grant of long standing, which had been the subject of much legislation, and as to the distribution of which no complaint is made by the appellant), separate school supporters were in 1863 given the added right to "share in all other public grants," etc. There is no allusion to "general grants" or "special grants"—"grants for urban schools" or "grants for rural schools"—"conditional grants" or "unconditional grants." All such grants are "public grants," i.e., grants of public moneys, in which common and separate school supporters have identical interests. Legislative and municipal grants for common school purposes differ widely from the annual legislative grant of "The Common School Fund." The latter is, to a substantial extent, a vote of the income of public moneys already set aside for educational purposes, while the former are wholly gratuitous grants of public moneys not so earmarked. In s. 20 of the *Separate Schools Act*, 1863, instead of merely adding the words "and in all other public grants," etc., immediately after the words in the Taché Act "shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools," the Legislature made the additional grants, to which the right of sharing was then extended, the subject of a distinct clause in these words:

> and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities.

Not only are the words "shall be entitled to a share" unnecessarily repeated, if the additional benefits conferred

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be restricted to grants *ejusdem generis* with the grant of "The Common School Fund," but an intention to exclude the application of that rule of construction, or of the kindred maxim "*noscitur a sociis*" (which would, if applicable, cut down the comprehensive words "all other public grants," etc., to mean only "general grants," i.e., grants for common school purposes generally), is further evidenced by the fact that the added clause deals with investments and allotments as well as grants and with municipal as well as provincial grants, etc. A distinction is also made, no doubt advisedly, in regard to the expressed purposes of the respective grants, the object of the earlier grant of "The Common School Fund" being designated "for the support of common schools," while that of the latter is stated in the broader terms "for common school purposes." As observed by Lopes L.J., in *Anderson* v. *Anderson* (1):—

> The doctrine of *ejusdem generis* is a very valuable servant, but it would be a most dangerous master.

In the same case Lord Esher, M.R., said, at p. 753:—

> *Prima facie* you are to give the words their larger meaning.

To exclude from the additional monetary benefits in which the right to "a share" was conferred on the separate schools in 1863 grants "for a common school purpose," made to particular schools, or otherwise restricted, and conditional grants for any such purpose, would defeat the apparent intention of the Legislature in 1863 to put separate schools on a footing of absolute equality with common schools in regard to all grants, municipal or legislative, of public moneys. Given such an application, the doctrine *ejusdem generis* would indeed be "a dangerous master." The only qualifications which the Legislature attached to the educational grants, legislative and municipal, in which it gave the separate schools the right to share, were that they should be "of public moneys" and should be made "for common school purposes."

But, it is said, if the Legislature of Ontario should see fit to restrict a grant to a particular common school or schools, or to make a grant for a particular purpose—such as, to aid schools in which "Darwinism" shall be taught —to apportion a share of any such special grant, in the

(1) [1895] 1 Q.B., 749, at p. 755.

former case to separate schools, and in the latter to schools in which "Darwinism" is not taught, would be to make a grant which the Legislature had not made. No doubt moneys so granted cannot be appropriated otherwise than as the Legislature directs; but the consequence is that any grant of that kind which prejudicially affects the right of separate schools under s. 20 of the *Separate Schools Act*, 1863, is *ultra vires*—whether it be provincial or municipal. Since Confederation for the purposes of s. 20, no distinction can be made between the powers of municipal councils and the powers of the Provincial Legislature. Section 93 (1) of the *B.N.A. Act* admittedly forbids any invasion of the legal rights of denominational schools as existing at Confederation. In regard to the particular matter now being dealt with, the situation thus created is precisely the same as if the *British North America Act* had contained a provision in these words:—

> Out of every grant of public moneys to be made by the Legislature of the Province of Ontario, or the municipal authorities of that Province, for common school purposes, there shall be paid to every Separate School a share thereof proportionate to the average number of pupils attending such school during the twelve next preceding months, or during the number of months which have elapsed since the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township.

If, therefore, a grant of public moneys is made by the Legislature or by a municipal authority to aid or assist in the carrying out of what would in 1867 have been deemed a common school purpose, either it must be so made that it is apportionable between the common schools (or their present day successors) and the separate schools, or compensation to the latter for their proportion of such grant must be provided for.

It may be that under s. 20 of the *Separate Schools Act* of 1863 there was no assurance that any grants other than that of "The Common School Fund" would be made in the future for common school purposes; but a definite right to share *pro rata* in such other grants, if and when made, was thereby assured to the separate schools. After 1863 municipal authorities in Upper Canada could not grant public moneys for any common school purpose except on the basis provided by s. 20 of the *Separate Schools Act*. They were absolutely bound by its provisions. Of course until Confederation the Legislature of Canada retained full power

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to repeal or amend s. 20 of the *Separate Schools Act*. It could, either expressly or by implication, direct that s. 20 should not apply to any grant which it, or a municipal council, might make to a particular school, or for any common school purpose or purposes, or subject to any condition. But the Ontario Legislature cannot do so since 1867 if the consequence would be to affect prejudicially the right of separate schools to share, on the basis prescribed by s. 20, in all provincial or municipal grants of public moneys for common school purposes. The Ontario Legislature may deal as it pleases with the proportion of its grants for "common school purposes" in which separate schools are not interested. It may divide or dispose of that "proportion" in any way it sees fit amongst "public schools" and "high schools" etc.; but every dollar appropriated by it to aid those schools or the work done in them, whether by way of general grant or special grant, (saving moneys granted to high schools in continuation of former grammar school appropriations) must be taken into account and treated as a payment to them "for common school purposes" in determining the share of "public grants" to which the separate schools are entitled.

The protection assured to separate schools by s. 93 (1) of the *B.N.A. Act* in regard to public aid is that their right to share *pro rata* on the basis of average attendance in all public moneys devoted to common school purposes should not be prejudicially affected by provincial legislation. Assuming the utmost good faith, and excluding any idea of a design to circumvent the provision of s. 20 of the Act of 1863, every grant for a common school purpose, whether made for a particular school or schools, or made subject to some restrictive term or condition, comes within the ambit of the protection of s. 93 (1) of the *B.N.A. Act*. The right to share in all such grants is given by s. 20 of the Act of 1863 in the plainest possible terms; and the power of the Provincial Legislature to defeat that right or to affect it to the prejudice of the supporters of such schools has been categorically negatived by the Imperial Parliament. The question is purely one of legislative power.

The Common and the Separate Schools Acts alike were continued in force after the Union by s. 129 of the *B.N.A. Act* as provincial legislation of Ontario, subject to repeal

and amendment by the legislature, as to common schools without restriction, and as to separate schools within the limitations imposed by s. 93 (1) of that Act. *Dobie* v. *The Church Temporalities Board* (1); *Attorney-General for Ontario* v. *Attorney-General for Canada* (2). The presence of the words " this Province " and " the Province " in s. 20 of the *Separate Schools Act* of 1863 did not render that provision inapplicable after Confederation to the changed conditions which it brought about, as is argued for the respondent. Those terms meant after 1867 the new Province of Ontario which, as erected by s. 6 of the *B.N.A. Act*, comprises that part of the Province of Canada which had, prior to 1841, constituted the Province of Upper Canada and to which alone the *Common Schools Act* (C.S.U.C., 1859, c. 64) and the *Separate Schools Act* (26 Vic., c. 5) applied. Indeed it might be contended with equal force that, because " the Legislature " mentioned in s. 106 of the *Common Schools Act* (C.S.U.C., 1859, c. 64) had meant the legislature of the Province of Canada when that section was enacted, it could not after Confederation mean the legislature of the Province of Ontario, and that common schools in Ontario after the Union (1867-1871) were no longer the " Common Schools in Upper Canada " for the purposes of s. 106, since Upper Canada had ceased to exist. As is truly stated in the appellants' factum (pp. 28-9):

> Confederation was the result of a compromise wherein the religious minority in both Upper and Lower Canada were guaranteed protection for their denominational or separate state-aided schools, and it would have startled and shocked the statesmen of that day had it been suggested that the obligations resting upon the then Province of Canada in respect to such state aid could be ignored by the Provinces to be established in place of the old Province, or, in other words, of the division of the Province of Canada into two Provinces, with the result that in Upper Canada or the Province of Ontario and in Lower Canada or the Province of Quebec, there was no guarantee of the Separate Schools sharing in state aid from annual grants for Common School purposes, but that after the Union the Legislature of Ontario and that of Quebec could make grants for Common School purposes without the Separate Schools being entitled to a share.
>
> It may be reasonably assumed that there was then no intention or desire by the Province of Ontario to evade the obligation that in that respect rested upon the Province of Canada, and that it was assumed that this obligation did continue is evidenced by the Separate Schools

(1) (1882) 7 App. Cas., 136, at p. 147.

(2) [1896] A.C., 348, at pp. 366-7.

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Acts passed from time to time by the Legislature of the Province of Ontario down to 1906, as appears in the Statutes.

Nor do the words, "and not otherwise appropriated by law", appended in s. 106 of the *Common Schools Act* (C.S.U.C., 1859, c. 64) to the description of the legislative grants to be apportioned by the Chief Superintendent, present a formidable difficulty. Section 20 of the Act of 1863 is subsequent legislation and, so far as there may be inconsistency, the terms of that section must prevail over those of s. 106 of the Act of 1859. Section 20 of the Act of 1863 precludes an appropriation by law of any grants made for common school purposes which would prevent the separate schools sharing proportionately in them.

Whether the legislature could validly formulate a scheme or impose conditions for the distribution amongst the separate schools themselves, other than on the basis of average attendance, of the proportion of the total grants for common school purposes, as understood in 1867, to which the separate schools as a whole were entitled, is, perhaps, a debatable question. The facts that s. 20 of the *Separate Schools Act* of 1863 gives the right to share "to every separate school" and that s. 22 requires that payment be made by the Chief Superintendent directly to the trustees of each separate school of its proportion of the legislative grant, should not be lost sight of in considering this aspect of the matter. Having regard to the primary apportionment amongst the municipalities of moneys to be granted by the legislature for the support of common schools, directed by s. 106 of the *Common Schools Act* (C.S.U.C., 1859, c. 64) to be made "according to the ratio of population in each" municipality, it would seem probable that where there is but one separate school in the municipality it is entitled absolutely to its entire *pro rata* share on the basis of average attendance of the moneys appropriated to such municipality and that the question suggested can arise only where there are several separate schools in the same municipality. But in no event may the share of any grant to which the separate schools of the Province are entitled be entirely or partly withheld from them so that the total amount payable to them as a whole will be lessened.

With the rights of separate schools *inter se* in the distribution of the grants of public moneys, however, we are not presently concerned. That the separate schools throughout the province, taken as a whole, have the right to receive annually a share in all public moneys validly granted for common school purposes (as understood in 1867) proportionate to the average attendance at such schools and that any such grants so made as to preclude the separate schools so sharing therein and without compensation being otherwise provided, are void, are, in our opinion, the certain consequences of the perpetuation by s. 93 (1) of the *B.N.A. Act* of the rights and privileges conferred by s. 20 of the *Separate Schools Act* of 1863. To hold otherwise would be to render illusory in a most material particular the substantial protection to religious minority rights in regard to education which the Imperial legislation of 1867 was designed to assure.

The parties agreed that in the event of the original suppliants being entitled to any proportion of the grants for common school purposes in the year 1922 (to which the suppliants' monetary claim is presently confined), payment of which was withheld for non-fulfilment of some conditions attached to them, their recovery should be for the sum of $736 demanded in the petition. Possibly for that reason no particulars were given as to the items of which this sum is composed. We are, therefore, unable to determine whether the grants of which portions were withheld from the original suppliant were or were not so made as to prevent " every separate school " from sharing in them. If so made, they were void and no part of them is recoverable. The claim for $736, therefore, cannot succeed.

We are, for the foregoing reasons, of the opinion that the appellants are entitled to the following declarations for which they pray, to wit:—

1. Every board of trustees of the Roman Catholic separate schools has the right to establish and conduct in the school or schools under its jurisdiction courses of study and grades of education such as are conducted in what are now described as continuation schools, collegiate institutes and high schools and any and all such regulations

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purporting to prohibit, limit, or in any way prejudicially affect that right are invalid and *ultra vires*.

2. Supporters of Roman Catholic separate schools are exempt from the payment of rates imposed for the support of any continuation school, collegiate institute or high school not conducted by the board of Roman Catholic separate school trustees for the municipality or school section in which they reside. Section 39 (1) of the *High Schools Act* (R.S.O., 1914, c. 268) is invalid as to supporters of separate schools.

3. Every statutory provision enacted by the Legislature of the Province of Ontario, which involves a departure from the principle of apportionment between common and separate schools *pro rata* on the basis of average attendance at such schools, as provided by s. 20 of the *Separate Schools Act* of 1863 (26 Vic., c. 5), of all legislative and municipal grants of public moneys for any purpose that was, under the law as it stood in 1867, a common school purpose, (saving grants to high schools in continuation of former grammar school appropriations), would, if valid, prejudicially affect a right or privilege with respect to their denominational schools which Roman Catholics had by law at the Union and is, therefore, *ultra vires*. Each of the statutory provisions enumerated in paragraph (2) of the prayer of the Petition of Right falls within this category.

The appeal should accordingly be allowed to the extent indicated.

DUFF J.—The claims of the appellants reduce themselves to two. The first concerns the right, which they allege the Roman Catholics in Ontario possess, to establish and conduct, free from control or regulation by the Legislature as respects the scope of instruction, denominational schools of the character of those known as "common schools" in 1867, which designation would include, it is contended, schools of the type and status of the present high schools, collegiate institutes and continuation schools; coupled with a consequential exemption from all taxation for the support of such last mentioned schools.

The second concerns the rights of such denominational schools in relation to public grants in aid of education.

It is important, first of all, to state, succinctly, but with some precision, the propositions of law and fact which the appellants advance in support of these claims.

As to the first, it is said that at the date of Confederation Roman Catholics, in Upper Canada, enjoyed, by law, the right to establish denominational schools and to conduct them by boards of trustees chosen by themselves; that, as respects text-books and courses of study, free and unfettered control of such schools was vested, by law, in the several boards of trustees, whose authority was sufficient to enable them to sanction courses of study coextensive in scope with those now pursued in high schools, collegiate institutes and continuation schools.

That by force of s. 93 (1), Roman Catholics of Ontario now enjoy these same autonomous rights coupled with the consequential right of exemption from taxation above indicated; that these rights are constitutional rights, and that any legislation is void, which, if valid, would prejudicially affect them.

As to the second claim, it is said that, by the *Separate Schools Act* of 1863, which remained in force at Confederation, every separate school, that is to say, every Roman Catholic denominational school established pursuant to law, was entitled to receive a part of every sum of money granted by the Legislature for "common school purposes" (which phrase included, by the appellants' construction of it, the maintenance of schools of the types of the present secondary as well as elementary schools), and that this part was determined (without regard to the purpose or conditions of the grant) by an arithmetical ratio, based upon the number of pupils attending the school and having no relation to the subjects taught, the text-books used or the efficiency of instruction—every separate school being entitled to its part, calculated according to the alleged statutory ratio, however advanced, however rudimentary, the nature of the education imparted might be. This right to share in the public grants, it is said, is now also a constitutional right, guaranteed by s. 93 (1) of the *British North America Act.*

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It will be convenient to consider these two sets of propositions separately; but before proceeding to do so, it is well to observe that they seem to entail this consequence: that every supporter of a separate school, however elementary the character of the education may be, which is imparted by the denominational school or schools in his section or municipality, is exempt, not only from taxation for the support of public schools, but from all taxation also for the support of secondary schools; an exemption that was valid fifty years ago, if valid to-day. The appellants' propositions also involve this further consequence, that every separate school, as to courses of study and text-books, is under the independent dominion of its board of trustees, who may prescribe only the most rudimentary studies; and yet each separate school, however rudimentary the studies pursued, is entitled to its part of all sums granted by the Legislature for "common school purposes", which purposes include, I repeat, as the appellants contend, the maintenance of schools of the type of the present collegiate institutes.

We are concerned only with rights protected by s. 93 (1) of the *British North America Act,* rights relating to denominational schools existing at the date of the Union and established by law; rights, that is to say, which could be maintained, as the trial judge observes, "in face of opposition", rights which the courts would be bound to enforce or protect; and which were, moreover, declared in some statutory enactment in operation at that date.

I shall first consider the appellants' propositions touching the character of the schools they were entitled to maintain and the extent to which they were under an exclusive denominational control; the question of the public grants will be examined separately. The Attorney-General takes his stand upon the conclusion unanimously adopted in the Ontario Courts, that the rights bestowed upon Roman Catholics by the statutes in force at the relevant date in relation to their denominational schools were no wider than this: they were entitled to establish schools of the class known as "common schools", to manage them by boards of trustees nominated by themselves, but with respect, *inter alia,* to the courses of study to be followed, it was their duty to proceed in obedience to such regulations as

might be promulgated by the central educational authority of the province, the Council of Public Instruction.

It will be observed that the appellants' propositions divide themselves into two branches: first, schools known as "common schools" were intended to provide, where that was desirable in the view of the local authorities, courses of study sufficiently advanced to enable the pupils to obtain the necessary preparation for entrance to the provincial university or the learned professions; to provide, it is said, let me repeat, a programme of studies not inferior in scope to the programmes now defining the courses of study in the secondary schools of to-day.

Second, within the superior limit, thus indicated, each board of trustees had supreme discretionary power as to the courses of studies to be pursued in the schools within its jurisdiction, and, in the case of separate schools, this authority extended to the use of text-books.

The appellants, in order to succeed, must make good their propositions on both these branches; they must establish that the legislation on the subject of common schools contemplated schools of the advanced character mentioned, and they must also establish that, in the conduct of such schools, boards of trustees were, as regards text-books and programmes of study, independent of the regulative authority of the Council of Public Instruction. Obviously, if such schools were in these respects subject to an over-riding authority in the Council, the appellants have no legal ground for inpeaching legislation upon these subjects, or regulations upon them, of a character which could lawfully have been put into force by the Council of Public Instruction in exercise of its controlling powers.

Primarily, we must look to the *Separate Schools Act* of 1863 to ascertain the measure of control Roman Catholics were entitled to exercise over their denominational schools; and also the degree in which such schools were subordinated to the dominion of the Council of Public Instruction.

Four sections of the statute (the 4th, 9th, 13th and 26th) require attention here, but of these we are at present chiefly concerned with the 26th.

The language of that section is this:

> The Roman Catholic Separate Schools shall be subject to such inspection, as may be directed, from time to time, by the Chief Super-

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intendent of Education, and shall be subject also to such regulations, as may be imposed, from time to time, by the Council of Public Instruction for Upper Canada.

The view of this section, which naturally first presents itself, regards it as investing the Council with a comprehensive authority to pass general regulations governing the management and conduct of separate schools.

The first member, dealing with inspection, purports, independently of any other legislation upon the subject, to entrust the Chief Superintendent with complete discretionary power. So, also, in this view, the second member, *ex proprio vigore,* imports the bestowal upon the Council of the fullest authority to formulate regulations, which it is the duty of the separate school authorities to observe—"such regulations as may be imposed from time to time."

Two other views suggest themselves as to the effect of the second branch of s. 26. First, that the authority thereby given does not include control by the Council over separate schools in matters other than those in relation to which jurisdiction may, from time to time, be entrusted to the Council, under the Common Schools Acts or other legislation; that the section envisages the Council as a body charged with public duties and endowed with powers of regulation in respect of defined subject matters under the existing Common School Acts or under subsequent amending legislation, and that in all such matters (but only such) the separate schools are subordinated to the Council. According to the other view (and subject to one qualification, this construction is adopted in Mr. Hellmuth's argument), the office of the section is merely to declare that the Council's functions, as affecting separate schools, have relation to the subject matters (and those only), which, at the date of the statute, were within the field of its authority under the Common School Acts—so that in exercising those functions, it would always remain subject to the limits fixed by those Acts at that date.

The appellants' argument adopts this last mentioned construction, with the qualification that the Council's authority does not, by force of s. 26, extend to the subject of text-books.

Either the first or second of these three interpretations, as it seems to me, is preferable to the third. The section places separate schools under the dominion of regulations

put into force from time to time; in terms there are no limits as to subject matter or otherwise. In fulfilling its duties under the section, the Council would, of course, be bound to observe any limitations governing it by force of the pertinent enactments of the Separate School law, as well as those necessarily proceeding from the nature of the subject matter; the duty being a duty to regulate only, must be performed in good faith for the purpose for which it is imposed, and, especially, with a vigilant eye to the fact that the purpose of the legislation was to make better provision for a system of Roman Catholic denominational schools. But, subject to this, there appears to be no very potent reason for restricting the natural sense of the words. Resort to other legislation seems unnecessary. And if the section is said to contemplate the Council, in exercising its powers thereunder, as acting within the field marked out by the Common School Acts, the words, on the more natural reading of them, would seem to direct us, for our guidance, to the provisions of those Acts at the time of the exercise of the power, rather than at the date of the Separate Schools Act.

In my own view of the Common School Acts, further discussion of the relative merits of these three readings would be superfluous. I shall proceed, for the present, upon the footing that the construction advocated by the appellants (except as touching the subject of text-books) is the right construction. Even on this assumption, it will sufficiently appear from a strict examination of the provisions of the Common School Acts, invoked by the appellants, that they furnish no reliable ground for overturning the conclusion of the Ontario judges as to the scope of the Council's powers; a view which, it will appear, dictated the practice of the Council itself in exercising its functions under the statutes of 1850 and 1859—a practice, which was, it will further be seen, acquiesced in by the Legislature itself.

The relevant provisions of s. 119 of the *Common Schools Act* of 1859 are to be found in clauses 2, 3, 4 and 5, which are in these words:—

119. It shall be the duty of such Council, and they are hereby empowered

2. To adopt all needful measures for the permanent establishment and efficiency of the Normal School for Upper Canada, containing one

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or more Model Schools for the instruction and training of Teachers of Common Schools in the science of Education and the art of Teaching;

3. To make from time to time the rules and regulations necessary for the management and government of such Normal School; to prescribe the terms and conditions on which students will be received and instructed therein; to select the location of such school, and erect or procure and furnish the building therefor; to determine the number and compensation of teachers, and of all others who may be employed therein; and to do all lawful things which such Council may deem expedient to promote the objects and interests of such school;

4. To make such regulations from time to time, as it deems expedient, for the organization, government and discipline of Common Schools, for the classification of Schools and Teachers, and for School Libraries throughout Upper Canada;

5. To examine, and at its discretion, recommend or disapprove of text-books for the use of schools or books for School Libraries.

Clause 4, if alone, could hardly be susceptible of debate. There are two subject matters for regulation, or rather perhaps, two phrases designating a group of subject matters: "the organization, government and discipline of common schools," and the "classification of schools and teachers." These phrases in their unstrained meaning denote subject matters of regulation which include branches of instruction; and "classification of schools," in the ordinary purport of the words, embraces the function of determining the different classes and their several typical characteristics.

Various reasons are propounded by the appellants for ascribing to these phrases a narrower compass. I shall first consider those reasons which derive any substance they possess from the terms of the common school legislation itself.

The provision of the *Common Schools Act* to which the appellants appear to ascribe the greatest force is clause 8 of section 79, which defines the powers of urban boards of trustees. By that clause such trustees are authorized and required to determine the several kinds and descriptions of schools which shall be maintained under their jurisdiction. This clause, it is argued, is incompatible with the attribution to the Council of supreme control over courses of study and "classification of schools."

To each board of trustees the task, it is said, is committed of classifying the schools under its charge, and this clause, it is argued, empowers the board to do this by reference to the character of the instruction in them; and this, it is further said, conveys the right to prescribe the

branches of study. And again, the argument runs, in fulfilling this mandate, the trustees are invested with an independent discretion, untrammelled by superior authority.

I have searched the statute without success for something to justify this version of sections 79 and 119. The intention to subordinate boards of trustees to the Council in matters over which the Council has the power of regulation is positively declared by clause 16 of section 79, which directs such boards to see that the schools under their care are "conducted according to the authorized regulations." In light of this provision, clause 8 of section 79, and clause 4 of section 119 must not be read as conflicting or mutually exclusive but as complementary enactments. We need not stop to discuss the precise effect of clause 8. This seems beyond dispute; it is the duty of trustees, in "classifying" (to quote the phrase of the Chief Superintendent) the schools within their jurisdiction, to observe the regulations upon that subject proceeding from the Council. If, as the appellants argue, they are entitled, in performing their duty under that clause, to act according to a canon based, as suggested, upon subjects of instruction—then, they are, it cannot be doubted, subordinate to the paramount jurisdiction of the Council in relation to the subject "classification of schools."

The argument of the appellants virtually deletes the phrase "classification of schools" from clause 4. The phrase can hardly, in this context, be read as denoting the classification of pupils; which seems rather to fall under the wider subject "government and discipline of schools." As this reading, however, is the only alternative reading suggested by the appellants, it is proper to observe that, if adopted, it would not at all advance the argument. "Classification of pupils," if these words have any substance at all, includes the arrangement of classes by reference to the subjects of instruction and the stages of advancement which the pupils have reached. It would not be easy to reconcile the possession by the Council of final authority in relation to the subject so described with the possession by the boards of trustees of completely autonomous jurisdiction in relation to subjects of instruction and "classification of schools" in the proper sense of the words. Indeed, there seems little room for doubt that the ordinary

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and natural reading of clause 4 is the true reading. "Classification," as applied to "schools" in the sentence in which it here occurs, can have no other force than that which it has when applied to "teachers"—grouping them into classes and ascribing its appropriate qualifications to each class. Furthermore, this argument which attributes to clause 8, section 79, the effect of so limiting the natural meaning of clause 4 of section 119 as to exclude courses of study from the regulative jurisdiction of the Council, seems to ignore the fact that no such clause as clause 8 forms any part of s. 27, in which the powers of rural boards of trustees are enumerated. The nearest approach to clause 8 to be found in that section is clause 6 by which such trustees are empowered to establish a female as well as a male school.

If the argument be sound and the subject matter of courses of instruction be not within the scope of s. 119, then the Act is silent upon the regulation of that subject matter in rural schools. It is nothing to the purpose to say, as appears to have been contended in the courts below by the appellants, that, by force of s. 7 of the Act of 1863, all the powers of urban trustees, under s. 79 of the *Common Schools Act*, are entrusted to rural as well as to urban boards of separate school trustees. Even if this proposition could be accepted, it leaves untouched the difficulty, just mentioned, as to the regulation under the *Common Schools Act* of the conduct of instruction in rural schools. But the proposition itself is inadmissible. By s. 7 of the Act of 1863, trustees of separate schools are to have as respects separate schools the powers that trustees of common schools "have and possess, under the provisions of the Act relating to Common Schools." There is nothing in the *Common Schools Act* investing any board of trustees with authority to direct the conduct of instruction in rural schools. Assuming clause 8 to have the meaning put forward, it confers no jurisdiction on anybody, over any rural school; and there is nothing in s. 7 of the *Separate Schools Act*, which can properly be read as endowing the board of trustees of such schools with authority to ignore, in the exercise of their powers, the limits necessarily imposed, by the terms in which such powers are defined in the *Common Schools Act*.

Another argument must be noticed, which is derived from the form of s. 6 of the *Grammar Schools Act* of 1853, where the powers of the Council, as touching such schools, are set forth. By that section the Council is required to "prescribe a list of text-books, programme of studies and general rules and regulations for the organization and government of the County Grammar Shools." In this context, it is argued, the general words "Organization and government" as applied to schools cannot include text-books and programmes of studies, which are specifically mentioned. And the use of the phrase "organization and government" in this sense, supplies a reason, it is urged, for similarly restricting the meaning of the same phrase in the clause we are considering. This argument, by which we are invited to resort to a statute passed in 1853, for the construction of an enactment, passed in 1850, I do not find convincing. It is always unsafe to construe the general and unambiguous language of one enactment by reference to phrases found in another. *McLaughlin* v. *Westgarth* (1). Phrases and even clauses are so often introduced into Bills on their passage through Parliament in response to importunities from various quarters, that such discrepancies can seldom be safely relied upon as furnishing a clue to the intention of the legislature. The history of grammar schools in Upper Canada, disclosed in the material before us, suggests an adequate explanation of the explicit mention of text-books and studies.

The common school legislation provides other much more apposite and useful contrasts. The system of common schools was instituted by a statute of 1841; and, by that statute, the regulation of courses of study and text-books was committed to the local authorities (the School Commissioners) who, in townships and parishes, were annually elected, and, in incorporated cities and towns, were appointed by the several corporations. The Act provided for a Superintendent of Education, who was invested with no regulative authority over text-books or studies of any kind in respect of the conduct of schools; but (s. 4, sub-s. 5) was required to address to the persons employed in carrying out the provisions of the Act "such suggestions

(1) (1906) 75 L.J.P.C. 117

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as may tend to the establishment of uniformity in the conduct of the Common Schools throughout this Province."

Section 7, subsection 4, of this statute may usefully be quoted in full. By it the Commissioners were entrusted with a duty

> to regulate for each school, respectively, the course of study to be followed in such school, and the books to be used therein, and to establish general rules for the conduct of the schools, and communicate them, in writing, to the respective teachers.

Complete local autonomy in relation to studies, text-books and generally in the management and conduct of the schools was a dominant principle of the common school system as first established. But, in 1850, this system has undergone a striking transformation. Local authority to regulate studies, to regulate text-books, "to establish general rules for the conduct of the schools and communicate them in writing to the respective teachers" finds no place in the statute of that year. For this local control there is substituted the central authority of the Council of Public Instruction to pass regulations under the terms of clause 4, section 119, and to deal with the subject of text-books as provided in clause 5; coupled with the enactments requiring local authorities to see that the regulations of the Council are observed. These changes point to an intention to improve the efficiency of the common schools by subjecting them to an over-riding central control. The progress of legislation in these years, at all events, gives little countenance to the surmise that it was the design of the legislature in 1850 and later to leave each school to exclusive control of the local board of trustees in the primary essentials of education.

I come now to a branch of the appellants' argument to which the appellants themselves attach a high degree of importance. The argument is that the provision of section 119 (clause 5 of that section), entrusting the Council with certain functions therein defined, in respect of the use of text-books in schools, justifies, by reason of the frame of it, an inference that the subject matters of regulation designated in clause 4 were not intended to include programmes of study. The presence of clause 5, according to the argument, containing, as it does, a special disposition upon the subject of text-books, requires us to read clause 4 as excluding that subject from its purview; and,

it is said that if the general language of clause 4 does not embrace that subject, it must also exclude the kindred matter, programmes of study. When the structure of section 119 is examined, and in particular the structure of clause 5, and especially when the history of the two clauses is also taken into account, it will be seen that there is little substance in this contention.

Clause 4 is concerned with a power of regulation which *ex facie* is an unrestricted power, or restricted only by reference to the designated subject matters; it is a power to make "such regulations, from time to time" as the Council "deems expedient". This power extends to subject matters defined by comprehensive, general terms, "organization, government and discipline of schools", "classification of schools and teachers". While *ex facie,* the various matters comprehended under these general expressions are all within the ambit of the clause, no emphasis is laid upon any particular matter, nor is any duty imposed in terms to deal with any particular matter in any special way or at all. The Council are given the fullest discretion as to the time and manner in which they shall discharge any particular branch or phase of the responsibilities committed to them. Clause 5, on the other hand, is concerned with a particular subject—text-books, and, in connection with that matter, a duty is imposed upon the Council; the duty to examine text-books. And then the Council is invested with a discretion to recommend or to disapprove of text-books examined with a view to the use of them in schools.

Of all matters which *ex facie* are comprehended within the general words in clause 4, one matter is singled out for special treatment, under clause 5. This clause does not, as clause 4 does in itself, endow the Council, *simpliciter,* with a general authority to make regulations. As to the subject with which it is concerned, the functions of the Council are stated with much greater particularity: to examine; to recommend; to disapprove, under a sanction nominated in another section. The draughtsman has carefully avoided any words which might be construed as imparting a general authority to regulate. This clause, then, treats the subject matter with which it deals as standing in a special category; the Legislature, in order to express

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its intention has selected language which shows that the object of clause 5 would not have been attained, had that clause been omitted, and the subject of text-books left at large, under the general jurisdiction of the Council under clause 4. The presence of such a clause would appear to justify no inference leading to any restriction of the applicability of the general words of clause 4 in relation to any subject other than text-books.

This conclusion becomes even less doubtful when one looks at the origin and history of the two clauses. Provision was first made in the Act of 1846 for the Council of Public Instruction (under the name of the Board of Education), and in that Act clause 5 of the statutes of 1850 and 1859 first appeared as clause 2 of section 3—the subject of text-books having been, as already mentioned, by the earlier statute of 1841, committed to the independent control of the local authorities.

Before the passing of the statute of 1846, the Chief Superintendent, and others concerned for the welfare of the recently established popular schools, had come to realize some of the evils arising from a diversity of text-books, which are discussed at length in the reports of the Chief Superintendent during the twenty succeeding years. It was then determined that some authority over the subject must be vested in a central body. It was considered that, at the beginning, at all events, it would be sufficient to give that body a power of recommendation only; and the Act of 1846, when it took the form of law, contained a clause corresponding with that which appears in the Act of 1859, except that in the clause itself the sanction attached to the use of a disapproved text-book (loss of the government grant) appears in the clause itself, and not in a separate section, as in the later Act of 1859.

The policy which inspired this clause did not go into effect without vigorous opposition. This subject of school books had aspects other than the educational aspect. There were numerous interests, as appears from the material before us—some of them, no doubt, powerful—which did not welcome the views of the Chief Superintendent and Council, who, shortly after the Act of 1846, published a list of recommended books. Indeed, notwithstanding the recommendations of the Council, and the provisions of the

law designed to bring about the observance of such recommendations, unrecommended text-books continued to be used for many years; and it was not until twenty years after the passing of the Act of 1846 that the Council, being satisfied that the policy of uniformity of text-books had won a "common consent" in the province, felt itself warranted in declaring that all books other than those recommended were disapproved. As late as 1866, a most determined effort was made by a well known publishing house in Great Britain, represented by Canadian publishers and backed by most powerful Canadian influences, to bring about the abrogation of this system, and a reversion to the old plan of the Acts of 1841 and 1843, by which the choice of text-books for each school was left to the local board of trustees.

It is hardly surprising, therefore, that when, in 1850, a Bill to consolidate and re-enact the School Law was introduced into the Legislature, the clause in the earlier statute of 1846, defining in carefully selected words the special rôle of the Council, in the matter of text-books, was left unaltered, or that it remained unaltered down to the date of Confederation. In view of all these considerations I can perceive little to recommend it in the argument that the presence of clause 5 justifies the inference contended for.

I am not suggesting that under clause 5 there is no authority to regulate. In disapproving of a text-book or list of text-books, the Council executes a power of disallowance under the sanction of a grave penalty, and is, of course, exercising a power of regulation; a power to make a rule, of a defined character, it is true, but still a rule, governing the use of text-books in schools. In recommending, also, the Council, by naming a book or books recommended, creates a situation from which, by force of other sections, duties arise that are incumbent upon the local authorities and officials responsible for the execution of the Act. Sections 27 (18), 79 (15), 91 (6), 98 (3).

The recommendations of the Council, once made, become, by force of these other sections, rules binding on local authorities and officials in the sense that their discretion is thereby limited; although s. 119 does not, in entrusting the Council with the duty of recommending.

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confer, *ex proprie vigore*, a power to prescribe; and, as already observed, the power to disallow is a power to regulate which can be executed only in a limited specified way.

And here we may conveniently examine the contention of the appellants that s. 26 of the Act of 1863 does not extend to the subject of text-books. I will not for this purpose dwell upon the view sketched above, according to which this section gives a general power of regulation, subject only to relevant enactments of the separate school law, and to the limitations necessarily implied in the fact that the power is given for the purpose of enabling Roman Catholics to carry on more satisfactorily their system of denominational schools; and that, at least, that section subordinates such schools to regulation by the Council in respect of all subject matters, which may from time to time fall within the ambit of its jurisdiction in relation to common schools.

I shall assume, for the present, that section 26 authorizes only such regulations as the Council might, at the date of the Act of 1863 have put into force under their existing powers in relation to common schools—but assuming that, I can discover no satisfactory reason for denying that such an authority would embrace the power to make recommendations as to text-books, and to disallow such text-books under clause 5 of the Act of 1859. I shall not repeat what I have said as to clause 5, I can think of no reason for excluding—under the construction contended for—the authority given by that clause from the power of regulation which is the subject of section 26.

Section 9 of the *Separate Schools Act* must not be overlooked. By that section trustees of such schools "shall perform the same duties and be subject to the same penalties as the trustees of Common Schools." There is no exception of the duties incumbent upon common school trustees under sections 27 (18) and 79 (15).

I have said that the view above stated as to the jurisdiction of the Council under the statutes of 1850 and 1859 (and incidentally, of the argument of the appellants that under those statutes the local boards of trustees were invested with completely autonomous powers in relation to the courses of study to be pursued in their several municipalities and school sections) was the view which dictated

the practice adopted by the Council and the Chief Superintendent in executing their duties under those statutes.

This is demonstrable from the documents in evidence. In 1855, a manual was published under the authority of the Council for the guidance of "trustees, teachers and local superintendents," giving the statutes of 1850 and 1853 (the *Grammar Schools Act*), "together with the forms, general regulations and instructions" for executing the provisions of those statutes. The publication was issued, no doubt, pursuant to the duty of the Chief Superintendent under section 35 (3) of the Act of 1850, which required him to "cause forms, instructions and general regulations of the Council to be printed from time to time," and distributed for the information of the officers of common schools; and the manual included "general regulations for the organization, government and discipline of the common schools of Canada" as well as a programme of studies entitled "The Order and Classification of Studies for the Common Schools in Upper Canada." Again, in a similar publication, issued under the authority of the Council, in 1861, and edited by the Deputy Superintendent of Schools, there appears the same programme, which is described as the "Order and Classification of Studies Prescribed for the Common Schools of Upper Canada, as observed in the Upper Canada Model Schools, Toronto," and it is stated that this programme had been adopted by the Council on the 31st December, 1858.

This programme directs, or at all events assumes, that the pupils are to be classified in three divisions, and it is stated that, in the Model Schools, pupils in these divisions are arranged in five classes, corresponding to the five reading books of the Irish National Series of Readers, which had been recommended by the Council. In the manual of the same description, published in 1864, compiled by the same editor, this programme again appears. It is not without importance to notice that certain subjects—trigonometry and some of the physical sciences—are given in this curriculum as "extra" subjects, which may be taught *at the discretion of the school authorities,* but not more than one in any single term. Still again, in a manual printed for the Council in 1863, after the enactment of the *Separate*

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*Schools Act* of that year, this same programme is reproduced and it is there said to be applicable to separate schools.

No inconsiderable weight attaches to these publications, issued successively under the authority of the Council, in the years 1856, 1861, 1863 and 1864, as indicating the view accepted by the Department as to the powers of the Council, and carried out with circumstances of the greatest publicity. It is impossible to suppose, moreover, that those responsible for the legislation of 1859 were ignorant of the proceedings of the Council. We have already seen that the enactments of the Act of 1850 touching the powers of the Council were reproduced without pertinent change in the Act of 1859; and it seems to be a fair inference from this, taken together with the unqualified language of s. 26 of the Act of 1863, as well as of s. 9 of that statute, that the Council had not misunderstood the scope of the powers with which it was intended to invest them. The Council, in professing to prescribe this programme of studies for the direction of those responsible for the conduct of the common schools, was assuming in the most public manner an over-riding authority in relation to such matters. In this the Legislature must be presumed to have acquiesced.

The appellants have not, I conclude, established their contention as to the autonomous jurisdiction of boards of trustees, and they fail equally, I think, in adducing satisfactory reasons for holding that, in scope of instruction, the common schools of 1867 were on the same footing as collegiate institutes, high schools or continuation schools to-day.

The system of public instruction, at Confederation, included a provincial university, grammar schools, a normal school with model school attached, common schools and separate schools, which, admittedly, for the present purpose, may be grouped with common schools.

On behalf of the appellants, it is argued that it was one of the functions of the common schools, at that date, to train pupils for entrance to the university and the learned professions, and for that purpose to provide the necessary instruction in Greek and Latin, mathematics and what were called the "higher branches of English"; that, in

this respect, they were, in truth, co-ordinate with the grammar schools.

The *Common Schools Act* of 1859 nowhere defines in terms the scope of the instruction to be imparted in such schools, but the type of school contemplated by the common school legislation may be inferred with confidence from the school legislation as a whole, and the official acts of the Council of Public Instruction and the Chief Superintendent, who were mainly charged with the administration of the school law.

Obviously, for our present purpose, the qualifications of teachers, the provision made for training them, the programmes of studies, officially promulgated, the character of the authorized text-books, may supply useful *indicia*. The Council of Public Instruction, which was entrusted with the office of regulating the conduct of the grammar schools and with the management of the Normal School, was also charged with duty, as we have seen, of regulating the programmes of study and prescribing text-books for common schools, and of prescribing the qualifications of teachers of such schools.

The programmes of study promulgated by the Council are in evidence, so, also, are the regulations prescribing the qualifications of teachers. The programmes are not framed with the view of fitting pupils for the university, as at once appears from a comparison of the list of subjects taught with requirements for matriculation; the qualifications for teachers are just as plainly not designed to provide instruction for any but the most elementary schools, and of the Normal School training, it is sufficient to say that Latin and Greek find no place in the curriculum. But, most important of all, are the lists of text-books recommended by the Council of Public Instruction for the common schools.

I have already mentioned that it was the duty of the local authorities to provide the schools with authorized text-books, and to see that no unauthorized books were used. It is true, as already observed, that there was, for years, much laxity in the enforcement of these rules, but it is beyond doubt that the school books necessary for effective instruction of pupils reading for matriculation in the university or for entrance into the learned professions,

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could not, if the law were observed, be used in common schools, at any time after 1847, when the first list of recommended books was sanctioned; and, after the year 1866, the use of a text-book in Latin or Greek, in a common school, would, by force of the regulation passed in that year, have entailed the loss of the government grant.

The position of the grammar schools in the system is also of considerable significance. The *Grammar School Act* of 1853 required each grammar school to make provision for instruction in the higher branches of a "practical English Education" in Latin, Greek and mathematics, so as to prepare students for the University of Toronto.

Grammar schools had been established long before, but the object of this Act was to cause them to take their proper place as intermediate schools between the common schools and the University. The Chief Superintendent repeatedly emphasizes the relative status of the two systems of schools. "The Grammar School should be a connecting link between the common schools and the University; the common schools should be the feeders of the grammar schools, and these should be the feeders of the University" (Report for 1850, p. 22). Such expressions occur frequently in the reports in evidence. In 1865, after the enactment of the *Grammar School Act* of that year, Dr. Ryerson addressed a number of circulars to local authorities explaining the object of the new statute, 19 Doc. History, pp. 41, 42, 43 and 44 (Exhibit 46). "The object of the Act is to make Grammar Schools what they were intended to be * * * * intermediate schools between the Common Schools and University College * * * * prepare pupils for matriculation in the university—to impart to others the higher branches of an English education, including the elements of French." These schools are not, he says "in any way the rivals of common schools, nor permitted to do common school work * * * * but a higher educational work which can be done by neither the common school on the one hand, nor by the College on the other." "The object of the Act," he says, "is to make your grammar school what it ought to be, a High School for your City—an intermediate school between common schools and the University", and pro-

viding a higher " English " education for those not desirous of studying Greek and Latin. " They are," he says, not to " poach upon common school ground," but to provide instruction supplementary to the " elementary " education of the common schools. The Act of 1865 and the new programme of studies under it, together with the regulations already mentioned, disallowing for common schools all text-books not recommended by the Council (a regulation having the effect of excluding grammar school subjects from the common schools, under penalty of loss of the government grant) finally marked in a decisive way the distinction between the respective rôles of the two classes of schools. The high schools and collegiate institutes of to-day are the decendants of the grammar schools, the " public schools " of the common schools.

It seems necessary to refer to the mass of quotations from the Chief Superintendent's reports adduced by the appellants for the purpose of shewing that common schools were subject in the matter of courses of study to the exclusive control of the boards of trustees, and in support of the contention, I have just been considering.

In reading these extracts, it is important, first of all, to remember that local autonomy was the rule for some years, and that it was only in 1850 that the Council received general powers of regulation; and, most important of all perhaps, that even in the vital matter of text-books it took years to bring the practice into conformity with the regulations. Then extracts, separated from the context, are apt to mislead.

I shall mention only a few of the passages quoted.

In his report for the year 1847, Dr. Ryerson states that there were, in that year, in Upper Canada, forty-one common schools in which Latin and Greek were taught, seventy, French, and seventy-seven, the elements of natural philosophy; 1847 being the year in which the first list of recommended books was published, a list not including a text-book in any of these subjects. The figures produced are in themselves of little value, but the change which occurs in a few years is important. By 1852, the last year for which the figures are available, seven schools were teaching Latin and two Greek. In the report of the year 1867, there is a significant statement. In that year,

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it appears from a table in the appendix, that in none of the cities (and these include Hamilton and London) were any text-books but authorized text-books in use—the result, perhaps, of the regulation, above mentioned, of 1866. Mr. Hellmuth, naturally enough, dwelt with some emphasis upon the report of the local Inspector for Hamilton for 1853, and that for London in 1863, as giving two conspicuous instances of common schools engaged in training pupils for matriculation in the University, and maintaining efficient clases in Latin, Greek and French. In 1867, as the report shews, this had ceased. I refer to one more extract. It is from a circular of the Chief Superintendent in the year 1847. In this circular, addressed to mayors of cities and towns, he appears to say that the local board of trustees is to determine (inter alia) "The subjects of instruction and the text-books to be used in each school" and this passage is adduced as supporting the appellants' contention as to the powers of boards of trustees. A circular issued a month later shews that, as to text-books, the Chief Superintendent only meant to say that trustees were entitled to select text-books from a list recommended by the Provincial Board of Education.

As to subjects of instruction, this circular was issued before the Act of 1850, in which clause 4 of section 119 of the Act of 1859 conferring on the Council, for the first time, general powers of regulation, first appeared.

My conclusion, after examining these extracts, with some attention, is that when read with due regard to date and context, and to the circumstances in which they were published, they afford little support to the appellants.

As against the argument the appellants seek to found upon these passages from a communication of 1847, may be set the official acts of the Council is prescribing programmes of studies, and the following passage from a letter published in March, 1866:

> Of private schools and their teachers, the law takes no note; but the Legislature, that provides by law funds for the support of public schools, has the undoubted right of prescribing the condition on which such schools shall be entitled to public aid. The Legislature has invested a body called the Council of Public Instruction, with the power and imposed upon it the duty to prescribe the subjects of instruction in the public schools, and the text-books, which shall be used in giving that instruction. A teacher of a public school is not, therefore, employed to teach

what subjects and books which he pleases but to teach those subjects and books which are provided by law, and no school is entitled to public aid which is not conducted according to law.

* * * *

The Legislature has authorized the Council of Public Instruction to prescribe and sanction text-books for the national schools, and to prohibit the use of others; and every school corporation and county boards are required to select text-books from the authorized list of such books; and if any such Board has recommended any text-book not in the authorized list, it has acted without authority and has violated the third clause of the Common School Act. With the law-abiding people, the law should be supreme.

On the first branch of the appeal, therefore, the appellants fail.

The appellants' claim in relation to the public grants rests upon s. 20 of the Act of 1863.

The principle of division laid down by that section assumes the existence of a fund, which has been appropriated for the benefit of the common schools generally in each municipality. It is upon this fund, so appropriated for a given municipality, that the section operates. The Act of 1863 contains no provision for the distribution among municipalities of public moneys granted for school purposes. In the absence of some specific appropriation it is necessary to resort to the provisions of the Act of 1859 to ascertain the fund in which, under s. 20, a given separate school is to share.

That statute deals with the distribution of moneys voted for common school purposes in sections 106, 120, 121 and 122. These sections enact, in effect, that moneys annually granted, in aid of common schools, shall, after providing for certain specific appropriations set forth in s. 120, and for any other express appropriations, be divided among the municipalities, according to population. The fund for each municipality having been thus ascertained, s. 20 comes into play.

It seems quite clear that the Legislature did not intend to tie its hands by s. 106 (1) in such a way as to necessitate the apportionment of all moneys voted for common schools, according to a fixed arithmetical ratio. The qualification "not otherwise expressly appropriated" sufficiently manifests the intention of the Legislature to reserve its freedom of action. A special appropriation directing the disbursement of moneys voted for the common schools on a different principle would, therefore, have involved in

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point of law no departure from or inconsistency with s. 106 or s. 20, and this applies to the methods of distribution now attacked. The fact that they are laid down in a general Act is, of course, immaterial.

Assuming s. 20 to have created a legal "right or privilege" within the meaning of s. 93 (1), it was not, and in the nature of things could not be, a right "by law" to require the Legislature to refrain from granting appropriations for special purposes or for the aid of schools reaching a certain standard of excellence or of school sections conforming to a certain standard of expenditure.

To none of the appropriations affected by the rules of apportionment, to which the appellants object, could a claim have been made under that section, or under that section combined with s. 106. The appellants have been deprived of nothing to which any "right or privilege," under those sections, could attach.

It may be said that although strictly the "right or privilege" in itself is not prejudiced by the legislation impeached, it is nevertheless rendered less valuable thereby. But, assuming that to be a legitimate ground of complaint, under s. 93 (1), there is no evidence of such prejudice, as affecting either the Roman Catholics as a whole or the representative plaintiffs. There is not the slightest reason for supposing that the existing grants, if distributed according to the arithmetical ratios of s. 106 and s. 20, would yield a larger sum for Roman Catholics as a whole. But, more important still, it is impossible to know (if under compulsion of a constitutional limitation, the Legislature were obliged to follow an unwise and wasteful plan of distribution) whether the grants would be as generous as they now are, under a system designed to ensure a fruitful expenditure. There is, of course, no suggestion that by the statutes now in force, separate schools are placed upon a footing of inequality with the public schools. Grants are shared by all schools alike, upon identical conditions.

During the argument it was suggested that it was not competent to the appellants by means of a Petition of Right to obtain (as they are attempting to do) a declaration that certain statutes of the Ontario Legislature are *ultra vires*. The question is important, and the appellants' right to maintain their petition in its present form is not

at all free from doubt. The Attorney-General, however, is content to have the questions raised passed upon in the present proceedings, and no such objection has been taken by him at any stage. A speedy determination of those questions is, moreover, obviously desirable in the wider public interest, and, in the circumstances, it would appear that the Court is not under a duty to consider the technical question, upon which no opinion is pronounced.

The appeal should be dismised.

MIGNAULT J.—Three claims, which are thus summarized by the Chief Justice, are advanced on behalf of the appellants:—

(A) Their claim "to establish and conduct courses of study and grades of education in Catholic separate schools such as are now conducted in continuation schools, collegiate institutes and high schools"; and that "all regulations purporting to prohibit, limit or in any way prejudicially affect such right or privilege are invalid and *ultra vires*";

(B) Their claim to exemption from taxation for the support of continuation schools, collegiate institutes and high schools not conducted by their own boards of trustees;

(C) Their claim to a share in public moneys granted by the Legislature of the Province of Ontario "for common school purposes" computed in accordance with what they assert to have been their statutory rights at the date of Confederation.

As to claims (A) and (B), I fully accept the judgment of the Chief Justice, and I feel that I cannot usefully add anything to what he has said in allowing these two claims. It seems to me inconceivable that when it granted to the Roman Catholics of Upper Canada the privilege of having their own separate schools, the Legislature could have intended to render this privilege valueless by allowing the Council of Public Instruction of that Province to restrict, by regulations, the scope of the education to be given in these schools. The educational systems both of Ontario and Quebec were established by the same Legislature, and it is a matter of common knowledge that in Quebec the religious minority of that province has always had full control of its own schools, including its high schools.

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To my very great regret, however, I find myself unable to accept in its entirety the decision of the Chief Justice with regard to the third claim. As briefly as possible, I will explain wherein my views differ from those of my Lord.

The appellants' case must be that a right or privilege with respect to denominational schools which the class of persons whom they represent had by law in the province at the Union has been prejudicially affected by the legislation of which they complain.

The crucial question therefore is: what was the right or privilege which this class of persons had by law at the Union to claim for their separate schools a share of public moneys granted by the Legislature for the support of common schools or for common school purposes? To answer this question, reference must be had to sections 20, 21 and 22 of the *Separate Schools Act* of 1863 (26 Vict., c. 5) which reads as follows:—

20. Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township.

21. Nothing herein contained shall entitle any such Separate School within any City, Town, Incorporated Village or Township, to any part or portion of school moneys arising or accruing from local assessment for Common School purposes within the City, Town, Village or Township, or the County or Union of Counties within which the City, Town, Village or Township is situate.

22. The Trustees of each Separate School shall, on or before the thirtieth day of June, and the thirty-first day of December of every year, transmit to the Chief Superintendent of Education for Upper Canada, a correct return of the names of the children attending such school, together with the average attendance during the six next preceding months, or during the number of months which have elapsed since the establishment thereof, and the number of months it has been so kept open; and the Chief Superintendent shall, thereupon, determine the proportion which the Trustees of such Separate School are entitled to receive out of the Legislative grant, and shall pay over the amount thereof to such Trustees.

There is no difficulty, nor is any complaint made, as to the distribution between common (or public) schools and separate schools of the Common School Fund, which

s. 20 describes as "the fund annually granted by the Legislature of this Province for the support of common schools".

The point on which, with great deference, I have been unable to agree with the Chief Justice is with respect to the character, either general, or both general and special, of "all other public grants, investments and allotments for common school purposes", of which, under s. 20, "every separate school" is entitled to a share.

In other words, what is the meaning and effect of the following language of s. 20: "Every separate school * * * shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the Province or the municipal authorities"?

Sections 20, 21 and 22 of the *Separate Schools Act* of 1863, I think, must be read with section 106 of the *Common Schools Act* of 1859, Consolidated Statutes of Upper Canada, 1859, chapter 64.

Section 106 is a long section, but I need specially refer only to subsection 1, the effect of which is to empower the Chief Superintendent of Education to apportion annually, on or before the first day of May, all moneys granted or provided by the Legislature for the support of common schools in Upper Canada, and not otherwise appropriated by law, to the several counties, townships, cities, towns and incorporated villages according to the ratio of population in each as compared with the whole population of Upper Canada.

Consistently with this enactment, s. 20 of the *Separate Schools Act* of 1863 states that every separate school shall be entitled to a share in the fund annually granted by the Legislature of the Province for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the Province or the municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months * * * as compared with the whole average number of pupils attending school in the same city, town, village or township.

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That is to say, the Chief Superintendent, as directed by s. 106 of the *Common Schools Act* of 1859, having apportioned all moneys granted or provided by the Legislature for the support of common schools in Upper Canada, and not otherwise appropriated by law, to the several counties, townships, cities, towns and incorporated villages according to the ratio of population in each as compared with the whole population of Upper Canada, every separate school is entitled to share in the amount thus apportioned, according to the average number of pupils attending such school during the twelve next preceding months, as compared with the whole average number of pupils attending school in the same city, town, village or township.

Consistently also, s. 22 of the *Separate Schools Act* of 1863, after requiring the trustees of each separate school to transmit twice annually a correct return of the names of the children attending such school, together with the average attendance during the six next preceding months, directs that the Chief Superintendent shall, thereupon, determine the proportion which the trustees of such separate school are entitled to receive out of the legislative grant, and shall pay over the amount thereof to such trustees. The trustees thus receive the share of the legislative grant to which their separate school is entitled from the Chief Superintendent, and the latter, in his apportionment, cannot apportion moneys otherwise appropriated by law.

In my opinion, the legislative grant which the Chief Superintendent apportions, and of which he subsequently pays a share to the trustees of each separate school, is a general grant for the support of common schools or for common school purposes. A special grant, say for the rebuilding of a particular school destroyed by fire, would be otherwise appropriated by law, and the Chief Superintendent could not deal with it in his apportionment. Section 20 of the *Separate Schools Act* places legislative grants on the same footing as municipal grants, and I cannot understand how the latter could be apportioned among the common and separate schools of the municipality unless they also are general grants.

Section 20, as I read it, embodies an undertaking, which is now binding on the Legislature of the Province of

Ontario by virtue of s. 93, sub-s. 1, of the *British North America Act,* that there should be then or thereafter no discrimination against the separate schools with regard to the common school fund and "all other public grants, investments and allotments for common school purposes". The grants, investments and allotments contemplated must have been of a general character, for "every separate school," as explained above, was entitled to claim a share therein. If the Legislature, after the passing of the *Separate Schools Act* of 1863, made such a grant, investment or allotment for common school purposes, no new enactment was required to entitle "every separate school" to a share therein, and in that sense there existed, at the Union, a "right or privilege by law" which could have been enforced before the courts. But, in my judgment, nothing in s. 20 would have entitled "every separate school" to claim a share in a grant made in favour of a particular common school. If, for instance, to refer again to the same illustration, the Legislature had granted $10,000 to rebuild a school in the city of Ottawa which had been destroyed by fire, it is to me inconceivable that "every separate school" in Ottawa could have asserted a claim, under s. 20, to a share in such a grant. Such special grants cannot be said to be grants "for common school purposes" within the meaning of s. 20. The generality of the apportionment contemplated, I think, indicates the generality of the grants which were to be apportioned among the common and separate schools respectively.

The appellants seem to concede this point. In their factum, they say:

> It may be that a grant by the Legislature towards the rebuilding of a school that has been destroyed by fire, or something of a like nature, might be construed not to be a grant for common school purposes. * * *

There is indeed an obvious distinction between a particular common school purpose, and common school purposes generally. It may be further observed that the whole context of s. 20 shews that both the Common School Fund and the other public grants referred to were general in their character, and were made in favour of all common and separate schools, since all of them participated therein. This admittedly was true of the Common School Fund, and I see no reason for doubting that the other public grants contemplated were also general grants.

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This is further shewn by the extract from the supply bill of 1865, at page 125 of the Appendix of Statutes. The grants for common schools thereby made were general grants. I think we have here an illustration of the contemporaneous practice at or near the time when these statutes were enacted.

It is said that the Legislature of Ontario may evade the obligation which results from s. 20 by the simple device of making special grants to each public school designated by its name. That a power may conceivably be abused is, however, no reason for denying its existence if it be clearly granted by law. But I do not think we should assume that this power to make special grants will be abused. The obligation undertaken by the Province, and rendered intangible by s. 93 of the *British North America Act,* is one of the safeguards stipulated by the religious minorities both of Quebec and of Ontario. It is even more than a legal obligation, it is, if I may say so, an obligation binding in honour. And I cannot assume that it will be deliberately evaded in the manner suggested.

In full agreement with the Chief Justice, I may add that conditions in excess of those laid down by s. 20 of the *Separate Schools Act* of 1863 cannot, in my opinion, be imposed on the separate schools in order to entitle them to obtain a share in the grants to which the section applies. That section is still in force and cannot be changed by the Legislature. I also agree that any statute which purports to impose such conditions, as well as all statutes and regulations which are in contravention of claims (A) and (B) of the appellants, are *ultra vires.*

NEWCOMBE J.—The suppliants, the board of trustees of the Roman Catholic separate schools for school section no. 2 in the township of Tiny, and the board of trustees of the Roman Catholic separate schools for the city of Peterboro, on behalf of themselves and the other boards of trustees of Roman Catholic separate schools in the province of Ontario, claim, by their amended petition of right,

(1) Payment of the sum of $736 to the first named board, that being the sum to which, under the Act of the former Province of Canada respecting Separate

Schools, c. 5, of 1863, s. 20, the board claims to be entitled for the year 1922 in excess of that which it has received.

(2) That it may be declared that certain Acts or parts of Acts of the legislature of Ontario respecting education, which are enumerated, and which were enacted in 1871 and subsequently, prejudicially affect the rights or privileges of the suppliants as claimed to have been conferred by the *Separate Schools Act* of 1863 and secured by s. 93 of the *British North America Act,* 1867, and that these provincial enactments are *ultra vires* in so far as they affect the rights of the suppliants.

(3) That it may be declared that the suppliants have the right to establish and conduct courses of study and grades of education such as are now conducted in the continuation schools, collegiate institutes and high schools of Ontario, and that any and all regulations purporting to prohibit, or in any way prejudicially to affect, such right are *ultra vires.*

(4) That it may be declared that the supporters of Roman Catholic separate schools are exempt from the payment of rates imposed for the support of the continuation schools, collegiate institutes and high schools not established or conducted by the suppliants or other boards of trustees of Roman Catholic separate schools.

(5) Such further or other relief as may be requisite.

The petition was dismissed at the trial, and the judgment was affirmed by the Appellate Division, from which it comes to this Court.

I agree that the appeal should be dismissed and with the reasons for that result which are expressed by my brother Duff, but perhaps I may usefully add the following.

I am satisfied that, even if the procedure by petition of right were available for the trial of the issues which the parties have presented, the suppliants' case must fail in all particulars. I shall consider presently the first claim of the petition, by which it is sought to recover the sum of $736. But, as to the other branch of the case, relating to the field within which a right is said to be secured to the trustees of the Roman Catholic separate schools of

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Ontario to carry on these schools, one cannot read the Statutes of 1859 and 1863 and the earlier Statutes, which must be read together, without realizing that the trustees are not at large, and that there were powers of regulation existing in the legislature at the time of the Union, and which were then carried forward, by the exercise of which the separate schools, equally with the common schools, were to be regulated and governed. The Council of Public Instruction had the comprehensive power, conferred by section 119, clause 4, of the Act of 1859,

> to make such regulations from time to time as it deems expedient for the organization, government and discipline of Common Schools, for the clasification of schools and teachers, and for school libraries throughout Canada.

And, when, by the Act of 1863, provision was made for the establishment and conduct of the Roman Catholic separate schools, it was declared by s. 26 that they

> shall be subject to such inspection as may be directed from time to time by the Chief Superintendent of Education, and shall be subject also to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada.

I have examined carefully the post-Union Statutes and Regulations of which the suppliants complain, but I am unable to perceive that any of these operates prejudically to affect any right or privilege which the suppliants, or the class of persons they represent, had by law in the province at the Union. If these provisions had been prescribed by the Council of Public Instruction previously to the Union, there could have been no sound objection to their validity, and the powers of regulation which, within the scope of the Acts of 1859 and 1863, the province possessed at the Union were not reduced by the *British North America Act*. The denominational schools to which s. 93 (1) refers, so far as they were Roman Catholic separate schools of Upper Canada, were regulated schools, and I do not doubt that the provisions to which the suppliants object are within the powers of regulation which the Province had in 1863, and continued to possess at and after the Union.

With regard to the $736, that is claimed as part of the appropriations sanctioned by the legislature in aid of the schools for the year 1922. But the money appears to have been applied in the manner authorized by the Statutes as expressed, and I can find no sanction for diverting any part of it to a different purpose. There is nothing in the *British*

*North America Acts* to compel the legislature to make a grant, or to avoid conditions prescribed for earning it, or to prevent a specific appropriation. Therefore, to put cases which appear to be very plain and simple, if the grant be for the sole benefit of one of the common schools, or if it be payable only to those schools which comply with a condition, for example, that they have a specified attendance, or a certain standard of efficiency, it is nevertheless an effective grant, and it would require the authority of the legislature to direct that it shall be shared by other schools, or by those which do not comply with the legislative conditions imposed.

It is said in effect, and this branch of the case depends upon the proposition, that, when such a grant is made, the board of trustees of a Roman Catholic separate school has, by force of the legislation as it stood at the Union, and by the effect of s. 93 (1) of the *British North America Act,* 1867, a legal right or privilege to enforce against the Provincial Government payment of a share of the grant in the proportion of the average number of pupils attending that separate school to the whole average number attending school in the same city, town, village or township; and, strangely enough, that contention is put alongside of another which maintains that the Special Act, or the Act which imposes the condition, is *ultra vires* of the legislature. I can understand, although I cannot justify, the latter suggestion. It involves the argument that legislative capacity for the grant in question has been withheld. But I confess I do not see how it is that, if, as must be the case, the authority of the legislature is necessary to the making of a grant, that grant can operate for a purpose which was not authorized by the provisions which sanction it. The court cannot take the place of the legislature to make a grant. The *British North America Act* has been productive of some results which perhaps were not anticipated, but it has not, I am persuaded, created anything so difficult of conception as a present legal right to share in a future legislative grant, and still less when the grant is by its terms not shareable, nor capable of distribution in the manner claimed. Therefore in this particular also the petition must fail, whether its

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object be to enforce payment of the $736, or to obtain a declaration of the invalidity of the grants.

RINFRET J. concurs with Anglin C.J.C.

LAMONT J.—The question for determination in this appeal is whether certain legislation enacted by the Legisture of the Province of Ontario was beyond the power of the Legislature to enact.

For the appellants it is contended that it was; that it amounted to a contravention of s. 93 (1) of the *British North America Act* of 1867. That section reads as follows:—

> 93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—
>
> (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union."

The particular respects in which the appellants contend that their rights were invaded by the impeached legislation, are:—

1. That it takes away the right of the Roman Catholics to have taught in their separate schools all the courses of study and subjects of instruction which are now being taught in the continuation schools, collegiate institutes and high schools of Ontario and that as a consequence thereof the Roman Catholic ratepayers are taxed for the support of these institutions, from which taxation they should be exempt.

2. That it altered the basis of the annual grants made by the Legislature for public school purposes in a manner which prejudicially affects the share thereof which each separate school is entitled to receive.

The argument on behalf of the appellants on the first branch of the case, briefly put, is as follows: That prior to Confederation the Roman Catholics of Ontario had, by law, the right to have their denominational schools managed by trustees of their own faith and choosing; that, as part of the management thereof, the trustees of each separate school had the right to prescribe the courses of study to be taught in their school; that this right was confirmed to them by s. 93 (1), above quoted, and, as a

consequence of such confirmation the Legislature after Confederation was powerless to validly impose any restriction or limitation upon their said right, or to prevent the trustees of such schools from causing to be taught therein all the subjects now being taught in the continuation schools, collegiate institutes and high schools. That these institutions are to-day teaching only the subjects taught in the common schools prior to Confederation, and, as by law separate school supporters are exempt from contributing to the support of common schools, they are exempt from contributing to the support of institutions doing common school work. What we have to ascertain in the first place, therefore, is: Did the trustees of the separate schools at Confederation have an unqualified and unfettered right by law to prescribe the courses of study to be taught in their schools. If so the legislation impeached in this action is an infringement of that right and, therefore, invalid.

The rights and privileges in respect to denominational schools which the Roman Catholics of Ontario had by law at Confederation, were those given to them by the Act of 1863 (26 Vict., c. 5). Section 2 of that Act provided that any number of persons, not less than five, and being heads of families and Roman Catholics, might convene a public meeting of persons desiring to establish a separate school for Roman Catholics and for the election of trustees thereof. Section 3 provided for the election of three of such persons present to act as trustees "for the management of such separate school". The trustees were declared to be a body corporate and to have power to impose, levy and collect school rates from persons sending children to or subscribing toward the support of such schools, but persons paying rates to separate schools were declared exempt from contributing to the support of the common schools. In addition the trustees were to have all the powers in respect of separate schools that the trustees of common schools had and possessed under the Act relating to common schools (s. 7). It was also enacted that the trustees of separate schools should perform the same duties and be subject to the same penalties as the trustees of common schools (s. 9).

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Then s. 26 reads as follows:—

26. The Roman Catholic Separate Schools (with their Registers), shall be subject to such inspection, as may be directed from time to time, by the Chief Superintendent of Education, and shall be subject also, to *such regulations* as may be imposed, from time to time, by the Council of Public Instruction for Upper Canada.

Turning now to the Act respecting Common Schools (C.S.U.C. 1859, c. 64) we find therein set out the powers, duties and obligations of the trustees of common schools (ss. 27 and 79). There it is expressly stated to be the duty of the trustees to see that the schools under their charge were conducted according to the authorized regulations and to see that no unauthorized text books were used.

By s. 119 (4) it was expressly declared to be the duty of the Council of Public Instruction

To make such regulations from time to time, as it deems expedient, for the organization, government and discipline of Common Schools, for the classification of Schools and Teachers, and for School Libraries throughout Upper Canada.

Does the authority to make regulations for the "organization, government, discipline and classification" of schools, include authority to make regulations prescribing the courses of study to be taught therein? The language of the section is, it seems to me, sufficiently wide to cover such authority. Furthermore, both before 1859 and afterwards until Confederation, the Council of Public Instruction had not only been in existence with the duty and authority set out in s. 119 (4), but, acting under that authority, had prescribed the courses of study in the common schools. This shows that prior to Confederation it was understood and accepted that the Council's authority to make regulations for the common schools embraced that of prescribing the studies to be taught therein. Then again the history of the legislation is instructive:

Under the *Common Schools Act* of 1841 (4-5 Vic., c. 18) it was the duty of the trustees (then called commissioners):

To regulate for each school, respectively, the course of study to be followed in such school, and the books to be used therein, and to establish general rules for the conduct of the Schools.

At that date the local authorities had an unrestricted control over the courses of study. Two years later, however, a restriction was placed upon their powers. By 7 Vict. c. 29 (1843), it was declared to be the duty of the trustees

To regulate for such School the course of study, and the books to be used therein, and to establish general rules; subject, nevertheless, to the approval of the Township, Town or City Superintendent.

This Superintendent was appointed by the council of the township, town or city.

Under this Act the power to prescribe the courses of study could only be exercised by the joint concurrence of the trustees and the local superintendent. But although this Act restricted the control of the trustees there was, as yet, no attempt at central control.

In 1846 (9 Vict., c. 20) it was enacted that the Governor might appoint a fit and proper person to be superintendent of schools in Upper Canada, whose duty it was to be

To prepare suitable forms and regulations for making all Reports, and conducting all necessary proceedings under this Act, and to cause the same, with such instructions as he shall deem necessary and proper for the better organization and government of Common Schools, to be transmitted to the Officers required to execute the provisions of this Act. * * *

Section 27 of the Act provides as follows:—

And be it enacted, that it shall be the duty of the Trustees of each School section: * * * To see that the School is conducted according to the regulations herein provided for; * * *

A comparision of the Acts of 1843 and 1846 shews that in both Acts the duties of the trustees are set out at length, but, while in the Act of 1843 express authority was given to the trustees to prescribe the courses of study, with the consent of the local superintendent, no such authority appears in the Act of 1846; but in that Act it was declared to be the duty of the trustees to conduct their schools in accordance with the regulations therein provided for, which regulations were those authorized to be made by the Superintendent of Schools for Upper Canada for "conducting all necessary proceedings under this Act."

In 1850 a further step was made by the appointment of the Council of Public Instruction with the powers set out in s. 119 (4), above quoted, which council took the place of the Superintendent of Upper Canada so far as the question under discussion is concerned.

Considering the wide language in which the authority of the Council of Public Instruction to make regulations is expressed, the course of the legislation and the practice prevailing over many years, I am of opinion that it was the intention of the Legislature prior to Confederation, in

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order to secure greater uniformity, to vest in the Council of Public Instruction authority to prescribe the courses of study for the common schools. That being so and the Roman Catholic separate schools being, by s. 26, expressly made subject to such regulations as might from time to time be imposed by the Council of Public Instruction, the trustees of each separate school at Confederation were in duty bound to see that their school carried out such programme of studies as the Council of Public Instruction might, by virtue of the authority vested in them to make regulations, impose.

For the appellants it was argued that, even if that were so, it was incumbent upon the Council of Public Instruction to exercise their authority and actually make regulations for separate schools before the right of the trustees to prescribe the studies would be displaced and that as, up to Confederation, no such regulations had been made, the effect of s. 93 (1) was to confirm the right of the trustees unfettered by any regulation which might afterwards be made.

In my opinion this contention cannot be supported, for even assuming (which is disputed) that up to Confederation no regulation as to the courses of study in separate schools had been made by the Council of Public Instruction, the authority of the Council to prescribe these courses by regulation was always there, and the right of the trustees was always subject thereto. It was the right of the trustees to manage their separate schools subject to the right of the Council to step in and make regulations relating (*inter alia*) to courses of study, that was confirmed by s. 93 (1).

The right of the Council to prescribe the subjects to be taught did not mean (as the appellants seem to fear) that in the exercise of the right the Council could, by forbidding the teaching of subjects beyond those required—say for a Kindergarten class—in effect destroy the separate schools. No authority, in my opinion, was ever given, either to the Superintendent of Upper Canada or to the Council of Public Instruction, to make regulations which would wipe out, wholly or in part, either the common or the separate schools. Prior to Confederation the Legislature could have done this, but after Confederation even the Legislature

was powerless to abolish separate schools. The power bestowed upon the Council was to make regulations for the organization, government, discipline and classification of common schools. At Confederation the common schools had a distinct and definite place in the system of education of Upper Canada. They were to furnish the elementary instruction for the pupils of their respective school districts; while the grammar schools were to furnish instruction

> in all the higher branches of a practical English and Commercial Education, including the Elements of Natural Philosophy and Mechanics, and also in the Latin and Greek Languages and Mathematics so far as to prepare students for University College or any College affiliated to the University of Toronto. * * * (*Grammar Schools Act*, 1853, 16 Vict., c. 186, s. 5.)

As was stated by the Chief Superintendent in a circular issued by him in 1866, the object of the Grammar School law was

> to make the Grammar Schools the High Schools of their respective localities—intermediate schools between the Common Schools and the University, in arts, in law, and in the department of civil engineering, to give to intended surveyors their preliminary education, and to impart the higher branches of an English and commercial education to those youths whose parents do not wish them to study Greek and Latin.

In the educational system of Upper Canada the common schools were, therefore, intended to be the primary schools, with the grammar schools as intermediate schools between the common schools and the University. These were their respective fields, and the duty of the Council was to make regulations prescribing courses of study which would enable the schools to effectively provide instruction covering the field which the Legislature intended they should occupy, but not to destroy or limit their usefulness by restricting the field of their operations.

In the actual working out of the system no doubt there were common schools which taught subjects that were intended to be taught in the grammar schools, and, no doubt, some grammar schools gave instruction in subjects covered by the primary course, but this over-lapping was, I think, due to the exigencies of the particular localities. It must not be forgotten that at that time the province was young and in process of being settled. Some settlements grew more rapidly than others, with the result that they required educational facilities beyond those which the common schools were intended to supply, before sufficient

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provision was made in these settlements for secondary education; while in other settlements, whatever may have been the cause thereof, the grammar schools, instead of confining themselves to the work of intermediate schools, were found to be furnishing instruction in subjects some of which belonged properly to the intermediate course, while others belonged to the elementary course of the common schools. It is not, however, to the manner in which the system worked out in actual practice that we must look for guidance in determining the sphere of operation of the primary and intermediate schools, but to the intention of the Legislature as disclosed in the various Acts.

Once we know the limits of the field which it was intended the common schools should occupy, we know the field to be covered by the separate schools, for, in my opinion, in so far as secular education was concerned the separate schools were intended to be simply common schools under denominational management.

The right of the Roman Catholics, however, to have separate schools carries with it, in my opinion, the right to have separate schools of the class of the common schools at Confederation, and covering the same field so far as secular education is concerned; that is to say, primary schools furnishing elementary instruction.

The line of demarcation between the primary and intermediate schools may not always have been definitely drawn or closely adhered to, for the reason that it was at times difficult to keep, or to induce the ratepayers to keep, the educational facilities up to the requirements of the respective localities, but I do not think it can reasonably be said that the separate schools of to-day under the impeached legislation have lost their status as primary schools of the class to which the Act of 1863 intended them to belong.

The appellants also relied upon s. 79 (8) of the *Common Schools Act* of 1859, which declared it to be the duty of the board of school trustees of every city, town and village

To determine the number, sites, kind and description of schools to be established and maintained in the city, town or village.

They contended that "kind and description" in this subsection meant the "grade or character" of the school

which would necessarily include the courses of study and branches of education taught therein, and they referred to the decision of the Privy Council in *Ottawa Separate Schools Trustees* v. *Mackell* (1), as supporting their contention.

In that case their Lordships, at page 71, say:—

> The "kind" of school referred to in sub-s. 8 of s. 79 is, in their opinion, the grade or character of school, for example, "a girls' school," "a boys' school," or "an infants' school," and a "kind" of school, within the meaning of that subsection, is not a school where any special language is in common use.

By the examples given their Lordships have indicated that the "kind," "grade or character" of a school which the trustees have a right to determine refers rather to the class of persons for whose education the school was to provide than to the courses of study to be taught in such school. The term, in my opinion, would also cover the right to determine whether the school should be a central, branch or ward school. I am, however, unable to find anything in the judgment which lends support to the appellants' contention that the "grade or character" of the school implies a right to grade in the sense of prescribing the courses of study. The examples given, in my opinion, point to the opposite conclusion.

I am, therefore, of the opinion that the impeached legislation so far as this branch of the case is concerned, does not prejudicially affect any right or privilege guaranteed to the separate schools by s. 93 (1) of the *British North America Act,* 1867.

This conclusion disposes of the further contention of the appellants that the Roman Catholic ratepayers were not liable to taxation for continuation schools, collegiate institutes and high schools.

The only exemption they had under the Act was that they should not be liable to contribute toward the support of common schools, that is, as I have said, schools furnishing elementary instruction.

The continuation schools, collegiate institutes and high schools under the legislation and regulations in force, all furnish instruction in matters pertaining to secondary edu-

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cation and they cannot, in my opinion, be classed as common schools. The Roman Catholic ratepayers are, therefore, not exempt from taxation for the support of these institutions.

On the other branch of the case the contention of the appellants is that the impeached legislation has altered to their prejudice the basis of distribution of legislative grants which prevailed at Confederation.

The right of a separate school to share in the legislative grants is governed by s. 20 of the Act of 1863. That section reads as follows:—

> 20. Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities, according to the average number of pupils attending such School during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending school in the same City, Town, Village or Township.

The object of this section was to enable the separate schools to obtain a share of the legislative grants for common schools.

It will be observed that there is no obligation on the legislature to make any grant, but the section provides that such grants as the legislature shall make for common school purposes are to be distributed upon the basis set out in the section.

The difficulty, in my opinion, is not with the basis of distribution but in determining what moneys are to be deemed grants within the meaning of the section. As to the "fund annually granted by the Legislature for the support of common schools", both respondent and appellants appear to be agreed that it relates to a fund known as the "Common School Fund" concerning which no question arises in this litigation. It is as to the construction to be placed upon the words "all other public grants for common school purposes" that the parties differ. To my mind the question involved, stated briefly, is: Are "public grants * * * for common school purposes" to be limited to general grants in which all schools are to share, or do they include grants made for a specific purpose or grants made conditional upon their being earned.

The respondent contends that a grant for a specific purpose or a grant made conditional upon its being earned, is not a grant for common school purposes within the meaning of s. 20.

The contention of the appellants as set forth in their factum is as follows:—

> It may be that a grant by the Legislature towards the rebuilding of a school that has been destroyed by fire, or something of a like nature, might be construed not to be a grant for Common School purposes, but that a grant to Common, now called Public, Schools, dependent upon their attaining a certain standard of efficiency or equipment or raising a sufficient amount of money to pay expensive teachers, is not such a grant as will entitle the Roman Catholic Separate Schools to share in, is denied by the appellants, and it is submitted such a grant is distinctly a grant for Common School purposes, whether called special or general.

It will be observed that under s. 20 the distribution is to be made between the common and separate schools in each city, town, village or township.

At the time s. 20 was enacted the statutory provision governing the apportionment of the legislative grants was s. 106 (1) of the *Common Schools Act* of 1859, which reads as follows:—

> 106. It shall be the duty of the Chief Superintendent of Education and he is hereby empowered—
>
> 1. To apportion annually, on or before the first day of May, all moneys granted or provided by the Legislature for the support of Common Schools in Upper Canada, and not otherwise appropriated by law, to the several Counties, Townships, Cities, Towns and Incorporated Villages according to the ratio of population in each, as compared with the whole population of Upper Canada.

The sum, therefore, which the Chief Superintendent had for apportionment was not the whole of the moneys voted by the Legislature for the support of common schools, but only such portion thereof as remained after deducting the amounts "otherwise appropriated by law." Having made the apportionment on the basis of population among the counties, townships, cities, towns and villages, it was then the duty of the Chief Superintendent to determine the proportion of the moneys allotted to each city, town and village or township, which the trustees of the separate schools situate therein respectively, were entitled to receive (s. 22 of the Act of 1863). As the sum total of the moneys apportioned did not include the portion of the grant "appropriated by law", that is specifically appropriated by the Legislature, the separate schools were not entitled to share in such portion. That the separate

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schools cannot rightfully claim a share of the moneys appropriated by the Legislature to specific purposes seems to me to be clear and is, I think, practically admitted by the appellants in their factum. If, for example, the Legislature were to make a grant to assist in rebuilding a certain school house destroyed by fire, would the trustees of a separate school in the same township be entitled to a share thereof by virtue of s. 20? In my opinion they would not. If the trustees brought an action to enforce such a claim it would be a good answer thereto that the Legislature had voted the money for a specific purpose and that it could not be properly applied to any other purpose. In such a case a court could not properly direct that the moneys be applied in a manner other than that specifically directed by the Legislature. The same reasoning applies to a grant for apportionment among schools attaining a certain standard of efficiency or equipment, or made payable upon the performance of a condition. Unless the required standard be attained or the condition performed the grant would not be available for distribution.

I am, therefore, of opinion that by "Public grants * * * for Common School purposes" in s. 20, the Legislature meant general or unconditional grants in which all schools were to share. In other words, "Grants * * * for Common School purposes" meant "Grants for the purposes of all Common Schools". These would include conditional grants for the same purpose once the condition had been performed. But as the authority of the Legislature to say whether or not any grant at all should be made, or to specify the conditions upon which public moneys shall be devoted to school purposes, is supreme, the only limitation imposed by s. 20 upon the exercise by the Legislature of its authority, so far as conditional grants are concerned, is that the separate schools must be given the same right as the common (now public) schools, to perform the conditions and earn the grant.

I would dismiss the appeal.

*Appeal dismissed.*

Solicitor for the appellants: *Thomas F. Battle.*

Solicitors for the respondent: *Tilley, Johnston, Thomson & Parmenter.*

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lative and municipal grants of public moneys for any purpose that was, under the law at Confederation, a common school purpose, (saving grants to high schools in continuation of former grammar school appropriations), would, if valid, prejudicially affect a right or privilege with respect to their denominational schools which Roman Catholics had by law at the Union and is, therefore, *ultra vires*. Every grant for a common school purpose, whether made for a particular school or schools, or made subject to some restrictive term or condition, is covered by s. 20 of the *Separate Schools Act*, 1863, and therefore comes within the ambit of the protection of s. 93 (1) of the *B.N.A. Act*, and cannot be made so as to preclude the right of separate schools to share therein unless compensation to them for their proportion thereof is otherwise provided. The Common and the Separate Schools Acts alike were continued in force after the Union by s. 129 of the *B.N.A. Act* as provincial legislation of Ontario, subject to repeal and amendment by the legislature, as to common schools without restriction, and as to separate schools within the limitations imposed by s. 93 (1) of the *B.N.A. Act* (*Dobie* v. *The Church Temporalities Board*, 7 App. Cas. 136, at p. 147; *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*, [1896] A.C. 348, at pp. 336-7). The presence of the words "this Province" and "the Province" in s. 20 of the *Separate Schools Act* of 1863 did not render that provision inapplicable after Confederation. Those terms meant after Confederation the new province of Ontario. The words "and not otherwise appropriated by law," appended in s. 106 of the *Common Schools Act*, C.S.U.C. 1859, c. 64, to the description of the legislative grants to be apportioned, do not present a formidable difficulty. S. 20 of the Act of 1863 is subsequent legislation, and, so far as there may be inconsistency, its terms must prevail over those of s. 106 of the Act of 1859. S. 20 of the Act of 1863 precludes an appropriation by law of any grants made for common school purposes which would prevent the separate schools sharing proportionately in them.—*Quaere*, whether the legislature could validly formulate a scheme or impose conditions for the distribution amongst the separate schools themselves, other than on the basis of average attendance, of the proportion of the total grants for common school purposes, as understood at Confederation, to which the separate schools as a whole are entitled.—*Per* Duff and Newcombe, JJ.: Under the legislation existing at Confederation, Roman Catholic separate schools were subject to regulation by the Council of Public Instruction for Upper Canada. Giving their natural sense to the words of s. 26 of the *Separate Schools Act* of 1863, the Council had a general power of regulation. This power would be subject only to relevant enactments of the separate school law and to the limitations necessarily implied in the fact that the power was given for the purpose of enabling Roman Catholics to carry on more satisfactorily their system of denominational schools. Subject as aforesaid, there is no good reason for restricting the natural sense of the words of s. 26. Another possible view is that s. 26 subordinated separate schools to regulation by the Council in respect of all subject matters which might from time to time fall within the ambit of its jurisdiction in relation to common schools, under the existing Common School Acts or subsequent amending legislation. In any case, and even assuming (but not accepting) that the Council's regulative powers as to separate schools could be taken as confined to the subject matters which were within the field of its authority in relation to common schools at the date of the passing of the *Separate Schools Act* of 1863, those powers (even if so confined as last mentioned) covered regulation as to scope and conduct of instruction, including courses of study and text-books. Not only does this appear on a proper construction of the common school legislation itself, but it was the view which, as shown by the documents in evidence, dictated the practice of the Council in exercising its functions under the Common School Acts of 1850 and 1859, in which practice, carried out under circumstances of the greatest publicity, the legislature, in view of its re-enactments without pertinent change in the Act of 1859, and the unqualified language of ss. 26 and 9 of the Act of 1863, must be presumed to have acquiesced.—In scope of instruction common schools or Roman Catholic separate schools were not, at Confederation, on the same footing as collegiate institutes, high schools or continuation schools to-day. Viewing the school legislation as a whole as it stood at Confederation, its history, and the official acts of those charged with administration of the school law, as shown by official documents in evidence and having regard especially to the required qualifications of teachers, the provision made for training them, the programs of studies officially promulgated, and the character of the authorized text-books, it is plain that such schools were intended to be elementary schools only.—The principle of division laid down by s. 20 of the *Separate Schools Act* of 1863 assumed the existence of a fund which had been appropriated for the benefit of the common schools generally in each municipality. It was upon this

fund, so appropriated for a given municipality, that the section operated; it operated only after the fund for each municipality had been ascertained under the distribution provided for in ss. 106, 120, 121 and 122 of the *Common Schools Act* of 1859. The legislature did not intend to tie its hands by s. 106 (1) of the Act of 1859 in such a way as to necessitate the apportionment of all moneys voted for common schools, according to a fixed arithmetical ratio. The qualification "not otherwise expressly appropriated" sufficiently manifests its intention to reserve its freedom of action. Assuming s. 20 to have created a legal "right or privilege" within s. 93 (1) of the *B.N.A. Act*, it was not a right "by law" to require the legislature to refrain from granting appropriations for special purposes or for the aid of schools reaching a certain standard of excellence or of school sections conforming to a certain standard of expenditure. There has been no deprivation of anything to which any "right or privilege" under s. 20 or under s. 20 combined with s. 106 could attach. Nor is there any evidence that the alleged right or privilege has been rendered less valuable by the impeached legislation (assuming that to be a legitimate ground of complaint under s. 93 (1) ). There is no reason for supposing that the existing grants, if distributed according to the arithmetical ratios of ss. 106 and 20, would yield a larger sum for Roman Catholics as a whole. But, more important still, it is impossible to know, if under compulsion of a constitutional limitation the legislature were obliged to follow an unwise and wasteful plan of distribution, whether the grants would be as generous as they now are. There is no suggestion that by the statutes now in force Roman Catholics are placed upon a footing of inequality with the public schools. Grants are shared by all schools alike, upon identical conditions.—*Quaere* as to suppliants' right by petition of right to obtain a declaration that certain Ontario statutes are *ultra vires*.—*Per* Mignault J.: The legislative grant which the Chief Superintendent was to apportion under s. 106 (1) of the *Common Schools Act* of 1859, and of which he subsequently was to pay a share to the trustees of each separate school, was a general grant for the support of common schools or for common school purposes. A special grant, say for the rebuilding of a particular school destroyed by fire, would be "otherwise appropriated by law," and he could not deal with it in his apportionment. Such special grants could not be said to be grants "for common school purposes" within the meaning of s. 20 of the *Separate Schools Act* of 1863.—Conditions in excess of those laid down by s. 20 cannot be imposed on the separate schools to entitle them to share in the grants to which it applies. Any statute purporting to impose such conditions, as well as all statutes and regulations contravening the suppliants' first two claims, are *ultra vires*.—*Per* Newcombe, J.: The powers of regulation which, within the scope of the Acts of 1859 and 1863, the province possessed at the Union were not reduced by the *B.N.A. Act*. The denominational schools to which s. 93 (1) refers, so far as they were Roman Catholic separate schools of Upper Canada, were regulated schools, and the provisions to which the suppliants object are within the powers of regulation which the province had in 1863, and continued to possess at and after the Union.—There is nothing in the *B.N.A. Act* to compel the legislature to make a grant, or to avoid conditions prescribed for earning it, or to prevent a specific appropriation.—*Per* Lamont J.: At Confederation the Council of Public Instruction had authority to make regulations, including the prescribing of the courses of study, for the common and separate schools. This appears on the proper construction of the *Separate Schools Act* of 1863 and the *Common Schools Act* of 1859, from the history of the legislation, and from the accepted practice carried on. It was the trustees' right to manage their separate schools subject to the Council's said regulative powers, that was confirmed by s. 93 (1) of the *B.N.A. Act*. The Council's powers would not enable it to make regulations which would wipe out, wholly or partially, the common or the separate schools. The common schools, at Confederation, had a distinct and definite place in the educational system of Upper Canada. They were intended to be the primary schools, furnishing elementary instruction, with the grammar schools as intermediate between them and the University; and the Council's duty was to make regulations prescribing courses of study which would enable the schools to provide effectively instruction covering the field which the legislature intended they should occupy. The separate schools, as to secular education, were intended to be simply common schools under denominational management, and covered the same field as the common schools. The line of demarcation between the primary and intermediate schools may not always have been definitely drawn or closely adhered to; there may have been some overlapping in instruction, due to the exigencies of particular localities; but the legislature's intention as disclosed in the various Acts, and not the manner in which the system worked out in actual practice, should be the guide in determining the sphere of

G. to be held liable to the bank, as holder in due course, to the extent of his *ex facie* obligation under his endorsement, not merely for whatever indebtedness of L. Co. he had undertaken to guarantee, but for any indebtedness of plaintiff to the bank; and this obvious alteration in G.'s position involved a substantial extension of his responsibility which released him from liability to the plaintiff. The principle of *Archer* v. *Hudson*, 7 Beav. 551, and other cases cited, applied.—Plaintiff's unsupported testimony by which he sought to modify or restrict the plain meaning and effect of his general hypothecation to the bank, was wholly inadmissible and ineffectual. (*Forman* v. *Union Trust Co.* [1927] S.C.R. 1).—S. 26 (*r*) of *The King's Bench Act*, Man. (providing that "giving time to a principal debtor, or dealing with or altering the security held by the principal creditor, shall not of itself discharge a surety or guarantor * * * " did not apply. The security held by the creditor to which the enactment refers is not the obligation either of the debtor or of the surety, nor the instrument evidencing such obligation, but some other security held by the creditor for its performance. Here the charge against the plaintiff was not that of having dealt in an unauthorized manner with any such security, but rather that he had so dealt with the very instrument evidencing the surety's contractual obligation itself.—*Held*, further, that the facts, known to plaintiff, that G. endorsed the note only for use as collateral to a bank, and would not have endorsed it had he known it was to be used for advances to be made by plaintiff, a money lender, vitiated G.'s consent and prevented any obligation arising on his part in favour of the plaintiff. *Smith* v. *Wheatcroft*, 9 Ch. D. 223, at p. 230, and other authorities, cited.—*Held*, further, that as G. endorsed the note for the sole purpose of being used for a loan of $10,000 to be made in five advances of $2,000 each to L. Co., which advances were necessary to carry out an arrangement with creditors, the plaintiff, who knew these facts, by refusing and failing (as found by the court) to advance the final $2,000 promised, declined to fulfil an essential condition of G's undertaking of his obligation of guarantor, and thereby discharged him from his liability. (*Burton* v. *Gray*, 8 Ch. App. 932; *Whitcher* v. *Hall*, 5 B. & C. 269, at p. 275).—The burden of proving that the note was to be a general continuing collateral security, as alleged by plaintiff, was on him. (*In re Boys*, L.R. 10 Eq. 467; *Tatam* v. *Haslar*, 23 Q.B.D. 345, at p. 348).—Further, the court was inclined to hold that, assuming that plaintiff could claim against G. for the $8,000 advanced on the note, the claim



was satisfied, partly by certain payments, by his appropriation of which the plaintiff was bound, and partly by a payment on a Government contract obtained by L. Co. and assigned to plaintiff. Though, as against L. Co., plaintiff might have a right to apply the payment received on the Government contract first against other moneys advanced to L. Co. to enable it to carry out that contract, yet he had no such right as against G. who was entitled to have his stipulation as to Government contract moneys (see first paragraph *supra*) carried out. (*Newton* v. *Chorlton*, 10 Hare, 646, at p. 653). Failure to apply these moneys as stipulated for by the surety would amount to a variation in the contract which would release him. (*Can. Bank of Commerce* v. *Swanson*, 33 Man. R. 127; *Pearl* v. *Deacon*, 1 DeG. & J., 461). GORDON *v.* HEBBLEWHITE..... 29

2——*Bond against embezzlement or theft by city employee—Bond limited to cover only embezzlement or theft committed within* 12 *months prior to notice of discovery — Employee's falsification of books to cover previous defalcations—Time of embezzlement or theft—Onus of proof—Particulars of claim — Amendment — Terms of bond—Renewal—Offence committed before, but discovered after, renewal—Complaint as to city's answers to questions in regard to proposed guarantee—Employee's failure to fulfil, and city's neglect to enforce, statutory requirements—Alleged failure by city to notify discovery of judgment against employee.*] Defendant, by bond dated 20th June, 1907, agreed to make good to plaintiff city, to the extent of $10,000, pecuniary loss sustained through embezzlement or theft of money by its tax collector in connection with his duties. The bond was renewed yearly, the last renewal being for the year beginning 1st October, 1922. The collector received payment of taxes in currency or cheques. From time to time, usually daily, he handed to a clerk or placed in the cash books for entry such of the receipted tax bills as he desired to account for at that time. These were in due course entered in the cash books. The total amount of the bills so entered was made up, and the collector then gave the clerk a corresponding amount in cheques and currency, for which the clerk made out a deposit slip, which, with the cheques and currency, was handed to the city treasurer whose duty it was to make the bank deposits. From the collector's cash books the payments thus recorded were credited in the ledger accounts of the various taxpayers in payment of whose accounts they had been attributed. On 19th September, 1922, R., a taxpayer, paid two cheques which were deposited by or on

**GUARANTEE**—*Continued*

behalf of the collector with the treasurer on 21st and 28th September. On 26th January, 1923, B., a taxpayer, paid a cheque which was deposited with the treasurer on 30th January. Except as to a portion of B.'s cheque, the collector did not give credit in his books to R. and B. for these payments, but appropriated the cheques in payment of other taxes which had already been paid, and for which he had issued receipted bills; but the taxpayers' money which the collector received in payment of these other taxes was not credited to their accounts in his cash books; instead, R.'s cheque, and B.'s cheque in part, were deposited so that it was made to appear that taxes other than those of R. and B. had been paid by their cheques, the collector suppressing the evidence that their taxes had been paid. The city claimed against defendant (up to the amount guaranteed) for misappropriations by the collector to the amount of the cheques of R. and B. not properly credited. Notice had been given defendant of the embezzlements or thefts, on 2nd June, 1923. The bond provided that no more than one claim, and that only in respect of acts of embezzlement or theft committed within 12 months prior to notice to defendant of discovery thereof should be made.—*Held*, as to the contention that there was no evidence of embezzlement or theft within said twelve months period, that it should be found or inferred that there was embezzlement or theft of the sums misappropriated on the dates when the cheques of R. and B. were by the collector's direction used and deposited with the treasurer to make up the credits for which they were not intended; that, in the absence of proof to the contrary, it should be found that the city then sustained pecuniary loss to the amount so misappropriated, by reason of embezzlement or theft by the collector in connection with his duties; there was *prima facie*, if not conclusive, proof of misappropriation at the time of the false accounting; if defendant relied upon an earlier date for the offence than that *prima facie* proved, it should have adduced evidence of it.—It was the appropriation of the cheques of R. and B. to the payment of the accounts which the collector knew had been otherwise satisfied by money in his hands, that constituted the commission of the crime, and its proof. *Rex* v. *Hodgson* (3 C. & P. 422 at p. 424) and other cases, referred to.—*Held* further, as to the contention that the R. and B. cheques, having been actually delivered to the treasurer and deposited in the city's bank account, thus reaching their intended and proper destination, were not misappropriated, and that, therefore, any charges of default or loss alleged by

**GUARANTEE**—*Continued*

the particulars of the statement of claim failed, that, although the particulars were lacking in some allegations necessary fully to explain the nature of the case, yet in view of a previous explanatory letter by the city's solicitor to defendant, and the evidence and the course of the trial, the contention should not prevail; an amendment, if necessary, should be allowed.—*Held* further, that, in view of the terms of the bond, the provision to indemnify as to embezzlement or theft "committed during the continuance of this agreement, and discovered during the continuance of this agreement," covered embezzlement or theft committed before,. but discovered after, the renewal of the bond on 1st October, 1922.—*Held* further as to complaint respecting certain answers by the city to questions submitted with regard to the proposed guaranty, which answers, along with others, were to be taken as "the basis of the contract," that, taking into consideration that, although the questions were not fully answered, the answers were accepted by defendant, and taking into consideration all the questions and answers made, including some made later, in 1918, relative to a renewal of the bond, and under all the circumstances and evidence, the answers complained of, when given a reasonable interpretation, could not be relied on to prevent recovery under the bond.—*Held* further, as to defendant's contention that it was discharged because the city had dispensed with certain duties of office with which the collector was charged by statute, that the contention failed for lack of proof; that, although there was great neglect in enforcing the statutory requirement of a monthly return, the evidence did not satisfy the condition to the discharge of a surety affirmed in *Black* v. *Ottoman Bank* (6 L.T.N.S. 763) that there must be some positive act done by the employer to the surety's prejudice, or such degree of negligence as to imply connivance and amount to fraud; moreover, on the evidence, the statutory requirements did not influence the making of the agreement; and under it their performance was neither represented nor expressly or impliedly undertaken by the city; there was no evidence of fraudulent concealment, or of suppression of any fact which the city was bound to communicate. *Davis* v. *London and Provincial Marine & Ins. Co.* (8 Ch. D. 469) referred to.—*Held* further, as to a clause in the bond avoiding it if the city should fail to notify defendant "of the discovery of any writ of attachment, execution issued, or judgment obtained against the salary or property of the employee " as soon as it became known to the city, that the judgment in question did not appear to have been one "obtained against the

**NEGLIGENCE**—*Continued*

the appellant was still in the operating room under the orders and control of the operating surgeon and his assistants, it is in evidence that, some time after the appellant had been removed to the hall, the nurse S. noticed a marked reddening of the skin about his chest where another hot water bottle had been placed; and the failure of the nurse to make sure that the other hot water bottle against the leg was not a source of danger is inexcusable and amounts to negligence in her capacity as a servant of the hospital in a matter of ministerial ward duty which entailed responsibility of that body for its consequences. The obligation undertaken by the hospital was not merely to supply properly qualified nurses but to nurse the appellant; and it was the negligence of its servant in the discharge of that contractual obligation that caused the severe injury of which the appellant complains.—*Per* Idington and Mignault JJ. dissenting. The present case falls within the *ratio decidendi* of the *Hillyer Case*. The respondent hospital cannot be held liable for the result of a treatment professionally administered to a patient by physicians and nurses placed under the orders of the physicians when the hospital board have exercised proper care in the employment of the physicians and nurses.—Amongst the regulations enacted for the government of the respondent hospital was regulation no. 9 which provided that "patients accepting such service or treatment, personally assume all risk and responsibility for any accident, injury or casualty of any kind which may happen to befall any patient, visitor or other person, in the exigencies of such an institution, whether caused by the acts of any of the employees, staff or otherwise."—*Held*, that the regulation no. 9 invoked by the respondent as relieving it from responsibility to the appellant is ineffectual for that purpose, both because as a regulation it transcends any power of regulation and management conferred by s. 49 of the statute (R.S., Alta. (1922), c. 116), and because such notice to the plaintiff of its existence as might, under some circumstances, make it an implied term of a contract between the respondent and a patient, has not been shewn. Idington and Mignault JJ. expressing no opinion. NYBERG *v.* PROVOST MUNICIPAL HOSPITAL BOARD.. **226**

2 —— *Municipal corporation — Highway —Icy condition of sidewalk—Injury to pedestrian—Liability of municipality — "Gross negligence"—Consolidated Municipal Act*, 1922, *Ont.*, *c.* 72, *s.* 460 (3)—*Reversal of concurrent findings of fact.* HOLLAND *v.* CITY OF TORONTO..... **242**

**NEGLIGENCE**—*Continued*

3 —— *Contributory negligence — Motor vehicles—Motor Vehicle Law*, 1915, *c.* 43, *s.* 4, *as amended* 1925, *c.* 10 (*N.B.*)—*Liability of owner of motor truck for personal injury caused through servant's negligent driving—Boy injured while riding on running board of truck—Essentials to constitute contributory negligence—Causa proxima, non remota, spectatur—The Contributory Negligence Act*, 1925, *c.* 41, *s.* 2 (*N.B.*)—*Whether Act would apply to affect claim for damages of father of injured boy.*] Under the *Motor Vehicle Law*, 1915, c. 43, s. 4, as amended 1925, c. 10 (N.B.), defendants were held liable in damages to a boy (the infant plaintiff) and to his father, for injury to the boy, while riding on the running board of defendants' motor truck, in an accident caused (according to jury findings sustained) through negligent driving of the truck by defendants' servant.—The benefit of s. 4 (1) of said Act is not confined to persons using the highway other than those in or upon a motor vehicle the operation of which causes injury.—The jury found the driver negligent in allowing the boy on the running board and in lack of proper attention to his duty of driving, but found contributory negligence in the boy "by staying on the car after having been asked to get off, and by standing on the running board of the car when it was moving." The courts below gave effect to the jury's findings and to *The Contributory Negligence Act*, 1925, c. 41 (N.B.) by reducing the damages otherwise recoverable.—*Held*, the evidence was consistent only with the view that the boy remained on the running board with the driver's tacit consent; and, further, the maxim *In lege causa proxima, non remota, spectatur*, was not sufficiently adverted to in the courts below; there was no evidence on which the jury could find that fault of the boy was, in the legal sense, a cause of his injury; and his counsel's contentions in this respect at the trial should have been acceded to.—To constitute contributory negligence, it does not suffice that there be some fault on plaintiff's part without which the injury would not have been suffered; a cause which is merely a *sine qua non* is not adequate. As in the case of primary negligence, there must be proof, or at least evidence from which it can reasonably be inferred, that the negligence charged was a proximate, in the sense of an effective, cause of the injury (*Spaight* v. *Tedcastle*, 6 App. Cas. 217, at p. 219; Beven on Negligence—Can. Ed.—at p. 155; *Admiralty Commissioners* v. *SS. Volute* [1922] A.C. 129, at p. 136, and other cases, cited).—Damage or loss is "caused" by the fault of two or more persons, within the meaning of s. 2 of

*The Contributory Negligence Act*, only when the fault of each is a proximate or efficient cause thereof; i.e., only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence (*Can. Pac. Ry. Co.* v. *Fréchette*, [1915] A.C. 871, at p. 879). *The Contributory Negligence Act* had no application to the case at bar.—Judgment of the Supreme Court of New Brunswick, Appeal Division, ([1926] 3 D.L.R. 918), reversed in part.—*Quaere* whether, assuming the boy's contributory fault, *The Contributory Negligence Act* would apply to affect the father's claim (which was to recover medical and other expenses for which defendants' negligence entailing injury to his son subjected him to legal liability). *McKittrick* v. *Byers* (58 Ont. L.R. 158), and *Knowlton* v. *Hydro-Electric Power Commission of Ontario* (58 Ont. L.R. 80) commented on; the wording of s. 2 of the Act referred to.—*Per* Newcombe J.: S. 2 of *The Contributory Negligence Act* states a case where there is no liability at common law. It has applied to persons with relation to their liability for negligence, the wording of s. 2 of *The Maritime Conventions Act*, 1914 (Dom.), which Act did not declare a liability where none previously existed, but regulated, as to each of the vessels at fault, the measure of damages in proportion to the degree of fault. *Quaere* whether the New Brunswick legislature, having gone to the Admiralty provisions for the enunciation of the law, thereby adopts the Admiralty principles of contribution, including that expressed in *Admiralty Commissioners* v. *SS. Volute* ([1922] 1 A.C. 129 at p. 144). McLAUGHLIN *v.* LONG..... **303**

4—*Master and servant—Injury to farm employee in employer's dwelling—Defective conditions alleged as cause—Alleged negligence of employer—Reasonable efforts by employer to remedy condition—Error of judgment as to cause of trouble—Acceptance by employee of risk.*] Plaintiff was employed by S. as a farm labourer. They lived together in a shack on S.'s farm. It was heated by a stove, which gave trouble by smoking, which S., assisted by plaintiff, tried to remedy. One afternoon plaintiff, feeling ill, went to bed, S. sitting up to look after the stove. Plaintiff awoke two days later with his feet frozen. S. was found dead on the floor. The cause of his death was matter of conjecture. The fire in the stove had burned out. Plaintiff claimed damages from S.'s estate.—*Held*, plaintiff could not recover; S. did all a reasonable man would have done to render the shack safe; assuming that S. committed an error of judgment in thinking (as apparently plaintiff thought also) that the cause of the trouble was in the stove (which S. proposed to replace by a new one as soon as weather permitted) and in not suspecting it to be in the "roof-jack" (serving as a chimney), such an error of judgment would not support a charge of negligence under the circumstances; moreover, if there was an obvious danger, it was as obvious to plaintiff as to S.; and plaintiff, with every means of information that S. possessed, voluntarily remained in the shack; on the evidence, it was not merely a case of knowledge by plaintiff of a possible danger, but of free acceptance by him of any risk there might have been in the existing conditions.—Judgment of the Court of Appeal of Saskatchewan (20 Sask. L.R. 468) reversed. SIGERSETH *v.* PEDERSON..... **342**

5 —— *Fire — Logging operations — Steel cable snapping and striking another, the friction causing sparks, starting fire—Damage to property—Method of operation—Dry season—Pure accident.*] Defendant was carrying on logging operations, using the "Lidgerwood system" for lifting the logs and carrying them through the air to its railway siding. A steel cable snapped, and a broken end coiled around a steel guy line, the friction causing sparks which ignited the bark of a tree, starting a fire. Defendant had all the appliances required by law for fighting fires, and its men did all they could to extinguish the flames, but the fire spread and damaged plaintiffs' property. Plaintiffs claimed damages.—*Held*, plaintiffs could not recover; as to the complaint that defendant should have used a "tree jack" in its system of operations, it could not be said, on the evidence, that defendant's method of operation was defective; and, although the season was drier than usual, it could not be said that operating at all at the time was *per se* negligence; the fire was a pure accident (*Municipality of Port Coquitlam* v. *Wilson*, [1923] S.C.R. 235, referred to).—Judgment of the Court of Appeal of British Columbia (37 B.C. Rep. 525) affirmed. HIGGINS *v.* COMOX LOGGING & RY. CO..... **359**

6 —— *Railways — Children walking on tracks killed by train—Licensees—Duty of railway company—Statutary prohibition to walk on tracks—Nova Scotia Railways Act, R.S.N.S.* 1923, *c.* 180, *s.* 268 (1).] Plaintiff occupied a house belonging to defendant in its railway yard. Defendant's train, while working in the yard, ran over and killed two of plaintiff's children who were walking on the tracks on their way to school. The train was moving reversely and there was no one on the car in front to look out. Plaintiff sued for compensation under *The Fatal Injuries Act*, R.S.N.S. 1923, c. 229. The jury

found, among other things, that the children were on the tracks by defendant's permission, and that the accident was caused by defendant's negligence, and judgment was entered for plaintiff for damages, which was affirmed on appeal to the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 154). On appeal to this Court it was urged that, by reason of the prohibition in s. 268 (1) of *The Nova Scotia Railways Act* (R.S.N.S. 1923, c. 180) to walk upon the tracks, there could be no lawful permission granted by defendant, and, moreover, that, if the permission found were in any way effective, it conferred on the children no rights beyond those of bare licensees, and therefore there was, in the circumstances, no negligence, as defendant did nothing other than to carry on its shunting operations within its yard in the ordinary and usual manner.—*Held*, that the judgment below should be sustained; conduct which is negligence does not cease to be so if or because it is ordinary and usual; the children's presence on the tracks by defendant's permission was an element which should have influenced the operation of the train; defendant was bound to use ordinary care not to run over them, and that duty it did not fulfil; s. 268 (1) of *The Nova Scotia Railways Act* did not affect the case; the decisions in *G.T.R.* v. *Anderson* (28 Can. S.C.R. 541) and *Maritime Coal, etc., Co.*, v. *Herdman* (59 Can. S.C.R. 127), while governing in identical cases, should not be extended; the statutory prohibition should not be taken to have the effect of relieving a railway company from liability for damages caused by negligent operation to persons who would have been entitled in the absence of the clause; if it applied to the children, and if, as found, they had permission to walk along the tracks, defendant ought not to be allowed to maintain trespass against them contrary to the fact, or to escape the responsibility which it incurred by its agreement to treat them as licensees; moreover, the children being only seven and nine years of age, and there being no finding as to their capacity for crime, the case could not be treated upon the footing that they were bound by the statute, nor could the principle that knowledge of the law is presumed be invoked against them. ACADIA COAL CO. LTD. *v.* MACNEIL. **497**

7—*Railways—Train striking automobile at highway crossing—Question whether statutory signal given by train—Interference on appeal with jury's findings—Maintaining of bank on side of railway—Contributory negligence—New trial.*] R. and C., while in a motor car driven by R., were injured by defendant's train striking the car at a highway crossing, and sued



for damages. The jury found that defendant was guilty of negligence causing the accident, its negligence being "whistle not blown at whistling post, maintaining banks that obstruct view of train coming from south"; that R. was guilty of contributory negligence, being "partially to blame in neglecting to ascertain the time that train was due at crossing," his degree of fault being 25 per cent; and that C. was not guilty of contributory negligence. Judgment was rendered, on the findings, for damages, those of R. being 75 per cent of his total damages assessed. The Appellate Division, Ont. (59 Ont. L.R. 396) reversed the judgment, holding that the evidence was overwhelming that the whistle was blown, and it was a proper case to interfere with the jury's finding; that the maintaining of the bank in its original or heightened condition was not negligence in law; and that the whole cause of the accident was the negligence of R. and C. and another occupant of the car. R. and C. appealed to this Court.—*Held*, The evidence was not so overwhelmingly in favour of the view that the whistle was blown at the whistling post that the judgment which set aside the jury's finding to the contrary should be sustained (*Loporte* v. *C.P.R.* [1924] S.C.R. 278). As to the bank, even if its existence along the railway, caused by the cutting made through a hill and any necessary cleaning out of the ditch, and, in normal cleaning, the throwing of materials on the side of the bank, increasing its height, could be regarded as negligence in law, there was no foundation in fact for the finding that it obstructed the view of a train coming from the south; what obstructed the view was the hill itself. As the wrongful finding of the latter ground of negligence against defendant (in addition to the other ground, sufficient to import liability, that the whistle was not blown at the whistling post) might have influenced the jury in their apportionment of the damages according to the degrees of fault as between R. and defendant, a new trial of R.'s action was directed. Owing to the unsatisfactory character of the jury's answer as to the nature of R.'s contributory negligence, the new trial should not be restricted to apportionment of damages, but should take place generally on all issues. There was nothing to justify a finding of contributory negligence against C., and the judgment at trial in her favour was restored. REYNOLDS *v.* C.P.R.; CRAIG *v.* C.P.R.... **505**

8 —— *Crown — Navigation company — wharf—"Slip" in bad condition—Accident in landing passengers—Inspection by government employee—Delay in report and failure to give warning—Liability of the*

**STATUTES**—*Continued*



**STATUTES**—*Continued*

**TRUSTS AND TRUSTEES** — *Accounting—Moneys received by nephew of deceased —Evidence of intention to make gift to nephew—Applicability of Strong* v. *Bird* (*L.R.* 18 *Eq.* 315). One S. B. was owner of a large tract of land and other assets and, being a bachelor and having no relatives in this country, brought out in 1888 from England his nephew, the respondent. The latter lived with his uncle, assisted him in his business and eventually was allowed a very large measure of control over his affairs. In 1906, S. B. made his will leaving the bulk of his estate to the respondent; and in 1907 he executed a power of attorney, under which the respondent was formally given powers to act for him in the management of his affairs. In 1908, S. B.

**TRUSTS AND TRUSTEES**—*Continued*

went to a hospital, and shortly thereafter left for England where he died in 1913. While there in 1912, S. B. changed his will in favour of some of his English relatives, but still left a substantial part of his estate to the respondent. In an action by the executor of the will of 1912 to compel the respondent as trustee for the estate of his uncle to account for rentals, profits and moneys received by him during the lifetime of his uncle, for, as alleged, the benefit of the latter, the defence was set up that the deceased evidenced his intention to permit the respondent to retain said moneys free from any condition that he should be regarded as a trustee with respect thereto. The language of the deceased, as reported by the respondent in his evidence, imports a declaration of a then present intention by the deceased to give all his real and personal property to the respondent; and that the respondent was to do as he pleased with it and was to be under no obligation to account for it. The trial judge held the respondent was not accountable on the ground that there had been a gift to him of these moneys, that the intention to give had remained unaltered down to the time of his death and that his judgment must be governed by the decision in *Strong* v. *Bird* (L.R. 18 Eq. 315). The judgment of the trial judge was affirmed, the Court of Appeal being equally divided.—*Held*, that the principle laid down in *Strong* v. *Bird* was not applicable to the circumstances of this case and that the respondent was accountable for all moneys of the deceased received by him since 1907, excepting those in respect of which the intended gift above mentioned was completed within the lifetime of the deceased.—Judgment of the Court of Appeal (36 B.C. Rep. 231) reversed. MORTON *v.* BRIGHOUSE..... **118**

2——*Procuring of new lease by former partner—Assignment thereof to those continuing the business on the premises—Covenants in assignment—Rights between the parties as to acquisition of further lease—Implied trust—Question of estoppel by res judicata—Effect of judgment in overholding tenants proceedings—Jurisdiction of judge in such proceedings—The Landlord and Tenant Act, R.S.O.*, 1914, *c.* 155.] P. and others had, as partners, conducted a laundry business on leased premises. The partnership was dissolved, the others continuing the business on the premises. P. procured from the landlord a new lease dating from the expiry of the existing one. As a result of litigation, P., for a certain sum, assigned to the others the new lease, covenanting that the assignees might "hold and enjoy the said premises for the residue of the

**TRUSTS AND TRUSTEES**—*Concluded*

term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor." The lease had no provision for renewal. Before its expiry P. procured from the landlord a further lease dated from the expiry of the existing one. Plaintiffs, the aforesaid assignees or their successors in interest, sued for a declaration that P., the defendant, was a trustee of the lease for them, and for other relief.—*Held*, affirming judgment of the Appellate Division, Ont. (56 Ont. L.R. 616) that P. held the lease as trustee for plaintiffs; his obtaining it was a breach of good faith and contravened an implied obligation with regard to renewals; the allusion to renewal in the assignment must be taken to refer to the reasonable expectation of the tenants in possession to obtain a renewal; *Griffith* v. *Owen* ([1907] 1 Ch. 195) applied.—*Held* further, that plaintiffs were not estopped by *res judicata* by reason of certain overholding tenants proceedings (under *The Landlord and Tenant Act*, R.S.O., 1914, c. 155) and judgment therein; in such proceedings the judge had no jurisdiction to adjudicate as to the relations between Pong and plaintiffs. PONG *v.* QUONG..... **271**

3——*Alleged declaration of trust—Written words of confirmation or acknowledgment—Statute of Frauds, ss.* 4, 7—*Contract — Want of consideration*..... **429**

*See* CONTRACT 2.

**WARRANTY**

*Actions in*..... **598**

*See* AGENCY 4.

**WATERCOURSES** — *Dam raising level of water—Action for damages and demolition — Pleadings — Inscription in law—Defence alleging existence of dam for long period and act by owner of removing obstructions—Materiality of these facts—Trial judge—Demolition of a thing — Direction of the court—Art.* 1066 *C.C.—Arts.* 105, 108, 110, 191, 192 *C.C.P.*... **59**

*See* PLEADINGS 1.

**WAY, RIGHT OF**

*See* GRANT.

**WHARF**

*See* CROWN.

**WORDS AND PHRASES**—*"and not otherwise appropriated by law"* (in *s.* 106 of the *Common Schools Act*, C.S.U.C., 1859, *c.* 64).....**639, 640, 641**

*See* CONSTITUTIONAL LAW 5.

2 ——*"Biens propres de succession"*.. **101**

*See* HUSBAND AND WIFE 1.

3——*"Bornage"*..... **213**

*See* MUNICIPAL CORPORATION 1.