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Supreme Court of Canada

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S. EDWARD BOLTON

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1932

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. FRANCIS ALEXANDER ANGLIN, C.J.C. P.C., G.C.St.G.
" " LYMAN POORE DUFF J., P.C.
" THIBAUDEAU RINFRET J.
" JOHN HENDERSON LAMONT J.
" ROBERT SMITH J.
" LAWRENCE ARTHUR CANNON J.
" OSWALD SMITH CROCKET J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. HUGH GUTHRIE K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. MAURICE DUPRÉ K.C.

MEMORANDUM

On the twenty-first day of September, 1932, the Honourable Oswald Smith Crocket, a Puisne Judge of the King's Bench Division of the Supreme Court of New Brunswick, was appointed a Puisne Judge of the Supreme Court of Canada in the room and stead of the Honourable Edmund Leslie Newcombe, deceased.

ERRATA

Page 151, at foot-note (1), 204 should be 205.
Page 241, at the tenth line, "an" should be "no."
Page 347, at foot-note (2), should be (1912) 19 R.L. 16.
Page 356, foot-note (1) should be 15 Can. S.C.R. 325.
Page 360, foot-note (2) to be transferred to page 361.
Page 363, foot-notes (1) and (2), should be 1912.
Page 390, at foot-note (2), 80 should be 81.
Page 540, at foot-note (2) 140 should be 145.
Page 554, at foot-note (2), 699 should be 669.
Page 629, the first foot-note (2) should be replaced by "(1) (1917) 23 B.C.R. 192."
Page 677, at the sixth line from foot, "and" should be inserted between "it" and "you."

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.

B.C. Fir and Cedar Lumber Company v. *The King* ([1931] S.C.R. 435). Appeal allowed, 8th March, 1932.

Bell Telephone Company and Others v. *C.N.R.* ([1932] S.C.R. 222). Leave to appeal granted, 19th July and 3rd November, 1932.

Consolidated Distilleries v. *The King* ([1931] S.C.R. 283). Leave to appeal granted, 21st July, 1932.

King, The, v. *Cutting* ([1932] S.C.R. 410). Leave to appeal refused, 12th December, 1932.

Malbaie, La Corporation du Village de la v. *Boulianne* ([1932] S.C.R. 374). Leave to appeal granted, 3rd March, 1932.

Overn v. *Strand* ([1931] S.C.R. 720). Special leave to appeal and stay of proceedings dismissed, 2nd June, 1932.

Preferred Accident Ins. of B.C. v. *Vandepitte* ([1932] S.C.R. 22). Appeal dismissed with costs, 4th November, 1932.

Regent Taxi & Transport Co. v. *La Congregation des Petits Frères de Marie* ([1929] S.C.R. 650). Appeal allowed, appellant to pay costs, 25th January, 1932.

Sale v. *East Kootenay Power Co.* ([1931] S.C.R. 712). Leave to appeal *in forma pauperis* dismissed, 8th March, 1932.

Spooner v. *Minister of National Revenue* ([1931] S.C.R. 399). Leave to appeal granted, 26th July, 1932.

Winnipeg Electric Ry. v. *Geel* ([1931] S.C.R. 443). Appeal dismissed with costs, 27th July, 1932.

Winnipeg, Selkirk and Lake Winnipeg Ry. Co. v. *Pronek* ([1929] S.C.R. 314). Appeal allowed with costs, 27th July, 1932.

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JOSEPH RIVET (PLAINTIFF).....APPELLANT;

AND

LA CORPORATION DU VILLAGE DE ST-JOSEPH (DEFENDANT).....RESPONDENT.

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*Feb. 23, 24.
*Oct. 6.

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

Contract—Specifications—Municipal sewer system—Quicksand—Trenching—Setting aside—Impossibility of performance—Supervision of city engineer—Arts. 13, 17 (24), 1062, 1080, 1200, 1201, 1202, 1688 C.C.

A contractor who entered into a contract with a municipality for the construction of a sewer system is bound to do the work necessary to shore up the sides of the trenches when he is met with a condition of the soil generally known as quicksand; and that fact is not a sufficient cause which would justify the court to set aside the contract on the ground that its performance is impossible. Even if the contract provides that the work will be performed under the supervision of the city engineer, the contractor cannot complain of the fact that the engineers had not given him any instructions or advice as to the way the trenches should be cribbed, as he was at liberty to do such work in his own way without the permission of the engineer as long as the latter was not making any formal objection. Cannon J. *contra.*

While articles 1200 and 1202 C.C. enact that, when the performance of an obligation to do has become impossible, the obligation is extinguished and both parties are liberated, in order that such a rule may be applied, it is not sufficient to establish that the performance would be extremely difficult, but it must be shown that it is *absolutely* impossible, i.e., that there exists an insurmountable obstacle which could not be foreseen.

Per Cannon J. (dissenting): Articles 1062 and 1080 of the Civil Code apply to this case because the municipality, through its engineer, by electing a defective material and mode of construction, imposed conditions that were contrary to law and public order and vitiated the whole contract. The contractor was in duty bound to refuse to erect a defective construction which could certainly not last during the period of guarantee imposed by article 1688 of the Civil Code, which is "d'ordre public," and no one, under article 13 of the same code, can, possibly, by private agreement contravene the laws of public order.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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Per Cannon J. dissenting.—The works contracted for were not susceptible of execution, inasmuch as the contractor was obliged by laws of public order to refuse to instal defective material, viz.: the short clay pipes specified in the contract, as long as the municipality did not specify in writing, as provided for in the contract and specifications, through its engineer, the manner of laying suitable foundation for them; consequently the appellant was right in refusing to continue and complete the works under such conditions that would inevitably endanger the solidity of the construction. Moreover the performance of the contract has been rendered impossible not through any fault of the appellant, but through the act of the municipality in trying to force the appellant to execute the contract in contravention with laws of public order, the altered specifications, substituting short clay pipes to longer iron pipes, not having been approved by the Provincial Board of Health, such previous approbation being required by R.S.Q. 1925, c. 186, s. 57.

Judgment of the Court of King's Bench (Q.R. 48 K.B. 374) aff., Cannon J. dissenting.

APPEAL from the decision of the Court of Kings' Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Weir J. (1) and dismissing the appellant's action, allowing also the respondent's cross-demand.

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

Aimé Geoffrion K.C., and *E. Salvas* for the appellant.

Chas. Laurendeau K.C. and *P. N. Pontbriand* for the respondent.

The judgment of Duff, Newcombe, Rinfret and Lamont JJ. was delivered by

RINFRET J.—L'appelant s'est engagé à construire un système d'égouts dans les limites de la municipalité du village de St-Joseph. Il a institué son action dans le but d'obtenir la résiliation de son contrat pour cause d'impossibilité de l'exécuter. Le contrat pourvoyait au posage de tuyaux de grès. L'appelant allègue que, en cours d'exécution, les travaux ont atteint un terrain " sablonneux, mouvant et délayé par l'eau " où le posage de tuyaux de grès était impossible. Il en a averti l'intimée; et, au moyen des procédures qui sont maintenant devant la cour, il demande que cette impossibilité soit constatée et qu'il soit, en con-

(1) (1930) Q.R. 48 K.B. 374.

séquence, relevé de ses obligations. En outre, il conclut au remboursement de certains frais de matériaux et de transport et au paiement d'une somme de six cents dollars ($600) pour prix et valeur de ses services.

L'intimée, au contraire, a nié l'impossibilité d'exécution. Elle a attribué les difficultés rencontrées par l'appelant à son défaut d'outillage, de matériaux et de main-d'œuvre, à son inexpérience et à son incapacité. Elle a allégué que, pour toutes ces causes, l'appelant a dû abandonner les travaux et qu'elle s'est autorisée d'une des clauses du contrat pour les continuer aux risques et dépens de l'appelant. Elle a terminé le système d'égouts. Il a coûté $7,726.79 en excédent du prix convenu dans le contrat. L'intimée reconnaît qu'une somme de $1,620.50 doit être retranchée de cet excédent pour le prix et la valeur de tuyaux, de sable et de bois ou de matériel non utilisés qu'elle a trouvés sur les chantiers lorsqu'elle a assumé l'entreprise. Il reste une balance de $6,106.29. Elle accepte d'en déduire la somme de $2,161.73 réclamée par l'appelant pour ses déboursés et frais de transport, mais elle refuse de reconnaître la somme de $600 pour valeur de services rendus. Elle conclut donc, par voie de demande reconventionnelle, à ce que, toute compensation étant établie, le demandeur-appelant soit condamné à lui payer une balance de $3,945.56.

La Cour Supérieure a maintenu l'action et rejeté la demande reconventionnelle, mais la majorité de la Cour du Banc du Roi a infirmé ce jugement et a donné raison à l'intimée.

L'appelant nous soumet maintenant la cause et nous demande de rétablir le jugement de la Cour Supérieure.

L'action s'appuie sur les articles 1200 et suivants du code civil. En vertu de ces articles, lorsque l'obligation de faire une chose est devenue impossible, cette obligation est éteinte et les deux parties sont libérées (Arts. 1200 et 1202 C.C.);

mais si l'obligation a été exécutée en partie au profit du créancier, ce dernier est obligé jusqu'à concurrence du profit qu'il en reçoit. (Art. 1202 C.C.).

C'est l'adoption par la loi du principe: *Impossibilium nulla obligatio.* C'est d'ailleurs la consécration d'une conséquence inévitable, car il est évident qu'à l'impossible nul ne peut être tenu.

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Mais, pour que la règle reçoive son application, il faut que l'on soit en présence d'une véritable impossibilité. La doctrine et la jurisprudence s'accordent à exiger une impossibilité absolue.

Il ne suffit pas (dit Mourlon (no 1480)), que l'exécution devienne difficile, il faut qu'elle soit absolument impossible.

Opposer l'impossibilité d'exécution, c'est, en somme, plaider le cas fortuit ou la force majeure.

La ligne de démarcation entre le cas fortuit et la force majeure n'est pas toujours clairement indiquée. Le code civil emploie tantôt l'un, tantôt l'autre, et parfois il les réunit tous les deux. Il définit l'un par l'autre. Il ne donne pas de définition de la force majeure; mais il dit du cas fortuit que

c'est un événement imprévu causé par une force majeure à laquelle il est impossible de résister. Art. 17, par. 24 C.C.

C'est la doctrine même du droit romain, et c'est pratiquement le texte d'Ulpien, qui décrivait le cas fortuit: Un événement que la prudence humaine ne peut prévoir. Et c'est-à-dire: Un événement qui sort de la marche accoutumée de la nature, un accident qui déjoue tous les calculs de la prudence humaine (5 Mignault, p. 671).

Quant à la force majeure, le paragraphe 24 de l'article 17 du code civil en exprime suffisamment le sens, en la qualifiant "une force * * * à laquelle il est impossible de résister" (*cui resisti non potest*).

Pour obtenir la résiliation d'un contrat par suite de l'impossibilité de son exécution, ce sont là les conditions qui doivent se rencontrer. Il faut un "obstacle insurmontable", suivant l'expression de Marcadé (vol. 4, p. 382, sur articles 1302 et 1303 C.N.); car, dit Pothier (Obligations, n° 133), "lorsque la chose est possible en soi, l'obligation ne laisse pas de subsister", quoiqu'elle soit impossible à un entrepreneur particulier; et, naturellement, c'est à l'entrepreneur qui demande la résiliation du contrat qu'il incombe de prouver l'existence d'une impossibilité de ce genre et d'établir qu'il n'aurait pas pu la prévoir. Le code le dit:

Le débiteur est tenu de prouver le cas fortuit qu'il allègue (Art. 1200 C.C.),

et Laurent ajoute (vol. 16, n° 255):

C'est le débiteur qui est en faute de n'avoir pas bien examiné, avant de s'engager, s'il était en son pouvoir d'accomplir ce qu'il promettait.

Dans les circonstances, la Cour du Banc du Roi a décidé que les faits de la cause sont loin d'établir l'impossibilité exigée par la loi pour accorder la résiliation d'un contrat. Nous dirions, à tout événement, que l'appelant n'a certainement pas apporté de preuve suffisante que l'exécution du contrat était impossible, et, en conséquence, pour justifier un tribunal de mettre ce contrat de côté.

Le terrain que l'entrepreneur a rencontré au cours de ses travaux et dont il nous décrit les difficultés est le terrain que, en termes du métier, on est convenu d'appeler " quicksand ". Par la preuve qui a été faite, on constate que c'est là une condition qui " se rencontre généralement quand on pose des tuyaux d'égouts ", et que celui du village de St-Joseph " était de même nature que tous les " quicksand " partout où on les rencontre ".

Ce n'était donc pas un " événement imprévu ". C'était, au contraire, une condition à laquelle tout entrepreneur expérimenté et compétent devait s'attendre, surtout quand on songe que, en l'espèce, le cahier des charges l'en avertissait expressément.

En plus, ce n'était pas une force " à laquelle il était impossible de résister ". Sur ce point, la preuve de l'appelant est tout à fait insuffisante. On y trouve même des éléments qui détruisent sa prétention. Mais la preuve de l'intimée est convaincante. Elle démontre que le contrat pouvait être exécuté suivant ses plans et devis, et que si l'appelant a échoué, il doit imputer son échec à son défaut de préparation, au manque de matériel ou d'outillage et à son incompétence dans la conduite des travaux. Comme le dit l'un des témoins: " Dans ce terrain-là, il ne fallait pas lâcher." Dès que l'appelant a atteint le " quicksand ", la manière de faire face à la situation, d'après la preuve, était de " travailler sans arrêt ". Dans un cas comme celui-là, " il ne faut pas laisser la tranchée ouverte trop longtemps ". Les équipes doivent travailler

continuellement, équipe par équipe; c'est comme cela que ces travaux-là doivent se faire.

* * *

Le fond de la tranchée était suffisamment bon pour porter le tuyau, pourvu que le jointement fût bon et qu'on ferme la tranchée le plus tôt possible afin de ne pas donner de chance au " quicksand " de devenir bouillant.

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L'appelant, probablement à cause de son inexpérience, laissa les tranchées ouvertes du jour au lendemain. Il les abandonna même le samedi à trois heures de l'après-midi pour ne les reprendre que le lundi matin, avec la conséquence que, la tranchée étant restée ouverte, le fond devint ramolli et de nombreux éboulis se produisirent. En outre, l'appelant n'avait pas le boisage voulu. Il fallait des pales-planches, c'est-à-dire un boisage jointé et embouveté. Il n'employa qu'un boisage insuffisant. Pour réussir, suivant un mot du secrétaire-trésorier, l'appelant " n'a pas su s'y prendre". Plus il tentait de continuer avec ces moyens défectueux, plus la situation s'aggravait; et le résultat fut, à cause de ces fautes initiales dans lesquelles il persistait, que les travaux devinrent de plus en plus difficiles. L'appelant avait lui-même gâté une situation déjà délicate et où des entrepreneurs de compétence et d'expérience doivent manœuvrer avec énergie et avec rapidité. C'est à son propre fait que l'appelant doit attribuer l'échec qu'il a subi; et il est assez remarquable de constater jusqu'à quel point la loi insiste pour décréter que l'obligation doit être devenue impossible " sans le fait ou la faute du débiteur ", puisqu'elle répète cette condition dans chacun des articles 1200, 1201 et 1202 C.C.

L'appelant n'a donc pu justifier de l'existence d'un état de choses qui entraînât la résiliation de son contrat pour cause d'impossibilité d'exécution; et, sur ce point, nous sommes absolument d'accord avec l'opinion de la majorité de la Cour du Banc du Roi. Cette raison est suffisante pour confirmer le jugement.

Notre conclusion n'est pas ébranlée par le fait que, plus tard, lorsque la corporation municipale eût assumé l'entreprise, comme le contrat le lui permettait, après avoir posé des tuyaux de grès, elle dut les remplacer par des tuyaux d'acier. Il est prouvé que par sa manipulation défectueuse du terrain, et, par conséquent, par son fait et par sa faute, l'appelant avait rendu les conditions beaucoup moins praticables. De plus, les pluies exceptionnelles et extraordinaires qui se produisirent en 1927, après que l'appelant eût ainsi aggravé la situation, apportent une explication plausible de la rupture subséquente des tuyaux de grès posés par les contremaîtres de la corporation qui ont succédé à l'appelant.

Le contrat ne mettait pas l'entrepreneur dans l'état de subordination que ce dernier prétend. Comme la majorité de la Cour du Banc du Roi nous interprétons ce contrat dans le sens que l'entrepreneur avait toute l'initiative nécessaire et qu'il avait le droit d'adopter de lui-même les mesures requises pour faire face aux circonstances dans lesquelles il s'est trouvé. L'ingénieur avait le pouvoir de " conseiller et guider l'ordonnance des travaux et la méthode d'exécution ". En cas de conflit, la décision de l'ingénieur était finale. Mais l'entrepreneur s'était obligé envers la municipalité " à faire et parfaire " tous les travaux et ouvrages " pour la construction d'un système d'égouts dans les limites de la municipalité ". A cet égard, il fournissait " tout appareil, outillage, toute la machinerie, équipement, etc., en un mot, tout ce qui est requis pour la construction et exécution parfaite des travaux ". Il était seul responsable " du maintien des travaux ou constructions en cours d'exécution ". Il était sous la surveillance de l'ingénieur, mais cela ne l'empêchait pas de décider lui-même de quelle façon les travaux devaient être conduits. Il pouvait les diriger à sa guise tant que l'ingénieur n'intervenait pas. Il n'avait peut-être pas le droit de les faire contrairement à l'avis de l'ingénieur. Il ne pouvait passer outre à sa défense. Mais il avait certainement le droit de prendre l'initiative de tous les travaux accessoires requis sans en demander la permission à l'ingénieur. En particulier, sur la question des pilotis ou des fondations qui auraient pu faciliter l'ouvrage dans le "quicksand", nous partageons l'avis de la majorité de la Cour du Banc du Roi que le contrat autorisait l'entrepreneur à les faire de lui-même, s'il les croyait opportuns ou utiles. Il prétend que l'ingénieur lui a dit qu'ils n'étaient pas nécessaires: il ne prétend nulle part que l'ingénieur lui aurait défendu de les faire.

A tout événement, cette discussion entre l'entrepreneur et l'ingénieur aurait pu donner lieu au moment où elle est supposée s'être produite—et il est juste, sous ce rapport, de signaler que l'ingénieur ne l'admet pas—à un protêt à l'égard de la corporation municipale; mais elle n'établit certainement pas que l'exécution du contrat était impossible en soi. Tout le monde admet qu'elle était possible avec des pilotis et des fondations. Comme je l'ai signalé

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plus haut, au cours de l'analyse de la preuve, l'appelant n'a pas réussi à établir qu'un entrepreneur compétent, qui aurait abordé le " quicksand " avec le matériel et les hommes voulus, en poursuivant les travaux continûment, n'eût pas été capable de les accomplir même sans fondation.

Il reste que l'appelant lui-même, lorsqu'il abandonna les travaux, ne l'a pas fait parce qu'il les prétendait impossibles. Il n'a pas adopté cette position lors de sa comparution devant le conseil municipal, au mois de septembre 1926. A ce moment, il avait cessé tout ouvrage depuis au delà de six jours. Il ne vint pas demander d'être relevé de ses obligations. Il déclara, au contraire, que, si on lui fournissait de l'argent, il continuerait le contrat. La corporation municipale était obligée de lui faire des avances d'argent seulement au fur et à mesure que le justifiaient les estimés de l'ingénieur. D'après les estimés qu'elle avait reçus jusque-là, non seulement elle ne devait pas d'argent à l'appelant, mais elle lui en avait déjà avancé plus qu'elle n'y était tenue.

A cette séance du conseil, l'appelant fit une déclaration que nous transcrivons d'après sa propre version:

> Monsieur le maire, si vous pensez qu'un autre peut faire mieux que moi, essayez-le. Si ça va bien, j'en bénéficierai pareil comme vous.

Ce n'était pas là demander la résiliation du contrat; c'était, au contraire, en demander la continuation. En effet, la clause 29 du cahier des charges permettait à la municipalité de pourvoir à l'achèvement des travaux " aux frais, coût et péril de l'entrepreneur ", si elle constatait

> que, par la faute de l'entrepreneur, les travaux sont interrompus ou traînés en longueur, de manière à donner des craintes fondées sur leur achèvement à l'époque fixée par le cahier des charges spéciales.

A la suite de la déclaration de l'appelant, l'intimée lui fit signifier un protêt où elle l'avisa qu'elle se prévalait de cette clause du contrat. Elle y était invitée par l'appelant lui-même; mais, en plus, il avait certainement abandonné les travaux à ce moment-là, ou il donnait pour le moins des craintes fondées qu'il ne pourrait les terminer dans le délai fixé par le contrat. L'intimée était donc dans les conditions voulues pour invoquer la clause 29.

Et l'appelant a indiscutablement accepté cette situation. Il n'a pas répondu au protêt de la corporation municipale. Cette dernière a pris possession de l'ouvrage sans protestation de sa part. Il a laissé faire les travaux jusqu'à leur

parachèvement; et son attitude, dans ses lettres subséquentes, le 17 janvier et le 4 novembre 1927, est strictement celle d'un homme qui considère que le contrat a continué et que, suivant son expression, le " conseil a pris les affaires pour finir les travaux ".

Il est douteux que, après cet acquiescement, l'appelant pouvait encore, le 21 avril 1928, près de deux ans après la séance du conseil dont nous avons parlé, instituer une action pour résilier son contrat. Il n'est pas nécessaire de décider ce point, puisque l'on trouve dans le contrat lui-même ce qui est suffisant pour justifier la prise de possession de la corporation municipale et puisque, en outre, l'appelant doit être quand même débouté des fins de son action parce qu'il n'a pas réussi à démontrer qu'il avait droit à la résiliation du contrat.

Il s'ensuit que le jugement de la Cour du Banc du Roi doit être confirmé. L'appelant n'a pu établir l'existence d'une situation de fait qui permette, au point de vue légal, de déclarer son obligation éteinte.

Comme conséquence, il ne peut avoir droit à la somme de six cents dollars ($600) pour la valeur de ses services, ou à titre de *quantum meruit*. Le contrat n'étant pas mis de côté, c'est lui qui doit continuer de régir les relations des parties. Il ne pourvoit en aucune façon à une rémunération du genre de celle que l'appelant réclame.

Quant à l'item de $2,161.73 pour frais de transport et déboursés divers, l'intimée ne le conteste pas. Elle conclut simplement que la compensation en soit établie avec la réclamation pour un montant supérieur qu'elle fait dans sa demande reconventionnelle. L'appelant a donc droit à cet item; mais le tribunal a adjugé en même temps sur l'action principale et sur la demande reconventionnelle; et, si cette dernière était bien fondée, il y avait lieu de déclarer qu'il y a compensation. (Art. 217 C.P.C.)

Nous ne sommes pas tout à fait sans hésitation quant à l'exactitude du compte qui fait la base de la demande reconventionelle. Le droit de l'intimée d'inclure dans le montant total dû la somme de $2,521.85 pour réparations jusqu'au 14 novembre 1927 n'est pas absolument clair. Le contrat permet de charger des réparations à l'entrepreneur; mais on aurait pu se demander si une partie de ces réparations n'est pas attribuable à la malfaçon des contremaîtres que

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l'intimée a employés pour succéder à l'appelant. Cependant le compte a été accepté par la Cour du Banc du Roi, et nous ne trouvons pas au dossier de quoi justifier une modification du jugement sur ce point.

D'autre part, vu que l'intimée a fini par remplacer les tuyaux de grès par des tuyaux d'acier, l'appelant pouvait prétendre que les travaux n'ont jamais été terminés tels qu'ils étaient prévus par le contrat, principalement en tenant compte de la déclaration de l'ingénieur qu'il ne les a jamais acceptés. Mais nous devons supposer que ce point eût été éclairci, si le demandeur lui-même, dans sa déclaration, n'avait allégué en toutes lettres que la défenderesse avait complété les travaux le 14 novembre 1927, ce dont la corporation municipale, dans sa défense, a demandé acte. Le fait de la complétion des travaux et sa date se trouvent ainsi fixés de consentement mutuel, et pour les fins de cette cause, cela doit nous lier.

Nous devons donc confirmer le jugement de la Cour du Banc du Roi avec dépens.

CANNON J. (dissenting).—L'appelant a poursuivi l'intimée en résiliation d'un contrat pour la construction d'égouts et en réclamation d'un montant de $2,761.73, dont $2,161.73 pour déboursés faits et $600 pour salaire, ou prix de services rendus en exécution partielle de ce contrat. L'intimée a contesté l'action principale; et, par demande reconventionnelle, a réclamé de l'appelant un montant de $7,726. Les moyens invoqués de part et d'autre sur la demande principale et sur la demande reconventionnelle sont pratiquement les mêmes.

La Cour Supérieure du district de Richelieu a maintenu l'action de l'appelant et rejeté la demande reconventionnelle de l'intimée par jugement du 29 juin 1929.

Par un arrêt du 14 janvier 1930, la Cour du Banc du Roi a renvoyé l'action avec dépens et déclaré bien fondée la demande reconventionnelle jusqu'à concurrence de $3,945.56. L'Honorable juge Tellier a enregistré sa dissidence.

Le 29 juillet 1926, l'administration municipale du village de St-Joseph de Sorel, par contrat notarié, engagea les services de l'appelant pour la construction d'un système d'égouts pour le prix de $32,811. Le montant de la sou-

mission de l'appelant était plus élevé; mais l'intimée ayant décidé, pour des raisons d'économie, de retrancher une partie des travaux aux devis et de remplacer, dans une section de la rue Montcalm qui nous intéresse spécialement, des tuyaux d'acier par des tuyaux de grès, le prix stipulé fut fixé au montant susdit. Ces changements ne semblent pas avoir été soumis au Service Provincial d'Hygiène, qui avait approuvé les plans et devis originaires le 14 juillet 1926, quinze jours auparavant. On semble donc, dès l'origine, avoir enfreint une disposition d'ordre public, 12 Geo. V, c. 29, s. 55 (S.R.Q. 1925, c. 186, s. 57), ce qui astreignait, le cas échéant, l'entrepreneur à modifier ou démolir les travaux faits sans autorisation préalable, outre la pénalité encourue pour l'infraction à la loi.

L'appelant expose que vers le 11 août 1926, après s'être procuré les matériaux spécifiés, il commença les travaux et posa les tuyaux sur une longueur d'environ 800 pieds, sur la rue Montcalm, à la satisfaction de l'intimée, représentée par un surveillant et des ingénieurs. L'appelant rencontra alors un terrain sablonneux et " sourceux " (" quicksand ") où les tuyaux de grès, ne pouvant être posés sur un fond solide, se disjoignaient ou se brisaient au fur et à mesure qu'ils étaient mis en place. L'appelant prétend qu'il devint évident que, malgré ses efforts, il n'était pas possible de faire un bon travail en suivant les plans et devis tels que préparés par MM. Roy et Toupin, les ingénieurs de l'intimée. Ces derniers ne firent rien pour remédier à ces difficultés, comme ils en avaient le pouvoir, d'après les clauses suivantes du cahier des charges partie du contrat:

8° L'entrepreneur sera tenu, au moyen de calculs et d'études des documents concernant l'entreprise, de s'assurer par lui-même de l'étendue des obligations que le cahier des charges lui impose et il devra visiter et examiner les endroits où les travaux doivent être exécutés. Il sera censé avoir examiné tous les documents et les avoir trouvés exacts, et les avoir trouvés en concordance les uns avec les autres. L'entrepreneur ne pourra sous aucun prétexte, élever aucune réclamation du chef d'erreurs ou omissions qui existeraient dans les dits documents, car des instructions détaillées seront fournies chaque fois qu'une erreur ou une omission de ce genre sera découverte, et l'entrepreneur exécutera ces ouvrages comme étant partie intégrale de l'ouvrage complet.

La décision de l'ingénieur sera finale et sans appel et la correction qu'il fera des plans ou des devis fera partie du contrat.

9° La construction, l'installation et l'exécution des travaux devront se faire conformément aux avis, soumissions, cahiers des charges généraux et spéciaux, plans et dessins qui pourront être fournis en même temps que

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les formules de soumissions, *ou suivant les instructions détaillées qui seront fournies au cours des travaux.*

13° L'entrepreneur ne devra *commencer aucun ouvrage* ou faire aucune *modification aux dits ouvrages* avant d'avoir reçu *un ordre écrit de l'ingénieur.* Après la signature du contrat, l'entrepreneur devra commencer les travaux au jour fixé par l'ordre écrit de l'ingénieur et les dits travaux devront être exécutés sans interruption avec les plus grande diligence à moins que l'ingénieur n'autorise le contraire par écrit.

En aucun cas l'entrepreneur ne pourra réclamer sur des ordres verbaux.

L'ingénieur aura toute autorité et qualité pour conseiller et guider l'ordonnance des travaux et la méthode d'exécution et sa décision sera finale. * * *

16° Là *où l'ingénieur l'exigera,* l'entrepreneur placera à ses frais et dépens dans le fond de la tranchée, une planche de 1" d'épaisseur, et de largeur suffisante pour recevoir l'égout.

Dans tous les endroits mous, l'entrepreneur devra à ses frais et dépens, *sur avis de l'ingénieur,* construire au fond de la tranchée un pavé dont les dimensions seront alors fournies par l'ingénieur et qui de toutes manières devra être suffisant pour empêcher l'égout d'enfoncer sous la pesanteur du remplissage.

L'entrepreneur est averti qu'il peut se rencontrer de ces endroits mous, bien que aucun puits n'ait été fait par la municipalité afin de connaître le sous-sol. C'est donc à l'entrepreneur à se rendre compte par lui-même de la nature du terrain.

21° S'il y a lieu de faire usage de pilotis l'entrepreneur suivra les avis de l'ingénieur. Dans ce cas les devis de l'American Society of Municipal Improvements seront suivis.

L'appelant nous dit, en outre, que ses employés, découragés, et attirés par la campagne électorale qui battait alors son plein, quittèrent le chantier. De son côté, l'intimée, par son protêt notarié du 20 septembre 1926, somme l'appelant d'abandonner les travaux, qu'elle se charge de continuer elle-même. Les contremaîtres qui se sont succédés après l'appelant et que l'intimée a choisis pour continuer les travaux n'ont pu exécuter les plans et devis. Ils ont échoué en particulier à l'endroit où l'appelant a été forcé d'abandonner son travail.

Pendant le cours des travaux, l'appelant a déboursé pour l'avantage et le bénéfice de l'intimée, la somme de $2,-161.73, représentant des frais de transport des matériaux que l'intimée a reçus et acceptés, payés et employés.

Le juge de première instance a accepté les prétentions de l'appelant. Il a fait un exposé complet de tous les faits de la cause, une étude détaillée du contrat, des plan et spécifications qui régissent les rapports juridiques des parties. Je crois utile de reproduire, en partie, les conclusions du savant juge:

Il appert par la preuve que les travaux se faisaient en la présence et sous le contrôle de l'ingénieur qui donnait les niveaux, et les tuyaux n'étaient enterrés qu'après son inspection et son consentement; que dans le terrain solide, le travail avançait rapidement, à la satisfaction de l'ingénieur et que les troubles ont commencé avec le terrain sourceux où les ouvriers ne parvenaient pas à faire tenir les tuyaux trop courts pour cette sorte de terrain; qu'à ce point, le demandeur et son contremaître représentèrent à l'ingénieur qu'il faudrait solidifier le fond de la tranchée; l'ingénieur a refusé son consentement et a ordonné de continuer les travaux, ce que le demandeur a essayé de faire, sans succès; que dans ces circonstances, les employés du demandeur se sont découragés et ont quitté le chantier, sans permission, et que même, le témoin Valois, le principal assistant du demandeur, homme d'expérience et de capacité, s'est décidé à laisser sa position, convaincu qu'il était inutile de continuer le travail sous l'autorité de l'ingénieur de la défenderesse et cette difficulté a été aussi à la connaissance de l'inspecteur Lanciault, nommé par la défenderesse et qui, examiné comme témoin, dépose que sous les circonstances, il était impossible de faire mieux que le demandeur;

Que d'autres témoins ont exprimé l'opinion qu'il aurait fallu poser des tuyaux plus longs et faire une fondation solide dans le fond de la tranchée, ce qui n'a pas été ordonné par les ingénieurs de la défenderesse;

Que l'ingénieur Roy dépose, qu'il n'a pas établi de fondation, qu'il n'a pas étudié le genre de fondation qui aurait dû être fait, mais qu'il a suggéré au témoin Valois de faire un radier en planches, mais n'a pas donné d'ordre à cet effet; que dans tous les cas, le dit ingénieur ajoute qu'il aurait été impossible de finir les travaux pour le quinze octobre, en faisant une bonne fondation, quoique le demandeur aurait pu finir une bonne partie de son travail;

Que l'ingénieur Toupin dépose que le demandeur a fait preuve de bonne foi et qu'il a fait son possible; que sous les circonstances, il n'aurait pas fait de reproches à l'entrepreneur s'il n'eut pas fini ses travaux pour le quinze octobre, il est d'opinion qu'il aurait fallu une fondation de pilotis, mais qu'il ne l'a pas conseillé au demandeur parce qu'il ne voulait pas prendre de responsabilité;

Que les contremaîtres engagés par la défenderesse après le quinze octobre, pour finir les travaux, ont toujours travaillé sous la surveillance et le contrôle des mêmes ingénieurs jusqu'au quatorze novembre 1927, et ont quitté les lieux l'un après l'autre;

Que la défenderesse a finalement abandonné les devis des ingénieurs et a fait les travaux à sa façon, changeant selon qu'elle le jugeait à propos, les tuyaux de grès par des tuyaux d'acier; que des témoins sont venus déposer que les devis étaient impossibles à exécuter, et, en effet, n'ont jamais été exécutés; que le contremaître de la défenderesse, un nommé Tapp, qui a succédé au demandeur dans les dits travaux, a suivi les devis et trois fois, le travail s'est défait. Il a travaillé ainsi pendant l'automne de 1926 et au printemps de 1927, lorsque la défenderesse l'a remplacé par d'autres contremaîtres, savoir: MM. Gallien, Leclerc et Lafrenière, en succession;

Qu'après le quatorze novembre 1927, les ingénieurs ne sont pas revenus sur les lieux. La défenderesse a continué les travaux sans leur assistance et les dits travaux n'étaient pas encore finis à la date de l'enquête, en octobre 1928;

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Considérant que la défenderesse a cancellé son contrat avec le demandeur et qu'elle a pris possession du matériel du demandeur sans indemniser ce dernier pour le dit matériel et pour le travail qu'il avait déjà fait en vertu du dit contrat pour lequel il a été payé en partie seulement;

Considérant que le demandeur était lié, non seulement par le contrat et les cahiers des charges général et spécial y annexés, mais par la stipulation qu'il devait obéir aux ordres verbaux ou écrits, donnés par l'ingénieur qui avait le contrôle et la surveillance de par le contrat, comme représentant de la défenderesse, en regard de tous les actes du demandeur, et lorsque des difficultés sont survenues causées par la nature du sol, alors qu'il était nécessaire de changer ou ajouter aux stipulations des cahiers des charges, comme par exemple, où la terre était mouvante dans la tranchée faite par le demandeur, il aurait fallu, suivant la preuve, faire un plancher au fond avant de poser les tuyaux de grès ou de les remplacer par des tuyaux d'acier plus longs que les tuyaux de grès, stipulés dans le contrat, mais lesquels étaient trop courts pour être utilisés à cause des difficultés rencontrées, l'ingénieur a négligé de donner des ordres requis à cet effet.

Considérant que l'ingénieur, dans ces circonstances, n'a fait rien autre chose que de constater les difficultés rencontrées par le demandeur qui était sous ses ordres et lié par les conditions de son contrat, lequel ne lui laissait aucun droit de se départir de ses conditions, sans l'ordre de l'ingénieur;

Les principaux motifs du jugement de la Cour du Banc du Roi sont les suivants:

Considérant qu'il est établi par le preuve au dossier que le demandeur ne s'était pas rendu compte suffisamment, comme son contrat l'obligeait, de la nature du terrain où devait être construit le système d'égout, mais qu'il n'y avait pas impossibilité d'exécuter son contrat si le demandeur avait eu la main-doeuvre, les matériaux et l'argent nécessaire pour les exécuter;

Considérant qu'un entrepreneur de système d'égouts est sensé (sic) connaître, étant un homme qui doit avoir l'expérience requise à cet effet, de quelle manière doit être pavé le fond d'une tranchée dans un terrain délayé par l'eau, mouvant et sablonneux, et comment protéger la tranchée par un boisement suffisant, de manière à pouvoir y poser les tuyaux d'égout;

Considérant que le demandeur ne peut pas invoquer le prétexte que les ingénieurs, chargés de la surveillance des travaux, ne lui avaient pas donné des ordres ou des conseils sur la manière de faire le posage d'un pavé dans le fond des tranchées, vu la clause 15 du cahier des charges qui stipule que la surveillance des travaux, par les ingénieurs, ne le relèvera pas d'aucune de ses obligations d'avoir à exécuter un travail parfait et de bonne qualité;

Considérant qu'il est en preuve que le demandeur a manqué à ses obligations, et que la défenderesse était en droit de les faire continuer et parachever aux frais et dépens du demandeur;

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Il ne s'agit pas, dans l'espèce, d'appliquer la règle concernant la responsabilité du constructeur ou de l'architecte découlant de la ruine d'un édifice par vice de construction, parce que nous n'avons pas ici un ouvrage complété. La question à résoudre est celle-ci: l'appelant a-t-il eu raison d'abandonner le travail qu'on persistait à lui faire exécuter dans des conditions qui rendaient impossible la solidité de l'ouvrage? En d'autres termes, dans les circonstances révélées au dossier, l'appelant était-il justifiable, vu le refus de l'ingénieur d'ordonner une fondation convenable, ou de changer les matériaux, d'avertir les autorités municipales de l'impossibilité pratique de placer solidement dans le sol mouvant découvert sur la rue Montcalm des tuyaux courts de grès que, pour raison d'économie, on avait substitués aux conduites plus longues de fer ou d'acier?

Et d'abord, qui est responsable du vice du sol?

D'après moi, la question de vice du sol se présente sous un angle différent lorsqu'il s'agit, comme dans l'espèce, non pas de la construction d'un édifice sur le terrain d'un particulier, mais de l'installation d'un système d'égouts dans les rues d'une municipalité. L'entrepreneur, vis-à-vis de la municipalité, est dans une position essentiellement subordonnée; le choix de l'emplacement est toujours déterminé par décision de l'administration qu'il n'est pas en son pouvoir de faire modifier. La municipalité doit obtenir d'abord l'approbation du plan et du terrain par les autorités provinciales. Le constructeur n'a dès lors aucun choix ou aucune discrétion à exercer et ne peut d'avance avertir le propriétaire des dangers possibles résultant de la nature du terrain. Même si l'on avait fait des sondages préalables à cet endroit de la rue Montcalm, le tracé n'aurait pas été changé, car les égouts devaient nécessairement passer à cet endroit indépendamment de la nature du sous-sol de la rue; et c'était à l'ingénieur et au conseil de donner les instructions voulues pour y faire les fondations requises s'il était possible d'utiliser dans ce terrain des tuyaux de grès; et, si l'on avait voulu, comme on l'a fait éventuellement, mettre de côté les devis, et substituer le fer au grès, l'appelant, d'après le contrat, avait le droit d'exiger une spécification supplémentaire écrite et un ordre d'un ingénieur. Ce der-

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nier a toujours refusé de faire le moindre changement à ses spécifications, n'a pas voulu y ajouter; et ce n'est que lors de l'enquête qu'il a déclaré qu'il aurait été préférable de faire une fondation en bois ou sur pilotis pour asseoir les tuyaux à cet endroit.

Il est clair, d'après la preuve, qu'à moins d'une fondation spéciale, il était impossible de faire tenir en place les conduites, trop courtes, en grès que la municipalité, sur l'avis de son ingénieur, avait choisies comme matériaux, et ce dernier, par une étrange aberration, a refusé d'ordonner aucun des travaux et des mesures propices pour asseoir solidement ces tuyaux, bien qu'il admette dans son témoignage qu'il aurait fallu une fondation mais qu'il " n'a pas étudié le genre de fondation qui aurait dû être fait "!

Comme le dit Sourdat, " De la responsabilité ", paragraphe nº 673,

lorsque l'entrepreneur n'est qu'un simple artisan, travaillant d'après les plans et sous les ordres d'un propriétaire ou de son préposé, on est réellement en dehors des prévisions de la loi, et les rapports du constructeur avec le maître sont ceux de l'entrepreneur ou du tâcheron avec l'architecte auquel il est subordonné, l'un répondant seulement de la main-d'œuvre, l'autre des plans et de l'observation des règles de l'art.

Le Conseil d'Etat, le 2 avril 1886, a décidé qu'un entrepreneur avait *le devoir* d'éclairer en temps utile l'administration communale sur les défectuosités des matériaux et l'impossibilité de faire avec ces matériaux un travail utile et convenable. Sirey, 1888-3-4.

Il faut décider, comme le premier juge, que le contrat doit être mis de côté parce que l'ouvrage n'était pas, à cet endroit de la rue Montcalm, susceptible d'exécution, vu que l'on voulait forcer l'appelant à installer des tuyaux trop courts dans du sable mouvant, sans ordonner la fondation nécessaire.

Frémy-Ligneville, dans son " Traité de la législation des bâtiments ", 3e édition, nous dit:

75. Lorsque la perte des ouvrages arrive par le vice intrinsèque des matériaux fournis par l'entrepreneur, il y a de la part de celui-ci une faute dont il supporte entièrement les résultats. * * * Toutefois, si le vice des matériaux fournis par le propriétaire était manifeste et que l'entrepreneur ait pu s'en apercevoir, il doit perdre le prix de son travail et la valeur des matériaux, *qu'il devait se refuser à employer;* et cela lors même qu'il aurait prévenu le propriétaire et que celui-ci aurait persisté à vouloir employer ces mauvais matériaux. *L'intérêt public exige qu'on ne fasse pas de constructions vicieuses;* l'entrepreneur ne doit pas céder à l'imprudence du propriétaire et faire sciemment une construction dont la

perte est probable, et dont la chute peut compromettre la sûreté publique (Troplong, no 985; Divergier, no 342; Guillouard, t. 2, no 790).

A plus forte raison, l'entrepreneur supporterait la totalité de la perte avant la livraison, si elle arrivait par un vice de construction. On appliquerait ici toutes les règles de la responsabilité des constructeurs pour vice de construction.

131. Lorsque le sol est tellement mauvais que toute consolidation est inexécutable, le marché de construction, soit à forfait, soit par série de prix, doit être considéré comme ayant pour objet une chose impossible. L'entrepreneur et le propriétaire ont tous deux le droit d'en faire prononcer la nullité en vertu de l'art. 1133 du C. civ. (1062 C.C.).

Dans ce cas, si le propriétaire a fourni le sol, il doit payer à l'entrepreneur le prix des travaux exécutés jusqu'à ce jour. Il ne saurait, pas plus que l'architecte, lui opposer que la découverte du mauvais sol est un cas de force majeure, qui doit lui faire perdre la valeur de ses travaux. Comme nous l'avons dit, la force majeure ne produit cet effet que lorsqu'elle détruit les ouvrages. Quand les travaux ne sont qu'arrêtés par un vice de la propriété, le propriétaire supporte les conséquences du mauvais état de sa chose et la perte des travaux qu'il occasionne.

938. Lorsque les vices de construction peuvent intéresser la solidité d'un bâtiment, il est du devoir de l'architecte et de l'entrepreneur d'éclairer le propriétaire, et *même de refuser* de construire dans les conditions indiquées par lui.

L'intimée nous dit que, malgré le refus des ingénieurs Roy et Toupin de donner les ordres voulus pour la construction d'une fondation en bois ou sur pilotis pour asseoir les tuyaux, l'appelant aurait dû, de lui-même, faire ces travaux.

Comme je l'ai déjà exposé, le contrat le liait absolument et l'obligeait à attendre les instructions écrites de l'ingénieur. Sur ce point, je citerai Lepage, "Loi des bâtiments", vol. 2, p. 39:

Lorsqu'un architecte est chargé de diriger les travaux confiés à un entrepreneur, le contrat de louage consenti par celui-ci porte pour condition, au moins tacite, qu'il suivra les ordres de l'architecte, afin que la construction soit exécutée fidèlement, comme elle a été projetée. La première attention de l'entrepreneur est donc de se conformer en tous points aux plans et devis que lui donne l'architecte. S'il est quelque objet qui ne soit pas suffisamment figuré sur les plans, ni décrit assez clairement dans les devis, l'entrepreneur doit avoir la précaution de se faire donner par écrit, les détails qui lui manquent et auxquels l'architecte est tenu de suppléer. Pareillement, si quelques changements sont arrêtés entre le propriétaire et l'architecte, pendant la construction, la sûreté de l'entrepreneur exige qu'il ne s'occupe pas de ces changements, tant qu'il n'en a pas reçu l'ordre par écrit, c'est le plus sûr moyen d'éviter toute responsabilité pour raison de changements. Pp. 49 & 50:

Au reste, l'obligation d'employer de bons matériaux n'est pas imposée à l'entrepreneur seulement lorsqu'il les fournit, nous pensons que, même quand il en trouve chez le propriétaire, ou quand celui-ci en achète ailleurs, il n'est permis à l'entrepreneur de faire entrer dans la construction que ceux qui sont de nature à produire un ouvrage solide. Lorsque après

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avoir choisi des matériaux qu'il croit convenables, il s'aperçoit en les travaillant qu'il leur manque les qualités qu'il leur avait supposées, il est de son devoir de les rebuter. Il manquerait à la confiance de propriétaire s'il ne l'avertissait pas du danger qu'il y aurait à employer de pareilles matières. Nous disons plus: l'entrepreneur qui userait de négligence ou d'une complaisance coupable dans une circonstance aussi essentielle, serait responsable des vices de solidité qui pourraient en résulter.

En effet, lorsqu'on désigne à un entrepreneur certains matériaux, c'est toujours sous la condition tacite qu'il les trouvera propres à l'objet qu'il faut construire. Si donc ils sont défectueux, il ne doit pas en faire usage, sinon il serait garant des vices de construction que cet emploi de mauvaise matière aurait occasionnés. L'industrie que loue l'entrepreneur, et sur laquelle a droit de compter le propriétaire, consiste non-seulement dans la manière de construire suivant les méthodes approuvées par les règles de l'art; mais encore dans le choix des matières qu'il met en œuvre, soit qu'il les fournisse lui-même, soit qu'on les lui procure.

Remarquez que, si l'objet était important, s'il s'agissait d'une construction dont les vices pussent donner lieu à des inconvénients graves, l'entrepreneur manquerait à son devoir en faisant usage de matériaux qui porteraient atteinte à la solidité de l'ouvrage: sur ce point, l'ordre du propriétaire ne doit pas être écouté; un entrepreneur honnête préférerait abandonner les travaux. D'ailleurs, outre qu'il ne convient pas, s'il est jaloux de sa réputation, de seconder des projets absurdes, c'est qu'il est expressément défendu par les lois de police de faire aucune construction qui pourrait compromettre la sûreté publique par une solidité insuffisante.

Il semble que ces passages d'un auteur réputé aient été écrits spécialement pour l'espèce qui nous est soumise.

Voir Dalloz, *Jurisprudence Générale,* (*Dubois* c. *Brémond* (1).

La responsabilité de l'architecte ou de l'entrepreneur reste engagée dans les conditions de l'art. 1792 c. civ., alors même qu'il n'a fait que suivre les ordres du propriétaire pour le mode de construction et l'emploi des matériaux, le devoir de l'homme de l'art étant de refuser les travaux qui lui sont proposés, quand ils doivent être exécutés de manière à compromettre leur solidité (c. civ. 1792). (1)

(1) La pensée qui a depuis longtemps prévalu dans la jurisprudence des cours d'appel et de la cour de cessation, c'est que l'architecte ou l'entrepreneur a le devoir étroit, en raison de ses connaissances spéciales et des obligations particulières qu'elles lui créent, de résister au propriétaire, quand celui-ci veut lui imposer un mode de construction vicieux ou des matériaux défectueux. Il doit refuser les travaux qu'on lui propose, plutôt que de les établir dans des conditions où leur solidité ne serait pas assurée; et il est en faute s'il cède à la pression du propriétaire.

L'étude de la preuve m'a convaincu qu'il n'y a pas lieu de changer les constatations faites par le juge de première instance; et j'adopte les conclusions très bien assises de l'honorable juge Tellier. Vu la négligence de l'ingénieur de donner les ordres requis pour continuer convenablement les

(1) D. 1889-1-91.

travaux d'installation des tuyaux de grès, il était devenu impossible pour le demandeur de compléter son ouvrage avant le 15 octobre 1926 sans engager sa responsabilité en exécutant un ouvrage voué à la ruine. Il a donc eu raison de refuser de continuer une construction vicieuse.

Il ne s'agit pas ici de cas fortuit ni de force majeure, mais de l'impossibilité de compléter le contrat dans le délai stipulé, avec la solidité voulue pour mettre l'entrepreneur à l'abris de tout recours à la suite de la ruine certaine de l'édifice que l'on voulait lui faire construire avec des matériaux défectueux et de manière à en compromettre la solidité. C'est une impossibilité résultant, non pas d'un cas fortuit ou d'une force majeure, mais des termes mêmes du contrat; on a mis l'appelant dans l'impossibilité de construire, comme le veut la loi, assez solidement pour satisfaire à la garantie de dix ans que, pour des raisons d'ordre public, le code lui impose, et l'intimée, par son ingénieur, a créé cette situation qui a forcé l'entrepreneur à refuser de continuer une construction vouée d'avance à la ruine. L'exécution de l'objet du contrat a été rendue impossible, au sens de l'article 1062 du code civil, par le refus ou la négligence de l'ingénieur de compléter ses spécifications en donnant par écrit les ordres voulus pour permettre à l'appelant de faire ses travaux et de se servir avec sûreté des matériaux de grès spécifiés. En pareil cas, l'objet de l'obligation devenait prohibé par une loi d'ordre public. Il était du devoir de l'appelant de ne pas assumer la responsabilité de la solidité de l'ouvrage dans ces conditions. Comme le disait le juge-en-chef Archambault, dans *La Corporation de Warwick* v. *Gagnon* (1),

> Cette responsabilité est d'ordre public, et existe, même si c'est le propriétaire qui fournit lui-même les matériaux. *Le devoir de l'entrepreneur est de refuser, dans ce cas, de mauvais matériaux.*

A plus forte raison, pour dégager sa responsabilité, doit-il refuser de fournir lui-même des matériaux défectueux et inutilisables pour une construction solide. La solidité des constructions est d'ordre public et l'article 13 du code civil défend de déroger par des conventions particulières aux lois qui intéressent l'ordre public.

7 Mignault, p. 407:

> Maintenant il faut voir dans l'article 1688 une disposition d'ordre public, car la solidité des édifices intéresse nonseulement le propriétaire,

(1) (1913) Q.R. 22 K.B. 280, at 287.

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mais le public tout entier. Il s'ensuit que * * * *l'ordre même du propriétaire d'exécuter les travaux de telle ou telle façon,* pas plus que sa présence sur les lieux et son consentement, ne saurait constituer une excuse, car *le devoir commande à l'architecte et à l'entrepreneur de ne pas se soumettre à de tels ordres.*

L'intimée, par son ingénieur, a voulu imposer à l'appelant un mode d'installation des matériaux qui constituait une condition contraire à la loi, nulle et rendant nulle l'obligation qui en dépendait. Art. 1080 C.C. Nous avons donc tous les éléments voulus pour appliquer l'article 1202 du code civil qui, d'après Mignault, 5 C.C., page 671, contient des dispositions que le Code Napoléon a passées sous silence. Le savant auteur fait remarquer que le code envisage ici le cas où l'exécution de l'obligation est devenue impossible *après* que cette obligation a été contractée. L'exécution de l'obligation, dans notre espèce, est devenue impossible par la faute et le fait, non du débiteur, mais par la faute et le fait de l'intimée en voulant forcer l'appelant à déroger à une loi d'ordre public. Nul n'est tenu à l'impossible, et d'après l'article 13 suscité, doit être considérée comme impossible toute dérogation à l'ordre public; on ne peut obliger personne à violer la loi. Or, dans l'espèce, on voulait forcer l'appelant à violer et le code civil concernant la durée des constructions, et la Loi d'hygiène, en lui faisant exécuter des travaux dont on avait changé les spécifications telles qu'autorisées par le Bureau Provincial d'Hygiène.

L'article 1202 ajoute:

> Mais si l'obligation a été exécutée en partie au profit du créancier, ce dernier est obligé jusqu'à concurrence du profit qu'il en reçoit.

Nous devons donc, autant que faire se peut, remettre les parties dans l'état où elles se trouvaient avant le contrat, en remboursant exactement à l'appelant des déboursés qu'il a faits et prouvés.

Je suis donc d'avis que l'action doit être maintenue pour le montant de $2,161.73 pour déboursés encourus par l'appelant, et dont l'intimée a bénéficié.

Elle n'a pas d'ailleurs contesté cette réclamation.

Quant aux $600 réclamés pour salaire ou profit, je ne crois pas qu'il serait juste de les faire payer par l'intimée. De même que cette dernière ne peut pas s'enrichir aux dépens de l'appelant, ce dernier, de son côté, ne peut faire de profit en vertu d'un contrat dont il demande l'annulation. D'ailleurs, la preuve sur ce point n'est pas suffisante.

Je serais donc d'avis de modifier le jugement de la Cour Supérieure en retranchant cette somme de $600, qui a été accordée par le premier juge, laissant $2,161.73, pour lequel il y aurait jugement avec dépens.

La demande reconventionnelle est basée sur la clause suivante du contrat:

29°. Si les travaux ne sont pas commencés à la date mentionnée dans l'ordre écrit de l'ingénieur ou ne sont pas achevés à la date prescrite, la municipalité pourra pourvoir à leur exécution ou à leur achèvement d'office aux frais, coût et péril de l'entrepreneur, soit en se procurant des ouvriers les matériaux nécessaires, soit en employant ses ouvriers, soit en faisant souscrire par un autre entrepreneur à son choix, une commission pour l'exécution des travaux non commencés ou laissés en souffrance. Le cas échéant, l'entrepreneur devra arrêter ses travaux à partir du jour qui lui sera désigné, à défaut de quoi, les ouvrages qu'il aura exécutés postérieurement seront acquis à la municipalité sans qu'il en soit tenu compte. La municipalité sera en droit de recourir aux mêmes mesures si elle constate que par la faute de l'entrepreneur, les travaux sont interrompus ou traînent en longueur de manière à donner des craintes fondées sur leur achèvement à l'époque fixée par le cahier des charges spécial. Le village aura le droit de confisquer le dépôt et l'employer pour payer les frais qu'elle aura ainsi encourus.

Cette mesure d'office ou mise en régie n'est qu'une application de la règle de l'article 1065 C.C. qui autorise le créancier, en cas d'inexécution de la convention, à la faire exécuter lui-même aux dépens de son débiteur. Elle consiste dans la substitution d'un gérant chargé, sous la surveillance des agents administratifs, d'exécuter les travaux aux risques et périls de l'adjudicataire en retard. Elle ne fait pas disparaître le contrat, qui reste obligatoire et continue de produire tous ses effets légaux. Elle permet seulement à l'administration, en écartant un entrepreneur inhabile ou négligent, de poursuivre avec rapidité et dans les conditions stipulées par les devis, l'exécution des travaux adjugés.

Dans l'espèce, dans quels cas la mise en régie pouvait-elle être ordonnée? C'est

1° Si les travaux ne sont pas commencés à la date mentionnée dans l'ordre écrit de l'ingénieur;

2° S'ils ne sont pas achevés à la date prescrite;

3° Si la municipalité constate que, *par la faute de l'entrepreneur,* les travaux sont interrompus ou traînés en longueur, de manière à faire craindre qu'il ne seront pas achevés à l'époque fixée.

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Les deux premières éventualités ne se présentent pas dans l'espèce; et j'arrive à la conclusion, par l'exposé ci-dessus, que les travaux ont été interrompus, non par la faute de l'entrepreneur, mais bien par celle de l'ingénieur ou représentant de l'intimée.

Pour ces raisons, je crois la demande reconventionnelle mal fondée, et elle devra être renvoyée avec dépens.

Je suis donc d'avis de maintenir l'appel, de casser et annuler le jugement de la Cour du Banc du Roi et de maintenir l'action principale jusqu'à concurrence de $2,-161.73, avec dépens, et de renvoyer la demande reconventionnelle, aussi avec dépens contre l'intimée. Cette dernière devra aussi payer les frais devant la Cour du Banc du Roi et devant cette cour.

Appeal dismissed with costs.

Solicitor for the appellant: *Elie Salvas.*

Solicitor for the respondent: *P. N. Pontbriand.*

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*Feb. 3.
*Oct. 6.

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK (DEFENDANT) ..... APPELLANT;

AND

ALICE MARIE VANDEPITTE (PLAINTIFF) ..... RESPONDENT;

AND

R. E. BERRY (DEFENDANT).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Insurance, accident—Automobile driven by insured's daughter—Judgment obtained against her for negligent driving—Action defended by insurance company—Action against insurance company to recover amount of judgment—Liability—Estoppel—Insurance Act, B.C., 1925, c. 20, s. 24.

B, the owner of an automobile, was insured against loss in the appellant company. The respondent was injured while riding in a car driven by her husband which collided with B's car driven by his daughter with B's permission and recovered judgment against her for damages, the appellant company taking charge of the defence on the trial. The re-

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

spondent then brought an action against the appellant insurance company under section 24 of the *Insurance Act* (B.C.) 1925, c. 20, to recover the amount of the judgment rendered against B's daughter. That section provides: "24. Where a person incurs liability for injury or damage to the person or property of another and is insured against such liability and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied." Under the policy, the indemnity to the owner was also "available in the same manner and under the same conditions as it is available to the insured to any person or persons while riding in or legally operating the automobile * * * with the permission of the insured * * *."

Held, reversing the judgment of the Court of Appeal (43 B.C. Rep. 161), that the respondent was not entitled to recover judgment against the appellant company for the amount recovered in the judgment against B's daughter as the latter was not "insured" within the meaning of s. 24 of the *Insurance Act*. Section 24 of the *Insurance Act* is a provision in aid of execution and in the nature of a garnishee proceeding. The action thereby authorized lies only if the judgment debtor, in this case B's daughter, is insured or has a right to recover indemnity from the insurer. The policy being between B. and the appellant company, B's daughter is not a party to it and there is no consideration moving from her to the insurer for the covenant upon which the respondent relies to establish that B's daughter was insured within the meaning of section 24. While it may be that B, according to the covenant, may recover from the insurer, presumably for the benefit of a person driving his car with his permission, it cannot be said that the insured can be compelled to exercise such a right of recovery or to undertake the duties and responsibilities of a trustee, unless by his consent or by reason of his having become a custodian of indemnity belonging to his daughter. Section 24 does not confer upon the licensee of the car a right of action upon the policy to recover against the insurer or to compel the insured to exercise his remedies for the recovery and the insured cannot be compelled to become a trustee for a stranger for no other cause than that he had permitted the stranger to drive his car or to ride in it at a time when that stranger negligently caused an accident in which a third party suffered bodily injuries.

Held, also, that the appellant company, by its conduct in defending the respondent's action against B's daughter, was not estopped from denying liability under the insurance policy on the ground that she was not "insured" within the meaning of section 24 (*).

(*) *Reporter's Note:* Leave to appeal to the Privy Council was granted on application to the latter, on the 7th of December, 1931.

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APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Gregory J. (2) which had maintained the respondent's action for $5,000 and allowing, on a cross-appeal, a further sum of $648.70.

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

W. N. Tilley K.C., and *N. B. Gash K.C.*, for the appellant.

C. L. McAlpine for the respondent.

DUFF, J.—I agree with the conclusion of my brother Newcombe and in substance with his reasons.

The action out of which the appeal arises was instituted under s. 24 of the B.C. *Insurance Act* of 1925, c. 20, which reads as follows:

> 24. Where a person incurs liability for injury or damage to the person or property of another and is insured against such liability and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

The respondent was injured in a motor accident, the car in which she was a passenger having come into collision with a car owned by the defendant, R. E. Berry, and driven by his daughter, Jean Berry. The judgment was against Jean Berry for $4,600 damages and costs taxed at $780.25. In the action Jean Berry was the sole defendant, and she was defended by solicitors appointed by the appellants, professing to act in pursuance of the policy, her father, R. E. Berry, having given notice of the accident pursuant to the policy.

The B.C. courts held that by virtue of this policy, Miss Jean Berry was "insured" within the meaning of s. 24 in respect of any liability attaching to her by reason of automobile accidents while driving a car belonging to her father, and consequently that the respondent was entitled to recover from the appellants the amount of her judgment up to the sum named in the policy.

(1) (1930) 43 B.C. Rep. 161; [1930] 3 W.W.R. 143.
(2) (1929) 42 B.C. Rep. 255.

I agree that the insurance contemplated by s. 24 is one which confers a right of indemnity, that is within the protection of the law, that is to say, one which the person incurring the liability has the legal means, direct or indirect, of enforcing. I think this is so for two reasons. First, unless it is so restricted in its operation, it is difficult to assign any certain limits to the scope of the section. Second, the section does provide for a method by which the liability of the insurance company to the person responsible for the injuries may be made available for the benefit of the person injured. In many cases, no doubt, the same result might be achieved through a receiver by way of equitable execution—perhaps in all cases; but the legislature has seen fit to give to the person injured a direct action against the insurance company in his own name, and there may have been very good reasons for doing so. So long as the enactment is limited to enforcing against the insurance company a right which could have been enforced through the courts by the person responsible for the injury, the insurance company, so far as one can see, can have nothing to complain of, especially in cases in which the same object could have been effectuated by a more circuitous method. It would, however, be an obvious injustice to establish by legislation a right of recourse against the insurance company in respect of which no person having a right of indemnity enforceable against the insurance company, is in any way responsible. Here the father, R. E. Berry, was responsible for his daughter's act under s. 12 of c. 44 of the British Columbia statutes of 1926 and 1927, but the respondent elected to proceed against the daughter. No judgment having been recovered against the father, the conditions never arose, under which, alone, by the terms of the policy, the insurance company could be called upon to indemnify him in respect of his liability to the respondent. It would, I repeat, be a monstrous injustice to impose upon the insurance company, by statute, a liability to the daughter or to persons injured by the act of the daughter, which the daughter could not enforce directly, or indirectly, in the absence of some such enactment, and a construction leading to that result ought not to be accepted unless the language employed is so clear as to leave no reasonable way of escape.

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The respondent bases her claim upon two alternative contentions. The first is that Miss Berry was entitled to require the insurance company to indemnify her in respect of the judgment recovered against her, either directly or indirectly, by calling upon her father to take proceedings under the policy. The second ground is that in consequence of the steps taken by the insurance company in defence of the action, they are estopped from denying Miss Berry's right to indemnity under the policy, as against both Miss Berry and the plaintiff.

It will be convenient to consider these contentions in the order in which I have stated them. I agree with my brother Newcombe, that there is no ground for holding that the policy was effected by R. E. Berry as trustee for Miss Berry.

The clause relied upon, by which the indemnity under section E becomes available for the benefit of the classes of persons mentioned in it, does not, I think, disclose an intention to declare that the named insured is contracting as trustee. That clause is in these words:—

> The foregoing indemnity provided by section D and/or E shall be available in the same manner and under the same conditions as it is available to the insured to any person or persons riding in or legally operating the automobile for private or pleasure purposes, with the permission of the insured, or of an adult member of the insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection of the named insured, and the remainder, if any, to the protection of the other persons entitled to indemnity under the terms of this section as the named insured shall in writing direct.

It may be that a trust would arise in consequence of a written direction by the insured under this clause; but until there is such a direction, at all events, it seems clear that the named insured is entirely master of the situation, and under no enforceable obligation to require the company to indemnify any one of the classes of persons described. Indeed until a direction in writing is given, he is not entitled to require the insurance company to provide indemnity in respect of any liability other than his own.

Then as to agency. The fair inference from the clause as a whole is that he is not contracting as agent; and since he is not professing to contract as agent, ratification (assuming there be adequate evidence of ratification) would be of no avail.

A word upon *Williams* v. *Baltic Insurance Association of London* (1). There the action was brought by the named insured; and ratification by the beneficiary before the accident occurred brought the case within the scope of Lord Campbell's judgment in *Waters'* case (2). The question of the right of the beneficiary to recover on the policy in her own name is not discussed in the judgment, and, apparently, that question was not considered material by Roche J. The judgment lends no support to the respondent.

There remains the question whether, by defending the action, the appellants have precluded themselves from denying that Miss Berry was "insured" under policy within the meaning of s. 24. The appellants professed to undertake the defence of the action on her behalf under the policy, and upon the invitation of the father. That was a recognition that the claim against Miss Berry was a claim covered by the policy; but it was not necessarily a recognition of Miss Berry's right to require indemnity either directly or indirectly by compelling her father to proceed. The course of the company is quite naturally attributable to a desire to fulfil their obligations to R. E. Berry himself; and there is no evidence to justify the conclusion that the solicitors who acted for Miss Berry had not her full consent to do so. It is impossible to affirm, judicially, upon the evidence before us, that the solicitors derived their authority solely from the policy. Whether, in assuming the defence of the action in execution of a contract with the father, and with the daughter's consent, the company may have exposed themselves to a charge of maintenance, is another question. The appeal should be allowed and the action dismissed with costs throughout.

The judgment of Newcombe, Rinfret, Lamont and Cannon JJ. was delivered by

NEWCOMBE, J.—The respondent was injured while riding in a car, driven by her husband, which collided with a car belonging to the defendant, R. E. Berry, and driven by his daughter, Jean Berry. The respondent, in an action against Jean Berry, recovered judgment on 13th June, 1928, for $4,600 damages and costs, taxed at $780.25; and, in third

(1) [1924] 2 K.B. 282. (2) (1856) 5 E. & B. 870.

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party proceedings, the respondent's husband was held liable to contribute to Jean Berry $2,300 and costs, upon the finding that he and she, the drivers of the two cars, were guilty of negligence in the same degree.

The defendant, R. E. Berry, was insured, by a combination automobile policy of the appellant company, against legal liability for bodily injuries or death of one person, for $5,000; and it was provided by the clause described as "Insuring agreements," printed upon the back of the policy, that the insurers agreed, among other clauses, to section E, entitled "Legal liability for bodily injuries or death", and thereby undertook (quoting the words and figures),

(1) To indemnify the insured against loss from the liability imposed by law upon the insured for damages on account of bodily injuries (including death, at any time resulting therefrom) accidentally suffered or alleged to have been suffered by any person or persons (excluding employees of the insured engaged in the operation, maintenance and repair of the automobile, and employees of the insured who at the time of the accident are engaged in the trade, business, profession or occupation of the insured) as a result of the ownership, maintenance or use of the automobile; provided that on account of bodily injuries to or the death of one person the insurer's liability under this section shall not exceed the sum of five thousand dollars ($5,000.00), and subject to the same limit for each person the insurer's liability on account of bodily injuries to or the death of more than one person as the result of one accident shall not exceed the sum of ten thousand dollars ($10,000.00).

(2) To serve the insured in the investigation of every accident covered by this policy and in the adjustment, or negotiations therefor, of any claim resulting therefrom.

(3) To defend in the name and on behalf of the insured any civil actions which may at any time be brought against the insured on account of such injuries, including actions alleging such injuries and demanding damages therefor, although such actions are wholly groundless, false or fraudulent, unless the insurer shall elect to settle such actions.

(4) To pay all costs taxed against the insured in any legal proceeding defended by the insurer; and all interest accruing after entry of judgment upon such part of same as is not in excess of the insurer's limit of liability, as hereinbefore expressed.

(5) To reimburse the insured for the expense incurred in providing such immediate surgical relief as is imperative at the time such injuries are sustained.

The foregoing indemnity provided by sections D and/or E shall be available in the same manner and under the same conditions as it is available to the insured to any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the insured, or of an adult member of the insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection of the named insured, and the remainder, if any, to the protection of the

other persons entitled to indemnity under the terms of this section as the named insured shall in writing direct.

It is provided by the *Insurance Act* of British Columbia, 1925, c. 20, s. 24, that

> Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

The defendant, R. E. Berry, had given notice of the accident to the insurers, pursuant to the policy, and his daughter, Jean, in the action to which I have referred, was represented and defended by solicitors named and instructed by the appellant company.

The present action was commenced on 20th May, 1929, against the appellant company as sole defendant; but, by order of 7th October, 1929, R. E. Berry was added as a defendant, subject to a proviso

> that the joinder should not in itself entitle the plaintiff to any relief which she could not have claimed if the action had commenced at the time of such joinder.

The action was tried before Gregory, J., of the Supreme Court of British Columbia (1), who held that the plaintiff (respondent) was entitled to recover from the defendant company (appellant) the sum of $5,000 and her costs. The company appealed, and the respondent cross-appealed claiming that the amount of her recovery was insufficient and should be increased by the sum of $648.70. The Court of Appeal, composed of Martin, Galliher and McPhillips, JJ. (2), dismissed the appeal and allowed the cross-appeal, directing that the judgment should be increased by the sum claimed.

Upon the appeal to this court the appellant company contends that Jean Berry was not entitled to sue upon the policy, and that a case of liability under the policy has not been established. There are other submissions on behalf of the appellant, to which, in my view, it will be unnecessary to refer.

The main question depends upon the interpretation of s. 24 of the *Insurance Act* in its application to the provisions of section E of the Insuring agreements, by which it is

(1) (1929) 42 B.C. Rep. 255.

(2) (1930) 43 B.C. Rep. 161; [1930] 3 W.W.R. 143.

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provided, as already shewn, that the indemnity shall be available in the same manner and under the same conditions as it is available to the insured to any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the insured * * *.

Section 24 is obviously a provision in aid of execution and in the nature of a garnishee proceeding. The action thereby authorized lies only if the judgment debtor, in this case Jean Berry, is insured, or, as I interpret it, has a right to recover indemnity from an insurer. Now the policy is between R. E. Berry, the insured, and the appellant company, the insurer, and Jean Berry, the insured's daughter, is not a party to it. Moreover, there is no consideration moving from her to the insurer for the covenant upon which the respondent relies to establish that Miss Berry is insured, within the meaning of section 24 of the statute. In *Colyear* v. *Mulgrave* (1), to which the Court of Appeal referred with approval In *re D'Angibau, Andrews* v. *Andrews* (2), it was held that where two persons for valuable consideration as between themselves covenant to do some act for the benefit of a third person, that person cannot enforce the covenant against the two, though either of the two might do so against the other.

In *Tweddle* v. *Atkinson* (3), in the Queen's Bench, the judgment of Wightman, J., in which Crompton and Blackburn, JJ. agreed, is as follows:

> Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne* v. *Mason* (4), in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

In *Gray* v. *Pearson* (5), Willes, J., said, at the beginning of his judgment:

> I am of opinion that this action cannot be maintained, and for the simple reason,—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated.

(1) (1836) 2 Keen 81; 44 E.R. 191.
(2) (1880) 15 Ch. D. 242.
(3) (1861) 1 B. & S. 393.
(4) (1695) 1 Vent. 6.
(5) (1870) L.R. 5 C.P. 568, at 574.

In *Gandy* v. *Gandy* (1), Bowen, L.J., said

It was supposed at one time in the history of our common law, that there was an exceptional class of cases, in which where a contract was made for the benefit of a person who was not a contracting party, that is to say, a stranger, it could be enforced by that person at law. It would be mere pedantry now to go through the history of that idea: it is sufficient to say that in the case of *Tweddle* v. *Atkinson* (2), to which we were referred, the true common law doctrine has been laid down. But whatever may have been the common law doctrine, if the true intent and the true effect of this deed was to give to the children a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would, in a Court of Equity, be allowed to enforce their rights under the deed. But the whole application of that doctrine of course depends upon its being made out that upon the true construction of this deed it was a deed which gave the children such a beneficial right.

Numerous other cases might be cited to the same effect, and Lord Haldane's speech in *Dunlop Pneumatic Tire Coy.* v. *Selfridge and Coy.* (3), should not be overlooked.

I construe the policy to have effect only as between the parties to it, namely, R. E. Berry and the company; and while it may be that the former, according to the covenant, may recover from the insurer, presumably for the benefit of a person driving his car with his permission, I find nothing to convince me that the insured can be compelled to exercise such a right of recovery or to undertake the duties and responsibilities of a trustee, unless by his consent or by reason of his having become the custodian of indemnity belonging to his daughter. The intention of the clause is, perhaps, not perfectly clear; but it should be so construed, if possible, as to make it operative for some purpose. Certainly, it does not confer upon the licensee of the car a right of action upon the policy to recover against the insurer, or to compel the insured to exercise his remedies for the recovery; and it seems unreasonable to suppose that the insured would be compelled to become a trustee for a stranger for no other cause than that he or a member of his household had permitted the stranger to drive his car or to ride in it at a time when that stranger negligently caused an accident in which a third party suffered bodily injuries.

But it is said that this case is different because of what I am about to state.

(1) (1885) 30 Ch. D. 57, at 69. (2) (1861) 1 B. & S. 393.
(3) 1915 A.C. 847 at 853.

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THE PREFERRED ACCIDENT INSURANCE CO. OF N.Y. v. VANDEPITTE.

Newcombe J.

The plaintiff, in her action against Miss Berry, in answer to the company's denial that Miss Berry was insured, pleaded that the company, by its conduct in defending the plaintiff's action against her, was estopped from denying liability under the insurance policy issued by the company to Miss Berry's father. The evidence is that Mr. Berry, as the insured, under that policy, gave, in his own name, notice of the accident to the insurer, and that, on the back of this notice, his daughter filled up and signed the form requiring a statement of particulars from her as the "person driving car at time of accident". Mr. Berry is asked "Who defended the action?" and he says "The insurance company". In his examination for discovery, he said that he knew the action against his daughter was defended by the insurance company, and that neither he nor his daughter paid for any legal services in connection with that lawsuit. Referring to the company, he says that "They got all the information from my daughter; they did not ask me for anything". The adjusters, he says, took the whole matter over. Miss Berry, upon discovery after judgment, says that she knew the company's solicitors were her solicitors. The learned judges in British Columbia seem to have thought that in view of these facts, the company became liable, as insurer, to indemnify Miss Berry; but, with due respect, I do not agree. What the evidence suggests, and what I think may be assumed, is that the company was acting in pursuance of its practice under section E of the Insuring agreements, and not with the intention or effect of incurring, or as representing itself as willing to incur, any obligation for payment of indemnity to the insured's daughter not enforceable by her under the policy. The essentials of estoppel are lacking; and the company's defence of the plaintiff's action against Miss Berry does not, in my opinion, cut any figure in determining liability in this case, wherein the respondent is asserting a direct statutory obligation of the company, as the insurer of Miss Berry, to pay the respondent's judgment up to the face value of the policy.

I would allow the appeal and dismiss the action with costs throughout. *Appeal allowed with costs.*

Solicitors for the appellant: *Walsh, Bull, Housser, Tupper & Molson.*

Solicitor for the respondent: *W. H. Campbell.*

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*May 21.
*June 12.

RETAIL CREDIT COMPANY, INC. (DEFENDANT AND THIRD PARTY)..... APPELLANT;

AND

COMMERCIAL FINANCE CORPORATION LTD. (PLAINTIFF)..... RESPONDENT;

AND

MERCHANTS CASUALTY INSURANCE CO. (DEFENDANT)..... RESPONDENT.

RETAIL CREDIT COMPANY, INC. (DEFENDANT AND THIRD PARTY)..... APPELLANT;

AND

COMMERCIAL FINANCE CORPORATION LTD. (PLAINTIFF)..... RESPONDENT;

AND

WESTERN ASSURANCE CO. (DEFENDANT) ..... RESPONDENT.

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

Contract—Agreement to supply service of car-checking and reporting thereon to company financing motor car dealers—Careless reports made by service company's local inspection agent and passed on to financing company—Liability in damages of service company—Construction of contract.

Respondent (plaintiff) carried on a business of financing motor car dealers. Appellant carried on a business of obtaining and giving information as to credit, character, etc., and including the checking of cars in dealers' hands and reporting thereon. Appellant made an agreement to supply its service to respondent. Respondent signed an "indemnity agreement," agreeing to treat in confidence the information furnished, to hold appellant harmless on account of any damages arising from publication or dissemination of information or careless handling of reports, and agreeing, "in consideration of receiving this service, and as a condition of its rendition," that neither the appellant nor its employees should be responsible "for any loss that may occur to [respondent] through the use of the information furnished." Through careless car-checking reports (made without personally checking over the cars) in respect of a dealer, made by a local inspection agent of appellant and passed on to respondent, the respond-

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

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ent was misled, to its loss, and sued appellant for damages. Appellant claimed that it had not bound itself for more than reasonable care in the selection of its inspection agents, and, further, that, in any case, it was relieved from liability by the concluding clause (above quoted) of the indemnity agreement.

Held, affirming judgment of the Appellate Division, Ont. (66 Ont. L.R. 10), that respondent should recover. The concluding clause of the indemnity agreement did not, on proper construction of that agreement, relate to car-checking reports. (Anglin, C.J.C., held that either this was the proper construction or, if the clause relied on by appellant extended to the entire service to be rendered including the checking of cars, etc., the words "In consideration of receiving this service" must likewise so extend, in which case, the service never having been rendered, the consideration failed and there was nothing to support the indemnity clause).

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1).

The plaintiff (respondent) company, whose business included automobile financing, sued, in one action, the Merchants Casualty Insurance Co., and, in another action, the Western Assurance Co., claiming under certain alleged insurance coverage or indemnification agreements against loss through wrongful conversion of motor vehicles on which the plaintiff held any security for unpaid purchase money or through fraud by the dealer or purchaser in connection therewith. In each action the defendant, besides contesting the plaintiff's claim, brought in the Retail Credit Co., Inc., by third party notice, claiming relief over against it. The latter company (the appellant in the present appeal) was subsequently, on motion on behalf of the plaintiff, made a party defendant. The plaintiff claimed against the Retail Credit Co., Inc., (and this was the main subject of the present appeal) for damages for alleged failure, in breach of its agreement with the plaintiff, to check motor cars and make proper reports, in respect of a certain dealer, who was thus enabled to convert certain motor cars to his own use, to the plaintiff's loss.

The actions were tried together before Garrow J. who (2) gave judgment in favour of the plaintiff against all the defendants, subject, in certain respects, to references which he directed. He dismissed the claims of the defendant insurance companies made by way of third party proceedings,

(1) (1930) 66 Ont. L.R. 10. (2) (1929) 66 Ont. L.R. 10, at 12-25.

holding that neither had shewn that there was a contract, express or implied, between it and the defendant the Retail Credit Co., Inc.; but he declared and adjudged that each of the defendant insurance companies, upon payment of the whole or any part of the plaintiff's recovery, should be entitled to subrogation to the rights of the plaintiff as against the defendant the Retail Credit Co., Inc., to the extent of such payment.

The said judgment of Garrow J. was affirmed by the Appellate Division (1), with a variation allowing to the plaintiff certain claims (made by cross-appeal) for interest as against the defendant insurance companies.

The defendant the Retail Credit Co., Inc., appealed to the Supreme Court of Canada. The defendant insurance companies, while supporting the judgment of the Appellate Division, appealed conditionally against the plaintiff, giving notice that, in the event of the appeal of the Retail Credit Co., Inc., being successful, they would contend that, if the plaintiff did give a special contract or release or indemnity to the Retail Credit Co., Inc., which had the effect of relieving the latter in whole or in part from its liability to the plaintiff, it did so without the knowledge or consent, express or implied, of the insurance companies, and thereby prejudiced their rights and released and discharged them also.

The appeal of the Retail Credit Co., Inc., to this Court was dismissed.

The material facts of the case, for the purposes of the judgment in the present appeal, are sufficiently stated in the judgment of Newcombe J., now reported.

I. F. Hellmuth K.C. and *J. R. Cartwright* for the appellant.

Gideon Grant K.C., H. R. Frost K.C., and *Fraser Grant* for the respondent Commercial Finance Corporation, Ltd.

Gordon N. Shaver K.C. for the respondent Merchants Casualty Insurance Co.

D. L. McCarthy K.C. and *F. J. Hughes K.C.* for the respondent Western Assurance Co.

(1) (1930) 66 Ont. L.R. 10.

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ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Newcombe, I agree in his conclusions and, generally, in the reasons on which he bases them.

The appellant certainly never rendered the service contracted for to the respondent in regard to the checking of cars, etc. To invoke an indemnity clause as excusing non-performance, by the appellant, of a distinct obligation undertaken by it, or, rather, as saving it from liability for the consequences of that non-performance, seems to me absurd. Either, as my brother Newcombe thinks, the indemnity provision was restricted in its operation to the obligations specifically referred to in the two earlier paragraphs of the document containing it, and, in that event, it does not advance the appellant's case, inasmuch as the two earlier paragraphs are restricted to obligations other than that here in question; or, the third paragraph, which is the indemnity clause, extends to the entire service to be rendered including the checking of the cars, etc., and, if that be the case, its introductory words, " In consideration of receiving this service " must likewise so extend. In that event, the service never having been rendered, the consideration failed and there is nothing to support the indemnity clause.

From any point of view, it is surely absurd for the appellant to invoke a provision for indemnity which, construed as it would construe it, would have the effect of rendering nugatory a distinct obligation undertaken by it.

The judgment of Newcombe, Rinfret, Lamont and Cannon JJ. was delivered by

NEWCOMBE J.—This litigation was determined, both at the trial (1) and in the Appellate Division of Ontario (1), adversely to the appellant company, which now brings up two alleged errors for review. The material facts are not in dispute. The appeal depends upon the meaning of the agreement between The Retail Credit Company Incorporated and The Commercial Finance Corporation, Limited; and these two companies are the principal parties. The understanding of the agreement is to be derived from the conversation which took place in July, 1925, between Mr.

(1) 66 Ont. L.R. 10.

Hill, the appellant's vice-president, and Mr. O'Grady, the general manager of the Finance Corporation; and from the written document, without date, described as "Indemnity Agreement," and known in the case as plaintiff's exhibit 9, which Mr. Hill passed to Mr. O'Grady at the latter's office at Toronto, on 27th July, and which Mr. O'Grady then executed on behalf of the Finance Corporation; there is also evidence of the subsequent course of business pursued by the parties in their relations to each other.

The trouble has arisen through the dishonesty of one Raynor, who carried on a large trade in buying and selling automobiles at Belleville and Picton, and the fault of Mr. O'Flynn, the appellant's agent at Belleville.

The Finance Corporation dealt in lien notes and security agreements, covering motor vehicles, and was accustomed to make advances upon such securities and to finance the dealers when satisfied with the security offered. Raynor became one of its customers. The course of dealing between them and other particulars are briefly described in the first four paragraphs of the appellant's factum:

"He (Raynor) would purchase cars from the manufacturer and the same would be shipped to Belleville or Picton consigned to the order of the manufacturer to be delivered to Raynor on payment of the invoice price. Upon being notified of the shipment Raynor, under the arrangement with the plaintiff, would go to the bank of the plaintiff at Belleville, execute a promissory note, usually at three months, for the amount of the purchase, less ten per cent., which he paid himself, execute also a bill of sale of the car or cars in question to the plaintiff company and complete at the same time a conditional sale agreement by which the plaintiff company agreed to re-sell to him the vehicles covered by the shipment the title to the cars remaining in the plaintiff company until payment. With these completed documents he was then in a position to draw upon the plaintiff company for the amount of the balance of the purchase price, attaching these documents to his draft. The draft was honoured by the bank and with the proceeds Raynor released the shipment from the railway company and got possession of the cars.

"2. It was part of the arrangement between Raynor and the plaintiff that on or before selling any car covered by

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such documents he should pay for the same to the plaintiff, it being considered that a purchaser from Raynor in the ordinary course of business would acquire a title good against the plaintiff.

"3. It was the practice of the plaintiff to have an investigation made from time to time to ascertain that all cars upon which it held security were still in the possession of Raynor.

"In or about the month of October, 1926, the work of checking these cars was entrusted to the appellant Retail Credit Company, Incorporated.

"4. The appellant Retail Credit Company, Incorporated, carries on the business of obtaining and giving information of various kinds as to credit, character and so forth including the business of checking cars in cases where arrangements have been made similar to those made in this case between the plaintiff company and Raynor."

Some extracts from the testimony of Mr. O'Grady and of Mr. Hill may be conveniently introduced. Mr. O'Grady, who is the plaintiff's leading witness, in his cross-examination says:

By Mr. Hellmuth:

Q. Mr. O'Grady, you met Mr. Hill of the Retail Credit first of all in Muskoka?—A. Yes.

Q. I suggest to you that was on Saturday, the 25th day of July, 1925?—A. I think so.

Q. And on the Monday following, which would be the 27th day of July, you and Mr. Hill met together at your office—10 King Street West, is it?—A. Yes.

Q. In Toronto. And Mr. Hill proposed to you that you should take advantage of the services that his company could render?—A. Yes.

Q. That is correct?—A. Yes.

Q. I think you have practically said that. At that time the suggestion was that he should furnish you—or, rather, his company should furnish you—with character reports on purchasers of automobiles, wholesale reports, car checks and reports on dealers?—A. Yes.

Q. That is what you said in chief; I have got the words that you used?—A. Yes.

Q. And an agreement was come to that he or his company should do that as and when you might request these reports?—A. Yes.

Q. And no other agreement at any time was made by you or your company with the Retail Credit?—A. I think not.

Q. You know of none; you said so before?—A. Yes.

Mr. Hill, the appellant's principal witness, gives the following testimony in chief:

Mr. GRANT: Q. Mr. Hill, would you mind speaking just a little louder? —A. I called on Mr. O'Grady following a suggestion made by him at

Muskoka that I do so, and offered the services of the Retail Credit Company for the use of the Commercial Finance Company. You would like me to go——

Mr. HELLMUTH: Q. Yes, go on?—A. I presented—I first described our facilities to Mr. O'Grady.

Q. Will you say what you described?—A. I described the fact that we have a forwarding office and representatives, forwarding office in Toronto and representatives in the cities throughout the country. I described to him the services rendered to finance companies, the auto purchase report, the dealer, the automobile dealer report, and the auto car check report, and described the blanks used in reference to each of these services. I quoted him the prices and told him the conditions under which the service was rendered; that is, that it is confidential, and that we would not be held liable for any damages accruing from the dissemination or publication of reports, nor were we responsible for any loss incident to the use of the reports. These conditions were all apparently satisfactory to Mr. O'Grady, and I then presented him with the printed form that we use in that connection. He read it very carefully and signed it.

Q. Now look at Exhibit 9 and tell me if that is the form?—A. Yes.

Q. Whose pencil writing is that—"10 King St. East, Toronto, Ont."?—A. That is mine.

Q. That is yours?—A. Yes.

Q. Then you say—I don't want to lead, but it is apparent—it was at this conversation with him, and offer whatever it was, that you made to him, at that time that this was signed, this Exhibit 9?—A. Yes, as a condition of forwarding supplies for the use of the service.

Q. Then is there anything else that you can recollect of that interview?—A. Yes, there are two things. First, I took that indemnity agreement to our local office here and gave it to our manager as his authority to release reports to the Commercial Finance Corporation.

Q. But can you tell me of anything else that took place while you were with Mr. O'Grady.—A. Yes. Mr. O'Grady explained that he could begin using the auto purchase and the automobile dealer reports immediately, but that the car check reports were at that time being done by some other people that might make a point of retaining the work, and he was not in a position to press a change, but he wanted to be equipped so that in event of when that could be arranged that the complete service could be secured from the Retail Credit Company.

Q. Does that cover as far as you can tell me what took place?—A. Yes.

When Mr. Hill returned to Atlanta, Georgia, where the head office of his company is situate, he wrote Mr. O'Grady, on 4th August, 1925, the letter known as exhibit 10, of which these are the first two paragraphs:

At the request of our Toronto City Office, we are opening an account with your company and supplies have been forwarded to you, under separate cover, for requesting Auto Purchase and Dealer Car Check Reports. These carry your stenciled address and the number 3983, which has been assigned to the account.

In filling out the inquiry tickets, we would only stress that you please arrange to give us all the data of identification possible on each one. We should like to have them typewritten and to have both the business and

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residence addresses, as well as occupation, etc. This data aids us materially in giving quick and accurate service.

That the appellant fully realized its obligation with regard to the car-checking reports, and the nature of the service which they embraced, appears from exhibits 34 and 35—instructions which it caused to be printed for the making of those reports. I quote the following clauses:

INSTRUCTIONS FOR MAKING DEALER CAR CHECK REPORTS

(Return blank if engaged in sale of automobiles).

Purpose of the Report

The dealer has used finance facilities to purchase the cars listed. The finance company holds paper against each car, due when the dealer sells the car. The finance company wants us to check the possession and condition of the car. The dealer understands that these checks may be made at any time.

Call on the dealer or his manager (not a clerk or mechanic) and ask him to show you the cars which are listed by serial number on the enclosed blank.

1. Checking the Serial Number on the Car Itself: This number is usually found on the dash or under the hood. Unless you personally see the number on the cars, this report may misinform and mislead our customers instead of protecting them. (Do not let the dealer call the numbers to you either from the car or a book record altho you may be willing to accept his word or record.) This is not to be a statement but a personal check by you as our representative.

2. Speedometer Reading: Note speedometer reading and enter this. If speedometer is not connected, so state in fourth column.

3. Car Reported "Out or on Demonstration": If there are cars listed and the dealers reports them out or on demonstration, you should answer "No" in the third column and make a note in the sixth column of where cars are reported to be.

Do not report any car present unless you actually see the listed serial number on the car.

The actual report of Mr. O'Flynn, who was the appellant's examining agent or inspector at Belleville, made on 4th June, 1927, upon one of the printed forms provided for the purpose by the appellant (exhibit 27), and produced as a sample, bears the legend at the top:

NOTE TO INSPECTOR

Personally examine the serial number and speedometer on each car, entering the information in the third and fourth columns and answer questions below.

Do not make report from book record or any other information except by actually verifying the serial numbers on the machines.

Now, the fact is that Mr. O'Flynn, instead of taking care to execute his explicit instructions, so far neglected

them as to permit Raynor's manager to prepare his reports; and while Mr. O'Flynn saw the reports, signed them, and sent them in to his principal, he did not see or identify the cars, or their serial numbers, or their speedometer readings; and so cars were reported as on the dealer's premises which were not there; and the Finance Corporation was misled to its loss. It is compensation for this loss that the corporation now seeks to recover.

The appellant resists, denying that it had bound itself for more than reasonable care in the selection of its inspection agents; but that was clearly not the intention that animated the parties. There was no express stipulation as to agents or sub-agents; no obligation to employ either, except that, by necessity, the incorporated appellant could act only through its officers or agents; and it was, in my view, as much bound to the exercise of due care in the car-checking as an individual contractor in the like case would have been. The appellant agreed to furnish information essential for the safety of the respondent's enterprise; in fact it did worse than to furnish none, for instead, it passed on, as its own, untrue and fraudulent statements prepared by the dealer's manager, in the similitude of truth, and calculated to defeat the very object for which the Finance Corporation had adopted and contracted to pay for the precaution of an exact and trustworthy check.

But Mr. Hellmuth argued very ingeniously that the appellant company, even if it would have been liable upon the facts, excluding the Indemnity Agreement (exhibit 9), is relieved, in express terms, by the concluding clause of that agreement; and it was upon that contention that the learned counsel placed the greater emphasis. The text of the document follows:

INDEMNITY AGREEMENT

....19....

To—RETAIL CREDIT COMPANY,
Atlanta, Georgia.

It is agreed that the information furnished by you, in accordance with this agreement, shall be treated in confidence; that the undersigned will not disseminate or transmit the same directly or indirectly to the person reported on, or to any other person, unless he be in our employ in such capacity as to make it necessary that he know such information for our protection and benefit.

The undersigned agrees to hold the Retail Credit Company, and its employees, harmless on account of any damages which may arise from

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the publication or dissemination of information contrary to this understanding, or from the careless handling of any such reports.

In consideration of receiving this service, and as a condition of its rendition, the undersigned agrees that neither the Retail Credit Company, nor its employees, shall be responsible for any loss that may occur to the undersigned through the use of the information furnished.

(Signed) COMMERCIAL FINANCE CORPORATION, Limited.

(Per) W. O'GRADY,
Managing Director.

Now, it must, of course, be remembered that the services which, by the oral agreement, the appellant agreed to render were not confined to reports respecting the locality and condition of cars. There were credit reports and personal or character reports which, naturally, would be of a highly confidential character, and as to which the reporting agency would be apt to stipulate for immunity from damages resulting from needless or unjustified publication or disclosure. Mr. Hill had described to Mr. O'Grady these reports in his negotiations for the contract. I have already transcribed the passage where Mr. Hill said:

> I quoted him the prices and told him the conditions under which the service was rendered; that is, that it is confidential, and that we would not be held liable for any damages accruing from the dissemination or publication of reports, nor were we responsible for any loss incident to the use of the reports. These conditions were all apparently satisfactory to Mr. O'Grady, and I then presented him with the printed form (Ex. 9) that we use in that connection. He read it very carefully and signed it.

It was considered by the trial Judge, or in the Appellate Division, that the Indemnity Agreement had reference only to reports of commercial credit, character and personal standing; it is suggested by the appellant's submissions, and it seems to be undisputed that the first two paragraphs relate only to reports of that nature. But it is contended that the remaining clause comprehends all services which the appellant company was to supply; and, as to the judgment of the Appellate Division which emphasizes the incredibility of the suggestion that the Finance Corporation would incur the trouble and expense of engaging the appellant's services for checking the dealer's cars upon terms of immunity to the appellant and its employees for their own fault in the operation; to this the learned counsel pertinently rejoins that it is not what the court would expect to discover in the attitude of the parties, but what, upon the true construction of their language, the parties

actually contracted for, that must govern the decision; and he insists that the provision which the court thinks so unlikely is precisely embodied in the very agreement to which the parties have, in writing, deliberately committed themselves; and so the enquiry comes back to the meaning and application of the last paragraph.

Upon this I have no doubt, after careful consideration, that the Indemnity Agreement, according to its strict and reasonable meaning, is *alio intuitu* to any question affecting the relations of the parties with respect to the ascertainment of the locality and condition of the cars which the dealer brought into his premises. What the Credit Company stipulated for in the last paragraph of the Indemnity Agreement was, expressly, in consideration of the service previously mentioned in the agreement; and that does not extend to the car-checking service. The expression, " this service," in the first line of the last clause, and the concluding words of the agreement—" the information furnished," refer only to what is the subject-matter of the two preceding paragraphs, and the car-checking is foreign to that. It follows that the Indemnity Agreement does not improve the appellant's case.

Mr. McCarthy, representing the insurance companies, explains that his clients are content with the judgment as it stands, and they cross-appeal only in the event that it is reversed or varied.

In the result, the appeal should be dismissed; and the respondents should have their costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smith, Rae & Greer.*

Solicitors for the respondent, Commercial Finance Corporation Ltd.: *Briggs, Frost, Dillon & Birks.*

Solicitors for the respondent, Merchants Casualty Insurance Co.: *Shaver, Paulin & Branscombe.*

Solicitors for the respondent, Western Assurance Co.: *Hughes, Agar & Thompson.*

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*March 11.
*May 11.
*Oct. 6.
*Nov. 16.

LORIE SINGER AND MADELINE SINGER BY THEIR NEXT FRIEND ELLA TARSHIS, AND THE SAID ELLA TARSHIS (APPLICANTS) ..... } APPELLANTS;

AND

ANNIE SINGER AND MOSES J. SINGER, EXECUTORS AND TRUSTEES OF THE LAST WILL OF JACOB SINGER, DECEASED, AND THE SAID ANNIE SINGER AND THE OFFICIAL GUARDIAN (RESPONDENTS) ..... } RESPONDENTS.

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

Will—Construction—Vesting—Postponed distribution—Provision for advancement of portion of share in estate—Postponed payment—Death of beneficiary—Effect of gift over.

A testator gave all his property to his executors upon trusts, which included a direction to pay his wife during her life or widowhood the income of the estate for maintenance of herself and children, a direction for settlement upon his daughters on marriage, a direction "to pay to each of my sons who shall reach the age of 30 years, a sum equal to half that portion of my estate, to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his 30th year * * * Such payment to be considered as a loan from the estate." Upon the death or remarriage of the testator's wife the residue of the estate was given to his children share and share alike, deducting from each share "any sum or sums which shall already have been advanced" to the child; with provision for division among surviving children of the share of any child who predeceased the widow without leaving issue, and for the issue of any child who predeceased the widow to take the share of their parent. By a codicil the testator directed that his real property (of which his estate mostly consisted) should not be divided among the beneficiaries as directed by his will until after the lapse of 10 years from his death. The testator died in 1911. At the time of the present proceedings, begun in 1930, his widow (who had not remarried) and children still survived except a son S. who died in 1914, having attained the age of 30 years in the testator's life time. S. left a widow and children, one of whom, a posthumous child, died in infancy.

Held (1): The half portions which the sons were to receive at 30 years of age should be considered, not as loans, but as advances out of their shares of the residue (The holding to this effect in *Re Singer*, 33 Ont. L.R. 602, at 618; 52 Can. S.C.R. 447, adopted).

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(2): S's share in the residue of the estate became vested in interest at the testator's death (*Busch* v. *Eastern Trust Co.*, [1928] Can. S.C.R. 479, distinguished). S., who was over 30 years of age, had then, subject to the effect of the codicil, an immediate right to payment of his half portion; and, while the codicil may have practically operated, owing to the nature of the assets, to postpone payment, it did not affect the vesting; nor was the right to the advance personal only to S. so as to be defeated by his death during the 10 year period. But S's. vested interest was subject to defeasance by an executory gift over (to his issue) in the event which happened (issue of S. surviving him); therefore his share was not transmitted by his will, and, the right now to the advance did not belong to S's. widow as his personal representative or as beneficiary under his will, but to his children (S's. widow inheriting her distributive share in the estate of S's. said deceased child).

Duff J. dissented, holding that the direction for payment of half portions to the sons was strictly personal in relation to them in its incidence and effect, and that, with regard to S., no right now existed in any person to have the direction carried out.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of Logie J. (2).

Jacob Singer, late of Toronto, Ontario, deceased, by his last will and testament, dated May 16, 1904, gave all his property to his executrix and executors upon trusts, which included a direction to pay to his wife, Annie Singer, during her life or widowhood, the net annual income arising from his estate for the maintenance of herself and children, a direction for settlement upon his daughters on marriage, a direction " to pay to each of my sons who shall reach the age of thirty years, a sum equal to half that portion of my estate, to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year * * * Such payment to be considered as a loan from the estate." Upon the death or remarriage of his wife, the testator gave the residue of his estate to his children share and share alike, deducting from each share " any sum or sums which shall already have been advanced to such child;" with provision for division among surviving children of the share of any child who predeceased the widow without leaving issue, and for the issue of any child who predeceased the widow to take the share of their parent. By a codicil dated October 31, 1911, the testator directed that his real prop-

(1) (1930) 39 Ont. W.N. 278. (2) (1930) 38 Ont. W.N. 355.

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erty (of which his estate mostly consisted) should not be divided among the beneficiaries as directed by his will until after the lapse of ten years from his death.

The material provisions of the will and codicil are more fully set out in the judgment of Newcombe J. now reported.

The will has previously been before the courts on certain questions (1).

The testator, Jacob Singer, died on November 13, 1911, leaving him surviving his widow (who has not remarried), three daughters and nine sons, all of whom survived at the time of the present proceedings except one son, Solomon, who died on October 19, 1914, being then upwards of 30 years of age (he had reached the age of 30 years in his father's lifetime), and leaving surviving him his wife (the appellant, Ella Tarshis) and two children (born March 22, 1911, and April 21, 1912, respectively) who are still living, and another, a posthumous child, who died in infancy. Solomon Singer left a will in which he appointed his said wife sole executrix and sole beneficiary.

The present proceedings were begun by originating notice of motion, on behalf of the present appellants (the said surviving children of Solomon Singer, deceased, and the said Ella Tarshis) for determination as to what rights or interests the present appellants or any of them have under the provisions of the will of Jacob Singer, deceased, and in particular whether the trustees of the will should be directed to pay now to the children of Solomon Singer, deceased, along with the mother of his said deceased minor child as one of the heirs of such child, as they may be interested, or to the personal representative of Solomon Singer, deceased, before the death or remarriage of the testator's (Jacob Singer's) widow, a sum equal to half that portion of the estate to which Solomon Singer would have been entitled under the will upon the death of his mother had he not predeceased her.

Logie J. (2) held that, upon the true construction of the will and codicil, neither the children of Solomon Singer, deceased, nor his personal representative, were entitled to receive any of the moneys which might have been payable as advances or loans to Solomon Singer had he survived the

(1) *Re Singer*, (1915) 33 Ont. L.R. 602; 52 Can. S.C.R. 447.

(2) (1930) 38 Ont. W.N. 355.

testator ten years. An appeal to the Appellate Division was dismissed (1), and an appeal was brought to this Court.

W. F. O'Connor K.C. for the appellants.

R. S. Cassels K.C. and *D. Guthrie* for the respondent Annie Singer.

McGregor Young K.C., Official Guardian, who, at the hearing before Logie J., was appointed "to represent all persons contingently entitled to interests in the estate."

E. F. Singer K.C. for the executors of the will of Jacob Singer, deceased.

The judgment of the majority of the court (Newcombe, Rinfret, Lamont and Cannon JJ.) was delivered by

NEWCOMBE J.—It becomes necessary for the Court further to interpret the will and codicil of the late Jacob Singer, of Toronto, who died 13th November, 1911. Some questions have already been determined, both at Toronto and in this Court, upon the same testamentary documents, *In re Singer* (2).

The will was executed 16th May, 1904, and the codicil 31st October, 1911. The testator left considerable property, consisting mostly of real estate in small lots at Toronto; he left surviving him his widow, three daughters and nine sons. The daughters and eight of the nine sons still survive, but the other son, Solomon, died 19th October, 1914, leaving a will whereby he constituted his wife, the appellant, Ella Tarshis, sole executrix; and the question involved in this submission is as to whether his surviving children and their mother, in right of her kindship to a deceased child, are entitled to share in the present distribution of that portion of the residue of Jacob Singer's estate which Solomon would have received if he had lived.

Jacob Singer, by the first clause of his will, provided as follows:

> I give, devise and bequest unto my executrix and executors hereinafter named all my property, both real and personal and wheresoever situated upon the following trusts, that is to say:

In the next four clauses there are some charitable or benevolent dispositions; and then there are some provisions

(1) (1930) 39 Ont. W.N. 278.

(2) (1915) 33 Ont. L.R. 602; 52 Can. S.C.R. 447.

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with regard to the carrying on of the testator's business; and the clauses material to the present question follow. In the words of the will they are:

And I direct my said trustees to pay to my wife Annie Singer, during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children; should however my said wife remarry, then such annuity shall cease.

I hereby appoint my said wife Annie Singer to be the sole guardian of my children during their minority, but in case of my said wife shall remarry, then I appoint my Son in law Geo. I. Miller of New York to act with her as guardians of my children and I direct my said trustees to pay to such guardians for the suport, maintenance, and education of my said children, whatever summ shall in their opinion be necessary for their proper support, maintenance and education; such sum however, not to exceed thirty dollars per month for each child.

I direct my said trustees to secure and settle upon each of my daughters at the time any such daughter shall marry with their mother's consent, such consent to be signified to the said trustees in writing, the sum of six thousand dollars, as her separate estate free from the control of any husband, and to give to each such daughter so marrying as aforesaid the sum of one thousand dollars for the purpose of her wedding outfitt.

I direct my said trustees to pay to each of my sons who shall reach the age of thirty years, a sum equal to half that portion of my estate, to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees, and shall be final. Such payment to be considered as a loan from the estate.

Upon the death or re-marriage of my said wife I give, devise and bequeath all the rest and residue of my estate, not hereinbefore specifically disposed of to my said children share and share alike and I direct my said trustees to pay to each of my said children upon his or her attaining the age of twenty-one years his or her share of my estate, deducting however therefrom any sum or sums which shall allready have been advanced to such child; and in the event of any of my said children predeceasing my said wife without leaving lawfull issue him, her, or them surviving, then his, her or their share or shares shall be devided equaly between my surviving children, who shall attain their age of twenty-one years; but in the event of my said children, who shall so predecease my said wife, leaving him, her, or them surviving lawfull issue, then I direct, that such issue shall stand in the place of and be entitled to the share of the parent so deceased.

By the codicil there are some additional gifts; and by clauses 10 and 14 the testator provided thus:

10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors, in remuneration for their services.

14. I further direct that anything mentioned in the aforesaid will, which is at variance with the provisions mentioned in this codicil, shall be subservient and subject to this codicil.

The particular question upon which the appellants seek to be advised, as stated in the originating notice of motion, is

In particular whether the trustees of the said last will of the testator should be directed to pay now to (1) the children of Solomon Singer, deceased (son of the testator) along with the mother of a deceased minor child of said Solomon Singer, deceased, as one of the heirs of such child, as they may be interested, or (2) to the said personal representative of said Solomon Singer, deceased, before the death or remarriage of the testator's widow, a sum equal to half that portion of the estate of the testator to which the said Solomon Singer, deceased, would have been entitled under the said last will of the testator upon the death of his mother had he not predeceased her.

The case was heard by Logie J., of the Supreme Court of Ontario, who held that neither the personal representative of Solomon Singer nor his children were entitled to share in the payment directed by the clause of the will which provides for an advance to be paid to each of the testator's sons who should reach the age of thirty years.

There was an appeal to the Appellate Division and the appeal was dismissed, either upon the ground that the interest of Solomon Singer was not vested, or because the provision for an advance to him upon his attaining thirty years of age lapsed at his death. It may, however, conveniently be said here that Solomon Singer was, at his death, upwards of thirty years of age. There are thus two questions to be determined; first, as to whether Solomon, at the time of his death, had a vested interest; and, secondly, whether his interest, if vested, inured only to his personal use and benefit and was not transmissible.

Both the learned Judge of first instance and the Justices of Appeal refer to *Busch* v. *Eastern Trust Co.* (1), but it does not, in my opinion, rule this case. There was a question of vesting, it is true; but the facts were materially different. In every case it is the testator's intention, if it can be gathered from the will, which must govern; and, while there are some rules to which resort may be had for ambiguous or doubtful cases, there is none which is allowed to prevail in competition with lawful intention clearly ascertainable upon the face of the instrument. In the *Busch* case (1) there was a direction to divide and pay the

(1) [1928] Can. S.C.R. 479.

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residue at a future time; and that was the only evidence of the gift, except a reference to the legatees, as those who would then be entitled; and the court followed the course of authority in holding that the vesting was postponed until the time of distribution. Here, however, the interpretation leads plainly to the opposite result. The entire estate is given at the testator's death to his executors, upon the trusts defined by the will. The income of the residue is to be paid to the testator's widow during her life, or so long as she remains his widow, " for the maintenance of herself and our children." The question is concerned with a gift of a portion of the residue, and the residuary clause is immediately preceded and interpreted by what I shall call the " thirty years clause "; I have already quoted the words, and I think they unmistakably determine the testator's meaning. Solomon Singer lived for more than thirty years. We are told that he had reached the age of thirty years in his father's lifetime, and, consequently, when the testator died, Solomon had, subject to the effect of the codicil which I shall presently consider, an immediate right to receive payment from the trustees of a sum equal to one-half of his share or portion of the estate, at a valuation, and his share is identified by the testator as " that portion of my estate to which such son is entitled under my will upon the death of his mother "; half of that was, therefore, payable at the testator's death. And, as I understand the judgment of the learned judge who heard the motion, he does not question that interpretation. He holds the appellants disentitled by the codicil. The learned Judges of Appeal reach the same result, though for various reasons.

It is clearly expressed in the residuary clause that, in the event of any of the testator's children dying before his widow, without issue surviving, " then his or her share or shares shall be divided equally between my surviving children who shall attain the age of twenty-one years; but in the event of my said children who shall predecease my said wife leaving him, her or them surviving lawful issue, then I direct that such issue shall stand in the place of and be entitled to the share of the parent so deceased."

A doubt is suggested as to the meaning of the concluding words of the thirty years clause, " such payment to be considered as a loan from the estate." That question was

considered along with some others in the former litigation; and, in the judgment of Meredith C.J.O., in the Court of Appeal (1), in which the majority of the learned Justices of Appeal concurred, he held that

> The direction that what they receive is to be considered as a loan from the estate, coupled with the provision for the deduction, upon the ultimate distribution of the estate, from the share of any child to whom advances shall have been made, of the amount of the advances, was intended to make it clear that a son who received any money under the direction as to payments to sons who attain the age of thirty years, should not, in addition, receive a full share of the residue to be divided, when the division came to be made.

It appears that the majority of the learned Judges in this Court agreed with the view so expressed. *Singer* v. *Singer* (2). It is difficult to suppose that the testator meant to require his sons, at the age of thirty years, to borrow from his estate, or that repayment should be enforced, except by way of set off; and I am willing to adopt the view expressed by Meredith, C.J.O., if not bound by it by reason of its acceptance by the majority of this Court upon the former appeal. The half portions which the sons were to receive at thirty years of age are, therefore, to be considered as advances out of their shares of the residue.

The codicil remains to be considered; and, by the 14th clause, it is to control the provisions of the will where there is any variance; but, for the purposes of this case, there is no conflict between the will and the codicil apparent upon these documents themselves. It is suggested that, inasmuch as the testator's estate consisted mostly of realty, upon some of which it would be necessary to realize in order completely to satisfy the thirty years clause of the will, the 10th clause of the codicil, having regard to the nature of the assets at the testator's death, indirectly operated to defer advances to any of the sons for the period of ten years. But while that clause may have practically operated to postpone payments, both under the thirty years clause and under the residuary clause, it does not, I think, affect the vesting. And the question which now arises, more than ten years after the testator's death, as to the rights of Solomon's widow and children, should, I think, be determined by the interpretation of the will itself, as if there had been no codicil.

(1) (1915) 33 Ont. L.R. 602, at 618.

(2) (1916) 52 Can. S.C.R. 447.

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Masten and Orde, JJ.A., consider that the provision made for the testator's sons under the thirty years clause "was personal to the son and lapsed if at the time when such advance became payable the son was no longer living"; but, with all due respect, neither of the testamentary documents says so, nor can I discover any evidence of such an intention.

I would, therefore, allow the appeal, with costs throughout to all parties, to be paid out of the estate. If, in these circumstances, there be any question whether the declaration should be in favour of Mrs. Tarshis, as the personal representative of Solomon Singer, or as guardian of her surviving children, and as representing an interest in the estate of her deceased child, it may be spoken to.

DUFF J. (dissenting).—The conditions themselves of the direction shew, in my view, quite unmistakeably, that the direction is strictly personal in relation to the sons in its incidence and effect. This is of the essence of the testamentary provision; and it is entirely incompatible with the supposition that any right is created to have the direction carried out that is transmissible by operation of law to the legal personal representative.

These considerations are also sufficient to negative the devolution of any such right upon the children under the terms of the will.

The appeal should be dismissed; the costs of all parties to be paid out of the estate.

A further hearing was held upon the question left open in the last paragraph of the judgment of Newcombe J., and pursuant to leave reserved therein, and for settlement of the terms of the formal judgment.

D. Guthrie for the respondent Annie Singer.

McGregor Young K.C., Official Guardian, for infants.

W. F. O'Connor K.C. (*F. D. Hogg K.C.* with him) for the appellant Ella Tarshis.

The judgment of the court on these questions was delivered by

NEWCOMBE J.—At the opening of the present session of Court, the parties were heard further, pursuant to the leave reserved by the judgment pronounced on 11th May last.

Upon the question as to whether Solomon's share was transmitted by his will, my answer is in the negative. It is provided in terms by the antepenultimate clause of the will of Jacob, his father, that

> in the event of my said children, who shall so predecease my said wife, leaving him, her, or them surviving lawful issue, then I direct, that such issue shall stand in the place of and be entitled to the share of the parent so deceased.

Jacob's widow is living and has not remarried; and, therefore, the time for distribution of the residue of his estate has not arrived; and, in any event, it would conflict with the natural meaning of the clause which I have quoted to recognize the suggestion, submitted on behalf of Solomon's widow, that she is entitled to the exclusion of the issue. And so, notwithstanding that Solomon acquired a vested interest at the testator's death, it was, upon my interpretation of the will, subject to defeasance by an executory gift over in the event which happened. This follows from the decisions of the House of Lords, in *O'Mahoney* v. *Burdett* (1), and *Ingram and McQueen* v. *Soutten* (2); and the judgment of Lord Shaw of Dunfermline, in the Privy Council, in *Ward* v. *Brown* (3).

There was, however, a posthumous son of Solomon, Eric, who died in his first year; and it is not disputed that Eric's mother inherits, to the extent of her share in his estate, under the Ontario statute of distributions.

The appellants now wish to recover interest, although interest was not claimed by the originating notice; but in my view that claim is not open upon this appeal. It may, however, without prejudice from the present application, be raised upon the accounting, or other proper proceedings, disclosing the facts, if the parties be so advised. They will, of course, not overlook that Meredith, C.J.O., in the former case (4), referring to the paragraph of his judgment already quoted, added that

(1) (1874) L.R. 7 H.L. 388.
(2) (1874) L.R. 7 H.L. 408.
(3) [1916] 2 A.C. 121.
(4) (1915) 33 Ont. L.R. 602, at 618.

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This consideration, and the absence of anything being said as to the loan bearing interest, or of an addition of interest to the sum to be deducted from the share, lead me to the conclusion that interest is not payable on the sum which a son may receive, and that he cannot be required, as a condition of making a payment to him, to give security for it.

Appeal allowed.

Solicitor for the appellants: *Louis M. Singer.*

Solicitors for the respondent trustees: *A. & E. F. Singer.*

Solicitors for the respondent Annie Singer: *Cassels, Brock & Kelley.*

Official Guardian: *McGregor Young.*

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*Oct. 23.

THE BELL TELEPHONE COMPANY OF CANADA ..... } APPELLANT;

AND

THE TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY, AND THE CORPORATION OF THE CITY OF HAMILTON..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Practice and procedure—Motion to strike paragraphs from factum—Jurisdiction of a judge in chambers or the registrar.

The rules of this court concerning the contents of the factum and the form and manner in which they shall be printed must be followed before the registrar will receive them; but, otherwise, it is not within the province of the registrar, or a judge in chambers, to control the manner and form in which the allegations of fact or the arguments of law are presented by counsel in their factum.

MOTION by the appellant for an order striking out certain paragraphs of the factums filed by the respondents, upon the ground that they were improper, vexatious and embarrassing.

M. Powell K.C., for the motion.

W. L. Scott K.C., and *A. J. Fraser, contra.*

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*PRESENT:—Rinfret J. in chambers.

RINFRET, J.—The appellant moves for an order striking out paragraph no. 11 of the factum filed on behalf of the respondent, the Toronto, Hamilton and Buffalo Railway Company, and paragraph no. 12 of the factum filed on behalf of the respondent, the city of Hamilton, in this appeal, upon the ground that the said paragraphs are improper, vexatious and embarrassing. The motion was heard by the registrar, who, being of opinion that this was a "matter * * * proper for the decision of a judge", under rule 83, referred the same to me as rota judge.

After having heard counsel for the parties, I am of opinion that the motion should be dismissed with costs.

The appeal is taken from a decision of the Board of Railway Commissioners for Canada pursuant to the provisions of the *Railway Act*. It is submitted upon a case settled by the Board. The statement of facts so settled contains the following paragraph:

2. Acting in pursuance of the powers conferred upon it in that behalf by its special Acts of incorporation, referred to in paragraph no. 1 hereof, and with the legal consent of the city of Hamilton, the appellant, the Bell Telephone Company of Canada, lawfully constructed its lines of telephone and plant over, along the sides of, upon, under and within the limits of the following streets, highways and public places within the limits of the city of Hamilton, namely: Charles street, McNab street, James street, Hughson street, Catherine street, Aurora street, Victoria avenue, Wood Market square and Baillie street.

The factums of each of the respondents set up the following allegation:

The appellant has not obtained authority to carry its lines, wires and conductors over or beneath the railway of the railway company as required by section 372 of the *Railway Act*, which said section reads as follows:

It is contended on behalf of the appellant that there is nothing in the statement of facts as settled and printed to support such an allegation in the respective factums of the respondents and that the appellant will accordingly be placed at an unfair disadvantage if this appeal is to be proceeded with upon the respondents' factums as they now stand.

There are rules concerning the forms of the printed case (Rules nos. 6, 7, 11 & 12) and they provide that the registrar shall not file the case without the leave of the court, or a judge, if these rules have not been complied with (rule 13). There are also rules concerning the con-

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THE BELL TELEPHONE CO. OF CANADA v. THE TORONTO, HAMILTON AND BUFFALO RY. CO. ET AL.

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tents of the factums and the form and manner in which they shall be printed. The registrar is not to receive them unless the requirements of these rules have been followed. But I cannot find any power vested in the registrar, or in a judge in chambers, to deal with the allegations of fact, or the arguments of law, which counsel deem it advisable to make in their factums. The factum is nothing more than a written argument. It sets out the "points for argument in appeal". It is not within the province of the registrar, or a judge in chambers, to control the manner and form in which these points for argument are to be presented.

The paragraph complained of in the respondents' factums is in the nature of an argument. It does not and cannot modify the statement of facts settled by the Board of Railway Commissioners. It will have to be appreciated and weighed by the court in the light of that statement of facts. The situation is vastly different from that where a party includes in his factum

> evidence which formed no part of the case in the court below and forms no part of the case settled for appeal here,

and the decision of Idington J. in *Bing Kee* v. *Yick Chong* (April, 1910, Cameron's Supreme Court Practice, 3rd ed., p. 405) can afford no precedent for the present application.

The appellant will not be prejudiced by my decision, for, if it should be found advisable, the matter can be dealt with by the full court when the appeal comes on for hearing (*Vernon* v. *Oliver* (1); *Coleman* v. *Miller,* Cassels' Digest, 2nd ed., p. 683; *Wallace* v. *Souther,* Coutlée's Digest, p. 1102; *Fairman* v. *City of Montreal,* Coutlée's Digest, p. 1105). In the reference *re Waters & Water Powers* (2) documents printed in the case were ordered struck out upon verbal application at the hearing.

As already stated, the motion will accordingly be dismissed with costs, including those already reserved by the registrar.

Motion dismissed with costs.

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(1) (1884) 11 S.C.R. 156. (2) [1929] S.C.R. 200.

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JAMES HUTCHISON (TRUSTEE IN BANKRUPTCY) ..... APPELLANT; *May 13, 15. *Oct. 6.

AND

THE ROYAL INSTITUTION FOR THE ADVANCEMENT OF LEARNING (PETITIONER) ..... RESPONDENT;

AND

J. K. L. ROSS (INSOLVENT).

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

Promissory note—Agreement to subscribe for a university fund—Validity—Valuable consideration—Bills of Exchange Act, R.S.C., 1927, c. 16, ss. 10 and 53.

In March, 1914, R. offered to give to McGill University, namely the respondent, $150,000 for the erection and equipment of a gymnasium and the offer was accepted; but the building was deferred owing to the war. In 1920, the university authorities undertook a campaign for a "Centennial Endowment Fund" and R., by the terms of a "Subscription and Pledge Card," then promised to contribute $200,000 to that fund on the condition that the previous offer of $150,000 would be included in the subsequent offer, the university being at the same time released from the obligation of erecting the gymnasium. R. paid $100,000 up to 1924, when he asked for an extension of time for payment of the balance. The respondent acceded to R's request and agreed to accept a promissory note for $100,000 dated December 1, 1925, and payable three years after date. R. became insolvent and the trustee in bankruptcy disallowed the respondent's claim for the amount of the note and the interest accrued. The Superior Court reversed that decision, which judgment was affirmed by the appellate court.

Held that R's offers to suscribe for the erection of the gymnasium and later for the Endowment Fund, upon the terms agreed, involved him in liability for the stipulated payments, according to the law of Quebec where the contract was entered into, and also, per Newcombe, Rinfret, Lamont and Cannon JJ., according to the common law of England.

Held, also, that the forbearance or extension of time limited for the balance of those payments which R. subsequently obtained by the giving of the note was valuable consideration within the meaning of the common law of England or under s. 53 of the *Bills of Exchange Act,* R.S.C., 1927, c. 16.

Judgment of the Court of King's Bench (Q.R. 50 K.B. 107) aff.

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

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HUTCHISON v. THE ROYAL INSTITUTION FOR THE ADVANCEMENT OF LEARNING.

APPEAL from the decision of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgment of the Superior Court, Panneton J. (2), and allowing the respondent's claim for $118,862.19 to be collected as valid according to its rank.

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

J. W. Cook K.C., and *G. G. Hyde K.C.*, for the appellant.

J. A. Ewing K.C., and *G. L. McFadden K.C.*, for the respondent.

The judgment of Anglin C.J.C. and Rinfret and Cannon JJ. (3) was delivered by

ANGLIN, C.J.C.—I concur in the disposition of this case suggested by my brother Newcombe and, speaking generally, in his reasons therefor.

Assuming that Mr. J. K. L. Ross incurred a legal obligation to pay to McGill University $200,000 towards its endowment fund, the proposition seems to me so clear that it can require no citation of authority to support it, that, whether the matter be dealt with under the law of England, or under R.S.C. 1927, c. 16, s. 53, the extension of time for payment of the $200,000, was a "valuable" consideration for the giving by Mr. Ross of the note in question.

The only question, therefore, requiring further discussion here seems to be whether or not Ross did incur a legally enforceable obligation to pay $200,000 towards the endowment fund of the university. That question, it seems to me, must be determined according to the law of the province of Quebec, where the contract to pay was entered into, and was intended to be carried out, and, if need be, enforced. According to that law there can be no question that there had been a real and lawful "cause" (Arts. 982, 984, 1131, C.C.) for Mr. Ross's promise to pay $150,000, to be used towards the cost of the erection of a gymnasium, to be

(1) Q.R. 50 K.B. 107. (2) Q.R. 68 S.C. 354.

(3) *Reporter's Note:* Rinfret and Cannon JJ. also concurred with Newcombe J.

known as the Ross Memorial Gymnasium. It follows that the release of that obligation afforded a like lawful "cause" for the promise to pay the $200,000.

This appeal, accordingly fails, the only grounds of appeal argued by the appellant having been that there was no "valuable" consideration for the giving of the note and an utter lack of consideration for the promise to pay the $200,000.

The judgment of Newcombe, Rinfret, Lamont and Cannon JJ. was delivered by

NEWCOMBE J.—It is admitted, for the purposes of the case, that the respondent institution, which is the petitioner, and McGill University are, in the words of the admission, "one and the same". The claim, filed 14th November, 1928, is against the bankrupt estate of John Kenneth Leveson Ross, upon a promissory note, dated 1st December, 1925, made by Mr. Ross, whereby the maker promised to pay to the order of the petitioner, three years after date, $100,000 at Montreal, value received, with interest at six per cent. per annum, semi-annually. The amount, as valued at the date of the claim, for principal and interest, was $118,862.19. The trustee, by notice in writing of 22nd March, 1929, notified the respondent that he had disallowed the claim, upon the ground, as expressed, that "the promissory note upon which your claim is made was given without consideration".

Upon appeal, Panneton J., of the Superior Court of the province of Quebec, sitting in bankruptcy, tried the case upon pleadings and evidence, reversed the decision of the trustee and ordered him

to admit the petitioner's claim as valid and to collocate it according to his rank.

The trustee appealed to the Court of King's Bench, where the appeal was heard by five judges, and the court, with one dissent, affirmed the judgment.

Upon appeal to this court, the trustee's contention is

that he was justified in rejecting the claim owing to absence of consideration, the note in question being a mere gift covering the balance of the subscription by Mr. Ross to the Centennial Endowment Fund for McGill University.

It is necessary to consider the facts; and they are not in dispute. There are the admissions and correspondence of the parties; and it is, perhaps, not immaterial to observe

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at the outset that " value received " is acknowledged upon the face of the note; and, moreover, there is the presumption of consideration until the contrary is shewn. Mr. Ross does not appear ever to have questioned his liability, and the respondent of course insists upon its claim.

The circumstances leading up to the making of the note are disclosed by the admissions signed by the solicitors; but the letters which passed between the parties were also produced as exhibits at the trial. By the first of these letters, dated 26th March, 1914, Mr. Ross, writing to Mr. Vaughan, the secretary of the university, says

> Following out the verbal promise I recently made Principal Peterson, I now confirm to you the offer I then made to him that I would give to McGill University a sum of one hundred and fifty thousand dollars for the erection and equipment of a gymnasium to be known as the Ross Memorial Gymnasium, on condition that the University apply a further sum of one hundred thousand dollars (being the amount of my late father's legacy to the University) for the completion of such gymnasium.
>
> As an additional safeguard in case of my decease before this undertaking is implemented, I have caused to be added a clause in a codicil to my will in terms of the enclosed copy.

The narrative of the first two enumerated paragraphs of the admissions is that

> 1. By the terms of a letter of date March 26, 1914, addressed by Mr. J. K. L. Ross, the bankrupt, to the secretary of McGill University, (The Royal Institution for the Advancement of Learning) the former agreed to give to McGill University the sum of $150,000 for the erection and equipment of a gymnasium to be known as The Ross Memorial Gymnasium on the condition that the University apply a further sum of $100,000 (being the amount of a legacy left by the father of the bankrupt) for the completion of such gymnasium.
>
> 2. By the terms of a letter of date March 28, 1914, addressed to Mr. J. K. L. Ross, the bankrupt, by the secretary of McGill University, the letter and offer of the 26th of March, 1914, were duly acknowledged and accepted.

These two paragraphs are apt to describe an arrangement whereby Mr. Ross and the university intended to be bound; it is in terms an accepted offer, and it is not denied that he incurred an obligation to pay $150,000 upon performance by the university of the stipulated conditions. It is suggested that the university had not earned the right to payment, because, as we are told, the building of the gymnasium was deferred owing to the war; but it is evident that neither of the parties considered the project to have been frustrated or abandoned; and, when, on 1st August, 1920, after the Peace, Sir Arthur Currie succeeded Dr. Peterson as principal of the university, and the governors, later in the year, under-

took the campaign for their Centennial Endowment Fund, which, in the result, produced upwards of $6,000,000, Mr. Ross, being a wealthy graduate and one of the governors, naturally had occasion to consider the amount and terms of a contribution to that fund. He appears then to have realized that his conditional promise for the gymnasium was still outstanding and to have desired that the amount of $150,000, so promised for that special object, should be released for the general purposes of the Endowment Fund, and, for this, he sought and obtained terms from the university, as stated by the third and fourth admissions.

3. By the terms of a Subscription and Pledge Card of date November 26, 1920, and an explanatory letter bearing the same date and attached to the same, Mr. J. K. L. Ross, the bankrupt, bound himself to contribute the sum of $200,000 towards the McGill Centennial Endowment Fund on the condition that the amount of $150,000 which the said Mr. J. K. L. Ross had agreed to pay towards a gymnasium for McGill University by the terms of his letter of the 26th of March, 1914, should be included in the said amount of $200,000, in consideration of which the said Mr. J. K. L. Ross withdrew the restriction on the destination of the said amount of $150,000, and on the condition also that an amount of $20,000 which had been promised by the said Mr. J. K. L. Ross to McGill University on a previous occasion should, if still remaining unpaid, be included in the said amount of $200,000; said amount of $200,000 was made payable in five equal consecutive yearly instalments, the first of which was to become due on the first day of January, 1922.

As regards the amount of $20,000 referred to by the bankrupt, as having been promised on a previous occasion, there was never any previous written agreement or subscription to pay an amount of that size.

4. By letter of date November 30, 1920, Mr. J. W. Ross, the honorary treasurer of McGill University, acknowledged and accepted the said subscription of $200,000 on behalf of McGill University and promised that the letter of Mr. J. K. L. Ross of the 26th of November, 1920, setting forth the conditions above referred to, would be kept attached to the subscription card in order that the wishes of Mr. J. K. L. Ross might be properly carried out.

Mr. Ross paid, on account of this consolidated subscription, the stipulated instalments of $40,000 in 1922 and in 1923, and $20,000 in 1924; or $100,000 in all. There have been no subsequent payments. It is shewn that unfortunately, even in 1924, liquid resources were becoming difficult and that Mr. Ross was seeking indulgence in the way of an extension of time for payment of the balance; and, at the end of the next succeeding year, the agreement evidenced by the following paragraphs of the admissions was concluded.

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10. By the terms of a letter of date November 19, 1925, written by Mr. J. K. L. Ross to Mr. John W. Ross, the honorary treasurer of McGill University, the former called attention to the balance of $100,000 then remaining due on his original subscription of $200,000 and requested the privilege of paying by giving his promissory note for the said amount of $100,000 for three years with interest at 6 per centum per annum.

11. By the terms of a letter of date December 3, 1925, written by Mr. A. P. S. Glassco, the secretary and bursar of McGill University, Mr. J. K. L. Ross was notified that his request for a further extension of time, as mentioned in his letter of the 19th of November, 1925, had been submitted to the Finance Committee of the Governors of the University and had been acceded to by them, the understanding being that Mr. J. K. L. Ross was to pay interest on the note semi-annually at the said rate of 6 per centum per annum.

12. In accordance with the said letters, a promissory note for $100,000, dated December 1, 1925, payable to the order of the Royal Institution for the Advancement of Learning, with interest at 6 per centum per annum, payable semi-annually, was duly signed and executed by the said Mr. J. K. L. Ross and delivered to the Royal Institution for the Advancement of Learning.

13. It is the said promissory note of $100,000, dated December 1, 1925, and payable three years after its date which is referred to in the proof of debt filed with the trustee on or about the 14th of November, 1928, by the Royal Institution for the Advancement of Learning, and the amount claimed to be due on the same at that time was $118,862.19, as appears from the said proof of debt.

When the note was made nobody doubted Mr. Ross's ability or willingness to fulfil his promise; he sought the forbearance for his own convenience, and because he did not care at that time " to disturb any investment ". The stipulation for interest was introduced at the suggestion of the university. It is not contended hat his liability is affected by any provision of the *Bankruptcy Act* impressing the transaction with invalidity; nor is it suggested that Mr. Ross was acting under any mistake, or that he did not intend the note to have the effect of an enforceable instrument.

The appellant quotes sections 10 and 53 of the *Bills of Exchange Act*, R.S.C. 1927, c. 16, by which it is enacted that

10. The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to bills of exchange, promissory notes and cheques.

Consideration

53. Valuable consideration for a bill may be constituted by

(*a*) any consideration sufficient to support a simple contract;

(*b*) an antecedent debt or liability.

2. Such debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

And he urges, by his factum, "that the matter is one governed by the common law of England, and that, under that law, Ross's agreement is a nullity". He adds that, "under the law of Quebec the agreement is equally void". But I think he fails to shew that the agreement is void under either system, for in my opinion, the presumption is not overcome, and moreover the evidence affords proof of valuable consideration for the making of the note, and is incompatible with any other conclusion.

The appellant in his factum states his case very frankly, and it is worth while to quote these passages.

It appears that the late Mr. James Ross, the father of Mr. J. K. L. Ross, died in the year 1913 and by his will bequeathed the sum of $100,000 to McGill. In the year 1914 Mr. J. K. L. Ross wrote the University authorities agreeing to contribute the sum of $150,000 towards the building of a gymnasium. This offer was subject to the following conditions: (1) That the gymnasium should be built by the University. (2) That it should be called "The Ross Memorial Gymnasium." (3) That the sum of $100,000 left by the late Mr. James Ross would be used to partially defray its cost. The gymnasium was never built, and when the campaign for the Centennial Endowment Fund was inaugurated, in the year 1920, it was stipulated as a condition of the subscription of Mr. J. K. L. Ross that any understanding between himself and the University authorities in regard to the gymnasium would be considered as at an end. Accordingly, when Mr. J. K. L. Ross agreed to contribute $200,000 to the Centennial Endowment Fund, as evidenced by his pledge card and letter, the understanding in regard to the building of a gymnasium was completely ended. Mr. Ross was released from his obligation, such as it was, and on the other hand, the McGill authorities were released from their obligation to build a gymnasium, to expend on it the $100,000 which they had received from the late Mr. James Ross and to name it "The Ross Memorial Gymnasium." Sir Arthur Currie fully understands this and explains it as follows:—

Q. Will you tell me what consideration Mr. Ross received from the University of McGill for the signing of that pledge card?—A. The release of an obligation to pay $150,000, which was to be devoted to the building of a gymnasium. The release of any obligation to pay $20,000, which was in dispute—not in dispute, but somebody seemed to have forgotten just what it was about.

Q. You speak of the release of the subscription for the building of the gymnasium of $150,000; the consideration of that subscription was the building of a gymnasium, $150,000?—A. Yes.

Q. And the gymnasium has never been built up to the present time, is that correct?—A. Yes, that is correct.

Q. So consequently the first subscription must be left out of the question altogether, because the building of a gymnasium which was the consideration for that subscription, has not been proceeded with?—A. The subscription had never been received; the amount was subscribed in 1914 and never paid.

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Q. The release was a release to the McGill University of this obligation to build this gymnasium?—A. Yes, and we relieved Mr. Ross of the obligation to pay $150,000, which he had promised.

Q. And he on the other hand relieved you from the obligation of building the gymnasium?—A. Yes.

Q. It was a mutual discharge and release, as regards the $150,000?—A. Yes.

Mr. Justice Panneton disposes of this evidence by stating that, in his view, Sir Arthur Currie is evidently mistaken since at no time was the University under an obligation to build a gymnasium, but Ross was under the obligation to pay if they built it. "There was, therefore, no mutual discharge or release as regards the $150,000."

This is obviously incorrect. The University was formally released from the obligation of erecting the building, of contributing the $100,000 received from the late Mr. James Ross and of naming it "The Ross Memorial Gymnasium." Mr. J. K. L. Ross, on the other hand, was released from the obligation of contributing the $150,000. There was, as Sir Arthur Currie truly stated, a mutual release and discharge.

Now if, as the appellant contends, the matter is governed by the common law of England, the mutual release and discharge upon which he relies really satisfies the requirement of valuable consideration. Obviously, when Mr. Ross's offer of 1914 was accepted, it became a promise; and it is unnecessary to consider whether or not he had power to revoke that promise; he never did revoke it or manifest any intention to exercise any power of revocation, if any, which he may have had. Sir Frederick Pollock in the 9th edition of his Principles of Contract, at p. 195, says that

> In many cases a promisor has the option of avoiding his contract for some cause existing at the date of the promise. But in all such cases the contract is valid until rescinded, and the right to rescind it may be lost by events beyond the promisor's control; so there is no difficulty in treating his promise as a good consideration.

And when, in 1920, Mr. Ross arranged with the university authorities the terms of his present subscription, it was one of his stipulations, and a term of the bargain upon which he insisted, that the amount promised for the gymnasium should, with the consent of the university, be diverted from that object and figure in the Endowment Fund. It was upon that footing that he consented to subscribe, and the substitution of the new agreement must be regarded as consideration of value to both parties. Mr. Ross says in terms of his letter to the treasurer of the university of 26th November, 1920, that

> The special conditions I asked for with regard to my contribution (meaning his contribution to the Endowment Fund) were (1) that an amount of $150,000 which I had previously promised towards a gymnasium

for McGill should be included in my present contribution, in consideration of which I should withdraw the restriction on the destination of that amount.

If, therefore, as I think, Mr. Ross's subscription to the Endowment Fund upon the terms agreed involved him in liability for the stipulated payments, the forbearance or extension of time limited for the balance of those payments which he subsequently obtained by the giving of the note was valuable consideration within the meaning of the law. This, I think, is established beyond doubt by the English authorities, and I shall refer to some of them.

Sir Frederick Pollock, in the book cited, at pp. 186, 187, quotes as an elementary principle that the law will not enter into an enquiry as to the adequacy of the consideration.

> The idea is characteristic (he says) not only in English positive law but in the English school of theoretical jurisprudence and politics. Hobbes says: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give." And the legal rule is of long standing, and illustrated by many cases. "When a thing is to be done by the plaintiff, be it ever so small, this is a sufficient consideration to ground an action."

The footnote refers to *Sturlyn* v. *Albany* (1), and marginal references there.

Professor Story in his book on Bills of Exchange, 4th ed., c. vi, s. 183, puts the following question:

> What then is a valuable consideration in the sense of the law?

And he answers, quoting Comyn's Digest, Action of Assumpsit, B. 1 to 15, and other authorities mentioned in the note:

> It may, in general terms, be said to consist either in some right, interest, profit, or benefit, accruing to the party, who makes the contract, or some forbearance, detriment, loss, responsibility, or act, or labour, or service, on the other side. And, if either of these exists, it will furnish a sufficient valuable consideration to sustain the drawing, indorsing, or accepting a bill of exchange in favour of the payee or other holder. Thus, for example, not only money paid, or advances made, or credit given, or the discharge of a present debt, or work and labour done, will constitute a sufficient consideration for a bill; but, also, receiving a bill as security for a debt, or forbearance to sue a present claim or debt, or an exchange of securities, or becoming a surety, or doing any other act at the request, or for the benefit, of the drawer, indorser, or acceptor, will constitute a sufficient consideration for a bill.

(1) (1588) Cro. Eliz. 67, and Cro. Car. 70.

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To the same effect is the judgment of the Exchequer Chamber in *Currie* v. *Misa* (1).

In *Smith* v. *Holmes* (2), Parke, B., said that "an action will be on mutual promises."

In *Westlake* v. *Adams* (3), the defendant, upon the apprenticing of his son to the plaintiff by a charitable society, agreed to give the plaintiff, in addition to a premium of £20 to be paid by the society, four I.O.U's for £5 each, payable at intervals of a year, and the indenture stated the consideration to be £20 payable by the society. The boy served the full term, and the plaintiff sued the defendant upon the last of the I.O.U's. It was held by Willes, J. and Byles, J., Williams, J. dissenting, that the circumstances of the indenture being void by the 39th section of 8 Ann. c. 9, for not truly setting forth the consideration, did not prevent the plaintiff from maintaining his action upon the I.O.U. Byles, J., in his judgment, at p. 265, says

> The indenture was the very indenture that the plaintiff agreed to give and which the defendant agreed to take. There was no fraud; the defendant knew all the facts and cannot be heard to say that he was ignorant of the law. It cannot even be said that the deed, though liable to be proved to be void, was valueless; for, it was a good deed on the face of it, and had the evidence of the additional consideration perished, or not been forthcoming, the deed would have had its full operation in every way.
>
> It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of the consideration; so that much less consideration than here existed might have sufficed.
>
> Lastly, it must be remembered that the defendant in this case has received a full performance of the terms of the indenture at the hands of the plaintiff. The jury have, I think, made an end of the question; for, they have found (as they well might) that the defendant received what he bargained for, and all that he bargained for.
>
> The only difficulty I feel, is, in distinguishing this case from the case of *Jackson* v. *Warwick* (4). But that was an action on a promissory note: the defendant had there certainly received some consideration: and the law was not at that time so well settled as it has since been, that an action to recover the full amount due on a bill or note can be sustained unless the consideration fails entirely, or fails to an ascertained and liquidated amount.

The case had been tried by Willes, J., with a jury, and his direction was, in substance, that the indenture of apprenticeship was void by the statute for not truly setting out the consideration; "but that," see pp. 261 and 262 of the report,

(1) (1875) L.R. 10 Ex. 152, at 162, 169.
(2) (1846) 10 Jur. 862, at 363.
(3) (1858) 5 C.B. N.S. 248.
(4) (1797) 7 T.R. 121.

if the consideration for the I.O.U. upon which the action was brought was the execution of the indenture, notwithstanding it might be void, such execution was a sufficient consideration for the promise.

And, in discharging the rule for a new trial at the conclusion of the case, the learned judge said

I am not ashamed of having been somewhat astute at the trial to defeat what I conceived to be an unjust and unworthy defence: and of course I do not express any different opinion now.

The well known cases of *Cook* v. *Wright* (1), and *Calisher* v. *Bischoffscheim* (2), both decided by Blackburn, J., and Lord Justice Bowen's judgment in *Miles* v. *New Zealand Alford Estate Co.* (3), were approved by Lord Atkinson in the Privy Council, in a Ceylon case, *Jayawickreme* v. *Amarasuriya,* (4).

In *Crears* v. *Hunter* (5), it was held by the Court of Appeal that forbearance by the plaintiff at the defendant's request constituted sufficient consideration, even in the absence of a promise. Lopes, L.J., at p. 346 states the law thus,

In this case the question is whether there was evidence of a consideration for the making of this note by the defendant. The law appears to be that a promise to forbear is a good consideration, but also that actual forbearance at the request, express or implied, of the defendant would be a good consideration.

In *Fullerton* v. *Provincial Bank of Ireland* (6), upon the question of consideration, Lord McNaghten held the point to be settled by authority that

It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it.

And His Lordship referred to *Oldershaw* v. *King* (7), *Alliance Bank* v. *Broom* (8), *and Miles* v. *New Zealand Alford Estate Co.* (9), and he added that "the proposition seems to be good sense".

In *Dunlop Pneumatic Tire Co.* v. *Selfridge & Co.* (10), Lord Dunedin said

My Lords, I am content to adopt from a work of Sir Frederick Pollock, to which I have often been under obligation, the following words as to consideration: "An act or forbearance of one party, or the promise

(1) (1861) 1 B. & S. 559.
(2) (1870) L.R. 5 Q.B. 449.
(3) (1886) 32 Ch. D. 266, at 291.
(4) (1918) 87 L.J. N.S. P.C. 165, at 168, 169.
(5) (1887) 19 Q.B.D. 341.
(6) [1903] A.C. 309.
(7) (1857) 2 H. & N. 517.
(8) (1864) 2 Dr. & S. 289.
(9) (1886) 32 Ch. D. 266, at 289
(10) [1915] A.C. 847, at 855.

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thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable." (Pollock on Contracts, 8th ed., p. 175.)

I would have thought that the question as to whether Mr. Ross's agreement of 1920 to contribute to the Endowment Fund was binding and enforceable would naturally fall to be determined by the law of Quebec, the province in which the parties resided and made the agreement and where it was meant to be performed; but, if that question is governed by the law of Quebec, the appellant's difficulty is greater and becomes even more obvious. It is true that the rules of the common law of England, including the law merchant, apply to bills of exchange and promissory notes, because the Parliament of Canada has, by the *Bills of Exchange Act,* so declared in the exercise of its exclusive legislative authority over that subject; but the Dominion legislation does not and was not intended to affect a subscriber's liability to implement his subscription, and, as I understood the argument, no contention to the contrary was submitted.

I quote articles 982 and 984 of the Civil Code of Quebec:

982. It is essential to an obligation that it should have a cause from which it arises, persons between whom it exists, and an object.

984. There are four requisites to the validity of a contract:
Parties legally capable of contracting;
Their consent legally given;
Something which forms the object of the contract;
A lawful cause or consideration.

It is essential therefore that an obligation shall have "a cause from which it arises", and that a contract shall have "a lawful cause or consideration"; but it is not meant that a contract which has a lawful cause within the meaning of article 984 C.C. shall be void or defective for lack of that which, under the English authorities, would constitute valuable consideration. Pothier's view is expressed in the second edition of his works by Professor Bugnet, 3 and 42. Under the latter number he says

42. Tout engagement doit avoir une cause honnête.

Dans les contrats intéressés, la cause de l'engagement que contracte l'une des parties est ce que l'autre partie lui donne, ou s'engage de lui donner, ou le risque dont elle se charge. Dans les contrats de bienfaisance, la libéralité que l'une des parties veut exercer envers l'autre, est une cause suffisante de l'engagement qu'elle contracte envers elle. Mais lorsqu'un engagement n'a aucune cause, ou, ce qui est la même chose, lorsque la cause pour laquelle il a été contracté, est une cause fausse, l'engagement est nul, et le contract qui le renferme est nul.

Article 1131 of the *Code Civil* provides that

1131. L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.

M. Rogron, in the 19th edition of his commentaries, at pp. 4236-7, explains the words " sans cause " in this article as follows:

Sans cause. La cause est ce qui détermine l'engagement que prend une partie dans un contrat; il ne faut pas la confondre avec la cause implicite du contrat, autrement dit le motif qui porte à contracter. La cause de l'engagement d'une partie est le fait ou la promesse de l'autre partie; elle peut aussi consister dans une pure libéralité de la part de l'une des parties: ainsi, lorsque je m'oblige à payer mille francs à Paul pour tels services que son père m'a rendus, la cause déterminante du contrat, ce sont les services qui m'ont été rendus; si celui-ci ne m'a jamais rendu les services dont il a été parlé dans l'acte, le contrat est sans cause, mais au cas où l'acte ne mentionnait point ces services le contrat pourrait être maintenu, si les juges décident par l'appréciation des circonstances que le désir de m'acquitter de services plus ou moins réels a été le motif et non la cause de mon engagement. Je m'oblige à donner mille francs à Paul pour qu'il suive une affaire pendante devant le tribunal de la Seine: la cause déterminante est la promesse de Paul qu'il suivra mon affaire; si elle est jugée irrévocablement au moment où nous avons stipulé, le contrat est sans cause. Enfin je donne, dans la forme des dispositions entre vifs, ma maison à Paul, qui l'accepte: ma libéralité est ici la seule cause du contrat.

Professor Langdell also quotes M. Rogron's comment in a note to *Thomas* v. *Thomas* (1), in his select cases on Contracts, Part I, 2nd ed., p. 169.

I extract the following paragraph from Sir Frederick Pollock's Principles of Contract at p. 185.

No one ever argued before an English temporal court that deliberate bounty or charitable intention will support a formless promise; but such was undoubtedly the canonical view, and is to this day, in theory, the rule of legal systems which have followed the modern Roman law. There was no room within the common law scheme of actions for turning natural into legal obligation.

And the note is

(*y*) Pothier, obl. para. 42; Sirey and Gilbert on Code Nap. 1131; Demolombe, Cours du Code Nap. xxiv. 329 sqq.; Langdell, Sel. Ca. Cont. 169; so in Germany from the 17th century onwards, with only theoretical differences as to the reason of the rule: Seuffert, Zur Gesch. der obligatorischen Verträge, 130 sqq.

My interpretation of the authorities, as applicable to the facts of this case, leads me to the view that there were both lawful cause and consideration for Mr. Ross's subscription, within the meaning of the Civil Code of Quebec; and that, as to the note, by the giving of which Mr. Ross, at his urgent request, secured an extension of the time

(1) (1842) 2 Q.B. 851.

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limited for the payment of the balance of his subscription, the consideration was valuable and satisfied the requirements of the common law and of the *Bills of Exchange Act*.

A considerable part of the appellant's argument was devoted to a contention that a promissory note cannot be the subject of a gift by the maker to the payee; but it is not necessary to determine that question in this case if, as I think, the note was intended not as a gift, but as evidence of the maker's promise, in consideration of the extension of his term of credit, to pay the balance of his subscription in accordance with the tenor of the note.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cook & Magee.*

Solicitors for the respondent: *Ewing & McFadden.*

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*Nov. 17.

LOUIS M. SINGER.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Appeal—Jurisdiction—Statutes—Retrospective construction —Statute giving new right of appeal—21-22 Geo. V, c. 28, s. 15 (amending s. 1025, Cr. Code).

Legislation conferring a new jurisdiction on an appellate court to entertain an appeal cannot be construed retrospectively, so as to cover cases arising prior to such legislation, unless there is something making unmistakeable the legislative intention that it should be so construed. The matter is one of substance and of right. (*Doran* v. *Jewell,* 49 Can. S.C.R. 88; *Upper Canada College* v. *Smith,* 61 Can. S.C.R. 413).

In the present case, *held,* that 21-22 Geo. V, c. 28, s. 15 (amending s. 1025 of the *Cr. Code*) did not give a right to appeal to the Supreme Court of Canada from the sustaining of the appellant's conviction by a judgment of the Appellate Division, Ont., rendered prior to such legislation.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing his appeal from his conviction by Wright J. (2)

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) [1931] O.R. 699.

(2) [1931] O.R. 202.

of offences against the *Combines Investigation Act*, R.S.C., 1927, c. 26, and of conspiracy, contrary to the provisions of s. 498, subs. 1 (*a*), (*b*) and (*d*) of the *Criminal Code*.

Singer, the present appellant, was tried jointly with others, namely, Belyea, Weinraub, O'Connor, Paddon and Ward. At the trial, Singer, Paddon and Ward were found guilty; and Belyea, Weinraub and O'Connor were found not guilty (1). Singer, Paddon and Ward appealed from their conviction; and the Attorney-General for Ontario (under the provisions of the Act of 1930, 20-21 Geo. V, c. 11, s. 28, amending the *Criminal Code*) appealed against the acquittal of Belyea and Weinraub. The Appellate Division (2) dismissed the appeals of Singer, Paddon and Ward; and allowed the appeals of the Attorney-General, and set aside the acquittal of Belyea and Weinraub and adjudged them guilty.*

The present appeal was brought under s. 1025 of the *Criminal Code* (R.S.C., 1927, c. 36), as amended by 21-22 Geo. V (1931), c. 28, s. 15. By said amending Act (s. 15), the following was substituted for subs. 3 of said s. 1025:

> 3. Any person whose acquittal has been set aside may appeal to the Supreme Court of Canada against the setting aside of such acquittal, and any person who was tried jointly with such acquitted person, and whose conviction was sustained by the Court of Appeal, may appeal to the Supreme Court of Canada against the sustaining of such conviction.

The present appellant was convicted on March 23, 1931, and his conviction was sustained by the Appellate Division on June 26, 1931. The said amending Act, which was assented to on August 3, 1931, provided (s. 16) that it should come into force on September 1, 1931.

A question of jurisdiction arose, counsel for the respondent contending that no appeal lay; that the said amendment, which was subsequent to the judgment in question of the Appellate Division, was not retroactive, and upon the delivery of the judgment the conviction was affirmed, and the right of appeal must date from the rights in law existing at the time of the delivery of judgment.

W. F. O'Connor K.C. for the appellant.

D. L. McCarthy K.C. and *J. C. McRuer K.C.* for the respondent.

(1) [1931] O.R. 202. (2) [1931] O.R. 699.

*The said Belyea and Weinraub have appealed to the Supreme Court of Canada.

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At the opening of the hearing of the appeal, argument was heard upon the question of jurisdiction, and after hearing counsel for the parties, the Court retired for a few minutes for consideration and, on its returning to the Bench, the Chief Justice delivered judgment orally as follows:

ANGLIN C.J.C.—The appeal in this case was taken under s. 15, c. 28, Stats. of Canada, 1931, which became law on the 1st of September, 1931. The appellant was convicted on the 23rd of March, 1931, and his conviction was affirmed by the Court of Appeal on the 26th of June, 1931.

It is common ground that, unless there is something making unmistakeable the intention of the Legislature that a retrospective construction should be put upon the legislation so that it may cover cases arising prior thereto, no clause, conferring a new jurisdiction on an appellate court to entertain an appeal, can be so construed. The matter is one of substance and of right.

The decision in *Doran* v. *Jewell* (1), is binding upon us and is conclusive to that effect. If further authority be required on this point, it may be found in *Upper Canada College* v. *Smith* (2).

The language relied upon here, as indicative of the intention of the Legislature to require a retrospective construction of the Act, consists merely in the fact that the perfect tense is used in dealing with the matter. This, however, is legislation in regard to appeals, where it seems almost inevitable that the past, or perfect, tense should be used, as the matter dealt with, viz., the conviction in the judgment appealed from, must necessarily be an event of the past when the appeal is taken. At all events, we find nothing in the language of the Legislature in this amendment to the *Criminal Code* indicative of an intention that it should receive a retrospective construction.

Appeal quashed.

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(1) (1914) 49 Can. S.C.R. 88. (2) (1920) 61 Can. S.C.R. 413.

IN THE MATTER OF THE ESTATE OF JOHN WILLIAM DRUMMOND, DECEASED. 1931

*May 21, 22.
*June 23.

W. D. BENN.....APPELLANT;

AND

R. J. HAWTHORNE AND OTHERS.....RESPONDENTS.

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

Will—Construction—Vesting—Res judicata

The testator, who died in 1881, by his will devised, subject to a life estate to his wife, who died in March, 1912, certain property respectively to each of his five daughters, with a provision for remainder to the daughter's children, but with no specific provision as to the remainder in the event of the daughter's death without children. The testator directed that, after his wife's death, the residue of his property should be divided equally amongst his children, with provision for issue taking a deceased child's share. A daughter C. died in 1919, having disposed of her property by will. A daughter E. died in 1926, unmarried. The present question was whether there had been vested in C., and so passed under her will, a share of the remainder in the property devised for life to E.; or whether, as claimed by appellant, a child of C., such share in the remainder belonged to C.'s issue.

Held: There was established a vesting in C., prior to her death, of a share of the remainder in question, which share passed under her will. If such remainder fell into the testator's residuary estate, the question of the vesting in C. of a share therein was *res judicata* by virtue of a consent order made in June, 1912, declaring the right of the testator's daughters to their share in the residue and ordering realization and distribution of the residuary estate; that order was binding until set aside by an action brought for that purpose; and the present appellant, who was represented by counsel on the motion for the order, could not now be heard to say that he was not bound thereby (*Kinch* v. *Walcott*, [1929] A.C. 482; *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673; *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.*, [1926] A.C. 761, at 771). If there was an intestacy as to such remainder (and if that view was now open, having regard to said order), then it had vested on the testator's death, and C., as one of his heirs at law, could dispose by will of her share therein.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which, reversing judgment of McEvoy J. (2), held that a share in the remainder in certain property, devised by the will of John

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1930) 39 Ont. W.N. 216. (2) (1930) 38 Ont. W.N. 109.

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In re ESTATE OF J. W. DRUMMOND, DECEASED.

BENN *v.* HAWTHORNE ET AL.

William Drummond, deceased, to his daughter Evaline Eliza Drummond for life, had become vested (subject to be divested in certain events) in the testator's daughter Charlotte Elizabeth Benn before her death and had passed under her will; the present appellant contending to the contrary, and claiming that the children of Charlotte Elizabeth Benn were now entitled to the share of the remainder in question.

The appeal to this Court was dismissed with costs.

A. Courtney Kingstone K.C. for the appellant.

N. W. Rowell K.C., A. W. Marquis K.C. and *J. B. Allen* for the respondents the executors of the J. H. Benn Estate.

J. D. Bissett K.C. for the respondent, Trustee of the estate of John William Drummond, deceased.

R. S. Robertson K.C. for Isabel Segsworth (one of the daughters of John William Drummond, deceased), and the Administrator of the Estate of Evaline Drummond.

McGregor Young K.C., the Official Guardian, representing any unborn children.

Hamilton Cassels for the respondents Edith A. Werden, Albert D. Werden, and William A. Werden (children of Hester Amelia Werden, deceased, a daughter of John William Drummond, deceased).

George C. Campbell K.C. for the respondent Laura Pearen (a daughter of John William Drummond, deceased).

The judgment of the court was delivered by

ANGLIN C.J.C.—The question for consideration in this case is, whether or not the remainders after the individual life interests in the several properties devised by the testator to his five daughters (and, more particularly, whether or not the remainder in the property which was the subject of the devise made in the 5th paragraph of the testator's will in favour of his daughter Evaline Eliza for life), on his death in 1881, in the cases of properties devised to daughters who left no issue, had vested, either, as on an intestacy, in the testator's heirs-at-law, or, as part of the residue devised by him in the 10th clause of his will, in his surviving children (other than the life tenant of each parcel) and the children of such of the other four as might die leaving issue before the period thereby fixed for the division of the residue.

If the interests of those entitled on the death of any one of the five life tenants, who should die without leaving issue, should be regarded as having been vested on the testator's death, although subject to be divested in the event of such life tenant leaving children, it follows that the interest of Charlotte Elizabeth Benn (one of the five daughters of the testator), who died on the 12th day of May, 1919, (leaving her surviving as her sole and only children, the appellant Wellesley Drummond Benn and his sister, Edna Ravelle Hunter (since deceased)), in the parcel devised for life to her sister, Evaline Eliza Drummond (who died unmarried in September, 1926), was capable of being disposed of, and was disposed of, by her will and passed thereunder.

Clauses 5 and 10 of the will in question read:

5th. Subject to my wife's life estate I give to my daughter Evalina Eliza to be held by her for and during her natural life the north half of Lot ten on Yonge street in the City of Toronto as laid down on a plan of Park lot eight made by John Lynn D.P.S. for one Peter McGill (together with the buildings thereon) but in case the centre line of the wall between the second and third stores is not co-incident with the centre line of the lot then the centre line of the said wall and such centre line produced at right angles to Yonge Street shall be the division line between the north and south halves of the lot as intended to be hereby devised and after the death of my said daughter Evaline I give the said north half as herein defined to such children as may have been born of my said daughter Evaline as are living at the time of her death and to the children of such as may be dead to be held by them in fee, the children of a deceased child to take such share as their parent would have taken if such parent had not predeceased his or her mother.

* * * * *

10th. I direct that after the death of my wife and upon my youngest daughter attaining the age of twenty-one years the residue of the property whereof I shall die possessed or entitled to shall subject to the eighteenth paragraph of this my will be divided by my executors equally amongst my said children and in the event of the decease of any of my children leaving issue before such division I direct that the issue of such child or children shall receive respectively the share of such property to which such deceased child or children would have been severally entitled.

Clause 18 of the will has no bearing upon the question now before the court, that being merely a provision made to enable the executors in certain events to equalize the several shares in value.

Of course, if there was an intestacy as to the remainder in the property devised to Evaline Eliza Drummond for life, no question need arise as to the construction of the residuary clause. That view, however,—although not a

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little may be said in support of it—is probably not open, when regard is had to what is stated below about the order of Middleton J. of the 20th of June, 1912. In the result, in that view, however, the judgment appealed from would have been substantially right in holding that the remainder in the parcel devised to Evaline Eliza for life had been vested on the testator's death, and that Charlotte Elizabeth Benn, as one of the testator's heirs-at-law, had effectually disposed of her interest therein by her will.

On the other hand, if an intestacy as to the remainders of the life estates given to such of the five daughters as died childless be not the correct view, or if that view be not open, and the remainder in each of the five parcels devised to the testator's several daughters, as part of the residue, fell into the residuary estate, as seems to have been agreed to by all parties interested before Middleton J., we are inclined to think the question *res judicata* by virtue of the consent order of that learned judge of the 20th of June, 1912, clauses 9 and 10 of which read:

> 9. And This Court Doth Further Declare that the daughters of the said John William Drummond, deceased, (other than Laura Pearen) are entitled to their share in the residue of the said estate absolutely.
>
> 10. And This Court Doth Further Order that the said trustee do forthwith proceed to get in and realize and distribute the residuary estate in accordance with the terms of the said Will subject to the above declaration.

Hester Ann Drummond, the testator's widow, having died on the 23rd of March, 1912, and Evaline Eliza Drummond being then unmarried and at least one of the other daughters being married but without children, this identical question as to the effect of the residuary clause (No. 10) of the will upon the vesting, as part of the residue, of the remainders in each of the five properties devised to the several daughters must have been present to the minds of the parties when they consented to the order of Mr. Justice Middleton, and, also, to the mind of that learned judge when he pronounced the order. We can discover no justification, therefore, for the view that it was not intended by the order of Middleton J. to deal with the very matter now before the court and to determine that question in favour of the respondents; neither can we understand the view being now taken that the residue of the estate referred to in paragraphs 9 and 10 of the order is not identical with

the residue dealt with in the 10th paragraph of the will. Clause 10 of the order seems to indicate clearly that it is.

We are, therefore, of the opinion that the order of Mr. Justice Middleton is to be taken as having been meant to dispose of the very question now before us. It is perfectly clear that that order is binding until set aside by an action brought for that purpose, and that the present plaintiff, Wellesley Drummond Benn, who was represented upon the motion by counsel, cannot now be heard to say that he is not bound thereby. *Kinch* v. *Walcott* (1); *Ainsworth* v. *Wilding* (2); *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.* (3).

The result is that the vesting of a share of the property, devised for life to Evaline Eliza Drummond, in Charlotte Elizabeth Benn, one of the daughters of the testator, prior to her death which occurred on the 12th of May, 1919, has been established.

The appeal is, accordingly, dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Ingersoll, Kingstone & Seymour.*

Solicitors for the respondents, the Executors of the J. H. Benn Estate: *Marquis, Pepler & Marquis.*

Solicitors for the respondent, Toronto General Trusts Corporation, Executors of the J. W. Drummond Estate: *Payne & Bissett.*

Solicitor to represent unborn children: *McGregor Young.*

Solicitors for the respondents, Edith A. Werden, Albert D. Werden and William A. Werden: *Cassels, Brock & Kelley.*

Solicitors for the respondent Laura Pearen: *Campbell, Jarvis & McKenzie.*

Solicitors for the respondents, Administrator of the Estate of Evaline Drummond, and Isabel Segsworth: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

(1) [1929] A.C. 482. (2) [1896] 1 Ch. 673.
(3) [1926] A.C. 761, at 771.

1930
*Nov. 3.
1931
*Nov. 9.

HIS MAJESTY THE KING..... APPELLANT;

AND

WILLIAM HENRY FARES, ALEXANDER SMITH AND SMITH & FARES, LIMITED (SUPPLIANTS)... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Waters and watercourses—Real property—Crown grants of land in North-West Territories abutting on non-navigable lake—Subsequent recession of waters owing to drainage for construction work—Subsequent acquisition of title by present owners—Claim by present owners, against the Crown, to land to centre of lake—Presumption of grant ad medium filum aquae—Applicability—Rebuttal or exclusion of the presumptive rule by inference from statutes, language of grant or agreement, surrounding circumstances—Dominion Lands Acts, R.S.C., 1886, c. 54; 1879, c. 31; Territories Real Property Act, R.S.C., 1886, c. 51; North-West Territories Act, R.S.C., 1886, c. 50, s. 11.

In 1888, 1889 and 1890, the Crown issued patents, some to the C.A.C. & C. Co., and some to the C.P.R. Co., for certain fractional sections of land in the North-West Territories (within what is now the province of Saskatchewan), which fractional sections then abutted on Rush Lake (held to be non-navigable). The only survey at that time of lands in Rush Lake's vicinity was that of 1883, and was of land not covered by water. The patents made no reference to the survey nor to Rush Lake. The descriptions in the patents were all in form such as follows: "All that parcel or tract of land, situate * * * in the 17th township * * * and being composed of the whole (fractional) of section 12 of the said township, containing by admeasurement 127 acres more or less." The survey of 1883 shewed the edge of Rush Lake as a meandered line, and the area of each fractional section bordering on the lake was shown, on the map, on that fractional section. The rights of the C.A.C. & C. Co. to its lands were acquired under an agreement in 1887 (made pursuant to an Order in Council) in which the Dominion Government agreed to sell 50,000 acres, 5,000 acres at each of ten points, of which Rush Lake was one, at the price of $1.50 per acre and performance of certain cultivation conditions, which acreage the company selected and paid for. The rights of the C.P.R. Co. to its lands were acquired under agreement of October 21, 1880, appended to and ratified by c. 1 of 44 Vict. (Dom.). In 1903-4, the C.P.R. Co., for the purposes of straightening its railway line, made a drain to lower the waters, and the effect was to make bare a large extent of land formerly part of the lake bed. In 1909 the respondents acquired title to the fractional sections in question (on the same descriptions of the lands as in the patents). In the present action they claimed, as being successors in title to the patentees and riparian owners, to be entitled to all the land in front of their fractional sections to the centre of Rush Lake, or, in any event, to the remainders of the whole sections respectively (which remainders had become dry owing to the recession of the waters).

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Cannon JJ.

Held: Respondents were not entitled to the land so claimed. Judgment of the Exchequer Court (Maclean J.), [1929] Ex. C.R. 144, reversed.

Under English law, the presumptive rule for construing a conveyance as a grant *ad medium filum aquae* is rebutted if an intention to exclude it is indicated in the language of the conveyance or is reasonably to be inferred from the subject matter or the surrounding circumstances. (*Dwyer* v. *Rich,* I.R. 6 C.L. 144, at 149; *City of London Tax Commrs.* v. *Central London Ry. Co.,* [1913] A.C. 364, at 372, and other cases cited). Likewise, assuming that said presumptive rule would otherwise apply in the Territories (*North-West Territories Act,* R.S.C., 1886, c. 50, s. 11; *semble,* the rule was not entirely excluded from the general body of English law as introduced into the region—*per* Duff and Rinfret JJ.; Lamont and Cannon JJ. inclining to the same view), and would apply there to such a body of water as Rush Lake, yet the rule would be excluded if the Dominion statute law applicable to the Territories satisfactorily disclosed an intention inconsistent with its application. And, *per* Anglin C.J.C., the Dominion statute law in force when the patents in question were issued indicated, as the proper inference therefrom, an intention to exclude the application of the rule to grants of Crown lands in the North-West Territories. (Lamont and Cannon JJ. were inclined to the same view, but based their decision on the interpretation, as stated below, of the patents and agreements from the Crown. Duff and Rinfret JJ. held that where lands were acquired through the commoner transactions sanctioned by the *Dominion Lands Act*—homestead entry, preemption entry, sale at a given price per acre—the presumption must necessarily be excluded in order to give full effect to the intent of the statutory provisions.) (*Dominion Lands Acts,* R.S.C., 1886, c. 54, particularly ss. 3, 8, 14, 29, 32, 129, 130, 131; 1879, c. 31, particularly ss. 30, 34; *Territories Real Property Act,* R.S.C., 1886, c. 51, referred to.) Also, the patents, and the agreements under which the lands were acquired from the Crown, and the circumstances of the purchase, (all as interpreted in the light of the statutory provisions), indicated, as the reasonable inference therefrom, that there was no intention that the *ad medium filum* rule should apply, but that the patents to the fractional sections now in question should be granted and accepted as covering only the acreage therein set out.

Duff and Rinfret JJ. further held that, even assuming that the presumption *ad medium filum* took effect and that, by force of the presumption, strips of the bed of the lake *ex adverso* passed to the grantees from the Crown, yet, on the subsidence of the lake in 1904, the land expressly described in each grant ceased to be riparian land, and, to a conveyance of this land to respondents under that express description, land not in contact with the lake, the presumption could not apply; no equitable right of respondents had been alleged or proved. (Anglin C.J.C. doubted whether the Crown should be allowed to set up the fact of the subsequent transfers in reference to the present claim; and was inclined to the opinion that, although respondents must succeed by the strength of their own title, they had an equitable, if not legal, right to everything granted by the Crown to their predecessors in title.)

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), hold-

(1) [1929] Ex. C.R. 144.

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ing that, according to the true construction of the grants from the Crown (in the right of the Dominion of Canada) of the whole (fractional) of sections 12, 13 and 14, in township 17, range 11, and of the whole (fractional) of sections 9, 16, 17, 18, 19 and 20, in township 17, range 10, all west of the 3rd meridian, in the Dominion of Canada (said land being within what is now the province of Saskatchewan), there was granted by the Crown to the grantees all the lands bounded by and abutting on Rush Lake, to the centre of the lake in front of said sections and more particularly all of sections 12, 13 and 14, in township 17, range 11, and all of sections 9, 16, 17, 18, 19 and 20, in township 17, range 10, all west of the 3rd meridian; and that the suppliants (the present respondents) are now the owners of the said lands, excepting out of any of said lands those portions now vested in the Canadian Pacific Railway Company.

The material facts of the case and the questions in issue are sufficiently set out in the judgments now reported, and are indicated in the above headnote. The appeal to this Court was allowed with costs.

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

E. F. Newcombe, K.C., and *W. C. Hamilton, K.C.*, for the respondents.

ANGLIN, C.J.C.—I have had the advantage of perusing the carefully prepared opinions of my brothers Duff and Lamont. While they may differ in some details, as I read what they have written, they agree in holding that, assuming the *ad medium filum* rule of English law to be ordinarily applicable in Saskatchewan to non-navigable waters, such as the lake in question, it is, at the highest, a rule of interpretation, and the rebuttable presumption thereby created yields readily to proof either of circumstances inconsistent with its application, or of the expressed intention of a competent Legislature so to exclude its application. With that view, I entirely agree (*Keewatin Power Co.* v. *Kenora* (1)), and I also agree that the intention of the Dominion Parliament—an authority competent so to provide—to exclude the application of the rule to Dominion

(1) (1908) 16 Ont. L.R. 184, at 190, 192.

lands in the North West Territories, was sufficiently manifested by the provisions of the *Dominion Lands Act* (c. 54, R.S.C. 1886).

I had occasion some years ago in *Keewatin Power Co.* v. *Kenora* (1), to consider the applicability of the *ad medium filum* rule in Ontario. Notwithstanding the reversal of my decision by the Ontario Court of Appeal (2), with the utmost respect, I still entertain the opinion which I then held. The difference between my view and the view taken by the Court of Appeal was this: in my opinion, notwithstanding the general adoption of English law in Upper Canada effected by the Act of 1792, only so much of that body of law as was suitable to the conditions of that province was thus brought in. The Court of Appeal, on the contrary, took the view that, the words of the statute being absolute and unqualified, the entire body of English law, as it stood at the date of the Act in question, was thereby introduced, including the provisions thereof which might not be suitable to the circumstances of the province. That question, fortunately, does not arise here owing to the wording of the *North-West Territories Act,* which expressly limits the provisions of English law introduced by it (R.S.C., 1886, c. 50, s. 11) by the words, "in so far as the same are applicable to the Territories." Moreover, the introduction of English law thus effected was made subject to repeal, alteration, variation, modification, or other affection thereof, by, *inter alia,* any Act of the Parliament of Canada.

The restriction of the application of the *ad medium filum* rule in Saskatchewan rests on legislation of the Parliament of Canada. See sections 3, 8, 129, 130, 131 of the *Dominion Lands Act,* c. 54, R.S.C., 1886,—provisions which were in force when the grants in question were issued in 1888 by the Crown,—and the *Territories Real Property Act* (c. 51, R.S.C., 1886), providing for the adoption in the Territories of the Torrens System of land transfer. I think that these provisions indicate an intention on the part of Parliament,

1. To have a definite clear cut system of survey of all lands coming under the *Dominion Lands Act,* in which a section should be an integral part of a township and should consist generally of 640 acres;

(1) (1906) 13 Ont. L.R. 237. (2) (1908) 16 Ont. L.R. 184.

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2. That the boundary lines thereof should run from one corner post or monument to another, each of which should be as nearly as possible a mile in length;

3. That these lines should be the "true and unalterable boundaries" of the section (s. 129) and that the section should consist of the whole width between the corner posts respectively "and no more or less" (s. 130); and

4. To provide by section 29 of the *Dominion Lands Act* for a price per acre of surveyed lands to be fixed by Order in Council.

The inference proper to be drawn therefrom, in my opinion, is the indication of an intention by Parliament to exclude the application of the *ad medium filum* rule of construction of English law to grants of Crown lands in those Territories.

My conclusion that this appeal should be allowed rests solely upon the inapplicability of the *ad medium filum* rule and has been reached entirely independently of the view pressed by counsel for the Crown as to the effect of the subsequent conveyances. I doubt whether the Crown should be allowed to set up the fact of those subsequent transfers in reference to the present claim. While, owing to privity of estate, they may not have been strictly *res inter alios acta,* they were certainly closely akin thereto. Although, no doubt, the plaintiff must succeed by the strength of his own title, the equitable, if not the legal, right of the respondent to everything granted by the Crown to his predecessors in title would seem to be reasonably apparent.

The judgment of Duff and Rinfret JJ. was delivered by

DUFF J.—Some questions of general interest which were rather elaborately discussed by counsel may be very summarily disposed of. That the presumptive rule *ad medium filum,* to employ a convenient label, was not entirely excluded from the general body of English law as introduced into the region later known as the Canadian Territories, is not susceptible of serious dispute. *Lord* v. *Commissioners of Sydney* (1). To what extent it is open to the courts to

(1) (1859) 12 Moo. P.C. 473.

hold that the rule was varied on its introduction, by force of the principle that the common law as introduced into a new colonial settlement must be regarded as modified, in so far as that may be necessary in order to make it reasonably capable of adaptation to the circumstances of the new country, it is unnecessary now to examine.

By the common law itself the presumption with which we are concerned applies to the beds of non-tidal rivers, whether subject to public rights of navigation or not; and powerful arguments may be advanced for the proposition that under the common law there is at least no general rule excluding its application to the beds of lakes.

The conclusion of the learned President that Rush Lake was not at the critical period navigable, in any pertinent sense, is unassailable; and I shall assume for the purposes of this judgment that the presumption would apply to such a body of water as Rush Lake, and that it would govern the rights of riparian proprietors there, unless the rule after its introduction was abrogated by competent legislative authority, or unless by reason of provisions in such statutes as the *Land Titles Act*, the *Dominion Lands Act* or the *North-West Territories Act* it was so affected in its operation as to make it inapplicable either wholly or in some particular class of cases.

The *prima facie* rule, which declares a presumption or embodies a principle of construction, may be overborne by circumstances establishing satisfactorily a contrary intention.

The presumptive construction is not excluded by the fact that the lands are described by reference to a plan by colour and by quantity, or by metes and bounds, so long as the land is shewn to be bounded by the body of water or by the highway as the case may be. *Central London Railway Co.* v. *City of London Land Tax Commissioners* (1); *Thames Conservators* v. *Kent* (2); *Maclaren* v. *Attorney-General for Quebec* (3). Blackburn J., in *Plumstead Board of Works* v. *British Land Co.* (4), used these words:

And it is not enough to rebut that presumption (the presumption *ad medium filum aquae* or *viae*) to say that it is designated as adjoining to

(1) [1911] 1 Ch. 467, at 474.
(2) [1918] 2 K.B. 272, at 284.
(3) [1914] A.C. 258, at 273.
(4) (1874) L.R. 10 Q.B. 16, at 24.

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Duff J.

or abutting on that road or river, and this even if there was a mention of the acreage. But * * * it always has been held to be enough when there is anything to shew that it was not the intention to convey any part of the road.

The scope and application of the rule for our present purpose is very clearly stated by Fitzgerald J., in *Dwyer* v. *Rich* (1), in these words: "The authorities adverted to in the course of the argument establish, as a general rule of construction, that where land adjoining a highway or inland river is granted, the *prima facie* presumption" (this is also the phrase used by Blackburn J. in the last mentioned case)

is that the parties intended to include in the grant a moiety of the road or of the river bed, as the case may be; and that such general presumption ought to prevail, unless there is something to indicate a contrary intention. * * * To rebut the general presumption, there must be something in the language of the grant indicating an intention to exclude or something in the subject matter or in the surrounding circumstances from which such an intention may reasonably be inferred.

Again, in *Micklethwait* v. *Newlay Bridge Co.* (2), Cotton L.J. says:

There may be facts, whether appearing on the face of the conveyance or not, from which it is justly inferred that it was not the intention of the parties that the general presumption should apply.

"No doubt" said Lord Atkinson in *City of London Tax Commissioners* v. *Central London Ry. Co.* (3), "the presumption may be rebutted, either by the provisions of a grant or conveyance or by the surrounding circumstances."

The observation of Lord Moulton in *Maclaren* v. *Attorney-General for Quebec* (4), was directed to a case where the sole question concerned the effect of the language of documents of title. The passage does not contemplate a case such as the present; and, when the controversy relates to the construction of a conveyance executed under statutory authority, it cannot properly be read as excluding from consideration the statutory provisions which prescribe the conditions of the transaction.

In *Duke of Devonshire* v. *Pattison* (5), Fry, L.J., delivering the judgment of Lord Esher, Bowen, L.J., and himself, said:

They have further contended that this presumption can be repelled only by words in the deed itself. In our opinion, this latter contention cannot

(1) (1871) I.R. 6 C.L. 144, at 149.
(2) (1886) 33 Ch.D. 133, at 145.
(3) [1913] A.C. 364, at 372.
(4) [1914] A.C. 258, at 273.
(5) (1887) 20 Q.B.D. 263, at 273.

be maintained, for we hold that the presumption may equally be rebutted by the circumstances under which the deed was executed.

Decisions in which the circumstances were treated as displacing the *prima facie* rule are numerous. In *Marquis of Salisbury* v. *Great Northern Ry. Co.* (1), the presumption was held to be rebutted where there was a conveyance to a railway company, purchasing under their statutory power, on the grounds that before the conveyance the company had, in their deposited plans and book of reference, treated the road as being vested in turnpike trustees and that the conveyance exactly carried out that view. In *Pryor* v. *Petre* (2), the lands were described in a schedule by reference to the numbers on the ordinance map, on which the road in question was separately numbered; the number assigned to the road not being included in the schedule. Moreover, the road was a "grassy lane" in which there were some trees for which grantee had not paid; although he had paid for the trees on the land specifically. These circumstances were regarded as sufficient to override the *prima facie* construction. Again, in *Ecroyd* v. *Coulthard* (3), it was held by the trial judge, North J., that the presumption does not apply to awards under the Inclosure Acts unless the bed of the river or half of it is shewn to be part of the waste of the manor over which the tenants have right of common; and this view was approved by Lindley M.R., Chitty L.J., and Collins L.J., in the Court of Appeal (4).

Considering the applicability of the presumption to a patent under the *Dominion Lands Act*, it is necessary to ask oneself how far the *prima facie* construction is consistent with the provisions of the Act under the authority of which the land is granted.

The provisions of the *Dominion Lands Act* do not, in themselves, directly, or by necessary inference, effect a general repeal of the presumptive rule; but, when the provisions of the statute are viewed as a whole, those prescribing the rules for the acquisition of title, together with those relating to survey and division, there is ample warrant for concluding, where lands are acquired through the commoner transactions sanctioned by the Act (homestead

(1) (1858) 5 C.B.N.S. 174.
(2) [1894] 2 Ch. 11.
(3) [1897] 2 Ch. 554.
(4) [1898] 2 Ch. 358.

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entry, preemption entry, sale at a given price per acre), that the presumption must necessarily be excluded in order to give full effect to the intent of those provisions.

The identity of the parcels severally described in the grants in question and the boundaries of the parcels as so described, are established beyond dispute.

The parcels, when surveyed and when granted, were riparian properties, in the sense that on one side they were limited by the shore of Rush Lake, as surveyed in 1883, the other boundaries being rectilinear, and drawn and laid out in compliance with the normal practice in surveying lands for settlement under the *Dominion Lands Act* of 1879. These boundaries are delineated on the official plan of a survey made and confirmed in 1883 which is in evidence; and there is also in evidence a traverse of the shore of the lake of the same year. The respondents contend and the Court below has held that, by force of the presumptive rule, the patents of these several pieces of riparian lands vested, in each case, in the patentee, the title to a strip of the bed of the lake, *ex adverso* the lands explicitly described in the patent, extending from the shore line, as surveyed, to the middle of the lake. My conclusion is that such a construction of the grants cannot in the circumstances be accepted because to accept it would be inconsistent with the policy of the *Dominion Lands Act,* and in particular with certain specific enactments of the statute; and that this is sufficient to overcome the presumption.

The lands granted to the Colonization Co. were purchased under the authority of sec. 29 of the *Dominion Lands Act,* R.S.C., 1886, Cap. 54, by an arrangement, which, after modifications, ultimately assumed the form of a sale by the Crown of 50,000 odd acres of land not covered by water, at a price, fixed by the Governor in Council, of " not less than " $1.50 per acre. In point of fact, the aggregate price paid was a few cents more than the price calculated at the minimum rate. These lands included, as already mentioned, no land covered by water, but did include the fractional sections at Rush Lake, the total area of which was about 1,800 acres. It is plain, therefore, that, since the price authorized by the Governor in Council was to be not less than $1.50 per acre, nobody had authority to convey to the Company additional lands for the consideration thus

paid, in other words, to make a gift to the Company of such additional lands. Indeed, no such conveyance could have been made without departing from the express enactments of the *Dominion Lands Act,* which, as it then stood (sec. 29, R.S.C. 1886, c. 54), required the purchase price of lands sold to be fixed from time to time by the Governor in Council, and the only price so fixed was, as already stated, the price of " not less than " $1.50 per acre.

The only fair inference from the facts, interpreted by the light of the statute, is that no lands in addition to the 50,000 acres (that is to say, no lands covered by water), were intended to pass.

Then the authority to sell, given by section 29, it will be noted, extends to no lands but those which have been surveyed. Unsurveyed lands are outside the scope of that section and I know of nothing in the statute which would permit a grant of unsurveyed lands except under conditions having no place here.

Now the several strips of the body of the lake *ex adverso* the several parcels described in the grants, which, as the petitioners contend, passed to the grantees, by force of the grant, in virtue of the *ad medium filum* rule, could not in any given case be described as " surveyed " lands within the meaning of section 29. There had been no survey of any one of these strips; indeed, the middle line of the lake itself had not been fixed, either by markings on the ground or otherwise. The boundaries of the strips had been in no way determined; the acreage could not be calculated. It was not suggested that there was any order of the Governor in Council applicable to these lands, permitting sales to be made at prices determined in any other than the usual manner, at a given price per acre. The price of the strip as a whole could not therefore be ascertained.

It is worth while, on this point, to revert to the Act of 1879, the *Consolidated Dominion Lands Act* of that year, ch. 31, section 30. The section is in these terms:

30. Unappropriated Dominion lands, the surveys of which may have been duly made and confirmed, shall, except as otherwise hereinafter provided, be open for purchase at the rate of one dollar per acre; but no such purchase of more than a section, or six hundred and forty acres, shall be made by the same person. Provided that, whenever so ordered by the Minister of the Interior, such unoccupied lands as may be deemed by him expedient from time to time may be withdrawn from ordinary sale or settlement, and offered at public sale (of which sale due and suffi-

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cient notice shall be given) at the upset price of one dollar per acre, and sold to the highest bidder:

2. Provided further, that any legal sub-division or other portion of unappropriated Dominion land which may include a water power, harbour or stone-quarry, shall not be open for purchase at the rate of one dollar per acre, but the same shall be reserved from ordinary sale, to be disposed of in such manner, and on such terms and conditions, as may be fixed by the Governor in Council on the report of the Minister of the Interior.

The uniform price fixed, it will be observed, is $1 per acre and the same price was fixed for pre-emptions, sec. 34, subsec. 1. There appears to be no authority anywhere in the Act (of 1879) to vary this price, except in certain special cases, as, for example, where the sale is to take place by public auction, which do not concern us here. It is plain, therefore, that in the survey of these fractional parcels in 1883 for sale or settlement, when the statute of 1879 was in force, the authorized officials must have contemplated the survey of parcels of land, the boundaries and the acreage of which should be fixed and determined so as to make it possible to dispose of them in the ordinary way, by sale or pre-emption, at the statutory price; and the evidence that this was so in fact is explicit. The shore line was run solely for the purpose of ascertaining the acreage of the fractional areas. The officials charged with the administration of the Act had no authority to include, in any sale of these areas, any unsurveyed part of the bed of the lake.

As to the lands purchased by the Railway Company, these are fractional sections 9, 13, 17 and 19. These sections had been acquired by the Railway Company under article 11 of its agreement with Her Majesty the Queen which received statutory ratification by Chapter 1 of 44 Vict. That article contemplated the allotment to the Railway of full sections of 640 acres. Where such sections contained "lakes and water stretches" the beds of these were not to be counted in computing the 25 million acres to which the Railway Company became entitled under the statute and agreement, although it seems clear enough that the title to the whole section was to pass to the Company. In the case of the four fractional sections mentioned, the patents now in question, which were accepted by the Company, embrace in each case only the fractional section and under any one of these patents the fractional section alone would pass.

Now, by the arrangement between the Company and the Government, the Company became entitled to 25 million acres precisely, subject only to the exception relating to the beds of lakes and other water stretches included within the limits of any section granted to the Company. Beds of lakes and water stretches not included in any such section could be acquired by the Company only by selection in accordance with the last clause of article 11. There is no suggestion that such a selection was made by the Company of any part of the bed of Rush Lake. No authority was vested in anybody to convey to the Company any part of the bed of Rush Lake save in pursuance of such a selection. In these circumstances I think the presumption is negatived.

The judgment of the learned President of the Exchequer Court is also attacked upon a ground indicated in the "fourth defence" set out in the appeal case. The Crown alleges that the subsidence of the waters of the lake, which resulted from the works of the Canadian Pacific Railway Company, occurred some years before the transfers to the respondents by the Canadian Agricultural Coal & Colonization Company. It was this subsidence which laid bare the bed of the lake now claimed by the respondents. There is no dispute about the facts, which are stated by the learned trial judge in his judgment in this passage (1):

> At the time the grants of the lands in question were made, the average depth was considerably greater than at present. The Canadian Pacific Railway, in a revision of its main line in this region, in the year 1903, constructed its road bed across a section of Rush Lake for a distance of about two miles, and in order to construct the road bed through the lake with the minimum of material, it lowered the level of the lake by straightening and deepening a small creek leading out of Rush Lake into another lake called Reed Lake; this lowered the water of Rush Lake somewhere between two and three feet. At the north and west ends of the lake, where the banks were low and the water was ordinarily shallow, a considerable area of lake bed became dry; at the east and south ends of the lake where the banks were higher, the recession of the water was not so great. * * * By reason of the recession of the waters of Rush Lake some 3,900 acres of land, it is said, have been reclaimed since the date of the original grants, and this chiefly at the northwest end of the lake.

The title set up by the respondents in the petition of right is stated in this way: In the first five paragraphs, grants by the Crown, to the Colonization Company and

(1) [1929] Ex. C.R. at 147.

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the Railway Company respectively, of the sections with which we are concerned are alleged. Then in paragraph 6, there is an allegation that these sections, as described in the preceding paragraphs, are bounded on one or more sides by, and abut on, Rush Lake, and that the sections are riparian lands. Then there is an allegation that the petitioners "are now" the owners of an estate in fee simple in these sections.

The Crown contends that the allegation in paragraph 6, that the sections are riparian lands bounded by and abutting on Rush Lake, not only was not proved, but was disproved.

I see no answer to this contention of the Crown. Let us assume that the presumption *ad medium* took effect, and to that, by force of the presumption, strips of the bed of the lake *ex adverso*, passed to the grantees. The grantees would thereby acquire the right to have these undetermined strips defined, and thereupon, to obtain a legal title to them by registration, but on the subsidence of the lake in 1904, as shown in the plans in evidence, the land expressly described in each grant ceased, admittedly, to be riparian land. To a conveyance of this land under that express description, land not in contact with the lake, the presumption could not apply. It would be just as entirely inapplicable as to a grant by the Crown, before the subsidence occurred, of the part of the section, separated, let us say, by 100 chains, from the shore of the lake. There was some suggestion that the strip would pass as, in some sense, appurtenant to the land, formerly riparian, expressly described. That of course is impossible. The strip was held by a severable title, as was every square inch that passed to the patentee; and land cannot, of course, in point of law, be appurtenant to land. The petitioners had, in some cases at least, procured their title to the lands expressly granted to be registered, and had obtained certificates of title according to the description in the Crown grants. There is no rule of law or rule of construction by which the description—being a description of non-riparian lands—can be read as comprehending any part of an *ex adverso* strip of the former bed of the lake passing—if anything did pass—under the presumptive rule to the Crown grantee. If any part of the

bed of the lake passed to the grantees, it did not pass under the description but under the grant, in virtue of the presumption.

It is possible that the petitioners might have established an equitable right. No such right, no fact suggesting such a right, is alleged in the petition. No facts are proved, not a jot of evidence is to be discovered in the record, pointing to the existence of such a right. The petitioners' case, in the petition and at the trial, was founded upon their title to the lands expressly granted, which by the petition were alleged to be riparian lands. Even in the supplementary written argument equitable title is not advanced. The case of the petitioners failed, completely and obviously, because the fact on which they based their claim, the riparian character of the land transferred to them, was admittedly non-existent.

While one may be permitted to surmise the existence of facts that might have been adduced, in support of an equitable right, one cannot, of course, acting judicially, proceed upon a mere surmise. Moreover it is very doubtful if the necessary amendments to the petition would be competent, with or without the consent of counsel for the Crown. Robertson, Civil Proceedings by and against the Crown, pages 390 and 391. In the circumstances the Court cannot properly refuse to consider the Crown's contention, which, as I have said, is, I think, quite unanswerable.

In the result, the appeal should be allowed, and the petition dismissed with costs.

The judgment of Lamont and Cannon JJ. was delivered by

LAMONT, J.—In this case, as appears from the documents filed, there were issued by the Crown between September 1, 1888, and February 1, 1890, the patents for a number of fractional sections of land in township 17, ranges 10 and 11, W. 3, in the North West Territories. Some of these were issued to the Canadian Agricultural Coal & Colonization Company, and some to the Canadian Pacific Railway Company, both of whom were the suppliants' predecessors in title.

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The following facts set out in the appellant's factum are not disputed:—

"The grants so conveyed comprised, in all, 3,033·55 acres, for which the patentees paid $1.50 per acre.

"At the time of the issue of the patents the fractional sections in question abutted on the waters of Rush Lake. At that time the only survey of lands in the vicinity of Rush Lake was the survey of 1883. That survey was a survey of land not covered by water. Rush Lake itself was not then surveyed, nor was it or its bed surveyed until 1912.

"The patents above mentioned did not refer to the survey of 1883, nor did they make any reference to Rush Lake. The descriptions of the fractional sections covered by the patents are all in the following form:—

"'All that parcel or tract of land, situate, lying and being in the 17th township, in the 11th range, west of the third meridian, in the Provisional District of Assiniboia, in the North West Territories of the Dominion of Canada, and being composed of the whole (fractional) of section 12 of the said township, containing by admeasurement 127 acres, more or less.'

"The survey of 1883 shewed the water's edge of Rush Lake as a meandered line, and the area of the various fractional sections bordering on the lake was shewn on the map on each fractional section.

"In 1903-4, for the purpose of straightening its main line, the Canadian Pacific Railway Company built a drain to lower the water in Rush Lake. This drain was constructed southeasterly from Rush Lake to Reed Lake, and the waters of Rush Lake were drained into Reed Lake thereby, and the level of the water in Rush Lake was lowered at least three feet. The effect of this was to make bare and dry, or, practically dry, a large extent of land, formerly part of the bed of Rush Lake, and lying between the meandered line on the map indicating the water's edge of Rush Lake as it was at the time of the survey of 1883, and as it was when the patents above mentioned were issued, and the new water's edge of Rush Lake created by the lowering of the waters thereof.

"The suppliants acquired their title to the fractional sections in question in 1909—six years after the lowering of the waters of Rush Lake."

The claim of the suppliants is that upon the true construction of the original patents they, being successors in title to the patentees and riparian owners, are entitled to all the land in front of their fractional sections to the centre of Rush Lake, or, in any event, to the remainder of the fractional sections which have become dry owing to the recession of the waters of the lake. The claim of the Crown is that the area conveyed by each grant is confined strictly to the acreage mentioned in the description thereof.

The matter was tried before the learned President of the Exchequer Court (1), who found that the suppliants were riparian owners, and, following the rule of construction, well established in English law, that where in a conveyance of land the description shews that the land granted extends to the bank of a non-navigable stream, the conveyance is to be construed as a grant *ad medium filum aquae,* he held the suppliants to be entitled to the land in front of their fractional sections extending to the centre of the lake. From that judgment this appeal is brought.

By s. 11 of the *North-West Territories Act,* R.S.C., 1886, c. 50, the Parliament of Canada enacted as follows:—

> Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council.

At that date the *ad medium filum* presumption or rule of construction formed part of the law of England. It, therefore, applied to the construction of grants or other conveyances of land in the North-West Territories unless (1) it was not applicable to the conditions existing in the Territories, and, therefore, not introduced therein, or (2) it was otherwise excluded.

Now it has long been settled law in England that the *prima facie* application of the rule would be rebutted if there was anything in the language of the conveyance indicating an intention to exclude it or anything in the subject matter or the surrounding circumstances from which

(1) [1929] Ex. C.R. 144.

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such an intention might reasonably be inferred. *Dwyer* v. *Rich* (1); *City of London Tax Commissioners* v. *Central London Railway Company* (2); *Maclaren* v. *Attorney-General for Quebec* (3). Likewise the rule would be excluded if the statute law of the Dominion applicable to the Territories satisfactorily disclosed a legislative intention inconsistent with its application to conveyances of territorial lands.

Whether the conditions prevailing in the Territories when English law was declared to be in force therein were so different from those prevailing in England that we would be justified in holding the rule entirely excluded on that ground, may, in my opinion, well be doubted. At any rate a consideration of that point will be unnecessary in the present case if the statute law discloses an intention on the part of the Legislature, or the patents, or the circumstances under which they were issued, disclose an intention on the part of the parties thereto, to exclude the rule. Our first inquiry, therefore, will be whether the legislation of the Parliament of Canada, passed prior to the issue of the patents in question herein, indicates any legislative intention as to the application of the rule.

At the outset it may be noted that, after the surrender of Rupert's Land and the North-West Territories to Canada by the Hudson's Bay Company in 1869, the title to all public lands therein was in the Crown in right of the Dominion, and, therefore, subject to the jurisdiction of Parliament. The first legislation dealing with these lands is to be found in chapter 23 of the Statutes of Canada passed in 1872, and cited as the *Dominion Lands Act*. This Act, with certain amendments, was re-enacted as chapter 31 of the Statutes of 1879, and carried forward into the Revised Statutes of 1886, as chapter 54. The sections of the Act referred to below are taken from the Revised Statutes, 1886, but they are almost identical with the corresponding sections of the Act of 1872.

S. 3 of the Act, in force when the grants herein were issued, reads as follows:

> 3. Except as provided by any other Act of the Parliament of Canada, this Act applies exclusively to the public lands included in Manitoba and the several territories of Canada.

(1) (1871) I.R. 6 C.L. 144, at 149.

(2) [1913] A.C. 364, at 372.

(3) [1914] A.C. 258, at 273.

Then, under the heading of "Surveys" we have s. 8, which reads:—

8. The Dominion lands shall be laid off in quadrilateral townships, each containing thirty-six sections of as nearly one mile square as the convergence of meridians permits, with such road allowances between sections, and of such width, as the Governor in Council prescribes.

Subs. 2 provides that the sections shall be bounded and numbered as shewn by the diagram therein inserted. The diagram shews that the boundary lines run north and south and east and west at right angles, each line presumably a mile long and the whole forming a square. Provision is made in the Act for the establishing of various base lines beginning with the International boundary, and also for correction lines.

S. 14 states that each section shall be divided into quarter sections of 160 acres more or less, subject to the provisions thereinafter made in the Act.

The Act also provides that before any given portion of the country is subdivided into townships and sections it shall be laid out into blocks of four townships each, by projecting the base and correction lines and east and west meridian boundaries of each block, and that on such lines, at the time of the survey, all township, section and quarter-section corners shall be marked, and such corners shall govern, respectively, in the subsequent subdivision of the block.

Then, by sections 129 and 130, it is provided that all boundary lines of townships, and all section lines and governing points as defined by mounds, posts or monuments, erected, placed or planted at the angles of any township, section or other legal subdivision under the authority of this Act or of the Governor in Council "shall be the true and unalterable boundaries" of such township, section or legal subdivision respectively, and that such section or subdivision shall consist of the whole width included between the several mounds, posts or monuments erected at the several angles thereof, *and no more or less.*

S. 29 reads as follows:—

29. Dominion lands, as the surveys thereof are duly made and confirmed, shall, except as otherwise hereinafter provided, be open for purchase, at such prices, and on such terms and conditions as are fixed, from time to time, by the Governor in Council; but no purchase shall be permitted at a less price than one dollar per acre.

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2. Except in special cases in which the Governor in Council otherwise orders, no sale to one person shall exceed a section, or six hundred and forty acres.

* * * *

S. 32 provides that every person who is the head of a family and every male who attains the age of eighteen years shall be entitled to obtain homestead entry for any quantity of land not exceeding a quarter section. In the Act of 1872 his right is expressed to be for "one hundred and sixty acres, or a less quantity".

In addition, there was in force at the same time the *Territories Real Property Act* (ch. 51 of R.S.C., 1886), in which Parliament had adopted for the Territories the Torrens System of land registration and transfer by which the title of an owner was registered under the Act and a transfer of land could be made by a conveyance in Form G, in which form the land to be conveyed is described by section, township, range and meridian, according to the description given in the survey provided for by the *Dominion Lands Act*. It will be noted, however, that no provision was made for the registration of property or property rights to which a riparian owner would be entitled in the bed of a non-navigable stream or lake by virtue of the *ad medium filum* rule if the same were applicable to conveyances of land in the North West Territories.

Although the provisions relating to the survey and the registration of titles indicate a legislative intention with regard to the manner in which the land policy of Parliament was to be worked out, it is more particularly to the provisions enacted for the disposal of the public lands that we must look for any legislative intention as to the application of the *ad medium filum* rule to grants of such land. Is a legislative intention to restrict to one hundred and sixty acres the quantity of land which a homesteader may acquire under his homestead entry, consistent with an intention that, should one of the boundary lines of his quarter section coincide with the bank of a non-navigable stream or lake, he would be entitled to claim ownership of the bed of the stream or lake in front of his quarter to the centre thereof? In my opinion it is not. If the rule were applied in such a case it would enable the homesteader to acquire an acreage in excess of that which he could lawfully obtain under the Act.

Then take the case of a purchaser under s. 29, above quoted. Under that section no person can purchase Dominion lands until the lands have been surveyed and the survey confirmed. If he does purchase he must pay the price fixed by the Governor in Council. His purchase is also restricted to six hundred and forty acres. Being presumed to know the law the purchaser must be held to have been aware of these restrictions. He must be held to have known that no official could sell him any unsurveyed land or any quantity of surveyed land in excess of the amount allowed by the statute, and also that he must pay for every acre purchased. Charged with this knowledge I fail to see how any riparian purchaser under this section can be heard to say that he is entitled, by reason of the application of the rule, to any acreage for which he did not pay and which he knew could not lawfully be sold to him. As it was chiefly by homestead entry, and purchase under s. 29, that Parliament made provision for the disposal of the Crown lands in the North West Territories, the legislative intention, as disclosed in the provisions for disposal by these methods, would apply to the greater portion of the territorial lands. Parliament, it is true, in special cases granted territorial lands as a subsidy to assist in the construction of railways, but these, while not inconsiderable, do not affect the legislative intention as disclosed in the statute.

Other provisions indicate the same legislative intention, for example, the provisions under which certain lands were reserved for the Hudson's Bay Company. The company acquired its right to these lands under the Deed of Surrender by which Prince Rupert's Land and the North West Territories became part of the Dominion of Canada. The sections reserved and to which the company obtained title, gave it exactly the quantity of land which, in the deed, it was agreed that the company should have. That quantity could not afterwards be increased by the application of the rule without obligating the Crown to grant to the company a greater acreage than that specified in the deed.

In view of these statutory provisions I incline to the view that Parliament, by adopting a policy which, in so many of its operations was inconsistent with the existence of the rule, indicated a legislative intention that it was not to be applied in construing conveyances of Territorial lands.

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It is not, however, necessary in the present case to express a final opinion upon that general question, as, in my view, the patents we have to deal with and the agreements under which the lands therein set out were acquired by the suppliants' predecessors in title respectively, justify the inference that neither the Crown nor the grantees intended the rule should be applicable but that these fractional sections should be granted and accepted at the acreage set out in the patents. I therefore leave the general question open for further argument and consideration.

The rights of the suppliants' predecessors in title, The Canadian Agricultural Coal & Colonization Company, to the land for which they obtained patents and which the suppliants now claim constituted it a riparian owner, were acquired under an agreement, dated 11th day of February, 1887, entered into pursuant to an order in council and made between the Government of Canada and the Canadian Pacific Railway Company and Sir John Lister Kaye. In this agreement the Government agreed to sell to Sir John Lister Kaye 50,000 acres of land; 5,000 acres at each of ten points, of which Rush Lake was one, for a consideration of $1.50 per acre, and the performance of certain stipulations as to cultivation. The agreement also provided for the purchase by Sir John Lister Kaye of a similar quantity of land at each of the points from the Canadian Pacific Railway Company.

On January 3, 1889, an order in council was passed which, after reciting that, according to representations made by Sir John Lister Kaye, over $700,000 had been spent by the Colonization Company on the farms purchased from the Government and the Canadian Pacific Railway Company, recommended that an immediate sale of the 50,000 acres be made to the company at a price of not less than $1.50 per acre. That this sale was carried out appears from the certificate of the Deputy Registrar of Dominion Lands' Patents, which reads as follows:—

> The Canadian Agricultural Coal and Colonization Company, Limited, which Company assumed the liabilities of Sir John Lister Kaye as set out in the Agreement of the 11th February, 1887, was permitted to purchase the 50,000 acres of land mentioned in the said Agreement by Order in Council dated the 3rd January, 1889 (P.C. 2757), at a price not less than $1.50 per acre, as originally agreed upon. Lands comprising a total area of 50,302 acres were duly paid for, and letters patent therefor in the name of the said Company were issued in the year 1889. All sec-

tions or fractional sections patented were lands shown to be not covered with water on the respective township plans in use at the time of the grants. The areas of dry land patented to the said Company in the five fractional sections bordering on Rush Lake in township 17, ranges 10 and 11, west of the 3rd meridian, aggregating 1,805·80 acres, are included in the total area of 50,302 acres referred to.

We have, therefore, the following circumstances from which to draw an inference as to the company's intention in reference to the application of the rule: The agreement was for 50,000 acres (allowed at 50,302 acres) to be paid for at $1.50 per acre. That acreage the company selected and paid for and received the patents thereof. As part of that acreage the company accepted the fractional even numbered sections in question herein, but it accepted them only at the acreage set out in the patents. It knew that no one, either under the statute or the order in council, had any right to convey to it an acreage in excess of that which it had received. That acreage was all it paid for and all it intended to pay for. Under these circumstances the only reasonable inference to be drawn, in my opinion, is that the company never intended that the *ad medium filum* rule should apply so as to give it an acreage in excess of that agreed upon and paid for.

The suppliants' other predecessor in title was the Canadian Pacific Railway Company. The rights of that company to the lands of which the suppliants are now the owners were presumably (for it is not clearly established) acquired under the special contract bearing date the 21st day of October, 1880, which forms the schedule to ch. 1 of the Statutes of Canada, 1881. In that contract the Government agreed to grant to the company a subsidy of 25,000,000 acres of land in consideration of the completion, equipment, maintenance and operation of the railway, as set out in the contract. The railway was completed and operated; the 25,000,000 acres were earned and I think we may assume that the company received the patents thereof, including the fractional uneven numbered sections bordering on Rush Lake. The contract between the railway company and the Government, however, contained a clause which, in my opinion, excludes the application of the rule to these patents. It reads as follows:—

11. The grant of land hereby agreed to be made to the Company, shall be so made in alternate sections of 640 acres each, extending back 24 miles deep, on each side of the railway, from Winnipeg to Jasper

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House, in so far as such lands shall be vested in the Government,—the Company receiving the sections bearing uneven numbers. But should any of such sections consist in a material degree of land not fairly fit for settlement, the Company shall not be obliged to receive them as part of such grant; and the deficiency thereby caused and any further deficiency which may arise from the insufficient quantity of land along the said portion of railway, to complete the said 25,000,000 acres, or from the prevalence of lakes and water stretches in the sections granted *(which lakes and water stretches shall not be computed in the acreage of such sections)*, shall be made up from other portions in the tract known as the fertile belt * * *

Under this clause the company was to get the sections bearing uneven numbers. If any uneven numbered section was not fairly fit for settlement the company was not obliged to receive it as part of its subsidy, but, if it did receive it, it obtained the whole of the section although the land under water was not taken into account in computing their 25,000,000 acres. This seems to follow from the right given to the company to make up from other portions of the fertile belt any deficiency which might arise " from the prevalence of lakes and water stretches in the *sections granted* ".

Being entitled under their contract to the land under water in each uneven numbered section as well as the dry land, the question of the application of the rule to these patents does not arise, for the company cannot be said to have been riparian owners with reference to the lands in the sections which were under water. The bed of the lake to the boundaries of each section was the company's to take. Title to that bed it did not take. Under these circumstances the intention both of the Crown and of the company must be held to have been not only that the *ad medium filum* rule should not apply but that the patents to these fractional sections should be granted and accepted as covering only the acreage therein set out.

In my opinion the appeal should be allowed with costs and the petition dismissed with costs.

Appeal allowed with costs; and petition dismissed with costs

Solicitor for the appellant: *R. V. Sinclair.*

Solicitors for the respondents: *Newcombe & Company.*

SAM LIEBLING .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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*Jan. 5.
*Jan. 13.

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

Criminal law—Leave to appeal—Section 1025 Cr. C.—Application should indicate judgments alleged to be in conflict—Rule 54 of this court—Conviction of an insolvent for not having kept books—Whether conflicting decisions were "in a like case" and from an "other court of appeal"—Section 417c Cr. C.—Section 193 Bankruptcy Act.

When application is made under section 1025 Cr. C. for leave to appeal in a criminal case, it is not sufficient to allege that the decision which is intended to be appealed from "conflicts with decisions of different courts of equal jurisdiction"; but the application, in order to comply with rule 54 of this court, should indicate specifically the judgments of other courts of appeal alleged to be in conflict with the decision to be appealed from.

The appellant was an insolvent trader and had been convicted under section 417c Cr. C. for not having kept proper books of account. Application for leave to appeal under s. 1025 Cr. C. was made on the ground that, inasmuch as section 417c Cr. C. was alleged to have been virtually abrogated by section 193 of the *Bankruptcy Act* subsequently enacted, the decision of the appellate court in affirming the conviction failed to apply the principle of law that a subsequent statutory enactment has the effect of abrogating an anterior enactment which is inconsistent with it; and, at the hearing, counsel for the applicant cited three judgments which were alleged to be in conflict with the above decision.

Held that the application for leave to appeal should be dismissed as the judgments cited were not rendered "in a like case" and by an "other court of appeal" within the provisions of section 1025 Cr. C.; besides, they were not in conflict with the decision intended to be appealed from: the appellate court had clearly admitted the principle of law above cited; but it had held that section 193 of the *Bankruptcy Act* was not inconsistent with the provisions of section 417c Cr. C.

Semble that a single judge, although sitting on appeal from a conviction by a magistrate, is not a "court of appeal" within the meaning of section 1025 Cr. C.

APPLICATION for special leave to appeal from the decision of the Court of King's Bench, appeal side, province of Quebec, upholding a conviction of the appellant under section 417c Cr. C.

S. J. Smilovictz, with *Alleyn Taschereau K.C.* for the applicant.

V. Bienvenu contra.

*PRESENT:—Rinfret J. in chambers.

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RINFRET, J.—Les conditions exigées par l'article 1025 du code criminel pour qu'un juge de cette cour puisse permettre l'appel sont que

le jugement dont il est interjeté appel (soit) en opposition à celui d'une autre cour d'appel dans une cause de même nature.

La requête que l'on m'a présentée se contente d'alléguer ce qui suit:

Whereas the decision of the said Court of Appeal conflicts with the definition of the Criminal Code and that of the *Bankruptcy Act*, which two acts are in contradiction, and also with the decisions of different courts of equal jurisdiction:

Je doute que cette allégation soit rédigée conformément à la règle 54 des Règles de cette cour. Dire simplement que la décision dont on entend interjeter appel " conflicts with the decisions of different courts of equal jurisdiction " ne me paraît guère se conformer à la règle qui veut que " the notice of motion shall set out fully the grounds upon which it is based "; et je croirais qu'un avis de motion, pour se prévaloir de cet article, devrait nécessairement indiquer quels sont les jugements des autres cours d'appel avec lesquels la décision dont on se plaint est en opposition. Cependant le savant procureur de la Couronne ne s'est pas objecté à ce que la requête me fût présentée dans la forme où elle était; et je me bornerai donc à indiquer qu'à mon avis cette requête n'était pas rédigée conformément aux règles de la cour.

A l'audition, de la part de l'appelant, l'on m'a indiqué trois jugements où l'on prétendait trouver le conflit exigé par l'article 1025 pour qu'un appel pût être permis. Ce sont les causes de *Regina* v. *Rose* (1), *The King* v. *Stone* (2) et *Rex* v. *Staneley* (3).

L'offense dont l'appelant a été trouvé coupable est

* * * que depuis cinq ans ou environ en la cité de Québec, dans le district de Québec, un nommé Sam Liebling, faisant affaires à Québec sous la raison sociale " La Maison Lucille ", comme commerçant, ayant un passif de plus de mille dollars, étant incapable de payer intégralement ce qu'il doit à ses créanciers, n'a point tenu de livres de compte qui, dans le cours ordinaire du commerce ou du négoce qu'il a exercé, étaient nécessaires pour faire connaître ou expliquer ses opérations, contre les dispositions de l'article 417c du code criminel.

Le conflit, d'après ce que l'on prétend, existerait dans le fait que le paragraphe c de l'article 417 du code criminel

(1) [1897] 27 Ont. R. 195. (2) [1911] 17 Can. Cr. Cas. 377.
(3) [1924] 44 Can. Cr. Cas. 367.

constituerait une législation en matière de faillite et qu'il aurait été implicitement abrogé par l'adoption de l'article 193 de la loi de faillite, qui, suivant le savant procureur de l'appelant, a pour but et pour effet de pourvoir à un cas semblable à celui qui était jusque-là couvert par le sous-paragraphe C de l'article 417. La Cour du Banc du Roi de la province de Québec, en confirmant la conviction de Liebling, aurait donc refusé de reconnaître le principe bien établi qu'une loi spéciale postérieure abroge la disposition incompatible qui se trouve dans une loi générale antérieure; Maxime qui nous vient du vieux droit romain: "Leges posteriores priores contrarias abrogant" (2 Inst. p. 685).

L'appelant ne saurait obtenir la permission d'appeler à raison des jugements qu'il m'a cités.

Et d'abord, ces jugements n'ont pas été rendus dans une cause semblable, ni par une autre cour d'appel, au sens de l'article 1025 du code criminel.

Dans *Regina* v. *Rose* (1), il s'agissait d'un *habeas corpus* pour obtenir l'élargissement d'un prisonnier qui avait été trouvé coupable de "personation", en vertu des dispositions de *The Consolidated Municipal Act—1892* d'Ontario. La requête a été présentée, non pas à une autre cour d'appel, mais à Boyd C. Sa décision fut:

> Where a clause in a statute prohibits a particular act and imposes a penalty for doing it, and a subsequent clause in the same statute imposes a different penalty for the same offence, which cannot be reconciled either as cumulative or alternative punishment, the former clause is repealed by the latter.

Nous n'avons donc ici ni une "cause de même nature", ni le jugement "d'une autre cour d'appel". En plus, comme nous le verrons plus loin, le jugement n'est pas en opposition avec celui de la Cour du Banc du Roi dont on se plaint.

Dans *The King* v. *Stone* (2), il s'agissait encore d'une requête pour *habeas corpus* présentée à M. le juge Trenholme,

> to review the decision of Extradition Commissioner Choquet, who decided that the prisoner, Isaac Stone, alias Schwartz, be surrendered on application by the United States Government on the charge of having committed an offence against the bankruptcy law of the United States, section 26b, United States Bankruptcy Act.

Si le juge Trenholme, en l'espèce, pouvait être considéré comme étant "une autre cour d'appel" conformément aux

(1) [1897] 27 Ont. R. 195. (2) [1911] 17 Can. Cr. C. 377.

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exigences de l'article 1025, il ne s'agissait pas, à tout événement, d'une cause semblable; et le procureur de l'appelant a admis qu'il ne me citait cette cause que pour signaler que le juge avait assimilé l'article 417 du code criminel à une législation en matière de faillite.

Enfin, dans *Rex* v. *Stanely* (1), il s'agissait, là encore, seulement d'une requête à un juge (Boyle J.) pour faire annuler une conviction par un magistrat en vertu de *The Government Liquor Control Act, 1924,* de l'Alberta.

Ici encore, je doute fort que, par le seul fait que le juge Boyle siégeait en appel de la conviction prononcée par un magistrat, il pourrait être considéré comme étant une cour d'appel telle que l'envisage l'article 1025 C.Cr. Mais je n'ai pas besoin de m'arrêter à la discussion de ce point, puisqu'il ne s'agit pas d'une cause semblable, et surtout parce que cette décision n'est pas en conflit avec celle dont l'appelant veut interjeter appel.

En effet, il n'est pas exact de dire que, dans la présente cause, la Cour du Banc du Roi de la province de Québec s'est prononcée à l'encontre du principe bien connu qu'une législation spéciale postérieure a pour effet d'abroger une législation antérieure sur le même sujet et avec laquelle elle est incompatible. Au contraire, chacun des juges qui a écrit des notes tient ce principe pour acquis et s'applique à démontrer qu'il n'y a pas lieu de le suivre en l'espèce, parce que l'article 193 de la loi de faillite n'est pas, à son avis, incompatible avec l'article 417c du code criminel.

Voici, en effet, ce que dit M. le juge Tellier:

> Comme on le voit, ledit article 193 et ledit article 417 ne sont pas faits pour le même cas. Ils peuvent donc exister simultanément, l'un et l'autre; et l'accusé a tort de prétendre que ledit article 193, parce qu'il est de date plus récente que ledit article 417, a implicitement abrogé ce dernier.

Voici maintenant ce que dit M. le juge Rivard:

> Il est vrai que l'un et l'autre article font une contravention du défaut de tenir des livres de compte; mais là s'arrête la similitude entre les deux dispositions. Ce n'est pas pour si peu que, de deux lois inscrites dans les statuts et conservés dans leur refonte, on peut dire que l'une d'elles se trouve implicitement rappelée. Entre 193 de la Loi de faillite et 417 du code criminel, il n'y a rien d'incompatible, rien qui répugne. Ce sont deux contraventions distinctes.

Et voici ce que dit M. le juge Galipeault:

> Il s'agit donc, encore une fois, de deux recours distincts qui ne s'excluent pas. Il serait donc oiseux de discuter, si la Loi de Faillite étant

(1) [1924] 44 Can. Cr. C. 367.

postérieure au code criminel, et si étant une loi spéciale, alors que le code criminel est une loi générale, si la peine prévue par l'*Acte de Faillite* est moins lourde que celle portée au code criminel, il y avait lieu de poursuivre en vertu de la *Loi de Faillite*.

Bien loin de répudier le principe, comme on le voit, chacun de ces honorables juges s'en inspire, mais fait remarquer qu'il ne s'agit pas d'un cas où le principe s'applique et que, par conséquent, il ne peut servir de base au jugement.

Bien entendu, l'appelant n'a pas été capable de me citer un jugement d'une autre cour d'appel qui décidait que l'article 193 de la *Loi de faillite* était incompatible avec l'article 417c du code criminel, et que, par conséquent, le premier devait prévaloir. Une décision dans ce sens eût fait tomber la requête actuelle strictement dans les conditions prévues par l'article 1025 du code criminel.

L'appelant n'avait même pas besoin de se trouver dans une situation aussi claire. Il n'était pas nécessaire que l'arrêt d'une autre cour d'appel fût dans une cause identique, pourvu qu'il eût soulevé une question de droit analogue tranchée dans un sens différent. (*The King* v. *Boak* (1); *Barré* v. *The King*) (2). Mais ici non seulement il n'y a pas conflit entre les décisions; l'on est, au contraire, en présence de cours qui, partant du même principe général qu'elles admettent toutes, font la distinction entre des cas où l'application du même principe entraîne des résultats différents.

La Cour du Banc du Roi de la province de Québec a admis sans discussion le principe invoqué par l'appelant; mais elle déclare dans son jugement que ce principe ne s'applique pas à la présente cause. En décidant ainsi, le jugement qu'elle a rendu n'est certainement pas en opposition à ceux des autres cours que l'on m'a cités, et il se conforme exactement à la règle telle qu'elle est exprimée dans Beale's Cardinal Rules of Legal Interpretation, 3rd ed., p. 525:

Every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is inconsistent or repugnant thereto *and no further*.

J'arrive donc à la conclusion que la requête pour permission d'appeler doit être rejetée avec dépens.

Application dismissed with costs.

(1) [1926] S.C.R. 481 (2) [1927] S.C.R. 284.

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*May 1, 4.
*May 18.

THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (DEFENDANT) ..... } APPELLANT;

AND

MILDRED G. C. KEY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Collision between tram-car and automobile—Contributory negligence—Ultimate negligence—Jury trial—Findings—Evidence—New trial—Questions to the jury—Answers inconsistent—Counsel not objecting nor asking for direction by trial judge.

The respondent, with her husband and child, was proceeding easterly on 49th Avenue in Vancouver in their automobile, her husband driving. On approaching the track of the appellant company across the road and seeing a tram-car coming from the south, the husband stopped his car, but as he saw a platform upon which people were standing, he thought that the tram-car would stop and he started to cross the track. The tram-car did not stop and consequently struck the automobile. As a result of the collision, the husband and child were killed and the respondent suffered serious injuries. The jury found that the employees of the appellant company were guilty of negligence and that the husband was also guilty of contributory negligence; but that, notwithstanding such negligence of the driver of the automobile, the motorman of the tram-car could have avoided the accident by the exercise of reasonable care. The jury then assessed the damages for which judgment was entered; and this judgment was affirmed by the Court of Appeal. The appellant company then appealed to the Supreme Court of Canada mainly on the ground that the finding of the jury, in answer to question no. 8 (that, notwithstanding the negligence of the driver of the automobile, the appellant, by the exercise of reasonable care, could have avoided the accident), was inconsistent with the earlier findings of primary negligence of the appellant and contributory negligence of the respondent, and, moreover, that such finding on question no. 8 was not supported by evidence.

Held, Rinfret and Smith JJ. dissenting, that there was no conflict in the findings of the jury and that they were sufficiently warranted by the evidence.

Per Anglin C.J.C. and Newcombe and Cannon JJ.—The appellant's contention, that the questions prepared for the jury and the answers thereto were insufficient and conflicting with each other and that a new trial should, therefore, be ordered, cannot be upheld, as the questions were drafted by both counsel, approved by the trial judge and submitted to the jury, whose answers and verdict were accepted without complaint by both parties, the appellant's counsel, moreover, not having asked for a more complete direction by the judge as to question no. 8, at the time of his charge.

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

Per Rinfret and Smith (dissenting).—The issue as to ultimate negligence was not properly put to the jury, either in the questions as framed, or in the charge of the trial judge; and it is impossible to say precisely in what the jury would, if asked, have found the ultimate negligence consisted. This lack of proper instruction as to the law bearing on the questions at issue, coupled with the apportionment of the degree of negligence and the finding of ultimate negligence, indicates that there was confusion in the minds of the jury, which may have affected all the findings. There should be a new trial as to the claim under what is commonly referred to as *Lord Campbell's Act*.

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 for damages.

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

J. W. de B. Farris K.C. and *W. A. Riddell* for the appellant.

R. L. Maitland K.C. and *C. M. O'Brian K.C.* for the respondent.

The judgment of Anglin C.J.C. and Newcombe J. was delivered by

ANGLIN, C.J.C.—In this case the appellant confines its attack to finding no. 8 of the jury which, it contends, conflicts with the earlier findings of primary negligence of the defendant and contributory negligence of the plaintiff (which it did not challenge) and is not supported by the evidence. We can see no inconsistency in the findings.

The finding of "ultimate" negligence, viewed in the light suggested by counsel for the respondent (which was certainly an admissible position on the whole case as indicated by my brother Cannon) seems to be warranted by the evidence. It is true that the jury did not specify the particulars of that negligence; but, on the other hand, it is impossible to say that they were not right in answering the eighth question as they did, for there is evidence in support of the answer, and, in contrast with the finding upon the ninth question, it clearly indicates that it was the negligence of the defendant company which, in the opinion of the jury, caused the accident. (*B.C. Electric Rly. Co.* v. *Loach*) (2).

(1) (1931) 43 B.C. Rep. 288. (2) [1916] 1 A.C. 719, at 727 and 728.

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Anglin C.J.C.

The appellant raised before us a complaint of non-direction with regard to the issue of ultimate negligence. It appears, however, that the learned trial judge, at the close of his charge, asked counsel if they had any objections, or suggestions, to make; and their answer was in the negative. Counsel had themselves framed and agreed upon the questions to be submitted to the jury. The burden was distinctly upon counsel for the appellant to satisfy this court that the answer to question no. 8 was unwarranted and, under the circumstances, he cannot complain of lack of specification by the jury of the particular ground upon which this finding is based, since he did not ask for any direction covering that point, nor that any question be put calling for such specification.

As was said by Lord Halsbury, in *Nevill* v. *Fine Art & General Insurance Co.* (1), counsel can never, as of right, ask for a new trial for mere non-direction. The granting of a new trial on that ground is purely discretionary; a request for that relief should only be acceded to by the court where the interests of substantial justice require that course to be taken. We are far from satisfied that that is the case here, counsel having failed to convince us that the jury's answer to question no. 8 must have proceeded on some ground not warranted by the evidence, or which, in law, would not amount to "ultimate" negligence.

Under all the circumstances, we think that a new trial, restricted to the issue raised by question no. 8, would probably be unsatisfactory and might involve the re-taking of all the evidence, except as to the quantum of the damages. We think the interests of justice in this case will be best served by putting an end to the litigation; and, accordingly, we dismiss the appeal with costs.

The view above expressed renders it unnecessary to consider the other question argued at bar, viz.: whether or not the *Contributory Negligence Act* applies to actions brought under *Lord Campbell's Act.*

CANNON J.—This is an appeal from the Court of Appeal for British Columbia, which confirmed a judgment of Mr. Justice Gregory, assisted by a jury, in favour of the plaintiff for $5,150 in respect of personal injuries sustained by

(1) [1897] A.C. 68, at 76.

her in a collision between a tramcar, owned and operated by the appellant, and an automobile in which she was driving with her husband and child, who both then lost their lives; the respondent recovered a further sum of $25,000 as executrix of her late husband, Frank Key. Counsel for both parties agreed as to the questions to be put to the jury; and no objections were taken at the trial against the jury's answers nor to the judge's charge.

The questions and answers are as follows:

1. Who was driving the auto?—A. Mr. Key.

2. Was the intersection—the scene of the accident in a thickly-peopled portion of the city of Vancouver?—A. Yes.

3. Was the defendant guilty of negligence which contributed to the accident?—A. Yes.

4. If so, what was such negligence?—A. Considering the place and the conditions as shown by the evidence, the motorman of the northbound train was negligent in failing to stop when he saw the Key automobile approaching the crossing from his left and then allowed his attention to be diverted by looking to his right.

5. Was the driver of the auto guilty of negligence which contributed to the accident?—A. Yes.

6. If so, what was such negligence?—A. Although the driver of the Key auto took reasonable care as shown in the evidence by stopping his automobile before arriving at the crossing, it is our decision he did not take all necessary precautions before proceeding.

7. If the defendant and the driver of the auto were both guilty of negligence, to what degree did the negligence of each contribute to the accident?—A. The degree of negligence, defendant 90 per cent; plaintiff, 10 per cent.

8. Notwithstanding the negligence of the driver of the auto, if any, could the defendant by the exercise of reasonable care have avoided the accident?—A. Yes.

9. Notwithstanding the negligence of the defendant, if any, could the driver of the auto by the exercise of reasonable care have avoided the accident?—A. No.

10. Damages, if any?

(*a*) In respect to the plaintiff for personal injury?—A. Section (*a*) in respect to the plaintiff for personal injury, pain and suffering, expenses $5,150 net.

(*b*) As executrix of the estate of the late Frank Key?—A. $200 per month to the plaintiff for the duration of her life to be paid by the defendant and guaranteed by a surety bond payable from date of accident, or alternatively, $25,000.00.

The appellant's case is based before this court on two propositions:

1. " That there is no evidence to support a finding of ultimate negligence as given in questions 8 and 9." This cannot be sustained on the motorman's evidence that he released his brakes at about the same time that his attention was fully turned to the motor moving very slowly

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towards the track. He says he could have stopped in seventy-five feet, but that he did not do so because the auto, in his judgment, showed every indication of waiting there until he had got past. He wrongly thought it would be all right to go ahead—and must have kept his head turned to the other side until the collision took place. On this version of the appellant's employee, the jury exculpated the victim from the moment the motorman decided to go ahead without stopping at the station, on the rash assumption, in the jury's view, that the motor would stop and wait.

2. "The plaintiff cannot succeed in an action under the *Families Compensation Act* where there is a finding of contributory negligence against the deceased." In my opinion, the finding is one of ultimate negligence against the appellant and this ground also fails.

But, the appellant also contends that question 8 in connection with ultimate negligence

> Could the defendant by the exercise of reasonable care, notwithstanding the negligence of the plaintiff, have avoided the accident?

is not sufficient and that there should have been added to it these words: "at a time when the plaintiff no longer could have so avoided it". Besides, the appellant claimed that the answers to questions 3, 4, 5 and 6 established contributory negligence of both parties and cannot be reconciled with the answer to question 8, in view of the failure of the jury to determine what the defendant could have done to avoid the accident notwithstanding the negligence of the victim.

The contention that the questions prepared for the jury and that the answers thereto were insufficient is fully met by the fact that the questions were drafted by counsel, approved of by the judge and submitted to the jury, whose answers and verdict were accepted without complaint by both parties. If the appellant desired a more complete direction as to question 8, or a fuller answer to it, it ought to have applied for it when it was possible to obtain it. Having been silent during the trial and when the answers were given, it waived the objection, if any, which it had a right to make and cannot now be allowed to urge such grounds for a new trial.

In the case of *Williams* v. *Wilcox* (1), Lord Denman observed:

(1) (1838) 35 E.C.L.R. 609, at 620.

It is the business of the counsel to take care that the judge's attention is drawn to any objection, on which he intends afterwards to rely.

In the present case the jury gave a unanimous verdict to which no objection was made at the time and now all this labour is to be set aside in order, at the cost and delay of a new trial, to get fuller answers which might have been obtained without delay, trouble or expense when the jury were in the box. I am therefore of opinion that we ought not now to maintain such objections to the questions or to the answers of the jury.

There is no appeal against the verdict for $5,000 awarded plaintiff for the personal injuries, which has been paid in full. It would therefore be impossible to retry this issue. Moreover, in its factum, the appellant does not ask for a new trial; it seeks to benefit from some alleged ambiguity in the findings to secure the dismissal of the whole claim for $25,000. This is not a case, in my view, where we would be justified, although competent to do so, in ordering a new trial, even restricted to the issue of ultimate negligence and of what it consisted in. To use Lord Halsbury's language in *Nevill* v. *Fine Art and General Insurance Company* (1):

what puts him (appellant) out of court in that respect is this, that where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you have an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough, you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect.

I would therefore dismiss the appeal with costs.

The judgment of Rinfret and Smith JJ. (dissenting) was delivered by

SMITH, J.—In this case the issue as to ultimate negligence was not properly put to the jury, either in the questions as framed, or in the charge of the learned trial judge; and it is impossible to say precisely in what the jury would, if asked, have found the ultimate negligence consisted.

In my view, this lack of proper instruction as to the law bearing on the questions at issue, coupled with the apportionment of the degree of negligence and the finding of ultimate negligence, indicates that there was confusion in the minds of the jury, which may have affected all the

(1) [1897] A.C. 73, at 76.

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findings. It is suggested to us that the jury was asked to apportion the degree of negligence merely in order to prevent the necessity of a new trial in case it should be finally held that a finding of ultimate negligence was not warranted. Nothing of this kind appears on the record, and there is no reference to it in the questions as asked, nor in the charge of the learned judge to the jury. I am therefore of opinion that there should be a new trial as to the claim under what is commonly referred to as *Lord Campbell's Act*.

Counsel on both sides were responsible for the questions as framed, and neither of them directed the attention of the learned trial judge to his failure to explain the law to the jury.

In view of this joint responsibility, the costs of this appeal should be costs in the cause.

Appeal dismissed with costs.

Solicitor for the appellant: *V. Laursen.*

Solicitor for the respondent: *C. M. O'Brian.*

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*Oct. 15.
*Nov. 9.

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

ISABEL MURRAY (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Defective brake on railway car—Whether cause of death of operator of brake—Accident not seen—Jury's finding—Reasonable inference.

An employee of defendant was killed while engaged in switching operations in defendant's yard. The accident was not seen, but he was found dead on the ground after "riding" down a "hump" a car which, as later found, had a defective brake. Plaintiff, mother of deceased, recovered, on verdict of a jury, judgment for damages, which was affirmed by the Appellate Division, Alta.

Held: Defendant's appeal to this Court should be dismissed. The jury were justified in concluding, as the reasonable inference from the facts and circumstances in evidence (nature and tendency of the defect in the brake, deceased's duty at the time, his operation and position when

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

last seen before the accident, direction of car, position of body when found, etc.), that it was defendant's negligence in having in use the defective brake which caused deceased to fall and be killed. (*Jones* v. *Great Western Ry. Co.*, 47 T.L.R. 39, at 45; *Cottingham* v. *Longman*, 48 Can. S.C.R. 542, and other cases cited.)

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta, dismissing its appeal from the judgment of Walsh J., entered upon the verdict of a jury, in favour of the plaintiff for the sum of $6,000 damages for the death of the plaintiff's son who was killed while in defendant's employ and, according to plaintiff's allegations, by reason of defendant's negligence. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

W. N. Tilley K.C. and *C. F. H. Carson* for the appellant.

S. J. Helman K.C. for the respondent.

The judgment of the court was delivered by

CANNON J.—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta unanimously dismissing an appeal from a judgment in the sum of $6,000 entered in favour of plaintiff after a trial with a jury.

At the time of his death, Murray, the respondent's son and sole support, was a young man of twenty-two years of age and had been in the employment of the appellant as switch tender, although, at the time of his death, with the consent and approval of the company, he was actually performing the duties of a yardman. Murray was killed on the 27th September, 1927, at nine o'clock in the evening, and was then engaged in switching operations over a "hump" in the appellant's yard at Calgary. When a car reaches the level or upper portion of the "hump," a "rider" gets on the car and takes his place at the brake and the car is then pushed down the incline sufficiently to permit it to run by gravity and also to enable a test to be made of the holding power of the brake. After the holding power of the brake has been ascertained, the car is cut loose from the remainder of the train and proceeds by gravity down the "hump," along the lead track into one of the tracks in the classify-

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ing yard. The "rider" controls the speed of the car by operating the brake as the car goes down and brings it to a stop at its ultimate destination.

On the night of the accident, Murray asked yardman Mosgrove to change places with him in order that he (Murray) might get some experience as a yardman. Mosgrove agreed and, with the knowledge and consent of the foreman, Murray proceeded to ride cars off the "hump." Murray mounted a flat car on which was loaded a combine thresher. The hand brake is at the front of the car and the person operating it stands on its floor. The top of the brake reaches up to about the rider's waist.

Murray proceeded to attempt to set the brake, which was found difficult to use. Finally, however, the brake was set, the pin was drawn and the car was released and started on its way down the gradient at about six miles per hour. At a dividing switch, at 122 feet from the place of the accident, the car with Murray on it passed one Jack, a switch tender, who was standing at that point and was the last person to see him alive. Murray was then standing at the front of the car with his right hand on the brake wheel and his left hand on the "club" which had been put through the wheel on the mast. Jack saw Murray a short distance west of him making an effort to put his brake on with the brake club by shoving with his club in his left hand and pulling with his right hand on the wheel. A noise was next heard like a car going off the track and was investigated by several witnesses. It was found that the car had not run off the track but that it had passed over Murray, who was found dead by Buckwell on the fork between the ninth and tenth switches in the receiving yard, at a distance of 122 feet from where Jack had last seen him.

The brake on the car is designed with a series of pinions, one gear fitting into the other and the large gear having a chain which wraps around the brake mast; the gear and the chain are below the platform of the car and are not visible to the person operating the brake.

It is common ground that the brake was not in good working order. The car was inspected after the accident by the car foreman and the master mechanic, and they found a defect in the construction of the large gear which

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was not a true circle and did not lie flat when laid on a flat surface; it had evidently been warped in the casting in its manufacture.

It is also common ground that this defective gear would bind at certain points, with the effect that when the brake wheel was turned it became stiff once in every turn. It is proven by the evidence of Steele, A. E. Whitlock, F. E. Whitlock and Meechan, that it was very difficult to turn the brake past the binding point and that when it went past that point, the brake unloosed so quickly that it would cause, or was likely to cause, a person to lose his balance and pitch forward. Indeed, Steele, who tested the brake immediately after the accident, swears that when the brake went past the binding point he swung right off the end of the car, but, as he was " hanging on," he did not fall off but swung right around.

The running or visual inspection by the appellant company of the hand brakes on freight cars at every terminal failed to disclose the defect in the construction of this gear. Mr. Jamieson, the divisional superintendent, admits that this defect could not be discovered unless the car was dismantled, so that an inspection made while the brake was on the car would only disclose that there was difficulty in turning it; but the exact nature of the defect could not accurately be judged by a " rider," who could not realize the extent and nature of the risk he was running when using this brake.

In presence of this evidence, the only remaining ground of appeal, and the only one to which, at the hearing, the respondent was called upon to address himself, is whether or not the negligence of the company or its employees in allowing Murray to use this defective brake really caused his death. In other words, did the learned trial judge err in refusing the appellant's motion for non-suit made on the ground that, assuming negligence to be established, such negligence was not shown to be the cause of the death of the deceased?

To use the words of Viscount Hailsham, in the comparatively recent case of *Jones* v. *Great Western Railway Co.* (1), does the plaintiff's evidence in the present case " take

(1) (1930) 47 T.L.R. 39.

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us beyond the region of conjecture into that of legal inference?" Upon the evidence, could the jury reasonably reach the conclusion that the real cause of the accident was inferentially established by the presence of facts too strong to be ignored?

Amongst other facts, we have:

1. The test made after the accident of the tendency of the brake to throw a man off his balance;

2. The brake required to be turned to tighten it and would become stiff once in every revolution;

3. The duty of Murray was to use this brake to control the speed of the car and this was the sole operation which he had to perform on that car at the time of his death;

4. The witness Jack saw Murray at 122 feet before he was killed with his hands on the brake, travelling at six miles an hour, which would reasonably lead to the conclusion that he had continued to use, and was actually using, the brake at the time he reached the fatal spot;

5. The position of the body on the track and the marks on the car also help to render not unreasonable the conclusion that the defective brake caused Murray to fall in front of the car;

6. The car was travelling in an easterly direction. Murray, when last seen, had his right hand on the front wheel and his left hand on the club inserted in the wheel. If he was pushing with his left hand, the tendency would be to throw him east and south, if the brake were suddenly unloosed.

The jury could reasonably infer from these facts, considering the position of the body after the accident, that the fall had been caused by the negligence of the company in allowing this defective brake to be placed in commission and used on this occasion by its employee. I believe that the evidence establishes not only that the accident was *possibly* due to the negligence to which the plaintiff seeks to ascribe it; but the evidence, to use the words of Lord MacMillan, in the above quoted case (1), is such that the attribution of the accident to that cause may reasonably be inferred. I think that we may safely apply to plaintiff's evidence the test propounded by the noble Lord as follows: (1)

(1) 47 T.L.R. 39, at 45.

The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved. Indeed, as Lord Shaw said in *Marshall* v. *Owners of SS. Wild Rose* (1): "The facts in every case may leave here and there a hiatus which only inference can fill." The true doctrine in the matter is clearly stated by Lord Penzance in *Parfitt* v. *Lawless* (2): "It is not intended to be said that he upon whom the burthen of proving an issue lies is bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved legitimate and reasonable inferences may, of course, be drawn, and all that is fairly deducible from the evidence is as much proved for the purpose of a *prima facie* case as if it had been proved directly." I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

In this case, we have facts proven which establish relation between the defective brake and the accident, as the victim was seen with his hands ready to use the same brake a few moments before it happened. Moreover, the defect was of a nature and created a danger which was likely to cause the operator to lose his balance and be thrown off the car. Here, we certainly have more evidence to satisfy the jury, than there was in *McArthur* v. *Dominion Cartridge Company* (3).

See also *Grand Trunk Railway Company* v. *Griffith* (4). In *Cottingham* v. *Longman* (5), this Court held: "A series of facts may be proved in evidence from which the jury may reach a conclusion, as to the cause of the mishap, in some respects more satisfactory than if they were obliged to depend upon the deposition of an eye-witness." As Chief Justice Fitzpatrick said in the last mentioned case (pp. 543-544), "the function of an appellate court is to consider in each case whether there was evidence before the

(1) 26 T.L.R. 608; [1910] A.C. 486, at 494.
(2) (1872) L.R., 2 P. & D., 462, at 472.
(3) [1905] A.C. 72.
(4) (1911) 45 Can. S.C.R. 380.
(5) (1913) 48 S.C.R. 542.

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jury from which they could reasonably draw the conclusion at which they arrived."

Here, too, the finding of the jury has the approval of the provincial Court of Appeal as well as of the trial judge, and it should not be disturbed.

In our opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *George A. Walker.*

Solicitors for the respondent: *McGillivray, Helman, Mahaffy & Smith.*

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*Nov. 10.

*Nov. 16.

FRANCOIS BOUVIER (DEFENDANT).....APPELLANT;

AND

ALEXANDER FEE ÈS-QUAL. (PLAINTIFF)..RESPONDENT.

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

Negligence—Accident—Cement mixer in public lane—Small child injured while playing—Machine unattended and unguarded—Liability—Common fault.

The respondent, as father and tutor of his minor son, brought an action in damages against the appellant for injuries sustained by his son, then 7 years of age, resulting from a serious accident due to the alleged fault of the appellant. The respondent's son was playing with a small tricycle in a lane behind his father's house; in that lane, facing the house, the appellant had placed a cement mixer at a short distance from a garage which he was constructing. The respondent's son, on his tricycle, approached the mixer and put his hand on the machine while in motion, with the result that his hand was caught and drawn into the machine, where it remained until he was extricated. The evidence shows that the machine had been left unattended and unguarded at the moment of the accident.

Held that, according to the circumstances of this case, the appellant was liable.

Per Anglin C.J.C. and Lamont and Cannon JJ.—The allurement of a piece of machinery in motion for a small child is notorious, and anybody, operating such machinery upon, or so accessible from, a highway or public place as to make it dangerous to children lawfully about the neighbourhood, assumes the burden of so guarding the same as to make it practically inaccessible to them.

Per Anglin C.J.C., Lamont and Cannon JJ.—An issue of contributory negligence or common fault cannot be raised as a ground of appeal in the case of a child under eight years of age, such an issue being eminently for determination by the trial judge, who, in the present case, has found in favour of the respondent.

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*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

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BOUVIER v. FEE.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, Désaulniers J., and maintaining the respondent's action in damages for $5,000.

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

L. E. Beaulieu K.C. and *R. Genest K.C.* for the appellant.

A. Théberge K.C. for the respondent.

The judgment of Anglin C.J.C. and Lamont and Cannon JJ. was delivered by

ANGLIN C.J.C.—In our opinion this appeal must be dismissed with costs. The reasons given by Mr. Justice Guerin, in dismissing the appeal to the Court of King's Bench, are quite convincing; and the facts on which he bases his conclusions find ample support in the evidence.

The allurement of a piece of machinery in motion for a small child is notorious, and anybody, operating such machinery upon, or so accessible from, a highway or public place as to make it dangerous to children lawfully about the neighbourhood, assumes the burden of so guarding the same as to make it practically inaccessible to them. (Beven on Negligence, 4th ed., 189; *Cooke* v. *Midland G.W. Rly.* (1); *Canadian Pacific Railway Co.* v. *Coley* (2). To fence the machine here (as was suggested) was, probably, not practicable. But, Mr. Justice Guerin points out, there was no reason why the defendant should not have it so guarded and looked after by some one of his employees that children, who were known to be in the neighbourhood, and in the habit of playing there, should be kept away from it. This duty the defendant failed to discharge, the machine in motion having been left unattended and unguarded at the moment of the accident. Of this fact there is abundant evidence, and, upon it alone, we are satisfied that the provincial courts were justified in holding the defendant liable.

As to contributory negligence or common fault, it is, in our opinion, almost out of the question to raise such an

(1) [1909] A.C. 229.

(2) (1907) Q.R. 16 K.B. 404.

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BOUVIER v. FEE.
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issue as a ground of appeal in the case of a child under eight years of age, i.e., barely above the age under which all responsibility must be denied. Eminently an issue for determination by a trial judge, an appeal from his finding upon it is almost hopeless. The trial judge, in the present instance, found in favour of the plaintiff; and his finding is conclusive. (*Delage* v. *Delisle* (1); 1 Sourdat, "Responsabilité," no. 17).

The judgment of Newcombe and Smith JJ. was delivered by

NEWCOMBE J.—The boy was nearly eight years of age and his home was in the immediate vicinity of the work, and it is conceded for the purposes of the case that the machine was partly upon the lane, contiguous to which the work was in progress. Each case must, I think, be decided upon its own facts, and I agree that this appeal should be dismissed; but I am not satisfied to assent to the general proposition that in all cases there is an absolute duty.

Appeal dismissed with costs.

Solicitors for the appellant: *Genest, Gélinas & Renaud.*
Solicitors for the respondent: *Théberge & Théberge.*

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*Nov. 9.

PHILIAS DUPÉRÉ (PLAINTIFF).....APPELLANT;

AND

MONTREAL TRAMWAYS LIMITED (DEFENDANT) ..... } RESPONDENT.

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

Jury trial—Trial judge—Charge—Misdirection—Common fault—Annuity table—Estimate of damages—New trial—Exception to the charge—Presence of the judge when made—Arts. 466, 467, 498, 500, 506 C.C.P. —Supreme Court Act, ss. 47, 48.

In an action for damages brought by the appellant for injuries suffered by him as the result of a collision between his horse-driven truck and one of respondent's tramcars, the jury rendered a verdict in favour of the appellant for $23,040, the full amount claimed. But the appellate court ordered a new trial on the ground of misdirection by the

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Smith and Cannon JJ.

(1) (1901) Q.R. 10 K.B. 481.

trial judge in not instructing the jury properly as to the application to the case of the doctrine of common fault, and as to the use to be made of annuity tables by the jury in arriving at the amount of the verdict.

Held that the order for a new trial pronounced by the appellate court should not be interfered with.

Per Anglin C.J.C. and Smith J.—It is unnecessary to decide the question whether or not the respondent was entitled *as a matter of right* to the order for a new trial made by the appellate court, as the result of the trial is so unsatisfactory that this court in the exercise of its own judicial discretion, inherent and statutory, ought to affirm such order.

Per Duff, Rinfret and Cannon JJ.—As to the question whether counsel for the respondent, at the trial, has "duly excepted to such misdirection" by the trial judge in the manner provided for by article 498 C.C.P., the circumstances of this case and the entries in the book of proceedings show that there has been a sufficient compliance with the requirements of the code. Moreover, *per* Duff, Rinfret and Smith JJ., this being a matter of practice and procedure, the judgment of the appellate court should be clearly wrong before this court ought to reverse it.

Per Duff, Rinfret and Smith JJ.—The fact that no mention of a by-law of the city of Montreal applicable to the case was made by the trial judge, in his charge made in French, (although asked to do so), and also the manner in which it was referred to in his charge made in English, amounted to a refusal "to instruct (the jury) on a matter of law" (Art. 498 C.C.P.) and constituted an additional reason for granting a new trial.

Judgment of the Court of King's Bench (Q.R. 50 K.B. 414) 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, Duclos J., in favour of the appellant and ordering a new trial.

The appellant was conducting a horse-driven truck out of a yard when he noticed a street car, some distance away; thinking that he had sufficient time to cross the tracks, he continued his way, but the tram-car struck the wagon killing one of the horses and throwing the appellant on the pavement, causing him serious injuries. The appellant brought an action in damages against the respondent company, and the latter alleged in its plea that the appellant was to blame in driving his truck in front of a moving tram-car when so close as to render the accident inevitable. The jury found the appellant was blameless and having in no way contributed to the accident and assessed the damages at $23,040, the full amount claimed. The trial

(1) (1931) Q.R. 50 K.B. 414.

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judge rendered judgment according to the verdict. The respondent then appealed to the Court of King's Bench, first, on the ground that the damages awarded were excessive, and also on grounds of misdirection: first, as to the doctrine of common fault, and, second, as to the use to be made of annuity tables in assessing damages. As to the question of common fault the trial judge made the following remarks: "That question is put to the jury because both parties might be at fault, but, as a rule, I would say that in nine cases out of ten, there is no such a thing as a common fault; there is generally one determining fault that causes the accident, and the other one is not a contributing fault in the sense of the law. I might say, with due respect to my fellow judges, that the common fault is often only an easy way to decide a doubtful case. When it is not quite clear who is at fault, they say: Both at fault, and let it go at that." As to the question of the annuity tables, the trial judge gave these directions: "D'après les tables d'assurance, à trente ans, s'il était normal, il devrait vivre trente-cinq ans de plus. On vit plus longtemps que cela des fois, mais il y en a qui vivent moins longtemps; trente-cinq ans c'est la moyenne. Et à cet âge-là, pour acheter une rente viagère de cent dollars, cela lui coûterait dix-sept cent quatre-vingt-deux dollars ($1,782) et pour deux cents dollars ($200) le double et ainsi de suite. Si vous arrivez à la conclusion que quand il était normal il gagnait mille dollars ($1,000) et qu'aujourd'hui il ne peut pas gagner plus, disons, que cinq cents dollars ($500) ce sera une *base* avec la table d'assurance, pour établir le montant des dommages que vous devez accorder pour cet item-là. Ce sera un guide pour vous aider. Vous direz : il perd cinq cents dollars ($500) par année. Si pour se rattrapper il veut acheter une pension viagère, il faudra qu'il paie cinq fois dix-sept cents quatre vingt-deux dollars ($1,782). S'il verse entre les mains d'une compagnie d'assurance dix-sept cent quatre-vingt-deux dollars ($1,782) la compagnie va lui payer cent dollars ($100) par année pour le reste de sa vie. Les rentes viagères plus vous êtes jeune, plus ça coûte cher. Quand vous êtes vieux, ça ne coûte plus bien cher. Cela n'est pas une règle absolue, c'est seulement un moyen, une indication pour vous aider à arriver à une conclusion."

The Court of King's Bench set aside the verdict and ordered a new trial on the ground that the trial judge had misdirected the jury in these two important respects and substantial prejudice had thereby been occasioned. The appellant then appealed to this court and urged as his first ground of appeal (which was also raised before the Court of King's Bench) that the objections to the particular statements made by the trial judge in his charge to the jury were not taken at the proper time. Under the Code of Civil Procedure (art. 498),

a new trial may be granted:

* * *

3. When the judge has misdirected the jury or refused to instruct them on a matter of law, and the party complaining has duly excepted to such misdirection or refusal.

But the causes for a new trial, mentioned in this paragraph,

can be ascertained only by means of the minutes of trial, and when the party has caused his objections to be entered therein.

(art. 506, C.C.P.). With regard to the minutes of trial, the code contains the following provisions:

466. The prothonotary keeps, under the direction of the judge, full minutes of the proceedings at the trial, including all admissions, and all exceptions taken, or objections made, orally in court.

467. A copy of such minutes is made out by the prothonotary, and, after being certified by the judge, is filed of record, and is held to be the true record of all proceedings mentioned therein, and stands in lieu of any bill of exceptions by either party against the evidence or the trial.

What took place after the learned trial judge had completed his address to the jury is recited thus in the minutes of trial:

Les jurés se retirent aux fins de délibérer.

* * *

M. Vallée fait quelques exceptions à l'adresse du juge et M. Genest y répond. Le tout est sténographié.

The material parts of the stenographic report referred to and thereby incorporated in the minutes of the trial read as follows:

Me Genest, C.R., conseil du demandeur:

La cour voudrait-elle demander aux parties si elles désirent que quelque chose soit ajouté à votre charge?

Le juge: C'est après que le jury sera retiré. (Les jurés se retirent. Le juge aussi se retire.)

Exceptions à la charge du juge aux jurés.

Après la charge aux jurés, alors que le juge et les jurés se sont retirés de la salle d'audience, Me Arthur Vallée, C.R., avocat de la défenderesse, fait la déclaration suivante:

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Le procureur de la défenderesse excipe respectueusement de la charge du juge aux jurés pour les raisons suivantes:

* * *

Parce que le président du tribunal n'a pas éclairé suffisamment le jury sur les dispositions du règlement 890 de la cité de Montréal, et surtout sur les dispositions de l'article 64 du contrat entre la cité de Montréal et la compagnie défenderesse;

Parce qu'il a mal défini la faute commune et mal avisé les jurés, en leur disant qu'il ne pouvait y avoir faute commune en l'occurrence, de même qu'il les a mal avisés en référant au montant nécessaire pour payer une annuité.

Under the above circumstances the effect of the judgment of the Court of King's Bench is that the manner in which the objections were taken was a compliance with the articles of the code sufficient to found a judgment ordering a new trial.

R. Genest K.C. and *B. Robinson* for the appellant.

Arthur Vallée K.C. for the respondent.

ANGLIN, C.J.C.—After giving full consideration to this case and to the arguments of counsel for the appellant and respondent, respectively, I am of the opinion that it is not possible for us to interfere with the order for a new trial. Having reached this conclusion, I abstain, as is our custom, from comment on the evidence or discussion of the facts. Without necessarily agreeing with the view of the Court of King's Bench that there had been sufficient compliance by counsel for the respondent company with art. 498 (3), I think that, in a proper exercise of judicial discretion, we should refrain from interfering with the order pronounced by that court. The trial already had, having regard to the manner in which the case was presented by the learned trial judge to the jury, cannot, as a whole, be regarded as other than most unsatisfactory.

It is almost impossible to say whether the jury was, or was not, properly instructed as to the application to the case at bar of the doctrine of common fault. Indeed, what was said by the learned trial judge may well have been taken by some members of the jury to amount to a withdrawal from its consideration of that issue. Yet, there certainly is evidence in the record of circumstances from which it might be inferred by the jury, as a reasonable deduction, that the plaintiff was not entirely free from fault.

Upon the other point of alleged misdirection, viz., as to the use to be made of annuity tables by the jury in arriving

at the amount of their verdict, the charge is also unsatisfactory, because, although it may not be possible to point to any particular statement of the learned judge, in the course of his directions in regard to the use the jury might make of these tables, as clearly erroneous, the charge was "out of harmony with the ideas that have always obtained as to the manner in which a jury should deal with" such tables, when presented for its consideration. Nor does the charge, read as a whole, so qualify or modify the effect of either of these objectionable features as to render them clearly inocuous. This case does not fall within art. 500 C.C.P.

Personally, I should have been prepared to accept our decision in *Barthe* v. *Huard* (1), as conclusive that a new trial should be had in this case, even if counsel for the defendant had failed to comply with the requirement of art. 498 (3) in regard to taking exceptions to the charge at the trial, before verdict, and in the actual presence of the trial judge. But I understand that some of my learned brethren take a different view of the decision in *Barthe* v. *Huard* (1). I, therefore, do not base this judgment upon it.

There, no objection to the charge was taken at the trial, although formal objections in writing were filed after verdict, on the morning following the hearing. Notwithstanding this state of facts, however, this court, reversing the Court of King's Bench, ordered a new trial. To quote from the judgment of Davies J., concurred in by Girouard and Duff JJ., a majority of the court,

> While the judge's charge to the jury was not objected to as a whole, objection was taken to a particular part of it in which the judge told the jury that "they should consider the case as if the charge of drunkenness had been made against themselves, their brother or their friend."
>
> I cannot but think that this was an entirely wrong and false doctrine to lay down as to the proper functions of a jury. It was calculated to mislead their minds as to the manner and extent to which they should assess the damages or make their findings.
>
> It is possible that if the learned judge's attention had been called to this language and its full meaning at the time, and objection taken to it he would have corrected the apparently misleading direction before the jury had retired, or if they had already retired, before they had agreed upon their verdict, but no such objection was taken at the time.
>
> This only goes to shew the imperative necessity of Courts of Appeal insisting, when asked to grant new trials as a matter of right, that only objections to particular statements made by the judge in his charge to

(1) (1909) 42 Can. S.C.R. 406.

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the jury will be considered or given effect to when it is shewn that objection has been taken to them at the time when their misleading character can be corrected before the jury.

A converse case came to this court in *Lamontagne* v. *Quebec Light, Heat & Power Company* (1), of which the headnote reads, in part, as follows:

> Where no objection has been taken to the judge's charge to the jury at the trial and it does not appear that any substantial prejudice was thereby occasioned there should not be an order for a new trial under the provisions of articles 498 *et seq.* of the Code of Civil Procedure.

Here, the objections on both points of misdirection by the learned trial judge are to be found formulated in the stenographer's notes which were, apparently, made part of the minutes of trial referred to in art. 506 C.C.P., and, on that ground, would seem to have been treated by the Court of King's Bench as having been properly taken as exceptions under art. 498 (3), C.C.P., and as entitling the respondent to a new trial *as a matter of right.* It is said, however, by counsel for the appellant that, although these objections are found in the stenographer's notes, those notes also shew that they were taken after the learned judge had left the bench and while the jury was deliberating, and that they were not known to the trial judge until after the verdict. In answer to this, counsel for the respondent assures us that they had been stated, in substance, to the learned judge before he left the bench and that they were inserted in the stenographer's notes by his express direction. I find it unnecessary to pass upon the question of fact raised by this regrettable contradiction.

In my view, it is also unnecessary now to decide the question discussed by this court in *Barthe* v. *Huard* (2), and impliedly passed upon in *Lamontagne v. Quebec L.H. & P. Co.* (1), as to whether or not the respondent was entitled, *as a matter of right,* to the order for a new trial made by the Court of King's Bench, since I think that the result of the trial already had is so unsatisfactory that we should, in the exercise of our judicial discretion, inherent and statutory (R.S.C., c. 35, s. 47), affirm the order of the Court of King's Bench for a new trial. Without, therefore, involving art. 495 C.C.P., and without expressing approval or disapproval of the ground on which the Court of King's Bench based its order, I accept its conclusion.

(1) (1914) 50 Can. S.C.R. 423. (2) (1909) 42 Can. S.C.R. 406.

The costs of the appeal to this court shall be to the defendant in any event of the cause, to be set off against the amount of any verdict which the plaintiff may obtain on a new trial.

This somewhat unusual disposition is made in ease of the plaintiff, who might otherwise be embarrassed by having to pay these costs forthwith. As a price of this concession in favour of the plaintiff, I think it reasonable to order the set-off directed,—the whole in the exercise of the discretion conferred on us by s. 48 of the *Supreme Court Act.*

The judgment of Duff and Rinfret JJ. was delivered by

RINFRET J.—For the reasons given in the judgment of the Court of King's Bench, we agree that the particular statements referred to therein and made by the learned trial judge in his charge to the jury were of a misleading character and substantial prejudice to the respondent must have been thereby occasioned. (Art. 500 C.P.)

The appellant urged that the misdirection complained of could not be made the ground of an order for a new trial, because, as he alleged, the objections to the misdirection were not taken at the proper time.

It is not disputed that the objections were taken before verdict. Further, we must hold that they were entered in the minutes of trial as required by art. 506 C.P. They form part of the stenographic report. The minutes of trial state the fact that the objections were made and refer to the stenographic report for the purpose of ascertaining what the nature of these objections was. But the contention is that they were taken after the judge had retired, and, therefore, at a time when the misleading character of the charge could not be corrected before the jury.

The article of the Code of Civil Procedure dealing with this question reads as follows:—

498. Subject to the qualifications stated in the next following articles, a new trial may be granted in any of the following cases:

* * *

3. When the judge has misdirected the jury or refused to instruct them on a matter of law, and the party complaining has duly excepted to such misdirection or refusal.

The French version uses the word " objecté " as the corresponding word for " excepted."

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It will be noticed that the article provides for two distinct cases: the first is misdirection and the second is non-direction. When there has been non-direction, the judge must be asked to instruct the jury on the point of law he has omitted to discuss; and if he refuses, exception must be taken to his refusal. When there has been misdirection, all that is required, according to the decision of the Court of King's Bench, is that the party complaining should have "duly excepted to such misdirection."

That is precisely what the respondent has done in the present case. The entry is as follows:—

"Le procureur de la défenderesse excipe respectueusement de la charge du juge aux jurés pour les raisons suivantes," etc.

The Court of King's Bench held that that was a sufficient compliance with the requirements of the code, and it gave effect to the objections.

As a mere question of the interpretation of the code, we are not prepared to differ from the Court of King's Bench on that point. Moreover, this being a matter of practice and procedure, we should be slow in reversing the judgment of the court of last resort of the province on a question of that kind.

What we have said thus far would be sufficient to dispose of the appeal; but, as there is to be a new trial, we think our view ought to be stated as to a further point raised by the respondent.

At the time of the accident which gave rise to the present action, there was in force, in the city of Montreal, by-law no. 890 entitled: "Règlement relatif à la circulation et à la sécurité publique." This by-law contained the following article:—

Article 15. Le conducteur d'un véhicule, en virant à une croisée ou en passant d'une ruelle, d'un garage ou d'une propriété privée, dans une rue, doit avertir de son intention de ce faire, avancer avec beaucoup de prudence et attendre qu'il ait un passage libre.

While the presiding judge was addressing the jury, counsel for the defendant asked him to call their attention to that by-law. Acceding to the request, the learned judge made reference to it in the following way:

There is a by-law of the city of Montreal known as by-law 890, an article of which I will read to you.

Article 15 of that by-law reads as follows: (It is in French, I will translate it.)

"The conductor of a vehicle, making a turn at an intersection, or coming out of a lane or of a private property into a street, must give notice of his intention so to do, advance with great prudence and wait until the way is clear.

That is the by-law. I am not going to tell you it applies to this case or not, that is the by-law.

No mention whatever of the by-law was made by the learned trial judge when addressing the French-speaking jurors. The absence of any reference to the by-law in the charge made in French and the manner in which it was referred to in the charge made in English amounted, in our view, to a refusal "to instruct (the jury) on a matter of law."

On this point, even if the construction put forward by the appellant should prevail, all the requirements of art. 498 (3) of the code were fully met, and exception to the refusal was duly taken.

We think it was the duty of the trial judge to instruct the jury as to the legal purport of article 15 of the by-law and to tell them that they should consider whether, upon the proven facts, the plaintiff complied with it and, if not, how far his failure to do so had any bearing upon the accident which happened later. The refusal of the trial judge so to instruct the jury, is an additional reason why a new trial should be granted.

1. The disposition made by the Court of King's Bench of the costs of the appeal to that court should not be disturbed. We notice, however, that, evidently through an oversight, no mention was made of the costs of the abortive trial. This clerical omission should be corrected by stating that these costs should be costs in the cause.

2. The costs of the present appeal should be to the respondent in any event; but, for the reasons stated in that respect by our Lord the Chief Justice, we think the right of the respondent to claim them should be suspended until after the new trial, at which time, if the appellant should secure a verdict in his favour, the respondent will be entitled to set off the said costs against the amount of that verdict; if, on the contrary, the verdict should be against the appellant, the respondent will then be entitled, if so advised, to collect his costs in the usual way, the bond given by the appellant upon his appeal to this court to remain in force in the meantime.

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SMITH, J.—One of the grounds of appeal is that objections to the misdirection of the trial judge were not taken at the time and in the manner required by the Code of Civil Procedure, article 498. The Court of King's Bench have held against this contention, and I agree with my brother Rinfret that we should not lightly interfere with the judgment of that court upon a mere matter of practice and procedure unless there is clear error. This, in itself, might be a sufficient ground for dismissing this appeal.

I am, however, also in agreement with my Lord the Chief Justice that the trial already had, having regard to the manner in which the case was presented by the learned trial judge to the jury, cannot, as a whole, be regarded as other than most unsatisfactory; and that the result of that trial is so unsatisfactory that we should, in the exercise of our discretion under article 495 and R.S.C., c. 35, s. 47, affirm the order of the Court of King's Bench for a new trial. There is no doubt that, in view of the express provisions of article 498 as to new trials, resort for the granting of a new trial should not ordinarily be had to these general provisions. Where, however, the ends of justice clearly require it, as here, this may be done.

In addition to the misdirection on the two points referred to in the Court of King's Bench, I am in agreement with what my brother Rinfret says as to the by-law he refers to, and there is also to be noted the evident lack of information upon the part of the jury when they proceeded to consider their verdict. An amendment of the claim for damages had been asked and granted at the conclusion of the plaintiff's case, by which the amount of damages originally claimed under each heading was greatly increased. The answer of the jury as to the amount of damages that they awarded was first in the following words: "Plein montant réclamé * * * Unanime". Then we have, in the "extrait du procès-verbal d'audience", the following:

> Les jurés reviennent dans la salle d'audience.
>
> Appelés, ils répondent à leurs noms et ils donnent les réponses qui suivent.
>
> Mais comme ils ne spécifient pas clairement les dommages qu'ils accordent, la cour leur demande de retourner dans leur chambre de délibérations, et d'exprimer par un chiffre le montant des dommages qu'ils conviennent d'accorder.
>
> Ce qu'ils font pour revenir avec leurs réponses complétées à la satisfaction du tribunal.

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From this it is quite clear that the jury, in returning the verdict for the full amount claimed, had no idea of what that amount was, and were prepared to give a verdict for the full amount, whatever it might be. They were sent back to find out the amount in figures, and then returned with the amount $23,040 filled in, after the words " Plein montant réclamé ".

A verdict for this large amount, arrived at in this manner, is certainly unsatisfactory, and a strong ground for ordering a new trial.

I agree with the disposition of the costs of this appeal proposed by my Lord the Chief Justice and my brother Rinfret, and agree with the latter that the costs of the abortive trial should be provided for as he suggests, and that it would be well to have it specially mentioned that the bond for costs of appeal to this court is to remain in force.

CANNON, J.—Pour les motifs exposés dans ses notes par l'Honorable Juge-en-chef de la province de Québec, je suis d'avis de confirmer l'arrêt de la Cour du Banc du Roi accordant un nouveau procès. L'appel doit donc être renvoyé. J'accepte aussi la décision de l'Honorable Juge-en-chef du Canada quant aux dépens devant cette cour.

Appeal dismissed with costs.

Solicitors for the appellant: *Robinson, Shapiro & Fells.*
Solicitors for the respondent: *Vallée, Vien, Beaudry, Fortier & Mathieu.*

RUTHERFORD *v.* ROYAL BANK OF CANADA

1931

*Nov. 9.
*Dec. 22.

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

Bills and notes—Banking—Cheque—Irregular payment by a bank—Verification slip—Release signed by authorized agent.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Patterson J. (2), and dismiss-

*PRESENT:—Duff, Newcombe, Lamont, Smith and Cannon JJ.

(1) (1931) Q.R. 50 K.B. 458.

(2) (1930) Q.R. 68 S.C. 349, *sub nomine Dunton* v. *Royal Bank of Canada.*

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ing the action instituted against the respondent bank by the appellant acting as trustee of a bankrupt company in reimbursement of a cheque alleged to have been paid without authorization.

The firm of Harvie Smith & Company, Limited, opened and operated, for the purposes of the business which it formerly carried on in Montreal, a current account in a branch of the appellant bank, under authority of a resolution of the directors of the company passed on the 30th of November, 1926, in accordance with its by-laws. The following resolutions relevant to the issues involved in this appeal were passed. Resolution no. 3 provided that any two of the four senior officers of the company, namely, the two vice-presidents and the treasurer, were authorized on behalf of the company to make, sign, draw, accept or endorse cheques, etc., and, by resolution no. 4, it was also provided that "all securities, documents and instruments signed, made, drawn, accepted or endorsed as aforesaid shall be valid and binding upon the company." The respondent bank had no knowledge of these resolutions. Throughout the period with which this appeal is concerned, Dr. Robert Harvie was the president and Milton F. Gregg was a vice-president and the treasurer of the company. On the 9th of August, 1927, a cheque signed in the name of the company by Robert Harvie alone, for $4,250 payable to himself or to his order, was presented at the branch of the respondent and, although incomplete since it bore the signature of only one officer of the company, whereas under the terms of the above mentioned resolution, it should have been signed by two, it was accepted for payment by the accountant of the branch, charged against the company's account therein and paid in due course through the personal account which Harvie had in the same branch of the bank. Milton F. Gregg, who was one of the officers of the company duly authorized for and on its behalf *inter alia* to receive all paid cheques and other vouchers and to sign the bank's form or settlement of balances and release, on the 5th of November, 1927, received from the bank a detailed statement of the company's account with the bank

for the three months ending the 31st of October preceding and the cheques and vouchers for the various items mentioned in the statement, and signed and delivered to the bank what is referred to as a "verification slip" and which in fact is the bank's form of settlement of balances and release whereby the company undertook forthwith to examine the statement and vouchers and to inform the bank within ten days of anything in them that was found to be incorrect, agreeing that the statement should be conclusive evidence of the correctness of the balance therein shown and that the bank should be released from all claims by the company in respect of each and every item shown therein, save such as were questioned or notified in writing to the bank. Harvie Smith & Company, Limited, assigned in bankruptcy in October of the next year (1928) and Mr. W. E. Dunton was appointed its trustee in bankruptcy. He found the said cheque of 9th August, 1927, among the papers of the company that were turned over to him and instituted the present action to recover from the bank the amount thereof, on the ground that it was paid by the bank out of the company's funds without authorization. Mr. Dunton was later on replaced as trustee by the present appellant, who continued the action to judgment.

The Superior Court, Patterson J. (1) maintained the appellant's action, but the judgment was reversed on appeal to the Court of King's Bench (2).

On appeal to the Supreme Court of Canada, after hearing counsel for the appellant and the respondent, judgment was reserved; and, at a later date, judgment was rendered dismissing the appeal with costs. Mr. Justice Smith, who delivered the judgment of the court, after stating the facts of the case, made the following observations: "No objection to the payment by the bank of this cheque was ever made by the company. The vice-president and treasurer Gregg had full authority to sign the release on behalf of the company, and *prima facie* that document is binding on the company. No evidence was offered to displace the *prima facie* defence thus established, and it is therefore un-

(1) (1930) Q.R. 68 S.C. 349. (2) (1931) Q.R. 50 K.B. 458.

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necessary to discuss here under what state of facts or circumstances a customer of the bank might be relieved from the ordinary effect of such a release."

Appeal dismissed with costs.

John Ahern K.C. for the appellant.

L. A. Forsyth K.C. and *H. Hansard* for the respondent.

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*Oct. 16.
*Dec. 22.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... APPELLANT;

AND

MAX KRAKOWEC, DAHLBERG AND EKLUND AND CONTINENTAL GUARANTY CORPORATION OF CANADA, LIMITED (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Criminal law—Conditional sales—Excise Act, R.S.C., 1927, c. 60—Forfeiture of vehicle under s. 181—Legal owners having no notice or knowledge of illegal use—Penal statutes—Construction.

A vehicle, otherwise undisputably liable to forfeiture under s. 181 of the *Excise Act*, R.S.C., 1927, c. 60, is (on construction of s. 181 and the Act as a whole) to be held so liable notwithstanding that its legal owner had, prior to seizure, no notice or knowledge of the illegal use which was being made of it.

Even a penal statute must not be construed so as to narrow its words to the exclusion of cases which those words in their ordinary acceptation would comprehend (*Dyke* v. *Elliott; The "Gauntlett,"* L.R. 4 P.C. 184, at 191; Craies on Statute Law, 3rd ed., p. 444).

A truck in the possession and use of its purchaser under a conditional sale agreement, by which the property in and title to it remained in the vendors until payment in full and on which a balance remained unpaid, was seized under circumstances which, as held on facts admitted, must be taken to have made it liable to forfeiture to the Crown under said s. 181. *Held* that it was liable to forfeiture not only as against the person in whose possession it was seized but also as against the said vendors, although the latter had no notice or knowledge of the illegal use which was being made of it.

The court is not vested under s. 124 of the Act with any discretionary power in the matter. It must decide according to law.

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*Present at hearing of the appeal: Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ. Newcombe J. took no part in the judgment, having died before the delivery thereof.

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Forget v. *Forget et al.*, Q.R. 67 S.C. 78; *The King* v. *Traders' Financial Corp. (In re Excise Act)*, [1929] 4 D.L.R. 154; *Le Roi* v. *Messervier et al.*, 34 R.L.n.s. 436, so far as inconsistent with above holding, overruled. *The Ship "Frederick Gerring Jr."* v. *The Queen*, 27 Can. S.C.R. 271, at 285, cited.

Judgment of the Exchequer Court (Audette J.), [1931] Ex. C.R. 137, reversed.

APPEAL by the plaintiff from the judgment of Audette J., of the Exchequer Court of Canada (1), dismissing the action and ordering that the seizure in question be set aside and annulled and that the vehicle in question be released to the owners to be dealt with under the contract between the vendors and purchaser thereof. The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported and are indicated in the above head-note. The appeal to this Court was allowed with costs.

D. L. McCarthy K.C. for the appellant.

No one for respondents.

ANGLIN C.J.C.—I would allow this appeal with costs throughout.

The judgment of Rinfret, Smith and Cannon JJ. was delivered by

RINFRET J.—In this case, the information of the Attorney-General of Canada sheweth that on or about the 5th day of December, 1929, at Albertville, in the province of Saskatchewan, one S. A. Bovan, an officer of His Majesty's Excise of Canada, under the authority of a writ of assistance and in accord with the provisions of section 181 of the *Excise Act*, did seize as having become subject to forfeiture to His Majesty a certain vehicle, to wit: a one-and-a-half ton Fargo Express, Serial No. 283531, Engine No. KT1690, covered by Saskatchewan Licence 1929 No. T-18-678; that, at the time of such seizure, the said vehicle was being used by one Max Krakowec for the purpose of removing spirits in his possession unlawfully manufactured contrary to the provisions of the said section 181; and that, on the 5th day of December, 1929, before John Ashby and John Rosser, two of His Majesty's Justices of the Peace in and for the

(1) [1931] Ex. C.R. 137.

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province of Saskatchewan, at Prince Albert, Krakowec was duly convicted of having in his possession a quantity of spirits of unlawful manufacture.

The information further sheweth that Alfred Dahlberg and Paul A. Eklund, residing and carrying on business at Prince Albert aforesaid, under the firm name and style of Dahlberg and Eklund, and that Continental Guaranty Corporation of Canada, Limited, a corporation having its head office in Montreal in the province of Quebec, and doing business in the province of Saskatchewan, severally claim interest in the said vehicle. They are made parties to the suit with Krakowec; and the prayer of the Attorney-General, as against all of them, is for a declaration and judgment that the said vehicle has become and is forfeited to His Majesty.

Only one statement of defence was filed on behalf of all the defendants. It alleged that Krakowec was in possession of the vehicle only by virtue of an agreement in writing whereby it was mutually understood that the property in and title to the Fargo express did not pass to him, but remained in Dahlberg & Eklund until the entire purchase price was fully paid in cash; that the agreement created a lien on the vehicle; that there was a balance owing by Krakowec to the Continental Guaranty Corporation to which Dahlberg & Eklund had assigned their rights and to which they remained liable under guarantee; that Dahlberg & Eklund and the Guaranty Corporation had no knowledge that Krakowec intended to use the vehicle for the unlawful purpose of which he was found guilty and, had they known it, they would not have sold the vehicle to him, nor financed the sale to him. They pray therefore that the claim be dismissed.

The action was tried, without the adducement of evidence, on the following admission of facts:

"It is admitted by counsel for the plaintiff and the defendants that:—

"(1) Action has been instituted herein on the information of the Attorney-General of Canada for the purpose of obtaining, should the facts warrant it, a declaration and judgment that the vehicle in the information described has become and is forfeited to His Majesty.

"(2) On December 5, 1929, S. A. Bovan, an Excise Officer carrying a Writ of Assistance, and C. E. Buck of the Prince Albert Town Station encountered at Albertville, Sask., one Max Krakowec, then driving the truck described in paragraph 4 of the information.

"(3) Bovan, under authority of the Writ, searching the truck found therein two bottles of spirits, one under the seat and one in the back, a third being found in Krakowec's pocket.

"(4) Bovan seized the spirits and truck as forfeited under section 181 of the *Excise Act,* duly served notice of seizure on Max Krakowec and laid information before John Ashby, J.P., against Krakowec in respect of having in his possession spirits of unlawful manufacture contrary to section 181.

"(5) At trial the same day before the said Ashby, J.P., and another, Rosser, Max Krakowec pleaded guilty and had sentence imposed.

"(6) The truck remained in the custody of the non-commissioned officer in charge of R.C.M.P. Town Station, Prince Albert, Sask.

"(7) On December 12th Messrs. Diefenbaker and Elder wired the Department of National Revenue as follows:

Max Krakowec on Dec. fifth pleaded guilty to offence under section 181 Excise Act Stop Fargo truck owned by accused still held by police Stop Please wire authorization to proper officials to release said truck to the accused.

"(8) On December 17, the department having been made aware of the circumstances, wrote in reply that 'the truck is regarded as confiscated.'

"(9) Under letter of December 23rd Messrs. Dahlberg and Eklund submitted the following document which they held out as a true copy of the sales contract covering the said truck:

(The agreement is here recited in full.)

"(10) The said Dahlberg and Eklund were informed in reply that the Act sets out no qualification as to ownership and that the truck was regarded as confiscated.

"(11) On January 24, 1930, the Continental Guaranty Corporation of Canada, Limited, issued unsealed warrant to one, S. C. Anderson, its bailiff, to take pos-

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session of the said truck. The said bailiff on the 25th of January, in attempting to seize the truck, handed * * * the warrant to a constable and received the same back forthwith:—

(Here the warrant is recited.)

"(12) The said truck was not then, or at any time by or on behalf of any defendant herein, removed from the possession of the non-commissioned officer above mentioned.

"(13) The said solicitors under letter dated January 25, 1930, forwarded the said copy of warrant to, and made demand for immediate delivery over of the said truck of, the Minister of Excise.

"(14) By virtue of the claim to the said truck so laid and the provisions of section 125 of the said Act the automatic condemnation of the said truck was avoided and the right of the claimant to have his claim adjudicated upon preserved.

"(15) The defendant Krakowec lays no claim and stands subject to having judgment signed against him on the pleadings.

"(16) The defendants Dahlberg and Eklund have assigned to the Continental Guaranty Corporation of Canada, Limited, all interest of them or either of them in the said truck or arising out of the said contract of sale.

"(17) The defendant the Continental Guaranty Corporation of Canada, Limited, claims the right to have delivered over to it the said truck or the sum of $672.55, the moneys still owing in respect thereof by the said Krakowec on the grounds that as assignee it stands in the shoes of Dahlberg and Eklund the vendors, is entitled to all the rights before assignment enjoyed by the said vendors, including title to and power to repossess the truck for cause.

"(18) The following question submitted in the pending summons is calculated to decide the claim put forward by the said corporation defendant:—

" Is the vehicle referred to in paragraph numbered 4 of the information filed seized under section 181 of the *Excise Act* in the circumstances set forth in paragraphs numbered 4 and 5 of the said information liable

to forfeiture notwithstanding that the legal owners of the vehicle in question had, prior to the said seizure, no notice or knowledge of the illegal use which was being made of the vehicle by the defendant Krakowec when the same was seized as alleged in said paragraph numbered 4?"

The Exchequer Court (1) dismissed the action largely, if not altogether, on the ground that the relevant provisions of section 181 apply only to vehicles " which have been or are being used for the purpose of *removing* the " spirits unlawfully manufactured or imported; and, as the court thought, the evidence failed to show that, in the circumstances, the Fargo express was being used for the purpose of " *removing* " within the meaning which the court ascribed to that word in the enactment.

Dealing with that point first, with deference, we think it should be eliminated as a ground of judgment.

As a result of the admissions upon which the parties agreed to submit the case, it must be assumed that all the necessary formalities for the effective seizure of the vehicle were complied with and the required procedure was followed. Further, it was not disputed that the vehicle was seized under circumstances which, by force of section 181 of the *Excise Act,* made it liable to forfeiture to the Crown. But it was granted that Krakowec, in whose possession the vehicle was seized, was not the legal owner thereof; and the question put to the court—and the only question—was

> whether a vehicle, otherwise undisputably liable to forfeiture under the *Excise Act,* is to be held so liable notwithstanding that its legal owner had, prior to seizure, no notice or knowledge of the illegal use which was being made of it?

It is therefore to that question alone that we must now confine our attention.

The Exchequer Court thought the statute was not so clear as to manifestly bring within its ambit innocent third parties without any knowledge of the illegal use to which their vehicle was being put; and, in the premises, it decided to give the defendants the benefit of the doubt.

(1) [1931] Ex. C.R. 137.

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Rinfret J.

The courts in several of the provinces of Canada have already had occasion to pronounce upon the same enactment, and also, in other instances, upon texts which, though not contained in the same statute, were not dissimilar in their essential provisions. Thus, in *Forget* v. *Forget and General Motors Acceptance Corporation* (1), the Superior Court in Quebec took the same view as the learned trial judge in this case. In *The King* v. *Traders' Financial Corporation (In re Excise Act)* (2), Galt J. in Manitoba, thought the language of the statute, construed literally, involved unjust consequences which the legislature could not have intended, unless it had manifested such an intention by express, and not merely general words. Accordingly he held that when goods seized under the *Excise Act* belonged to an innocent third party, who duly claimed them, the Crown was not entitled to forfeit the goods.

On the other hand, in *Rex* v. *Martch* (3), a case under the *Ontario Temperance Act,* and in *McDonald* v. *Clarke* (4), a case from Nova Scotia, the contrary view prevailed.

Special attention should be given to the decision of Stein J., in *Le Roi* v. *Messervier et Légaré Automobile de Montmagny Limitée* (5), where the learned judge, though apparently of the opinion that liability to forfeiture was absolute under sec. 181 (then sec. 185) of the *Excise Act,* decided he had the power to exercise a discretion under sec. 124 (then sec. 129).

It will thus be seen that the enactment in question has so far given rise to quite a diversity of opinion. It has now become the duty of this court to express its views upon it.

In order to do so more conveniently, it is necessary to quote section 181:

> 181. Every person who sells or offers for sale, or who purchases, or has in his possession any spirits unlawfully manufactured or imported, whether the owner thereof or not, without lawful excuse, the proof of which shall be on the person accused, is guilty of an indictable offence, and shall, for a first offence be liable to a penalty not exceeding two thousand dollars and not less than two hundred dollars, and to imprisonment, with or without hard labour, for a term not exceeding twelve months and not less than one month, and, in default of payment of the penalty, to

(1) (1928) Q.R. 67 S.C. 78.
(2) [1929] 4 D.L.R. 154.
(3) (1926) 46 C.C.C. 192.
(4) (1889) 22 N.S.L.R. 110.
(5) (1928) 34 R.L.n.s. 436.

a further term of imprisonment not exceeding twelve months and not less than six months, and for every subsequent offence to a penalty not exceeding two thousand dollars and not less than five hundred dollars, and to imprisonment, with hard labour, for a term not exceeding twelve months and not less than six months, and in default of payment of the penalty, to a further term of imprisonment equal to that already imposed by the court for such subsequent offence; and all spirits so unlawfully manufactured or imported wheresoever they are found, and all horses and vehicles, vessels, and other appliances which have been or are being used for the purpose of removing the same, shall be forfeited to the Crown, and shall be dealt with accordingly.

The section, it will be noticed, sets out no qualification as to ownership of the "horses and vehicles, vessels and other appliances which have been or are being used." On the contrary, it says that all such horses, vehicles, etc., "shall be forfeited to the Crown, and shall be dealt with accordingly." Upon the bare words of the enactment it must, therefore, follow that any vehicle used for the purpose of removing spirits unlawfully manufactured or imported is subject to the forfeiture therein prescribed, unless something be found in the context or in the general scope of the Act to justify a departure from the well known rule that the intention of the legislature must be determined from the words it has selected to express it. Here we find nothing of the kind in the context or in the subject-matter of the statute. The learned trial judge observed that, when dealing with penalties, the expression "whether the owner thereof or not" is used in the section, while it is not there when the section comes to deal with the forfeiture. But the explanation is that it was necessary, in order to avoid doubt, to insert the expression in the one case, while it was not in the other. In the first part of the section, mere possession is the mischief aimed at by the legislature. Now, possession may be possession by the owner, or it may be possession in the name of or for another; and it was, of course, essential, in the premises, to specify that "possession" alone would be sufficient to incur the penalty, "whether" the person found in "possession" of the spirits was "the owner thereof or not." It was not so, however, in that part of the section dealing with the forfeiture of vehicles, and the other appliances mentioned. It may be a question whether, the legislature having once said that the penalty was incurred by the mere possessor, whether owner or not, the expression does not *ipso facto* extend to

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the whole section without the necessity of its being repeated. It is sufficient to say that, in the provision respecting forfeiture, the object in view is the connection between the vehicles and the spirits unlawfully manufactured or imported. The point is that the vehicles " have been used or are being used for the purpose of removing the same "; and it is immaterial to whom the vehicles belong. In the words of Sedgwick J., in *The Ship " Frederick Gerring Jr."* v. *The Queen* (1),

> In the enforcement of fiscal law, of statutes passed for the protection of the revenue or of public property, such provisions are as necessary as they are universal, and neither ignorance of law, nor, as a general rule, ignorance of fact, will prevent a forfeiture when the proceeding is against the thing offending, whether it be the smuggled goods or the purloined fish, or the vehicle or vessel, the instrument or abettor of the offence.

That the proceeding is, under the *Excise Act,* " a proceeding against the thing," that is, in the nature of a proceeding *in rem,* is apparent throughout the Act (Secs. 79, 83, 121, 124, 125, 131, etc.), but is nowhere more evident than in sec. 125, under which

> all vehicles, vessels, goods and other things seized as forfeited * * * shall be deemed and taken to be condemned and may be dealt with accordingly, *unless the person from whom they were seized, or the owner thereof,* * * * gives notice * * * that he claims or intends to claim the same.

As will be noticed, the automatic condemnation is against the thing seized. Moreover, the right to object is given both to the owner and " the person from whom (it was) seized "—a right quite incompatible, if forfeiture resulted only in cases where the owner was also the offender.

We agree that, when the meaning of a statute is doubtful or ambiguous, the courts should not, unless otherwise compelled to do so, give it that interpretation which might lead to unjust consequences; but even penal statutes must not be construed so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation would comprehend (*Dyke* v. *Elliott; The "Gauntlett"* (2)); and it is surely not for the judge so to mould a statute as to make it agree with his own conception of justice (Craies on Statute Law, 3rd ed., pp. 86, 444). Adverting to the particular case before us, it is not assuming too much to say that it must have been known to the

(1) (1897) 27 Can. S.C.R. 271, at 285.

(2) (1872) L.R. 4 P.C. 184, at 191.

legislature, when it passed the *Excise Act*, that a great many drivers of motor vehicles are not the owners thereof, but possess and operate them subject to conditional sale agreements, and if sec. 181 was meant to apply only to vehicles driven by the owners thereof, it is obvious with what ease the provision respecting forfeiture could be evaded.

Whether such a thing exists as what is referred to by Lord Cairns (in *Partington* v. *Attorney-General* (1)) as the " equitable construction " of a statute, we cannot see that this is a case for its application, and we find no reason why we should not simply adhere to the words of the enactment.

It is not for the court to say if, in some cases,—such as, for example, when the vehicle utilized was stolen from its owner—the forfeiture may effect a hardship. Such cases are specially provided for in subs. 2 of sec. 133 of the *Excise Act*. The power to deal with them is thereby expressly vested in the Governor in Council, thus leaving full play to the operation of sec. 91 of the *Consolidated Revenue and Audit Act* (c. 178 of R.S.C., 1927), for the remission of forfeitures. We are unable to agree with the decision in ***Le Roi*** **v.** ***Messervier*** (2), already referred to, that the discretionary power is also vested in the court under sec. 124 of the Act. In our view, that section means nothing more than this:

After the vehicles, vessels, goods and other things have been seized as forfeited under sec. 181, the person from whom they were seized, or the owner thereof, may prevent the automatic condemnation of the said vehicles, etc., by giving notice as provided for in sec. 125 " that he claims or intends to claim the same "; whereupon, an information for the condemnation of the vehicles, etc., having been filed (as was done in this case), the court may hear and determine the claim made by the person from whom they were seized or from the owner, and the court may release or condemn the vehicles, etc., as the case requires, i.e., according as they come or not under the provisions of the Act. The court thereunder is vested with no discretion, it must decide according to law.

(1) (1869) L.R. 4 H.L. 100, at 122. (2) (1928) Q.R. 34 R.L.n.s. 436.

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The appeal must be allowed and judgment should be entered granting the conclusions in the information of the Attorney-General of Canada, with costs both here and in the Exchequer Court.

Appeal allowed with costs.

1931

*Oct. 8.

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*Feb. 2.

L. BATTISTONI (PLAINTIFF).....APPELLANT;

AND

CLAUDE M. THOMAS AND CLAUDE THOMAS (DEFENDANTS)

AND

CLAUDE M. THOMAS.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Negligence of servant—Liability of master—Scope of employment—Motor vehicle driven by servant—Deviation from route—Evidence—Whether servant on "frolic of his own."

The defendant C., who was in the employ of his father, co-defendant and respondent, as a truck-driver, was instructed on Christmas Day to drive a load of milk from Lulu Island, where they lived, to the Fraser Valley Dairies, whose place of business was in the city of Vancouver but farther south than was the down-town section of the city; and he had orders to return home with the empty cans at three o'clock in the afternoon, to be in time to have dinner with the family. Instead of returning home from the dairy as soon as he had delivered the milk, C. went to the basement of the dairy, changed his working clothes for a better suit and proceeded in the truck to a down-town café. After having his dinner, he picked up a friend and they spent the afternoon together. Shortly after five o'clock, they decided to go to visit a friend who was not at home and so they turned to come back. As they were driving back, C. ran down and severely injured the appellant. At the time the accident occurred, C. was driving west headed for the hotel where he had picked up his friend, intending to take him home; and after leaving the latter at the hotel, C. drove to his father's farm. The trial judge held that the proximate cause of the accident was the negligence of C.; but the appellant was to some degree at fault in not having looked up the street before attempting to cross and was assessed in one-fifth of the damages awarded; and the trial judge also held that at the time of the accident C. was on his way home and therefore acting within the scope of his employment and his father was liable. The Court of Appeal

*Present at hearing: Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.; Newcombe J. took no part in the judgment, having died before the delivery thereof.

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reversed that decision, holding that C. was "going on a frolic of his own without being at all on his master's business" and the action as against the master was dismissed.

Held, affirming the judgment of the Court of Appeal (44 B.C. Rep. 188), that, under the circumstances of this case, C. was not, at the time of the accident, in the course of his employment as his father's truck driver, but was "on a frolic of his own"; and that therefore the master was not liable.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge McDonald J. (2), and dismissing the appellant's action for damages resulting from the alleged negligent driving of an automobile by the respondent Claude Thomas.

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

J. A. MacInnes for the appellant.

F. J. Hughes K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—In this case the facts are simple and are not in dispute.

The respondent, Morgan Thomas, lives at Steveston, on Lulu Island, an hour's drive south of Vancouver. He had a contract to deliver milk to the Fraser Valley Milk Producers Association, whose place of business (dairy) was in the city of Vancouver, but farther south than was the down-town section of the city. This milk he gathered up in cans from the neighbouring farmers, took it to the dairy in a motor truck, exchanged the full cans for empty cans and distributed the empty cans either the same day or the following morning, to the farmers. He employed his son Claude Thomas to drive the truck and deliver the milk.

On Christmas day, 1929, Claude drove his truck load of milk to the city and delivered it at the dairy, where he finished unloading about one o'clock. He had orders to be back home at 3 p.m., when the family intended having

(1) (1931) 44 B.C. Rep. 188; [1931] 3 W.W.R. 44; [1931] 4 D.L.R. 526.
(2) (1930) 43 B.C. Rep. 273; [1930] 3 W.W.R. 671; [1931] 1 D.L.R. 559.

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their Christmas dinner. Instead of returning home from the dairy as soon as he had delivered the milk, as was his custom, Claude went to the basement of the dairy and there changed his working clothes for a better suit (dressed up) and then proceeded to drive north to the down-town section of the city, having in his truck the empty milk cans. He drove to the Cascade Café where he had his dinner. After dinner he drove to the Dominion Hotel to see his friend Fred Reggy, who lived there. They remained at the hotel a short time and then spent two or three hours driving around the city, after which the two boys went to the Pantages Theatre. After the theatre they decided to go to visit a friend, Smith by name, on the other side of the Union Oil Company's premises. Smith was not at home, so they turned to come back. As they were driving back Claude Thomas ran down and severely injured the appellant. At the time the accident occurred Claude was driving west on Union Street headed for the Dominion Hotel, taking Fred Reggy home. After leaving Reggy at the hotel Claude drove to his father's farm.

The sole question in this case is: Was Claude Thomas at the time of the accident, in the course of his employment as his father's truck driver, or was he, as it is put in some of the cases, " on a frolic of his own?"

The contention of the appellant is that when Claude found that his friend Smith was not at home and turned to come back, with the intention of leaving Fred Reggy at the Dominion Hotel and then going on home himself, he was in the course of his employment from the moment he started back from Smith's house, and that his going to the Dominion Hotel was a mere deviation from the direct route home, which does not relieve the respondent of liability.

On the other hand the respondent's contention is that Claude was on a frolic of his own from the time he dressed up and drove down town until he arrived back at the Dominion Hotel from Smith's, as all his actions during that time are totally inconsistent with his being engaged on his employer's business.

In cases of this kind the law is well settled. A master is responsible for the consequences of his servant's negligent act only while the servant is on his master's business. That

is to say, the master is responsible for the result of the negligent acts of his servant committed in the course of the servant's employment. The difficulty, however, is to determine when the master's employment has ended and the servant's frolic has begun, or, as in this case, to determine when the servant's frolic ended and he again entered upon his master's business.

In the well known case of *Mitchell* v. *Crassweller* (1), it was the duty of the defendants' servant, after having delivered his masters' goods, to return to their house, get the key of the stable and put their horse in the mews in an adjoining street. On returning one evening the servant got the key, but, instead of going to the mews, he, without the defendants' leave, drove a fellow-servant in an opposite direction and, on his way back, injured the plaintiff by his negligent driving. It was held that the defendants were not liable. In his judgment, Jervis C.J., said:—

> Each case must depend upon its own particular circumstances, and no doubt there may be cases in which the master is liable if the servant drives *extra viam*, but I do not think this is one of them. It cannot be denied that, although the servant was on his master's service up to the time that he arrived first in Welbeck street, he started from thence on a new journey, and not with the intention of performing his masters' busi- business, but, as it were, upon a frolic of his own; in which case, as said by Parke B. in *Joel* v. *Morison* (2), his masters would not be liable. If he had started to go to the stables, and had merely deviated from the direct road to them, possibly, the defendants would have been liable for his negligent driving during the deviation. But I think that to make them liable, he must have originally started upon, and have been at the time of the committing the grievance in the course of following, his masters' employment.

And Maule J. said:—

> This is not a case in which the servant went a roundabout way to perform his masters' business; it cannot be said that his journey to Euston Square was a mere *détour* from Welbeck Street to the stable. * * * The servant here did something contrary to, and inconsistent with his masters' business; the journey to Euston Square had no connexion with it whatever, and the servant only, not his masters, is liable.

In *St. Helens Colliery Company* v. *Hewitson* (3), Lord Atkinson, at page 71, suggested as a test for determining when a workman was in the course of his employment, the following:—

> A workman is acting in the course of his employment when he is engaged "in doing something he was employed to do." Or what is, in other and I think better words, in effect the same thing—namely, when

(1) (1853) 22 L.J.C.P. 100. (2) (1834) 6 Car. & P. 501.
(3) [1924] A.C. 59.

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he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service. The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word "employment" as here used covers and includes things belonging to or arising out of it.

Another way of stating the same test is found in Salmond on the Law of Torts, 7th ed., page 115, where the author says:—

> On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it. He can no longer be said to be doing, although in a wrong and unauthorized way, what he was authorized to do; he is doing what he was not authorized to do at all.

Can it reasonably be said that Claude Thomas, at the time of the accident, was doing something in the discharge of his duty to his employer directly or indirectly imposed upon him by his contract of service, or arising out of it? Or, was his driving west on Union Street so connected with his duty to his employer as to be a mode of performing that duty? The evidence, in our opinion, shews the very opposite to have been the case. When the two boys set out from the Dominion Hotel and drove around the streets for two or three hours, they were clearly on a frolic of their own. So were they also when they went out to visit Smith. And, as in *Mitchell* v. *Crassweller* (1), it was on the return journey (in this case from Smith's to the hotel), that the accident happened. In our opinion this frolic cannot be said to have ended until they returned to the Dominion Hotel from whence they started. When they started out, Claude was on a journey separate and distinct from that which he had been employed to perform by his father. In coming back to the hotel he was not going in the direction of his father's farm at all, but away from it. In order to have the visit to Smith's house brought within the principle of the "*détour*" cases, Claude must have been on his father's business at the time he started to go to Smith's. This clearly was not the case. For several hours before setting out to make the visit the boys had been driving around town, or at the theatre, neither of which pastimes was in any way connected with the business of the respondent.

(1) (1853) 22 L.J.C.P. 100.

The appellant advanced the argument that it was Claude's duty to take the truck home and that he was in the performance of that duty when he started back from Smith's. This argument is founded on two answers made by Claude to questions put to him: he was asked if he was in the course of his employment at the time of the accident, to which he answered, "Yes." As that was a mixed question of law and fact and the very question which the court had to decide, the pronouncement of Claude on the question could not be very helpful. The other answer referred to what he was doing on Union Street. The evidence is as follows:—

The court: Q. You were on Union street going west. What was your course?—A. Well, I was going home then.

Mr. Farris: Q. Well, were you going actually home then or were you going down to the Dominion Hotel to get your friend Reggy home?—A. Well, I was going to take Reggy home, Yes.

Q. And that was not in the direction of your home?—A. No.

Q. And so you were not going home at that time at all?—A. No.

Q. You were going in an opposite direction from going home at that time?—A. Yes.

The learned trial judge stated that he did not accept Claude's evidence that he was going to the Dominion Hotel, but did believe that he was going home. Of course he was going home in the sense that he intended eventually to arrive there, but, in our opinion, the evidence that he was at the time of the accident taking Fred Reggy back to his hotel is too strong to permit of its being gainsaid. This is not a case of deciding as between the credibility of different witnesses; it is only the credibility of Claude Thomas that is in question. and, as for deciding which part of his story is the more probable, an appellate judge is in as good a position as the judge at the trial. In his judgment in the court below, Mr. Justice Martin called attention to a recent English case, *Harrington* v. *Shuttleworth & Co.*, which is not reported, but of which a note appears in 171 L.T. Jo. (24th January, 1931), which seems to us to uphold the principle laid down in *Mitchell* v. *Crasswellер* (1). There the chauffeur had driven the company's managing director to the Carleton Hotel and, on his way back to the garage, instead of taking one of the orthodox routes, he made a *détour* of two miles out and two miles back to pick up the

(1) (1853) 22 L.J.C.P. 100.

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young lady to whom he was engaged. During the course of that *détour* he injured the plaintiff through his negligent driving. Lord Justice Scrutten held that the *détour* was not in the course of the man's employment and was a frolic for which the employer could not be held liable.

In the case before us the duty of Claude Thomas was to drive the truck home after delivering the milk. Instead of doing that he made an independent journey out to Smith's and back, in the course of which the appellant was injured by his negligent driving. For the consequences of that negligent act, the respondent, in our opinion, cannot be held liable. We, therefore, agree with the court below and dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *MacInnes & Arnold.*
Solicitors for the respondents: *Farris, Farris, Stultz & Sloan.*

1931
*Nov. 3, 4.
1932
*Feb. 2.

IN THE MATTER OF

ALMUR FUR TRADING COMPANY
(IN LIQUIDATION)

AND

BANK OF UNITED STATES (CLAIMANT) .. APPELLANT;

AND

DOUGLAS L. ROSS (LIQUIDATOR) (CONTESTANT) ..... } RESPONDENT.

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

Promissory note—Company—By-law—Resolutions—Persons authorized to sign—Absence of signature—Person taking note—What is his duty—Companies Act, R.S.C., 1927, c. 27, ss. 37, 100, 106d, 108.

The Almur Fur Trading Company was incorporated by Dominion Letters Patent on May 25, 1927, and went into liquidation in June, 1929. The appellant bank filed its claim in respect of five promissory notes made by S., as president, on behalf of the company and amounting to $28,768.02. The liquidator called upon the bank to prove its claim before

*Present at the hearing: Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.; Newcombe J. took no part in the judgment, as he died before the delivery thereof.

the Superior Court. The notes were signed in blank by S. alone and were handed to L., the New York buying agent of the company, to be filled in and used by L. in payment of goods bought or to be bought by the company. L. filled the blank note forms with the names of two other companies owned and controlled by him, being also at that time the owner of all the shares of the insolvent company. The notes were endorsed to the appellant bank, and it is admitted that the bank was a holder in due course. S. was the only witness at the trial; he produced a by-law of the insolvent company providing *inter alia* that "all cheques, * * * notes * * * shall be signed by such officer * * * of the company and in such manner as shall from time to time be determined by resolution of the Board of Directors," and he also produced a resolution of the directors pursuant to the by-law which provides "that all notes * * * be signed by the president and countersigned by the auditor * * *," of which resolution the appellant bank had no knowledge.

Held, reversing the judgment of the Court of King's Bench (Q.R. 50 K.B. 204) that the appellant bank, being a holder in due course, was entitled to rank as a creditor of the insolvent company. The notes were made in general accordance with the authority of the president under the by-law of the company and it was not necessary for the appellant bank to inquire into the authority of the president to sign the notes on behalf of the company. Under section 106*d* of the *Dominion Companies Act,* the president had to be one of the directors; and, under section 37, the only persons who could make notes on behalf of the company would be those designated in the by-law. Persons dealing with a company are presumed to have notice of what is contained in the Act under which the company was incorporated and the Letters Patent; and, in a case like the present, where the Act refers specifically to the by-laws as the place where the authority of an officer or an agent to sign promissory notes is to be found, the person taking a note made by an officer is under obligation to ascertain from the by-laws that the officer who signed the note might have been authorized to make such note in the course of the company's business; but he is not obliged to go further and inquire whether the directors passed the resolution which would give the officer express authority. That constitutes part of the company's "indoor management." If the officer might, under the by-laws, have been authorized to make the note, the making of it was within his ostensible powers and was "in general accordance with his powers as such under the by-laws."

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Coderre J., and disallowing the appellant bank's application to rank as a creditor of the insolvent company in respect of five promissory notes amounting to $28,768.02.

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) (1931) Q.R. 50 K.B. 204.

1932

BANK OF UNITED STATES v. ROSS.

T. B. Heney K.C. for the appellant.

W. F. Chipman K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—The question involved in this appeal is whether or not the appellant bank (hereinafter called the Bank), is entitled to rank as a creditor against the assets of the Almur Fur Trading Company in liquidation in respect of five promissory notes made by Murray H. Smith, as president of the company, and amounting in all to $28,768.02 The notes were signed in blank by Smith, as follows: "Almur Fur Trading Company, Limited, per Murray H. Smith, President," and were handed to H. Licht, or H. Licht, Incorporated, the New York buying agent of the company, to be filled in and used by Licht in payment of goods for the Almur Fur Trading Company, some of which had already been purchased by Smith and the balance were to be purchased by Licht or his company. Licht filled in one of the blank note forms with the name of H. Licht, Incorporated, and the others with the name of The Pacific Fur Trading Corporation. Both these companies were owned or controlled by Licht who, at the time the notes were given was the owner of all the shares in the Almur Fur Trading Company, Limited. The notes were indorsed to the Bank and it is admitted that the Bank is a holder in due course.

The Almur Fur Trading Company was incorporated by Dominion Letters Patent on May 25, 1927, and went into liquidation in June, 1929.

After the winding up order was made the Bank filed its claim, in respect of these notes, with the liquidator, who called upon the Bank to prove its claim before the Superior Court. The trial judge disallowed the claim on the ground that the notes on which the claim was based were signed by the president of the company alone, and were not countersigned by the auditor as required by the resolution of the directors adopted pursuant to the by-laws of the company. On appeal the Court of King's Bench maintained the judgment of the Superior Court (Justices Guerin and Tellier dissenting). The majority of the court based their opinions on the same ground as that taken by the trial

judge, but Mr. Justice Bernier went further and found that there was no intention on the part of the company that the documents signed by Smith should form the basis of promissory notes. The two dissenting justices were of opinion that it was not necessary for the Bank to inquire into the authority of the president to sign the notes on behalf of the company; that the notes were made in general accordance with the authority of the president under the by-laws and that the appellant, being a holder in due course, was entitled to rank as a creditor of the company. From the judgment of the Court of King's Bench an appeal is now brought to this court.

At the trial the only witness to give evidence was Murray H. Smith, president of the company. He produced by-law no. 15 of the company's by-laws, passed June 13, 1927, which in part reads as follows:—

> All cheques, bills of exchange * * * notes, * * * shall be signed by such officer, or officers, agent or agents, of the company and in such manner as shall from time to time be determined by resolution of the Board of Directors.

He also produced a resolution of the directors pursuant to the by-law, which provides:—

> That all notes, cheques, drafts and other commercial documents of the company be signed by the president and countersigned by the auditor, such countersignature to be on the left side of said note, draft, cheque or commercial document preceded by the words "Payment approved by," or other words having a like effect and meaning.

The auditor appointed was A. H. Lippman, the sales manager of the company. Smith also produced the notes in question, none of which had been countersigned by the auditor.

In the early part of 1929 Smith was in New York on his way to Europe, and in his evidence he says:—

> Mr. Licht's bookkeeper came to me the day before I left for Europe with several notes, and asked me to sign them in blank, which I did, and which I gave to her on the condition that these notes would be used as previously stated, in payment of purchases made either by me in New York or by H. Licht, Incorporated, while acting, and who did act, as our New York buying agents.
>
> At that time I had made, as previously stated, a few purchases, and the merchandise was shipped direct to Montreal, and the invoices were sent to H. Licht, Incorporated, as the vendors of this merchandise required Mr. Licht's guarantee, since they knew he was the financial man behind the Almur Fur Trading Company, Limited.
>
> Q. You signed these notes, Mr. Smith, to be used in payment of these goods which you had purchased?

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A. Yes. As well as for any additional orders which I could not fill, and which Mr. Licht had instructions to fill, * * *

Q. As I understand it, you signed these blank notes and gave them to Mr. Licht's bookkeeper with the intention they should be used as promissory notes to cover these particular commitments you had made and any future commitments?

A. Any future orders that Mr. Licht would fill on behalf of the Almur Fur Trading Company, Limited, and for which we would receive the goods.

As to the receipt of the goods, he says:—

The purchases I made while in New York and for which the invoices were sent to Licht were sent direct to us, but whether we received the other orders he had instructions to fill I have no knowledge of, because I left for Europe.

The above evidence makes it abundantly clear that Smith intended Licht to convert the documents signed by him into promissory notes binding on the company and to use the same or the proceeds thereof in payment of the goods which Smith himself had already purchased and of those which Licht or his firm were to buy for the Almur Fur Trading Company. The purchasing of these goods was part of the ordinary business of the company. Whether Licht filled the order given to him by Smith on behalf of the Trading Company does not appear, nor do I see how the application of the proceeds of the notes can be material in this case. If the notes would have been binding on the company in the hands of a holder in due course provided Licht used the proceeds as instructed by Smith, they must, in my opinion, be equally binding if Licht misappropriated the proceeds after receiving them, although, in such case, he might have to account to the liquidator for the proceeds of the notes. That, however, cannot affect the Bank. The one question here is, can the Bank's claim to rank as a creditor be defeated because the notes were not countersigned by the auditor?

It is to be noted at the outset that the Almur Fur Trading Company, being a limited company, was capable of speaking and acting only through agents duly authorized in accordance with its constitution. When the notes were tendered to the Bank for discount, the duty of the Bank was to ascertain if they were binding on the company on whose behalf they purported to be made by the company's president. The Bank was bound to see that Smith, as president, had, under the constitution of the company, power to execute promissory notes on its behalf. The company,

being incorporated by Letters Patent under the Dominion Companies' Act (R.S.C., 1927, c. 27), its constitution was to be found in the Act and in the Letters Patent. An examination of the Act shews that the president had to be one of the directors (s. 106*d*); that the affairs of the company were to be managed by a board of not less than three directors (s. 100); that the persons named in the Letters Patent were to be the directors of the company until others were appointed in their stead, and that the directors had power to

> administer the affairs of the company in all things, and make or cause to be made for the company, any description of contract which the company may by law enter into.

(s. 108). The Act also provides (s. 37) that:—

> Every promissory note or cheque made, drawn or endorsed on behalf of the company by any agent, officer or servant of the company in general accordance with his powers as such under the by-laws of the company shall be binding upon the company.

Under this section the only persons who could make notes on behalf of the company would be those designated in the by-law; and the by-law provided that the persons who might sign notes which would bind the company were

> such officer or officers, agent or agents as the directors would determine by resolution.

The resolution required the notes to be countersigned by the auditor, but of this the Bank had no knowledge and what has here to be determined is, was the Bank justified in assuming that, as the directors might, under the by-laws, have authorized the president to sign notes on behalf of the company, the necessary resolution for that purpose had been duly passed? In my opinion it was. In *Dey* v. *Pullinger Engineering Company* (1), the articles of association of a company empowered the directors to authorize one of their body as managing director to draw bills of exchange on behalf of the company. The managing director drew a bill on behalf of the company without having in fact received any authority from the directors to draw bills. In an action on the bill against the company as drawers it was held that the managing director, in drawing the bill on behalf of the company, was a "person acting under its authority" within the meaning of s. 77 of the *Companies' (Consolidation) Act,* 1908, and that the company was liable.

(1) [1921] 1 K.B. 77.

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The section of the English Act in question in that case read as follows:—

> A bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted or endorsed in the name of, or by or on behalf or on account of, the company by any person *acting under its authority*.

In his judgment Bray J., at page 79, said:—

> It is clear, therefore, that anyone looking at the Memorandum and Articles of Association would see that the managing director might have the power to draw and indorse this bill: * * *
>
> A holder in due course cannot as a rule be expected to know what goes on in the company's board room, and if he has to take the risk of its turning out that the persons signing had no authority, and much more so if he has to prove that they had authority, people in business would be very shy in dealing with such bills. * * *
>
> An "authority" may be express, or implied, or apparent, and I can see no reason for inserting the word "express" before it in s. 77.

In *Biggerstaff* v. *Rowatt's Wharf, Limited* (1), the question was whether an assignment of debt by the company to the plaintiff was valid. The assignment was executed by the managing director, one Davy. By the articles of the company the directors were authorized to appoint a managing director and to delegate to him such of the power of the board as they thought fit. The company had power to assign the debts but there was no minute shewing what powers had been delegated to the managing director, nor his powers as such, although he had acted in that capacity. It was held that the assignment was valid. Lindley L.J., in his judgment, at page 102, said:—

> The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bona fide.

The authority of an officer to bind a company by contract entered into on its behalf was considered by this court in the case of *McKnight Construction Co.* v. *Vansickler* (2). There the respondent made an offer in writing to purchase certain lands belonging to the appellants. The offer was accepted by Douglas, the secretary-treasurer of the company, who was also assistant manager, but he signed as secretary-treasurer. There was no evidence that Douglas had ever been authorized to accept any offer for the company's lands. It was held that in accepting the offer he was acting within the apparent scope of his authority, and that

(1) [1896] 2 Ch. 93. (2) (1915) 51 Can. S.C.R. 374.

was sufficient to protect a person dealing with him bona fide. In his judgment Duff J., at pages 382 and 383, said:—

> The secretary-treasurer was the apparent agent of the company for the transaction of the kind of business he undertook to do. That being so, the case is within the principle very satisfactorily stated in Palmer's Company Law, 9th ed., 1911, p. 44, in the following words:—
>
> "This rule is that where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; they need not inquire into the regularity of the internal proceedings—what Lord Hatherly called "the indoor management." They are entitled to assume that all is being done regularly. See also *Mahony* v. *East Holyford Mining Co.* (1); *Bargate* v. *Shortridge* (2); *In re Land Credit Co. of Ireland* (3); *Premier Industrial Bank* v. *Carlton Manufacturing Co.* (4), is not easily reconcileable with the rule.
>
> This rule is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed."

And Anglin J. (now Chief Justice), at page 387, laid down the rule as follows:—

> For any lack of formality in the steps leading to the authorization of Douglas the plaintiffs should not suffer. They were not called upon to ascertain that proper steps had been taken to clothe him with authority to execute the contract with them on behalf of the company. They acted with perfect good faith. The power which Douglas purported to exercise was such as under the constitution of the company, he might possess, and "that is enough for a person dealing with him bona fide."

The law, therefore, seems to be that persons dealing with a company are presumed to have notice of what is contained in the Act under which the company was incorporated, and the Letters Patent. Also in a case like the present, where the Act refers specifically to the by-laws as the place where the authority of an officer or an agent to sign promissory notes is to be found, I am of opinion that the person taking a note made by an officer is under obligation to ascertain from the by-laws that the officer who signed the note might have been authorized to make such note in the course of the company's business. He is not, however, obliged to go further and inquire whether the directors passed the resolution which would give the officer express authority. That constitutes part of the company's "indoor management." If the officer might, under the by-laws, have

(1) (1875) L.R. 7 H.L. 869.
(2) (1855) 5 H.L. Cas. 297.
(3) (1869) 4 Ch. App. 460.
(4) [1909] 1 K.B. 106.

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been authorized to make the note, the making of it was within his ostensible powers and was "in general accordance with his powers as such under the by-laws."

Even if Smith had not any authority to sign the notes who, in this case, can question his right to do so? Certainly not the liquidator, for he stands simply in the place of the company. Now the man who had acquired all the shares in the company at the time the notes were made, and who was in fact the company, not only approved of their being made, but it was at his request and under his direction that they were made. Where all the shareholders of the company have ratified or are estopped from objecting to the making of the notes by the president, it is not, in my opinion, open to the liquidator to question his authority. If it was thought that the making and discounting of these notes was part of a scheme on the part of Smith and Licht to defraud the creditors of the company, the creditors might, by appropriate action, inquire into the matter. That, however, cannot affect the rights of a holder of the notes in due course. I am, therefore, of opinion that the appeal should be allowed with costs and the Bank permitted to rank as a creditor.

Appeal allowed with costs.

Solicitors for the appellant: *Cook & Magee.*

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

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*Dec. 16.
*Dec. 28.

SAM ARCADI .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Section 1025 Cr. C.—Appeal to the Supreme Court of Canada—Conflicting decisions—"Judgment of any other court of appeal"—Must be courts within Canada—Cr. C., s. 1012, 1025.

The provisions of section 1025 of the Criminal Code, giving right of appeal to the Supreme Court of Canada, upon leave to appeal being granted, "if the judgment appealed from conflicts with the judgment

*PRESENT:—Rinfret J. in chambers.

of any other court of appeal," must be taken to refer to courts within the jurisdiction of the Dominion Parliament and not to courts outside the Canadian territory. *Brunet* v. *The King* ([1928] S.C.R. 161) ref.

APPLICATION for leave to appeal from a decision of the Court of King's Bench, appeal side, province of Quebec (1), upholding the conviction of the appellant for the offence of selling narcotic drugs.

Lucien Gendron for the applicant.

Gustave Monette contra.

RINFRET J.—The application is made under section 1025 of the Criminal Code, on the ground that the judgment appealed from conflicts with two decisions of the Court for Crown Cases Reserved, in England, respectively delivered in 1890 and 1894.

I think the alleged conflict does not bring the case within the condition essentially required by section 1025 of the Criminal Code. The wording of the section is that the conflict must be " with the judgment of any other court of appeal." In my view, those words used without qualification in a Canadian statute mean any other Canadian court of appeal. When the legislature of this country uses language of that kind it must be taken to refer to courts within its jurisdiction, and not to courts outside the Canadian territory. (*Jeffrys* v. *Boosey* (2); *Cooke* v. *Charles A. Vogeler & Company* (3). It is to no purpose to argue that criminal courts in Canada may, and possibly will, follow the decisions of the English courts of criminal appeal. The whole question here is what parliament is presumed to have intended when referring to " any other court of appeal " in section 1025 of the Canadian Criminal Code; and I think the principle is that general words in a statute refer only to persons or things within the territory, unless the contrary intention is shewn.

In addition to the rule just stated, we have in section 1012 of the code the legislative interpretation of the words in question precisely for that part of the Criminal Code

(1) (1931) Q.R. 51 K.B. 533. (2) (1854 4 H.L.C. 815, at 955.
(3) [1901] A.C. 102.

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dealing with appeals from convictions on indictments. Under subsection (*b*) of section 1012,

> "court of appeal" means the court designated by paragraph (7) of section 2 of this Act (i.e., the code) as the court of appeal from the province in which the conviction or indictment was had.

Paragraph 7 of section 2 just mentioned is an enumeration of the courts of the several provinces of Canada which are stated to be included in the expression "court of appeal."

The evident intention of Parliament in enacting section 1025 was to insure uniformity in the administration of criminal law by the courts of Canada. Bearing that in mind, the expression "any other court of appeal" should, I think, be interpreted as meaning any other court of appeal to which "a like case" may be brought under the Canadian Criminal Code, and therefore: any other court of appeal in Canada.

I have, for these reasons, reached the conclusion that the petitioner does not allege nor show a conflict between the courts of appeal contemplated by section 1025 of the Criminal Code, and that this is not a case where I have jurisdiction under that section to grant leave to appeal to the Supreme Court of Canada.

The petitioner relied, of course, on the decision in *Brunet* v. *The King* (1), where special leave was granted in not dissimilar circumstances. It will be seen, however, that when the case came before the full court (including the learned judge who granted leave), the court took particular care to state (*Brunet* v. *The King*) (2), that it was not "passing on the question of whether or not this is an appealable matter, even with leave."

For that reason, I feel that I am at liberty to decide as above. If I am wrong the appellant may yet find relief by asking the full court to revise my decision. (*In re Sproule* (3); *The Industrial Acceptance Corporation* v. *Canada Permanent Trust Company* (4).

Application dismissed.

(1) [1928] S.C.R. 161.

(2) [1928] S.C.R. 375 at 378.

(3) (1886) 12 Can. S.C.R. 140, at 180, 209.

(4) [1931] S.C.R. 652.

IN THE MATTER OF ORDERS NOS. 42808 AND 44417 OF THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

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*Oct. 13, 14.
*Dec. 22.

THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED AND CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANTS;

AND

CANADIAN NATIONAL RAILWAY COMPANY, THE NORTH FRASER HARBOUR COMMISSIONERS AND THE PROVINCE OF BRITISH COLUMBIA ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Constitutional law—Jurisdiction of Board of Railway Commissioners for Canada—Foreign company, licensed in province, operating railway under Dominion jurisdiction and also operating its own provincial line, part of which connected two railways under Dominion jurisdiction—Railway Act, R.S.C., 1927, c. 170, ss. 6 (a), 314, 316, 317—B.N.A. Act, s. 92 (10), (a).

The B.C. Co. (British Columbia Electric Ry. Co.) was incorporated in England and operates in British Columbia under a provincial licence. Under agreement with the C.P.R. Co. (Canadian Pacific Ry. Co.) it operates by electricity the V. & L.I. Ry. (Vancouver & Lulu Island Ry.) which connects with the C.P.R. and which, in 1901, was leased to the C.P.R. Co. for 999 years, and was declared by Parliament to be a work for the general advantage of Canada. The B.C. Co.'s "Central Park Line" runs from Vancouver to its connection with a branch of the V. & L.I. Ry. and thence over the latter to the latter's terminus at or near New Westminster, from which terminus the B.C. Co.'s "Central Park Line" continues for one mile to a point where it makes physical connection with the Canadian National Ry. The Board of Railway Commissioners for Canada, by its order No. 42808, of June 10, 1929, directed the B.C. Co. and the Canadian National Rys. to publish and file, between stations on the V. & L.I. Ry. and points on the Canadian National Rys., "via direct connection between the companies," joint rates on the same basis as those published between the said V. & L.I. points and stations on the C.P.R. The B.C. Co. appealed against the order on the ground of lack of jurisdiction in the Board to compel it to file joint rates as aforesaid over the said one mile of its line, which, it contended, was subject only to provincial jurisdiction.

*Present at hearing of the appeal: Duff, Newcombe, Lamont, Smith and Cannon JJ. Newcombe J. took no part in the judgment, having died before the delivery thereof.

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Held (Cannon J. dissenting): The Board had not jurisdiction to make the order.

The jurisdiction (as to railway companies incorporated elsewhere than in Canada) conferred by s. 6 (*a*) of the *Railway Act*, R.S.C., 1927, c. 170, is, on its proper construction in the light of ss. 5 and 6 as a whole, limited to the company's operation of lines of railway within the legislative authority of the Parliament of Canada. To construe s. 6 (*a*) otherwise would raise the question of its constitutional validity (*Att.-Gen. for Quebec* v. *Att.-Gen. for Canada; Insurance Reference*, [1931] 3 W.W.R., 689; [1932] 1 D.L.R. 97, referred to in this connection).

The Board did not acquire jurisdiction over the B.C. Co.'s line by virtue merely of that company's operation also of another line which was under Dominion jurisdiction. Nor would the facts that a part of the B.C. Co.'s line formed a connecting link between two lines of railway under the Board's jurisdiction, one of which extended beyond the limits of the province, and that the B.C. Co. handled traffic over its provincial lines to and from lines of railway under Dominion jurisdiction, extending beyond the limits of the province, pursuant to agreements with companies owning and operating those lines under Dominion jurisdiction, be a ground for invoking s. 92 (10) (*a*) of the *B.N.A. Act* in support of the Board's jurisdiction. Nor could the order be upheld on the ground that it dealt with the regulation of trade and commerce. Nor did the Board have jurisdiction by virtue of ss. 314, 316 and 317 of the *Railway Act*, the remedying of any discrimination in the manner provided in the order involving, as it did, the exercise of jurisdiction over said mile of railway which was under provincial jurisdiction.

Montreal v. *Montreal Street Ry.*, [1912] A.C. 333, cited and discussed. *Luscar Collieries* v. *McDonald*, [1927] A.C. 925, distinguished.

Per Cannon J., dissenting: The B.C. Co. fell under the wording and operation of said s. 6 (*a*), and s. 6 (*a*) was *intra vires*.

APPEAL from the order of the Board of Railway Commissioners for Canada, No. 42808, issued June 10, 1929 (1), directing the British Columbia Electric Railway Co. Ltd. and the Canadian National Railways to publish and file, between stations on the Vancouver and Lulu Island Railway and points on the Canadian National Railways via direct connection between the companies, joint rates on the same basis as those published between the said Vancouver and Lulu Island points and stations on the Canadian Pacific Railway; and from an order of the Board, No. 44417, of March 7, 1930, dismissing the applications of the British Columbia Electric Railway Co. Ltd. and the Canadian Pacific Railway Co. to review and rescind said Order No. 42808.

Leave to appeal was granted by a judge of this Court (under s. 52 (2) of the *Railway Act*) upon the following questions:

(1) 35 Can. Ry. Cas. 384.

1. Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act to issue Order No. 42808 in so far as it directs the British Columbia Electric Railway Company Limited to publish and file joint rates between stations on the Vancouver and Lulu Island Railway and points on the Canadian National Railway via direct connection between the British Columbia Electric Railway Company Limited and the Canadian National Railway?

2. If the above question should be answered in the affirmative, had the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel the British Columbia Electric Railway Company Limited to publish such joint rates over the route in question?

The material facts of the case are sufficiently stated in the judgment of Smith J., now reported, and are indicated in the above headnote. Question No. 1 was answered in the negative; in view of that answer, it was unnecessary to answer question No. 2. Cannon J. dissented, and would answer both questions in the affirmative.

J. W. de B. Farris K.C. and *W. A. Riddell* for the appellant the British Columbia Electric Ry. Co. Ltd.

L. Coté K.C. for the appellant (intervenant) the City of Vancouver.

G. F. Macdonell K.C. for the respondent the Canadian National Ry. Co.

E. F. Newcombe K.C. for the respondents the North Fraser Harbour Commissioners.

L. J. Ladner K.C. for the respondent the Province of British Columbia.

The judgment of the majority of the court (Duff, Lamont and Smith JJ.) was delivered by

SMITH J.—The appellant, the British Columbia Electric Railway Company, Limited, is a corporation, incorporated under the provisions of the *Companies Act* of England, operating street railways and interurban services in and around the city of Vancouver, having authority so to oper-

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ate in the province of British Columbia by virtue of a provincial licence issued pursuant to statutes of that province.

In pursuance of this licence, this company acquired, as a going concern, all the property, business, undertakings and franchises of the Consolidated Railway Company, which was incorporated by an Act of the Legislative Assembly of British Columbia, and thus became the owner and operator of the British Columbia Electric Railway, running on the streets of Vancouver, thence in a southeasterly direction to the city of New Westminster, and along some of the streets of that city, and referred to in these proceedings as the Central Park Line.

The Vancouver & Lulu Island Railway Company was incorporated by an Act of the Legislature of the Province of British Columbia, and, in pursuance of its powers, constructed, about the year 1900, a railway commencing at a point of connection with the railway of the Canadian Pacific Railway Company in the city of Vancouver, and extending southerly to Eburne Junction, on the north side of the north arm of the Fraser river at or near Marpole on the plan produced, and thence southerly across this north arm to Steveston, on the north side of the south arm of the Fraser river; and, in 1908, constructed a branch line from Eburne Junction along the north shore of the north arm of the Fraser river, to New Westminster.

In 1901 the Canadian Pacific Railway Company, pursuant to the authority of an Act of the Parliament of Canada, leased from the Vancouver & Lulu Island Railway Company the railway of the latter for a term of 999 years, and by an Act of the Parliament of Canada, 1 Edw. VII, ch. 86, the railway and works of the Vancouver & Lulu Island Railway Company were declared to be works for the general advantage of Canada.

The Canadian Pacific Railway Company acquired all the capital stock of the Vancouver & Lulu Island Railway Company, and in pursuance of its lease, financed the construction of its lines, and operated several portions thereof directly, as part of its railway system, until these were taken over for electric operation by the appellant, the British Columbia Electric Railway Company, under agreements made in 1904 and 1905, confirmed by Acts of the Canadian Parliament in 1907 and 1909, under the terms of which the

British Columbia Electric Railway Company operates the Vancouver & Lulu Island Railway by electricity and performs the necessary switching and terminal services in connection therewith, on behalf of the Canadian Pacific Railway Company.

By virtue of these agreements the Electric Railway Company owns, controls and operates trains and rolling stock on and over the Vancouver & Lulu Island Railway.

The British Columbia Electric Railway, running as mentioned above, from Vancouver to New Westminster, and referred to as the Central Park Line, connects with the Vancouver & Lulu Island Railway branch running from Eburne Junction, at or near Marpole, to New Westminster, at the easterly terminus of said branch at or near New Westminster, and continues for the distance of about one mile to a point where it makes physical connection with the Canadian National Railway lines at New Westminster, the one mile of the Central Park line forming a direct connecting link between the Vancouver & Lulu Island lines and the Canadian National lines.

Upon application to the Board of Railway Commissioners by the North Fraser Harbour Commissioners and others, the Board made an order, No. 42808, dated June 10, 1929, directing the British Columbia Electric Railway Company Limited and the Canadian National Railways to publish and file, between the stations on the Vancouver & Lulu Island Railway and points on the Canadian National Railways, " via direct connection between the companies," joint rates on the same basis as those then published between the said Vancouver & Lulu Island points and stations on the Canadian Pacific Railway.

The appellants appeal against this order upon the ground of lack of jurisdiction in the Board to compel the British Columbia Electric Railway Company to file joint rates with the Canadian National Railways over the one mile of their street railway referred to, which railway, they contend, is subject only to provincial jurisdiction.

On behalf of the respondent, it was argued that the order does not necessarily require the publishing of joint rates over the one mile of the Central Park line referred to, because the order might be complied with by routing traffic in some other direction or over some other lines. There is nothing

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to show that this could be done otherwise than by using the lines of the Canadian Pacific Railway, there being no direct physical connection between the lines of the Vancouver & Lulu Island Railway Company and the Canadian National Railway Company, at Vancouver or elsewhere. In any event, in view of what appears on the record, it is clear that the words "via direct connection between the companies," as used in the order, means, by way of the one mile of the Central Park Railway mentioned above.

It is argued that, as the Central Park Railway is operated by the British Columbia Electric Railway Company, incorporated in England, jurisdiction over it in connection with its operation of the Central Park Railway is conferred upon the Board by virtue of section 6 of the *Railway Act*, which reads as follows:

6. The provisions of this Act shall, without limiting the effect of the last preceding section, extend and apply to

(*a*) every railway company incorporated elsewhere than in Canada and owning, controlling, operating or running trains or rolling stock upon or over any line or lines of railway in Canada either owned, controlled, leased or operated by such company or companies, whether in either case such ownership, control, or operation is acquired by purchase, lease, agreement or by any other means whatsoever;

(*b*) every railway company operating or running trains from any point in the United States to any point in Canada;

(*c*) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company wholly or partly within the legislative authority of the Parliament of Canada, or by a company operating a railway wholly or partly within the legislative authority of the Parliament of Canada, whether such ownership, control, or first mentioned operation is acquired or exercised by purchase, lease, agreement or other means whatsoever, and whether acquired or exercised under authority of the Parliament of Canada, or of the legislature of any province, or otherwise howsoever; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

2. The provisions of the last preceding paragraph of this section shall be deemed not to include or apply to any street railway, electric suburban railway or tramway constructed under the authority of a provincial legislature, and which has not been declared to be a work for the general advantage of Canada otherwise than by the provisions of the said paragraph. 1919, c. 68, s. 6; 1920, c. 65, s. 1.

It is pointed out that the appellant, the British Columbia Electric Railway Company, is a company incorporated elsewhere than in Canada and operates trains on lines of railway in Canada owned, leased or operated by the company within the precise language of this section, 6 (*a*), and

that therefore the Board is expressly given jurisdiction over this appellant in connection with its operation of the Central Park Line, though that line is a provincial undertaking carried on within the province under provincial authority. If this be so, the Board has jurisdiction over the whole tramway of the company, quite independently of its connection with the other railways, and over all purely local railways in Canada that happen to be operated by any company that has not been incorporated in Canada.

Reading the whole of sections 5 and 6, the true construction seems to be that the jurisdiction conferred by section 6 (*a*) over the company is limited to its operation of lines of railway within the legislative authority of the Parliament of Canada.

It does not follow that the Board acquires jurisdiction over the street railway or the Park line by virtue merely of its operation also of another line of railway which is under Dominion jurisdiction. There is nothing abnormal about its being under provincial jurisdiction in connection with its operation of the one, and under Dominion jurisdiction in connection with its operation of the other.

To construe section 6 (*a*) otherwise than indicated above would raise the question of whether or not such legislation is *ultra vires* of the Dominion Parliament. The recent decision in the Privy Council in *Attorney-General for Quebec v. Attorney-General for Canada* in what is known as the *Insurance Reference* (1) and not yet in the official reports, would seem to be an authority against the validity of this section. It is there laid down that

> a Dominion licence, so far as authorizing transactions of insurance business in a province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with provincial legislation has not already got, if he has complied with provincial requirements.

This has reference to British and foreign companies doing business in Canada under provincial licences, and indicates that the mere fact that a company is British or foreign does not give the Dominion Parliament jurisdiction over it, in connection with the carrying on, as here, of a purely local work under provincial authority.

It is, however, urged that, by virtue of the *British North America Act*, section 92, head 10 (*a*), jurisdiction is con-

(1) [1931] 3 W.W.R. 689; [1932] 1 D.L.R. 97.

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ferred on the Board over this company in connection with its operation of the provincial or Central Park line, or part of it, because that part forms a connecting link between two lines of railway admittedly under the jurisdiction of the Board, one of which extends beyond the limits of the province, and because it handles traffic over its provincial lines to and from lines of railway under Dominion jurisdiction, extending beyond the limits of the province, pursuant to agreements with companies owning and operating those lines under Dominion jurisdiction.

This one mile of the Central Park line, it is argued, thus becomes a part of a continuous system of railways extending beyond the boundary of British Columbia into other provinces.

Against this contention the case of *City of Montreal* v. *Montreal Street Railway* (1) is cited. There the Montreal Street Railway was constructed and was operated under special Acts of the Province of Quebec, and the Montreal Park and Island Railway was also constructed under provincial authority, but had been declared to be a work for the general advantage of Canada, and had thus come under Dominion jurisdiction. The lines of the two railways were physically connected at different points, both within and without the limits of the city of Montreal, and arrangements existed between them for the traffic of passengers and their continuous passage from points on the line of each to points on the line of the other, and the cars of each railway ran over the tracks of the other. The Board of Railway Commissioners, on application to it, found as a fact that the Montreal Park and Island Railway unjustly discriminated against the residents of Mount Royal, and in favour of the residents of the village of Notre Dame de Grace in respect of rates charged, and ordered it to grant the same facilities at the same rates to both classes of residents. It further ordered that with respect to through traffic over the Montreal Street Railway the company owning that railway should enter into any agreements that might be necessary to enable the Montreal Park and Island Railway Company to carry out the provisions of the order.

As both these companies were incorporated in Quebec, section 6 (*a*) of the *Railway Act* had no application in the

(1) [1912] A.C. 333.

case, and as neither line extended beyond the limits of the province or connected with lines extending beyond the limits of the province, section 92-10 (*a*) of the *British North America Act* had likewise no application.

It was, however, contended that there was jurisdiction under section 8 of the *Railway Act,* which, as it then stood, provided that any railway under provincial jurisdiction that connected with or crossed a railway under Dominion jurisdiction should be subject to the jurisdiction of the Act relating to, amongst other matters,

(*b*) the through traffic upon a railway or tramway and all matters appertaining thereto.

It was held that this subsection (*b*), as regards provincial lines of railway properly so called, was *ultra vires,* and it no longer appears in the Act.

It was also held that power to authorize the Board to make the orders was not necessarily incidental to the exercise by Parliament of its jurisdiction over federal lines, and could not be upheld upon the ground that it dealt with the regulation of trade and commerce.

The case of *Luscar Collieries* v. *McDonald* (1), is cited in support of the jurisdiction of the Board in the present case. There the appellant company owned a short railway line in the province of Alberta branching from a line which branched from the Canadian Northern Railway at a point within the province. Both branches were operated by the Canadian Northern Railway Company under agreements, and traffic could pass from the appellant's line without interruption into such other provinces as were served by that company's railway.

It was held that the Board had jurisdiction over the appellant's lines constructed under provincial authority, because the line was part of a continuous system of railways operated together by the Canadian National Railway Company and connecting one province with another.

The decision is expressly put upon the way in which the railway is operated by the Canadian National Railway Company under the agreements, and it is intimated that if that company should cease to operate the appellant's branch, the question whether, under such altered circumstances, that branch ceases to be within s. 92, head 10 (*a*),

(1) [1927] A.C. 925.

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might have to be determined. The question thus left undetermined is the very question that arises in the present case, because the Park line is not operated by the Canadian National Railway Company, nor by the appellant, the British Columbia Electric Railway Company, as the operator of the Vancouver & Lulu Island Railway, on behalf of the Canadian Pacific Railway.

The mere fact that the Central Park line makes physical connection with two lines of railway under Dominion jurisdiction would not seem to be of itself sufficient to bring the Central Park line, or the portion of it connecting the two federal lines, within Dominion jurisdiction.

The *Montreal Street Railway* case (1) referred to above seems to be authority against that view. It is there stated in the reasons for judgment (2),

> that so far as the "through" traffic is carried on over the federal line, it can be controlled by the Parliament of Canada. And that so far as it is carried over a non-federal provincial line it can be controlled by the provincial Legislature, and the two companies who own these lines can thus be respectively compelled by these two Legislatures to enter into such agreement with each other as will secure that this "through" traffic shall be properly conducted; and further that it cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of "through" traffic.

The same case is authority against the contention that the power of the Board in this case is necessarily incidental to the exercise by Parliament of its jurisdiction over the federal lines, and that in any case the order can be upheld on the ground that it deals with the regulation of trade and commerce. The facts and circumstances in connection with the present case do not seem to give a stronger basis for these contentions than existed in the previous case.

It has been further contended that the Board has jurisdiction by virtue of sections 314, 316 and 317 of the *Railway Act*, particularly because of the discrimination which it has found as a fact to exist. The argument is that the Board, having jurisdiction over the appellant, the British Columbia Electric Railway Company Limited, by virtue of its operation of the Vancouver & Lulu Island Railway, which is under Dominion jurisdiction, has jurisdiction over the company in order to remedy the discrimination. Elimination of the discrimination in the manner provided in the

(1) [1912] A.C. 333. (2) *ibid*, at 346.

order involves, however, the exercise by the Board of jurisdiction over part of the Central Park Line, which is under provincial jurisdiction. If it be correct, as already stated, that the Board has jurisdiction over the company only in reference to its operation of the railway under Dominion jurisdiction and by virtue of that situation acquires no jurisdiction over the purely provincial railway that it also happens to operate as owner, it follows that the order, in directing this appellant to publish a joint tariff " via direct connection between the companies," that is, over the one mile of the Central Park line, is an attempted exercise of a jurisdiction over that one mile which the Board does not possess.

The remedies pointed out in the *Montreal Street Railway* case (1) of course exist here also. The Legislature of the Province of British Columbia has power to coerce the owners of the provincial line to enter into the necessary agreement, and the Dominion Parliament may end the difficulty by declaring the Park line of the appellants to be for the general advantage of Canada. It is contended, however, on behalf of the Canadian Pacific Railway Company, that action of this kind, like the order appealed from, would be unjust to that company, in view of the fact that it constructed its line into the territory and is entitled to an advantage in securing traffic from that territory, and should not be compelled to hand over, for the long haul, traffic secured there, within a short distance of its origin, to a rival company. What action, therefore, the Legislature or Parliament should take under the circumstances is a matter of policy, and both bodies may view the situation as one not calling for any remedy.

Further, it is admitted that there is an indirect connection between the Vancouver & Lulu Island Railway and the Canadian National Railway lines by way of Canadian Pacific Railway lines, over all of which lines the Board has jurisdiction.

The construction, under Dominion authority, of a connecting link between the Canadian National Railway lines and the Vancouver & Lulu Island Railway lines by Dominion authority would also furnish jurisdiction over the matter in dispute.

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In any event, for the reasons stated, I am of opinion that the Board had not jurisdiction to make the order appealed against, and that question 1 submitted must be answered in the negative, rendering it unnecessary to answer question 2.

Costs will be to the appellants.

CANNON J. (dissenting).—I have had the advantage of perusing the notes of my brother Smith in this case. They contain a full statement of the facts. I will simply give the reasons why, with great deference, I cannot agree with his conclusions. The case presents this peculiar situation: the appellant, the British Columbia Electric Railway Company, contests the jurisdiction of the Dominion Parliament and of the Railway Board over it, claiming that its works and operations are within the legislative ambit of the provincial Legislature, while the Attorney-General of British Columbia, the natural guardian of the rights and prerogatives of this province, takes before us the stand that the Dominion jurisdiction should be affirmed. This attitude of the provincial authorities is explained, to my mind, by the fact that the appellant company is neither a provincial nor a federal company, but an English corporation authorized or licensed to do business in British Columbia. It seems to me that the question involved in this appeal is not a conflict of jurisdiction between the Legislature and the Dominion parliament, but purely and simply the validity of the enactment by the Dominion Parliament of section 6 (*a*) of the *Railway Act,* which reads as follows:

> 6. The provisions of this Act shall, without limiting the effect of the last preceding section, extend and apply to
>
> (*a*) every railway company incorporated elsewhere than in Canada and owning, controlling, operating or running trains or rolling stock upon or over any line or lines of railway in Canada either owned, controlled, leased or operated by such company or companies, whether in either case such ownership, control, or operation is acquired by purchase, lease, agreement or by any other means whatsoever.

Although the British Columbia Electric Railway Company is licensed to carry on its business within the province of British Columbia, with one Johannes Charles Martin Buntzen, as attorney for the company, it is nevertheless a company incorporated elsewhere than in Canada with power to acquire, as a going concern, and it has acquired not only the franchise, rights, powers and privileges of the Consoli-

dated Railway Company, but it is admitted also that, at all material times, it operated street railways and inter-urban services in and around Vancouver and it owned, controlled, operated and ran trains and rolling stock upon and over the lines of the Vancouver & Lulu Island Railway—which is a federal railway.

The appellant, plainly and without any possible ambiguity, falls, therefore, under the wording and operation of section 6 (*a*) of the *Railway Act*.

Is this section *intra vires* of Parliament?

Using the words of Mr. Justice Mabee in the case of *Stewart et al* v. *Napierville Junction Railway Company* (1), where he gives the history of this section, originally 8-9 Edw. VII, ch. 32, I would say,

> In cases where a line of railway has passed into foreign hands; when it has either been sold out and out, and become absorbed, if you will, and forms part of the foreign line, or where it has been leased; or *where it is operated by the foreign road;* or *where the foreign road has obtained control of the stock;* or, *where it has obtained control of that road by any means whatsoever,* parliament, we presume, thought, being *international* matters, that Federal control should apply.

This decision has not been challenged, although it would appear from the report that time was given to apply for leave to appeal to this Court. It has been acted upon and considered as good law for the last twenty years. See MacMurchy & Denison, Railway Law of Canada, 1922, p. 25. In law, a company incorporated and having its head-office in England must be considered as foreign to Canada; if it enters Canada to engage in the railway business it must submit to certain rules for its conduct in Canada. The Insurance cases, especially the last decision of the Privy Council, delivered on the 22nd of October, 1931 (2), cannot apply to railway legislation, which is always of public or semi-public character, while the insurance business is a matter of civil rights and contract which has been declared in *Attorney-General for Canada* v. *Attorney-General for Alberta* (3), to be exclusively subject to provincial law.

(1) (1911) 12 Can. Ry. Cas. 399. The words quoted are at pp. 409-410.
(2) *Attorney-General for Quebec* v. *Attorney-General for Canada; Insurance Reference,* [1931] 3 W.W.R. 689; [1932] 1 D.L.R. 97.
(3) [1916] A.C. 588.

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Reasons of general national interest, to my mind, should give and give to the Dominion parliament, through the Railway Board, control and regulation of foreign companies owning and operating railways anywhere in Canada, even if their operations or works be confined for a time to one province. Railway works, when owned by a foreign company, cannot be considered as merely local, as they may affect our international or inter-imperial relations and, possibly, the defence of the country or the plans of the federal government for the use of the railway for a possible mobilization of troops, either in peace or in war time; provisions to regulate them are necessarily incidental to effective Dominion legislation concerning railways. See remark of Lord Dunedin in *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada* (1). For instance, is it not a matter of general national concern that a majority of the directors of a foreign company owning or controlling a railway in Canada should be British subjects, as provided for in section 113, para. 3, of our *Railway Act?* This is a matter of national, not provincial, policy, and only the Governor in Council can permit otherwise. I would therefore answer the questions as follows:

"1. Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act to issue Order No. 42808 in so far as it directs the British Columbia Electric Railway Company Limited to publish and file joint rates between stations on the Vancouver and Lulu Island Railway and points on the Canadian National Railway via direct connection between the British Columbia Electric Railway Company Limited and the Canadian National Railway?"

Answer: Yes.

"2. If the above question should be answered in the affirmative, had the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel the British Columbia Electric Railway Company Limited to publish such joint rates over the route in question?"

Answer: Yes.

(1) [1907] A.C. 65 at 68.

The costs of the appeal should be borne by the British Columbia Electric Railway Company.

Question No. 1 answered in the negative; therefore unnecessary to answer question No. 2. Costs of appeal to appellant.

Solicitor for the appellant the British Columbia Electric Ry. Co. Ltd.: *V. Laursen.*

Solicitor for the respondent the Canadian National Ry. Co.: *Alistair Fraser.*

Solicitor for the respondents the North Fraser Harbour Commissioners: *D. N. Hossie.*

Solicitor for the respondent the Province of British Columbia: *Leon J. Ladner.*

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*Nov. 11.
*Dec. 22.

EMMA G. LIVINGSTONE (PLAINTIFF) ....APPELLANT;

AND

TORONTO WINE MANUFACTURING COMPANY, LIMITED (DEFENDANT) } RESPONDENT;

AND

DOMENICK JANNETTA AND NICOLETTA JANNETTA (DEFENDANTS).

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

Mortgage—Agency—Loan on security of mortgage on land—Loan required to pay off prior mortgage—Lender paying proceeds of loan to solicitor for prior mortgagee—Authorization—Misappropriation by solicitor—Forged discharge of prior mortgage—Responsibility for loss—Validity of mortgage to secure the loan, as against the mortgagor and subsequent purchaser of the land.

Appellant sued upon a mortgage assigned to her by C. to whom it had been made with the object of finding a person to lend the money with which to pay off an overdue mortgage on the land to Y. for whom C. acted as solicitor; said method being adopted to avoid delay when a lender was found, the mortgagor being away on a visit. H., who in the mortgagor's absence had attended for him to the business of Y.'s mortgage, interviewed appellant, who agreed to lend the money, and, as directed by H. (whether, in this regard, H. acted as agent for the

*Present at hearing of the appeal: Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ. Newcombe J. took no part in the judgment, as he died before the delivery thereof.

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mortgagor or for appellant was in dispute), made her cheque payable to C., and (through a solicitor, O.) took from C. and registered a purported discharge of the Y. mortgage, the mortgage in question and C.'s assignment thereof to appellant. It was found later that the discharge of the Y. mortgage was a forgery, and that Y. did not receive the money from C.

Held: Upon the correspondence and facts in evidence, C. was authorized by the mortgagor to receive the money, and H., in directing appellant to make her cheque payable to C., was acting for the mortgagor; the receipt and cashing of the cheque by C. completed the loan as between the mortgagor and appellant, and the registration of the mortgage constituted it a valid security on the land as against the mortgagor and the respondent (a subsequent purchaser of the land). Even assuming that knowledge that appellant's loan was to be used to pay off the mortgage to Y. must be attributed to appellant by reason of information conveyed by H. to the solicitor, O., who (acting, as found, for both appellant and the mortgagor) attended to searching title and putting through the loan, yet such knowledge was only that C., the authorized agent of the mortgagor to receive the proceeds of the loan, was to apply them on the Y. mortgage. While O. owed a duty, both to appellant and to the mortgagor, to see that the title was clear, yet any negligence in that respect was a question between him and them and had nothing to do with the question of C.'s right to receive the money as the person authorized by the mortgagor to receive it. The situation was the same as if the mortgagor himself had received the money; and the argument that no consideration had passed from C. to the mortgagor, and that appellant, buying the mortgage, was bound by the state of the mortgage account, was, in the circumstances, untenable.

Murray v. *Crossland*, 64 Ont. L.R. 403, and *Butwick* v. *Grant*, [1924] 2 K.B. 483, distinguished.

Judgment of the Appellate Division, Ont. ([1931] O.R. 325), reversed, and judgment of Garrow J. (*ibid*) restored.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which (reversing the judgment of Garrow J. (2)) held that the mortgage in question was not a valid and subsisting mortgage.

The mortgage in question had been made by the defendant Jannetta (his wife joining to bar dower) to one Campbell, who was acting as solicitor for Mrs. Young who held a prior mortgage on the land. The mortgage to Mrs. Young was overdue and required to be paid. Jannetta, the mortgagor, was in Italy at the time, and, to facilitate the raising of a loan from a lender to be found and paying off therewith Mrs. Young's mortgage without delay, a mortgage

(1) [1931] O.R. 325. (2) *ibid.* at 327-331.

was made to Campbell, with the object of assigning it to the person, to be found, who would advance the money. One, Hook, had been looking after the land for Jannetta in the latter's absence and had been corresponding with him in regard to the arrears on Mrs. Young's mortgage. Hook interviewed the plaintiff (appellant) who agreed to make the advance. As found by this Court on the evidence, Hook, acting for Jannetta, told the plaintiff to make her cheque payable to Campbell, which she did; (the question of agency in this regard was in dispute and was found upon differently in the Appellate Division, which held that Hook was acting as the plaintiff's agent on this occasion, and advised her to make the cheque payable to Campbell). Campbell executed an assignment of the mortgage in question to the plaintiff and also produced a discharge of Mrs. Young's mortgage, which discharge was later (in an action brought by Mrs. Young on her mortgage) found to be a forgery. Mrs. Young never received the money. The purported discharge of Mrs. Young's mortgage, the mortgage in question and the assignment thereof from Campbell were registered. The respondent (defendant) company was a subsequent purchaser of the land from Jannetta. A fuller statement of the facts in certain respects is given in the judgment now reported.

The plaintiff brought action on the mortgage. Garrow J. (1) held that it was a valid and subsisting mortgage, subject only to the prior mortgage to Mrs. Young, and gave judgment accordingly. His judgment was reversed by the Appellate Division (2), which held that the mortgage in question was not a valid and subsisting mortgage. The plaintiff appealed to this Court. By the judgment of this Court, now reported, the plaintiff's appeal was allowed with costs here and in the Appellate Division, and the judgment of the trial judge restored.

W. N. Tilley K.C. and *J. C. McRuer K.C.* for the appellant.

J. M. Bullen for the respondent.

(1) [1931] O.R. 325, at 327-331. (2) [1931] O.R. 325.

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The judgment of the Court was delivered by

SMITH J.—This is an action by plaintiff, appellant, to recover $6,125 and interest thereon due on a certain mortgage made by defendants Domenick Jannetta and his wife Nicoletta Jannetta to one John A. Campbell, assigned by him to the appellant, and for foreclosure of the mortgage.

Prior to 1924, the defendant D. Jannetta went to Italy, leaving his affairs in reference to the premises covered by the mortgage in the hands of one Thomas Hook, a real estate agent in Toronto.

The property in question was at this time subject to a mortgage for $6,125 to one Mrs. Georgina Chilcott Young. E. W. Owens, a Toronto solicitor, had been Jannetta's legal adviser up to the time the latter left for Italy, and in October, 1924, was in correspondence with Jannetta in reference to arrears of interest due on Mrs. Young's mortgage.

On 23rd March, 1925, John A. Campbell, the solicitor mentioned above, wrote Owens that he had instructions from Mrs. Young to put the property up for sale unless the interest was paid. Owens sent a copy of this letter to Hook, and correspondence between Hook and Campbell followed. Hook cabled Jannetta that the property was to be put up at auction, and requested that $300 be cabled to him; and in the meantime gave Campbell his own cheque for $200, and obtained a postponement of the sale for two weeks.

On April 20th, Jannetta wrote to Hook, requesting him to try to sell the property.

The $300 was cabled to Hook, who subsequently paid to Campbell $309.63 and $2.50, the balance, after crediting the $200, owing for interest and costs, as shewn by Campbell's statement sent to Hook on May 6th, 1925, for which amount a receipt is endorsed on the back of the statement, signed by Campbell, per "E. F."

On May 7th, 1925, Hook wrote to Jannetta, giving him full information as to the above facts, and informing him that all interest was paid up to the 24th of March, 1925, and that the next payment of interest would be due on the 24th of October next. He goes on to say that Mrs. Young now wants her mortgage paid off, and that he is trying to secure someone who will lend the necessary money on the property, and that when he succeeds, the necessary

papers will be sent, so that the new mortgage will pay off the old one. He explains that the Young mortgage is past due, so that a new mortgage is necessary.

On the 19th of May, 1925, Campbell wrote a letter to Hook, enclosing a mortgage drawn from Jannetta and his wife to himself for $6,125, with interest at 7 per cent., which was signed by Jannetta and his wife, and which is the mortgage now in question. The letter asks Hook to send the mortgage to Jannetta with instructions to have it executed and returned, and continues as follows:

> Also have him give you a letter with instructions to pay over the money received from this mortgage to Mrs. Chilcott Young so that she can be paid off at once. This matter must be completed and the money in the hands of Mrs. Young by the 15th day of June, otherwise I will continue the mortgage sale proceedings and your client will lose his property.

On the same day, Hook wrote Jannetta as follows:

> Dear Mr. Jannetta:
>
> Enclosed find a letter from Mr. Campbell who is solicitor for Mrs. Young, the mortgagee, which speaks for itself, and I also enclose you a mortgage and duplicate made out in his name for $6,125 and the proceeds of this mortgage when sold is to be applied on the present mortgage held by Mrs. Young and this is the only way that I can see to meet the demands as the present mortgage has expired and cannot be sold.

He goes on to give instructions about the execution of the mortgage, and then continues as follows:

> * * * return them to me by return mail and send the necessary written authority for the proceeds of this mortgage to be credited to the present mortgage and in this way we may get the whole matter cleaned up for another five years.

On June 11th, 1925, Jannetta cabled Hook as follows: "Mortgage is coming"; and the mortgage was received by Hook in due course.

Here we have a proposal by Hook to Jannetta that he, Hook, is trying to negotiate on Jannetta's behalf for a new loan, followed by a proposal by Campbell and Hook to Jannetta that this new loan should be obtained by the execution of the mortgage and its sale. The acceptance of these proposals by Jannetta, by the execution of the mortgage, its return and the cablegram, was an express acceptance of the whole proposition set out in these letters, that is, an express authority to Campbell and Hook to obtain a loan by securing a purchaser of the mortgage and to receive and apply the proceeds on the Young mortgage. Hook interviewed the appellant on Jannetta's behalf to get a loan in the manner agreed to by Jannetta, and we have therefore two

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parties negotiating for and finally entering into a bargain for the purchase of the mortgage, one of them being Jannetta by his agent Hook, and the other the appellant. If Jannetta had been there himself instead of Hook, the situation would have been the same. The appellant and her brother were taken by Hook to inspect the property, and Hook told them that the property was good security, a mere representation on behalf of Jannetta that Jannetta himself would have made. Hook knew the property before going to the appellant, and would not expect to get the loan otherwise than by representing it as a good one. To convince the appellant of the truth of this representation, he took her and her brother to see the property, just as Jannetta himself would have done had he been there to act for himself. If the appellant was constituting Hook her agent to value the property, and was trusting to his valuation, there was no need for her and her brother to look at the property at all.

The verbal bargain for the loan was concluded by the appellant agreeing to take it. Campbell was in fact authorized by Jannetta, as stated, to receive the money, and Hook, acting for Jannetta, told the appellant to make the cheque payable to Campbell, which she did. The receipt and cashing of the cheque by Campbell completed the loan as between Jannetta and the appellant, and the registration of the mortgage constituted it a valid security on the land as against Jannetta and the subsequent purchaser, the respondent, the Toronto Wine Manufacturing Company, Limited.

Owens had previously been solicitor for both the appellant and Jannetta; and Hook, knowing this, and with the appellant's assent, engaged Owens to look after searching the title and putting through the loan, and there is no doubt that, in attending to this business, Owens was acting for both the appellant and Jannetta, as it was Jannetta who paid him for these services. After getting the appellant's assent that Owens should act in the matter, Hook wrote to Owens the letter, exhibit no. 4, which is as follows:

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79 Victoria Street,
Toronto, 24th June, 1925.

E. W. J. OWENS Esq., K.C.,
32 Adelaide St. E.,
City.

Re: No. 1682 Queen Street W.

DEAR SIR,—

Mrs. Livingston is buying a mortgage given by Dominick Jannetta to John A. Campbell for $6,125 for five years from the 15th May last, with interest at 7 per cent. per annum, payable half yearly, covering the above property and the proceeds of this mortgage is to be used for paying off a previous mortgage for $6,125 given by Jannetta to Mrs. Chillcott Young, which mortgage is past due; and when the necessary papers are executed and the title found satisfactory, I will give you the necessary cheque for the said amount.

Yours very truly,

(Sgd.) T. HOOK.

P.S.—Mr. John A. Campbell, 24 King St. W. (Ad. 0246), is the solicitor with whom you can communicate.

It is argued that because of the statement in this letter that the proceeds were to be used for payment off of the previous mortgage to Mrs. Young, this knowledge, conveyed to Owens, must be attributed to the appellant, for whom he was acting. Assuming that to be so, it amounts only to knowledge on the part of the appellant that Campbell, the authorized agent of Jannetta to receive the proceeds of the loan, was to apply them on the Young mortgage. It was, of course, Owens' duty, both to the appellant, and to Jannetta, to see that the title was clear, but if he was negligent in that respect, it is a question between him and them, and has nothing to do with the question of Campbell's right to receive the money as Jannetta's authorized agent.

Mr. Bullen, in an able and exhaustive argument, presented everything that I think could be offered on behalf of the respondents, and cited a number of cases upon which he placed strong reliance. An examination of these cases, however, discloses that they have no application to the facts of this case. The argument that no consideration had passed from Campbell to Jannetta, and that the appellant, buying the mortgage, is bound by the state of the mortgage account, is surely not tenable. The appellant purchased the mortgage from the mortgagor and paid over the purchase money to the very party authorized by Jannetta to receive it, so that the situation is as if Jannetta himself had received the money.

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Smith J.

In the case of *Murray* v. *Crossland* (1), a solicitor received the mortgage moneys from the mortgagee, the intention, as found by the learned trial judge, of all parties being that the money should be paid in satisfaction of a prior mortgage. The solicitor misapplied the funds, and it was held that the mortgage was not a valid security for the amount, upon the express finding of fact by the learned judge that the solicitor did not receive the moneys as agent of the mortgagors.

Butwick v. *Grant* (2), is cited as authority for the proposition that an agent with authority to sell has no implied authority to receive the money. The case is authority for the proposition that a purchaser is justified in paying the purchase price of goods to an agent who sells them for a principal only when the agent has express authority, ostensible authority or customary authority; and that the question of authority must be determined from the facts of each particular case. There the agent got an order for goods by sample, and the principal shipped the goods and posted the invoice under his own name. Later, the agent called and collected the price, and it was held that under those circumstances there was no ostensible authority. The case is quite different where a principal entrusts the possession of his goods to an agent to sell and to hand them over to a purchaser. In the present case the mortgage was placed in the hands of Campbell and Hook by Jannetta for the express purpose of selling it and for the express purpose of transferring it to a purchaser and receiving and applying the money.

The appeal must be allowed, with costs here and in the Appellate Division, and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *McRuer, Evan Gray, Mason & Cameron.*

Solicitor for the respondent: *Arthur S. Winchester.*

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(1) (1929) 64 Ont. L.R. 403. (2) [1924] 2 K.B. 483.

WILLIAM FRANCIS O'CONNOR (PLAINTIFF) ..... APPELLANT;

1931

*Nov. 23.
*Dec. 22.

AND

GORDON WALDRON (DEFENDANT) ..... RESPONDENT.

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

Defamation—Absolute privilege—Words spoken by person while conducting, as commissioner, proceedings of enquiry under the Combines Investigation Act, R.S.C., 1927, c. 26.

Respondent was sued for damages for alleged defamatory words spoken by him in the course of proceedings which he was conducting as a commissioner appointed by letters patent under the Great Seal of Canada, by the Governor General, under the authority of the *Combines Investigation Act,* R.S.C., 1927, c. 26, and of the *Enquiries Act,* R.S.C., 1927, c. 99.

Held, that absolute privilege attached to the proceedings conducted by respondent and protected him against the present action.

Judgment of the Appellate Division, Ont., [1931] O.R. 608, affirming judgment of Orde J.A., 65 Ont. L.R. 407, dismissing the action on motion in weekly court, affirmed. (Reasons of Middleton J.A. in the Appellate Division, and of Orde J.A., approved. *Hearts of Oak Assur. Co. Ltd.* v. *Attorney-General,* [1931] 2 Ch. 370, discussed).

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (*a*) dismissing his appeal from the judgment of Orde J.A. (*b*) dismissing the action, upon motion made by the defendant in weekly court. The action was for damages for alleged defamatory statements made by defendant. The words spoken were (as found by the court on the pleadings and admissions in plaintiff's particulars and examination for discovery) spoken during the course of certain proceedings which defendant was conducting as commissioner appointed by letters patent under the Great Seal of Canada, by the Governor General, under the authority of the *Combines Investigation Act,* R.S.C., 1927, c. 26, and of the *Enquiries Act,* R.S.C., 1927, c. 99. Defendant's motion before Orde, J.A., to dismiss the action was made on the ground that the statement of claim disclosed no reasonable cause of action or

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(*a*) [1931] O.R. 608. (*b*) (1930) 65 Ont. L.R. 407.

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that the action was frivolous or vexatious, in that the defendant was absolutely privileged on the occasion in which it was alleged he spoke the words complained of. Orde, J.A., dismissed the action on the ground that the proceedings before the defendant were absolutely privileged, and his judgment was upheld by the Appellate Division.

The appellant in person.

H. H. Davis K.C. and *D. G. Farquharson* for the respondent.

The judgment of the court was delivered by

SMITH J.—This is an appeal by the plaintiff from a judgment of the First Appellate Division of the Supreme Court of Ontario (1), upholding, by a majority of four to one, the judgment of the Honourable Mr. Justice Orde (2), dismissing the plaintiff's action upon motion in weekly court, on the ground that the defence of absolute privilege was clearly sound.

The first ground of appeal is that there were relevant and material issues of fact outstanding and undetermined, making it improper to dispose of the case in weekly court on motion.

I agree with Mr. Justice Orde that the pleadings and the admissions made by the plaintiff in the particulars furnished by him and on his examination for discovery, made it quite clear that the words were spoken by the defendant during the course of certain proceedings which he was conducting as a commissioner appointed by letters patent under the Great Seal of Canada, by the Governor General, under the authority of the *Combines Investigation Act,* R.S.C., 1927, ch. 26, and of the *Enquiries Act,* R.S.C., 1927, ch. 99.

The only question to be determined, therefore, was one of law as to whether or not the commissioner so acting was entitled to absolute privilege. For this reason the motion was properly entertained by the learned judge.

A very full discussion of the law on the question at issue, with a review of the cases applicable, appears in the reasons for judgment of Mr. Justice Orde on the motion and in the

(1) [1931] O.R. 608. (2) (1930) 65 Ont. L.R. 407.

reasons of Mr. Justice Middleton in the Appellate Division. I agree with their reasons and conclusions and would only add to what they have said a reference to the case of *Hearts of Oak Assurance Company, Limited* v. *Attorney General* (1), decided since the judgment herein of the Appellate Division.

In that case the Industrial Insurance Commissioner, as authorized by s. 17 of the *Industrial Insurance Act,* 1923, appointed Mr. John Fox inspector to examine into and report on the affairs of the plaintiff company. This section authorizes the commissioner to make such appointment, if, in his opinion, there is reasonable cause to believe that an offence against this Act or certain other Acts has been, or is likely to be committed. The inspector is given power to examine into and report on the affairs of the society or company, and for that purpose to exercise in respect of the society or company all or any of the powers given by subs. 5 of sec. 76 of the *Friendly Societies Act,* 1896, to an inspector under that section, which reads as follows:

> An inspector appointed under this section may require the production of all or any of the books or documents of the society, and may examine on oath its officers, members, agents and servants in relation to its business, and may administer such oath accordingly.

On receiving the report of the inspector, the commissioner may issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed, and may, in case of a society, award that the society be dissolved and its affairs wound up, and in case of a company, may present a petition to the court for the winding up of the company. The question at issue was as to whether or not the inspector was entitled to conduct his examination in public, as he proposed to do.

Luxmoore J. decided that, on the true construction of the Act, the inspection may be held at the discretion of the commissioner, either in public or in private, or partly in public and partly in private, and was upheld by the Court of Appeal, Lord Hanworth, M.R., dissenting.

It was argued that the inspection was a judicial or quasi-judicial proceeding, and therefore must be held in public

(1) [1931] 2 Ch. 370.

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Smith J.

on the principle laid down in *Scott* v. *Scott* (1). Luxmoore J. and the majority of the judges in the Court of Appeal (Lawrence and Romer, L.JJ.) held that it was unnecessary to determine this question, but Lawrence, L.J., states that, in his opinion, there is a good deal to be said for the contention of the Attorney General that an inspection under s. 17 is in the nature of a judicial enquiry because of the powers given the commissioner as a result of it.

Lord Hanworth in his dissenting judgment says that if the hearing was a judicial proceeding he would follow the principle laid down in *Scott* v. *Scott* (1). He refers to a number of proceedings that have been held to be of a judicial nature carrying immunity in respect of reports of the proceedings, and cites a number of cases, including some of those cited in the reasons of Mr. Justice Orde and Mr. Justice Middleton. He points out that in *Barratt* v. *Kearns* (2) it was the duty of the commissioners to hear evidence of both sides and then report, and that in *Dawkins* v. *Lord Rokeby* (3) full opportunity was to be afforded to the officer or soldier of being present at the enquiry, of making any statement, of cross-examining witnesses and of offering evidence. After stating that in both those cases there was provided opportunity for both sides to be heard and for their evidence to be considered, he goes on to say that there is no difficulty in attaching a judicial character to such tribunals. He then alludes to the fact that the inspector was not given power to compel witnesses to answer, and concludes that the proceedings of the inspector were not of a judicial character.

In the Acts under which the commissioner was appointed in the present case, he is given the most ample powers for compelling witnesses to attend and to answer questions on oath and to compel the production of documents; and there is provision that parties whose conduct is being investigated, or against whom charges are made, are to be given opportunity to be present and to be heard and to be represented by counsel.

What is said, therefore, in *Hearts of Oak Assurance Company Limited* v. *Attorney-General* (4) seems to be rather

(1) [1913] A.C. 417.
(2) [1905] 1 K.B. 504.
(3) (1873) L.R. 8 Q.B. 255; (1875) L.R. 7 H.L. 744.
(4) [1931] 2 Ch. 370.

in support of than against the judgment here appealed from.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

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O'CONNOR v. WALDRON.

Smith J.

Solicitor for the appellant: *J. Gerald Kelly.*
Solicitors for the respondent: *Kilmer, Irving & Davis.*

MERRITT REALTY COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

CHARLES R. BROWN (PROVINCIAL ASSESSOR) (PLAINTIFF) ..... } RESPONDENT.

1932

*Feb. 3.
*Feb. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Provincial income tax—Real estate company—All shares but two owned by one person—Profits of company—Whether accretions to capital or income.

A practising dentist incorporated a company with power *inter alia* to buy, hold and sell real estate and to carry on the business of real estate agents. He held all but two shares and he contended that his purpose was that the company manage his own property and control real estate for the investment of his own money, not for speculation. He conveyed his real estate property to the company in exchange for shares. These lands increased considerably in value and were sold at a profit. He contended that such profits were accretions to capital and not income made in the business of buying and selling real estate and, therefore, not subject to assessment as such.

Held that these profits were profits acquired in a scheme for profit making, which the appellant company was putting into effect as part of its business, and, therefore, were liable to assessment under the provincial *Income Tax Act*. Upon the facts of the case, the properties in which the company dealt were acquired for the purpose of turning them to account to the profit of the company, by sale, if necessary; and it had been verbally admitted that the possibility of turning its properties to account by selling them at a profit was contemplated by the company from the beginning. *Ducker* v. *Rees* ([1928] A.C. 127) and *Anderson Logging Co.* v. *The King* ([1925] Can. S.C.R. 49) applied.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the Court of Revision at Vancouver, W. H. S. Dixon J., and confirming the assessment made by the respondent as provincial

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1932] 1 W.W.R. 234.

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assessor of $15,242.18 as income tax for the years 1926, 1927 and 1929.

In 1919 Dr. Gilbert, a practising dentist, incorporated a private company with power *inter alia* to carry on the business of buying, holding, managing, and selling real estate. He claimed that he intended the company to control real estate for investment of his own money and the management of his own property, not for speculation. He conveyed certain real estate to the company in return for shares all of which except two belonged to him. He conveyed certain of his lands to the company which thereafter increased substantially in value and were sold at a considerable profit. The company bought other lands with the money and in this way dealt with the lands and property which it acquired, selling each time at a profit. The company claimed that these profits were accretions to capital and objected to pay income tax thereon. They were, however, assessed by the government for income tax and on appeal to the Court of Revision the judge upheld the assessment. From that judgment an appeal was taken to the Court of Appeal and the decision was affirmed.

R. S. Robertson K.C. for the appellant.

A. M. Harper for the respondent.

The judgment of the court was delivered by

DUFF J.—The principle of law governing this appeal is not in dispute or doubt. In *Californian Copper Syndicate* v. *Harris* (1), it was laid down that the test to be applied is whether the sum in dispute was "a gain made in an operation of business in carrying out a scheme for profit-making." That test was adopted by the Judicial Committee in *Commissioners of Taxes* v. *Melbourne Trust, Limited* (2), which decision was followed in this court in *Anderson Logging Company* v. *The King* (3), the decision of this court being subsequently affirmed by the Judicial Committee of the Privy Council (4). The test was reaffirmed by the Houses of Lords in *Ducker* v. *Rees* (5).

I see no reason for disagreeing with the finding of the Court of Revision, affirmed by the Court of Appeal, that

(1) (1904) 5 Tax Cases 159.
(2) [1914] A.C. 1010.
(3) [1925] Can. S.C.R. 49.
(4) [1926] A.C. 140.
(5) [1928] A.C. 127, at 140.

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MERRITT REALTY CO. v. BROWN.

Duff J.

the profits in question were profits acquired in a scheme for profit-making, which the appellant company was putting into effect as part of its business. When the facts proved are taken into consideration, there seems to me no real ground for doubting that the properties in which the company dealt were acquired for the purpose of turning them to account to the profit of the company, by sale, if necessary. Indeed, I think it is virtually admitted that the possibility of turning its properties to account by selling them at a profit was contemplated by the company from the beginning. This, in itself, is sufficient to bring the case within the decision in *Anderson Logging Company* v. *The King* (1), as well as the judgment of Lord Buckmaster in *Ducker* v. *Rees* (2).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mackay & Fraser.*

Solicitors for the respondent: *Harper & Sargent.*

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*Nov. 19, 20.
*Dec. 22.

LIGHTNING FASTENER COMPANY, LIMITED ..... } APPELLANT;

AND

CANADIAN GOODRICH COMPANY, LIMITED ..... } RESPONDENT.

CANADIAN GOODRICH COMPANY, LIMITED ..... } APPELLANT;

AND

LIGHTNING FASTENER COMPANY, LIMITED ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-mark—Conflicting claims to word—Whether descriptive—Questions open for determination by court under proceedings taken—Use of word—Class of goods—"Merchandise of a particular description"—Confusion—Conditions justifying refusal of registration—Trade-Mark and Design Act, R.S.C., 1927, c. 201, ss. 45, 12, 11, 4 (c); Exchequer Court Act, R.S.C., 1927, c. 34, s. 22 (as enacted by 18-19 Geo. V, c. 23).

G. Co. in 1923-1924 adopted, put into use, and caused to be registered in Canada, the word "Zipper" as a specific trade-mark in connection with footwear, and has since sold under it overshoes equipped with

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) [1925] Can. S.C.R. 49; [1926] A.C. 140.

(2) [1928] A.C. 127.

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slide fasteners. The slide fasteners were manufactured by L. Co. which supplied all of them that were so used by G. Co. In 1927 L. Co. applied for registration of the word "Zipper" as a specific trade-mark in connection with the sale of slide fasteners. Subsequently G. Co. applied for registration of the word as a specific trade-mark in connection with the sale of slide fasteners and all articles containing the same. The Commissioner of Patents refused both applications, notifying the parties that, in view of certain conflicting applications, no further action could be taken "until the rights of the different parties have been determined either by mutual agreement or by a court of competent jurisdiction." L. Co. then petitioned in the Exchequer Court, and G. Co. (objecting party) counter petitioned, each for an order for registration as applied for. Maclean J. ([1931] Ex. C.R. 90) dismissed both petitions, holding that the word had become descriptive of slide fasteners in such degree as to preclude its registration as a trade-mark. Both parties appealed, both contending that the judgment below was made upon an issue not properly before the court, and that, in any case, the evidence was insufficient to support the holding, and each claiming an exclusive right to the use of the word for its purpose as applied for.

Held (1): It was within the competence of the Exchequer Court (and of this Court on appeal) to pass upon said ground taken in the judgment below. On proceedings such as those taken in this case, the court has jurisdiction to enquire into all reasons wherefor, under the *Trade Mark and Design Act,* the registration should be permitted or refused; its powers are co-extensive with those conferred on the Minister in s. 11, and (in the absence of surprise to the parties) its investigation should cover the same field (s. 45 of said Act cited and discussed; also s. 22 of the *Exchequer Court Act,* as amended by 18-19 Geo. V, c. 23). (*Quaere* whether, on a reference by the Minister to the Exchequer Court under s. 12 of the *Trade Mark and Design Act,* the court's jurisdiction may not be limited to the determination of the question involved in the reference).

(2): The evidence, however, was not such as to establish that, at the time of the applications in question, the word "Zipper" had become descriptive, so as to justify refusal of registration on that ground.

To deny registration of a word on the ground that it is descriptive, it must appear that, at the date of the application, it was a name, in current use, descriptive of the *article itself.*

(3): G. Co.'s petition should be refused. A specific trade-mark can only be registered "in connection with the sale of a class merchandise of a particular description" (s. 4 (*c*)); and the "merchandise of a particular description" which G. Co. sold was an overshoe, not the fastener with which it was equipped; nor did G. Co. indicate any present intention of manufacturing or selling slide fasteners separately (*Batt & Co.'s Trade Marks,* 15 R.P.C. 262 and 534 (at 538), [1899] A.C. 428; *Bayer Co.* v. *American Druggists' Syndicate,* [1924] Can. S.C.R. 558, at 569-570; *Pugsley, Dingman & Co.* v. *Proctor & Gamble Co.,* [1929] Can. S.C.R. 442, at 448, referred to in this connection). Further, although G. Co. had used and registered the word in connection with footwear, it had never used it in connection with fasteners (and the exclusive right to a mark is restricted to the class of goods to which it has been attached: *Somerville* v. *Schembri,* 12 App. Cas. 453); and its application for registration was posterior to that of L. Co. Also its

application to register the mark in connection with "all articles containing" slide fasteners should be refused by reason of the confusion which, on the evidence (which showed that slide fasteners are or may be used on a great number of goods of all classes), would otherwise result; (*quaere* whether, under the Act, a request in that form for a specific trade-mark may be entertained at all).

(4): L. Co.'s petition should also be refused. In view of the long and extensive use of the word by G. Co. in connection with overshoes, of the existence of certain other marks on the Register, and of the wide variety of goods to which the fasteners were or might be attached, confusion would likely have resulted had the mark been allowed. To justify refusal of registration it is sufficient that the mark *might* have the effect of deceiving the public (*Eno* v. *Dunn*, 15 App. Cas. 252, at 257). L. Co.'s adoption of the word as a mark for slide fasteners came too late in the word's history.

Judgment of the Exchequer Court (*supra*), in its result, affirmed.

CROSS-APPEALS taken independently by each of the parties from the judgment of Maclean J., President of the Exchequer Court of Canada (1), refusing the petition of each party for an order directing registration of the word "Zipper" as a specific trade-mark.

In 1923-1924, the B. F. Goodrich Company (a corporation of the State of New York, U.S.A.) adopted and put into use the word "Zipper" as applied to footwear manufactured by it, which footwear was equipped with a separable fastener of the slide controlled type (the fastener itself was not manufactured by it). In February, 1924, it obtained in Canada registration of the word "Zipper" as a specific trade-mark to be applied to the sale of footwear. This was assigned, in January, 1925, to the Canadian Goodrich Company, Ltd. (hereinafter called the "Goodrich Co.") which has since carried on the Goodrich business in Canada, which business has included the manufacture of overshoes equipped with slide fasteners under the trade-mark "Zipper." The Goodrich Co. never manufactured the slide fasteners themselves, but purchased them from the Lightning Fastener Company Ltd. (hereinafter called the "Lightning Co.") which manufactured them and supplied to the Goodrich Co. all that were used by the latter in its footwear as aforesaid.

In October, 1927, the Lightning Co. applied for registration of the word "Zipper" as a specific trade-mark to be used in connection with the sale of separable fasteners, par-

(1) [1931] Ex. C.R. 90.

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LIGHTNING FASTENER CO. LTD. v. CANADIAN GOODRICH CO. LTD.

ticularly of the slide-controlled type. Subsequently the Goodrich Co. applied for registration of the word "Zipper" as a general trade-mark, which application was refused, and the Goodrich Co. later applied for registration of the word as a specific trade-mark to be used in connection with the manufacture and sale of slide fasteners and articles containing same.

On March 14, 1929, the Commissioner of Patents wrote a letter to each of the parties, in which, after referring to certain conflicting applications, he stated that "no further action can be taken" thereon "until the rights of the different parties have been determined either by mutual agreement or by a court of competent jurisdiction."

On March 12, 1930, the Lightning Co. filed a petition in the Exchequer Court of Canada, praying for an order for registration of its trade-mark "Zipper" as a specific trade-mark to be used in connection with the manufacture and sale of separable fasteners. The Goodrich Co. filed its statement of objection, in which, by way of counter petition, it prayed for a declaration that it is exclusively entitled to the use of the word "Zipper" as a trade-mark for slide fasteners and articles equipped therewith, and for a direction to the Commissioner of Patents to act upon its application.

Maclean J., President of the Exchequer Court of Canada (1), refused both the petition and counter petition, holding that the word "Zipper" had become descriptive of slide fasteners in such degree as to preclude its registration as a trade-mark.

Both parties appealed, the Lightning Co. from that part of the judgment which refused registration of its trade-mark "Zipper" as a specific trade-mark to be used in connection with the manufacture and sale of separable fasteners, and the Goodrich Co. from that part which refused registration of its trade-mark "Zipper" as a specific trade-mark in connection with the sale of slide fasteners and articles containing the same.

Harold G. Fox for the Lightning Fastener Co. Ltd.

R. S. Smart K.C. for the Canadian Goodrich Co. Ltd.

(1) [1931] Ex. C.R. 90.

ANGLIN C.J.C.—I would dismiss the appeal and cross-appeal with costs.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

RINFRET J.—These are cross-appeals taken independently by each of the parties from the judgment of the President of the Exchequer Court (1), refusing to order the registration by either party of the word "Zipper" as a specific trade-mark for separable fasteners of the slide-controlled type referred to as slide fasteners. The latter may be described as devices consisting of two opposite series of members adapted to be attached one on each side of an aperture in some article and to interlock so as to close the aperture upon the slide being operated in one direction, or to separate so as to leave the aperture open upon the slide being operated in the opposite direction.

The proceedings originated by way of petition to the Exchequer Court praying that an order may be made directing the registration of the trade-mark in the name of the Lightning Fastener Company Ltd. to be used in connection with the manufacture and sale of separable fasteners of the type in question. The Canadian Goodrich Company Ltd. was the Objecting Party, and, in its statement of objection, it also petitioned for the registration of the trade-mark in connection with similar goods.

The learned judge dismissed both applications. His decision was that, subsequently to its use and registration as a trade-mark by the Goodrich Company on overshoes equipped with slide fasteners, the word "Zipper" had become descriptive of slide fasteners generally and was, therefore, no longer a proper mark for registration.

Both parties appeal. They join in asking that the judgment be set aside because, as they contend, the adjudication was made upon an issue not properly before the court and as to which, at all events, the evidence was quite insufficient to support the conclusion of the learned judge. But, after having thus jointly enunciated their grounds of attack upon the judgment, the parties separate, and each

(1) [1931] Ex. C.R. 90.

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Rinfret J.

of them prays for a declaration that it is exclusively entitled to the use of the word "Zipper" as a trade-mark.

The question of the competency of the Exchequer Court in the premises must first receive our attention.

The point comes up in this way:

There being several applications for the registration of the word "Zipper" pending before the Commissioner of Patents, he notified each party that "no further action (could) be taken on any of the above noted conflicting trade-mark applications until the rights of the different parties (had) been determined either by mutual agreement or by a court of competent jurisdiction."

The point raised by the appellants is that conflict was therefore the only question in controversy and upon that question alone was the Exchequer Court competent to adjudicate.

Under the *Trade Mark and Design Act,* the Minister named by the Governor in Council to administer the Act may refuse to register a trade-mark in any of certain cases enumerated in sec. 11, and conflict is one of them. In such cases, the Minister may also, if he thinks fit, "refer the matter to the Exchequer Court of Canada" and, says sec. 12,

> in that event, such court shall have jurisdiction to hear and determine the matter, and to make an order determining whether and subject to what conditions, if any, registration is to be permitted.

It may be argued—and with some force—that when the case is brought before the Exchequer Court in the form just described, the jurisdiction of that court is limited to the determination of the question involved in the reference. That question only, it may be said, is the subject-matter of the reference and it alone is "the matter" which the court "shall have jurisdiction to hear and determine."

But such is not the case that we have before us. The Minister made no reference. He simply left it to the different parties to decide upon their own course to have their rights adjusted. One of them, the Lightning Company, instituted the present proceedings. They are proceedings by way of petition complaining that the petitioner's application was, without sufficient cause, refused by the Minister. In proceedings of that kind, the parties apply to the court for relief notwithstanding that the matter has not been

referred to the court by the Minister. This they may do under sec. 45 of the Act (See *In re "Vulcan" Trade Mark* (1)), but they should express no surprise if, under the circumstances, they do not find themselves in exactly the same position as if there had been a reference. While it may be that, upon the bare words, section 12 is susceptible of being construed as conferring only a limited jurisdiction, as to which the present case does not call for our opinion, the same may not be said of sec. 45, which reads as follows:

45. The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the register of trade-marks or in the register of industrial designs, or by any entry made without sufficient cause in any register, make such order for making, expunging or varying any entry in any such register as the Court thinks fit; or the Court may refuse the application.

2. In either case, the Court may make such order with respect to the costs of the proceedings as the Court thinks fit.

3. The Court may in any proceedings under this section, decide any question that may be necessary or expedient to decide for the rectification of any such register.

We can see no limitation, such as is suggested, in the language of this section. The court may make such order as it thinks fit, or it may refuse the application; and, for that purpose, it has jurisdiction to inquire into all the reasons wherefor, under the Act, the entry in the register should be permitted or should be refused. The intention appears, in any of the cases contemplated by sec. 45, to import into the section all the provisions of sec. 11, so that, in the relevant litigation, the powers of the court are co-extensive with those conferred on the Minister in Sec. 11 and the court, *mutatis mutandis,* stands in the position of the Minister.

If it were necessary, resort may be had to sec. 22 of the *Exchequer Court Act,* as introduced in 1928 by c. 23 of 18-19 George V:

22. The Exchequer Court shall have jurisdiction as well between subject and subject as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade-mark or industrial design;

(*b*) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade-marks or industrial designs made, expunged, varied or rectified; and

(1) (1915) 51 Can. S.C.R. 411.

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(c) in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at Common Law or in Equity, respecting any patent of invention, copyright, trade-mark, or industrial design.

By the above section, the jurisdiction is conferred in broad and general terms. Both under that section and under sec. 45 of the *Trade Mark and Design Act*, the jurisdiction of the court is not limited to the points invoked in the Minister's ruling, and the whole case is properly and competently before the court.

Of course, as the appellants contend, the rule remains that the adjudication must be confined to the issues to which the trial was directed, but the real issue is whether the mark is a proper one for registration; and it should not be forgotten that legislation concerning patents, trade-marks and the like exists primarily in the interest and for the protection of the public, so much so that it could be said that the public is a third party to all patent or trade-mark litigation. For that reason, when applied to those cases, the rule should receive the widest and most liberal interpretation. After all, the court may not give a final order for making an entry in the register of trade-marks, unless it be satisfied that the applicant is undoubtedly entitled to the exclusive use of the mark and that the mark is not in any way objectionable under one or the other of the sections of the Act, more particularly section 11; and it is for the applicant to satisfy the court in these respects. We fail to see why the court's investigation should not cover the same field as that of the Commissioner or the Minister, provided always the parties are not taken by surprise.

We do not therefore agree with the appellants' contention that the judgment proceeded on a point which was not before the court. As already said, the learned President refused the applications because, in his opinion, the word " Zipper " was descriptive and was not accordingly a proper mark for registration. It cannot be doubted that, in the present proceedings, the Exchequer Court was competent to pass upon that ground of objection, nor that the applicants were amply advised, by the course of the trial, that this would be one of the points considered in the judgment and that they were expected to satisfy the court in regard

to it. They have no reason to complain now if they have neglected to direct their attention to that question.

What is true of the Exchequer Court and of the manner in which it may deal with a case like this applies, we apprehend, in no lesser degree to this Court. We do not doubt our power to dispose of the case upon grounds other than those stated by the Minister, grounds based on the record and which are presently to be stated.

We would hesitate, however, to follow the learned trial judge in his conclusion that the evidence was sufficient to hold that the word "Zipper" had in such degree become descriptive as to preclude its registration as a trade-mark.

The proposition that words merely descriptive are not registrable is not disputed. It should, of course, be qualified by adding that even a descriptive word may be registered if, through long, continued and extensive use, it has acquired a secondary meaning and become adapted to distinguish the goods of the applicant (Rule X of the Patent and Copyright Office). Incidentally, it may be said that the Goodrich company quite failed in its attempt to establish that the word "Zipper" was generally associated by the public with wares of Goodrich manufacture or selection.

But, in order to deny registration of a word on the ground that it is descriptive, it must be shown that, at the date of the application (which is the date to be taken into consideration), the word was a descriptive name in current use, descriptive of the article itself as distinguished from a name exclusively distinctive of the merchandise of a particular dealer or manufacturer.

Now, in 1923, the word was a newly coined fancy word, applied to footwear equipped with slide fasteners, and not known in the language. It was none the less a fancy word because it might be said that "zip" (an ordinary English word expressing the light sharp sound of a bullet or other object passing rapidly through the air) lies at the root of "Zipper" (see the *Bovril* case (1), and the *Tabloid* case (2)). The application of the petitioner dates back to the first of September, 1927. The evidence bearing on the state of facts existing at that time falls far short of establishing

(1) (1896) 13 R.P.C. 382. (2) (1904) 21 R.P.C. 217.

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that, in the minds of the general public, the word had then acquired a meaning descriptive of slide fasteners of the type in question. There is some evidence of the occasional use of the word in that sense in a loose way; but even that is vague in point of time and quite fails, in our opinion, to show a general acceptance and a common use of the word for the purpose of describing the article itself.

In our view, the record does not contain the kind of evidence required to decide that, at the time of the applications, the word " Zipper " was not registrable, on account of having become descriptive. Accordingly we shall proceed further to examine the respective claims of the appellants, taking first that of the Objecting Party.

We think its application should be refused for two reasons.

A specific trade-mark can only be registered " in connection with the sale of a class merchandise of a particular description " (Sec. 4c).

The mark covers the merchandise as manufactured or sold. It may be applied to the product or the article itself, or it may be applied to the package, parcel, case, box or other vessel or receptacle containing the same (sec. 5), but it applies to the article in the form only in which it is produced or sold and not to the component parts of the article. The Goodrich company never manufactured or produced or offered for sale slide fasteners *per se*. They are dealers in footwear, and certain overshoes which they offer for sale are equipped with slide fasteners. That does not alter the fact that the " merchandise of a particular description " which they sell is an overshoe and not a fastener. The fastener is no more the merchandise than the fabric or the rubber which, together with it, go to make up the overshoe.

Nor does the Goodrich company indicate any present intention of manufacturing or selling slide fasteners separately. In fact, the only ground upon which it advances its claim in respect of the mark as applied to fasteners is that, although it admits having " purchased all the slide fasteners required by it from the Lightning company," it inspected and selected the same before using them. Assuming this to be sufficient to justify registration under the Act, suffice it to say that there is a complete absence of

satisfactory evidence to bring the Goodrich company within that condition. The learned trial judge came to the conclusion that "it was not so much that (Goodrich) wished the registration, but rather that it did not wish others to get it." We think the conclusion is certainly borne out by the record.

This is a situation to which the principle laid down in *Batt & Co.'s Trade Marks* (1) is clearly applicable. Bearing in mind the difference of language between the English and the Canadian Act, we would put in this way the question and answer propounded by Lindley, M.R., in the *Batt* case (2): Can a man properly register a trade-mark for goods which he does not sell or intend to sell—meaning by intending to sell, having at the time of registration some definite and present intention to sell certain goods or descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he may think desirable? This question we answer in the negative.

In this connection, we may refer to what was said by Duff J., in *Bayer Co.* v. *American Druggists' Syndicate* (The *Aspirin* case (3)), and in *Pugsley, Dingman & Co.* v. *Proctor & Gamble Co.* (4), where he delivered the judgment of this court.

There might be yet another obstacle standing in the way of the Goodrich company's obtaining registration of the word "Zipper" as a specific trade-mark for slide fasteners. They have used and registered the word in connection with footwear; but we have seen that they never used it in connection with fasteners. The exclusive right to a mark is restricted to the class of goods to which it has been attached. (*Somerville* v. *Schembri* (5)). It follows that the same mark may be used by another in connection with a different article (See dictum of Lord Westbury in the *Leather Cloth* case (6)).

The application of the Goodrich company for the registration of the word in connection with fasteners was pos-

(1) (1898) 15 R.P.C. 262 and 534; [1899] A.C. 428.
(2) *See* 15 R P C. 534, at 538.
(3) [1924] Can. S.C.R. 558, at 569-570.
(4) [1929] Can. S.C.R. 442 at 448.
(5) (1887) 12 App. Cas. 453.
(6) (1863) 4 DeG. J. & S. 137.

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terior to that of the Lightning company. So that, under ordinary circumstances, as between itself and the Lightning company, with regard to "Zipper" as applied to fasteners, the Goodrich company can claim neither prior use, nor prior adoption, nor prior application for registration, and the petition of the Lightning company should receive first consideration.

But, in the particular circumstances of this case, there are reasons why, in our view, the latter petition should equally be disallowed.

Goodrich, at the inception of its business in Canada (1923-24), adopted, put into use and caused to be registered the word "Zipper" as a specific trade-mark in connection with footwear. Since then it has offered for sale and sold under the name of "Zipper" overshoes equipped with fasteners of the slide controlled type. These overshoes have been widely advertised and distributed. We are told that they have met with considerable success in the market. The Lightning company was manufacturing slide fasteners of the type in question, which they called "Lightning" or "Hookless." The evidence is that they supplied all the slide fasteners used by Goodrich and incorporated by the latter in the overshoes sold, as above mentioned, under the name of "Zipper." The Lightning company fully knew that their slide fasteners were being used in that way as an integral part of a Goodrich overshoe known to the trade and offered to the public under that mark. They allowed this to go on for considerable time, after which they suddenly turned around and applied for the registration of the word "Zipper" in connection with their slide fasteners alone. It is difficult to escape the suspicion that the application is hardly founded in truth, and that the real purpose is, in the words of Lord Watson, in *Eno* v. *Dunn* (1), "to obtain pecuniary advantage from the wide reputation" of the Goodrich overshoe.

The Lightning company admits that, if its application were acted upon as made, and authority was thus obtained for the general distribution of fasteners bearing the word "Zipper," the public would be deceived by the use of such fasteners on overshoes. While we are not prepared to say

(1) (1890) 15 App. Cas. 252.

whether a limitation excluding such a use could be satisfactorily framed, the conclusion seems to us unavoidable, upon the state of facts already in existence at the time of the first application to the Patent Office, that to have allowed then the registration of the mark for slide fasteners alone would have meant running a grave risk of deceiving the public.

At that time, the following marks, among others, were already on the Register: "Zipper" for footwear; "Zip-on" for children's leggings, coats and hats; "Zip" for bound loose-leaf books; "Zipps" for boots and shoes made of rubber; "Zip-over," "Zip-kinck" and "Zip-midy" for wearing apparel for men, women and children; "Zip-pat" for spats. All of these marks are applied to goods having or which may have slide fasteners as an integral part thereof. It is admitted these fasteners may be attached to an infinite variety of goods. Just previous to the Lightning company, the Ripper company, of Vancouver, put in an application for the word "Zipper" as applied to receptacle opening devices. We also know that the Closgard Wardrobe Company, of Washington, wished to register the word in connection with wardrobe bags.

Many of the articles just referred to are usually sold by the same class of persons. It is not necessary that the danger of confusion should be demonstrated, it is sufficient to say that the mark might have the effect of deceiving the public. It would be the duty of the Minister to refuse to register when it is not clear that deception may not result from such registration (*Eno* v. *Dunn* (1)). The duty of the court is the same and, to use the language of Lord Macnaghten (p. 263), it "ought to reject words which involve a misleading allusion."

The whole question must be envisaged from a business and commercial point of view, and all the circumstances of the trade are to be considered. In the premises, we are convinced that, on account of the goods with which the slide fasteners of the type in question are used or are capable of being used and owing to the state of things at the time of the applications, there would have been every likelihood of confusion if the mark had been allowed. To say the least,

(1) (1890) 15 App. Cas. 252, at 257.

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the extension of the number of such marks should not be encouraged (Kerly on Trade Marks, 6th ed., p. 281).

The adoption by the Lightning company of the word "Zipper," as a mark for slide fasteners, came too late in the history of the word.

Returning again to the Goodrich company. In addition to its demand with regard to slide fasteners *as such,* its application also requested the Commissioner to register the mark in its name in connection with all "articles containing the same." We have serious doubt whether, under the Act, a request in that form for a specific trade-mark may be entertained at all. The evidence shows that slide fasteners are used or may be used on an almost innumerable number of goods of all classes. By definition, a specific trade-mark means a mark having reference to "a class merchandise of a particular description" (sec. 4*c*). A mark intended to cover all articles containing slide fasteners would hardly answer the definition.

Be that as it may, on that part of the petition of the Goodrich company, the trial judge found as follows: "If the application in its entirety were granted, that there would be confusion is quite certain from the evidence."

It is unnecessary for us to add anything to what we have already said to indicate that, on that point, we find ourselves fully in accord with the learned President of the Exchequer Court.

The appeal of the Lightning company and the cross-appeal of the Goodrich company should be dismissed with costs. It should be stated, however, that nothing in the present judgment may be taken as affecting the specific trade-mark of the Goodrich company in connection with footwear.

Appeal and cross-appeal dismissed with costs.

Solicitor for Lightning Fastener Co. Ltd.: *Harold G. Fox.*

Solicitors for Canadian Goodrich Co. Ltd.: *Smart & Biggar.*

LADY DAVIS (DAME ELEANOR CURRAN) (DEFENDANT) ..... } APPELLANT;

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*Feb. 2.
*Mar. 1.

AND

THE ROYAL TRUST COMPANY AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS;

AND

LADY DAVIS (DAME HENRIETTE M. MEYER (MISE-EN-CAUSE).

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

Appeal—Jurisdiction—Interlocutory judgment—Exception to the form——Final judgment—Supreme Court Act, R.S.C., 1927, c. 35, ss. 2 (e), 36.

In an action brought by the plaintiffs as testamentary executors or trustees, a judgment dismissing a preliminary exception to the form, alleging that their appointment by judges of the Superior Court was void for want of jurisdiction, is not a "final judgment" within the meaning of sections 2 (*e*) and 36 of the *Supreme Court Act*.

Such a judgment is only provisional and has not determined, in whole or in part, any substantive right in controversy, as the decision is still open to revision by the final judgment of the trial court. *Willson* v. *Shawinigan Carbide Company* (37 Can. S.C.R. 355) foll.

Distinction must be made between a judgment rendered upon a preliminary exception to the form and a judgment maintaining demurrers, in whole or in part: if the demurrer be to the whole action and if it be maintained, the action is dismissed and *cadit questio;* in all other cases, the allegations struck out upon demurrer disappear from the record and no evidence whatever can be adduced in respect thereof at the trial; the trial judge is therefore powerless, and any attempt by him to remedy the situation by the final judgment would be ineffective and inoperative. Therefore, a judgment on a demurrer, striking out material allegations of pleadings, is a "final judgment." *Dominion Textile Company* v. *Skaife* ([1926] S.C.R. 310) disc.

MOTION to quash an appeal, for want of jurisdiction, from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of P. Cousineau J., in the Superior Court and dismissing an exception to the form presented by the appellant.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) (1931) Q.R. 52 K.B. 59.

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The material facts of the case and the question in issue are stated in the head-note and in the judgment now reported.

Aimé Geoffrion K.C. for the motion.

W. F. Chipman K.C. and *W. K. McKeown K.C. contra.*

The judgment of the court was delivered by

RINFRET J.—On October 28, 1897, the late Sir Mortimer Davis entered into a marriage contract with the *mise-en-cause,* Dame Henriette Marie Meyer, under the sixth clause of which he gave to her and to

his child or children * * * by way of donation *inter vivos* and irrevocably * * * the sum of one hundred thousand dollars, payable at his death,

in the manner and subject to the conditions therein provided.

By the seventh clause of the marriage contract, the future husband stipulated

the right to name trustees either during his lifetime by notarial acts or by his last will and testament: to whom such payments may be made for the administration and management thereof.

The eighth clause of the marriage contract defined the powers of the trustees and provided for the disposition of the trust under certain conditions.

The ninth clause of the marriage contract reads in part as follows:

Unless otherwise provided by the instrument appointing the trustees, there shall be always three trustees.

Should the future husband neglect to appoint them during his lifetime or by will, they shall be appointed on petition by any interested party by a judge of the Superior Court in the district of Montreal on the advice of a family council: two being chosen by the relatives and friends of the future husband and one by the relatives of the future wife.

The respondents were respectively appointed trustees of the donation by judges of the Superior Court of Montreal. By their action, they demand judgment for the balance of the $25,000 claimed to be unpaid under the donation, and for a further sum representing the alleged present value of the 750 shares of American Tobacco Company of Canada, assigned and transferred to the future wife by the marriage contract to secure the fulfilment of the future husband's obligations.

In the writ of summons, the respondents describe themselves as follows:

* * * all three acting in their quality of trustees and duly appointed under the provisions of the contract of marriage between the late Sir Mortimer Davis and Miss Henriette Marie Meyer, passed before W. de M. Marler, notary, on the 20th day of October, 1897.

The action was directed against the testamentary executors and trustees of the late Sir Mortimer Davis, described in the writ of summons as follows:

The Right Honourable Lord Shaughnessy (William James Shaughnessy), of the city and district of Montreal, Alexander M. Reaper, of the city and district of Montreal, and Lady Davis (Dame Eleanor Curran), of the city and district of Montreal, widow of the late Sir Mortimer Barnet Davis, Knight, all three in their quality of testamentary executors and trustees of the late Sir Mortimer Barnet Davis.

The appellant filed a preliminary exception in the nature of an exception to the form and urged that, no trustees having been appointed by the late Sir Mortimer Davis, the appointment of the respondents made since his death by the judges of the Superior Court were void for want of jurisdiction. Accordingly, he demanded the dismissal of the respondents' action.

Judgment was rendered by Cousineau J., holding that the respondents were qualified to bring the action, and dismissing the exception to the form.

All three co-executors respectfully excepted to the judgment and made express reservation of all rights of redress by way of appeal or otherwise. The appellant alone, and without the concurrence of her co-executors, inscribed in appeal before the Court of King's Bench. That court confirmed the judgment of the Superior Court. Bond J., was for dismissing the appeal upon the ground that the appellant had no right to appeal alone. Hall J., was for confirming for the reasons given in the Superior Court. Rivard J., adopted the reasoning of both of his colleagues. Howard and Létourneau JJ. did not prepare any notes.

The appellant then gave notice of appeal to the Supreme Court of Canada, and the respondents now move to quash the appeal for want of jurisdiction.

Two points are raised by the respondents in support of the motion to quash.

1. The judgment appealed from is not a final judgment;
2. The appellant cannot appeal without the concurrence of her co-executors.

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Article 174 of the Code of Civil Procedure of the province of Quebec provides that

the defendant may invoke any of the following grounds, by way of exception to the form, whenever they cause a prejudice:

* * *

3. Absence of quality in the plaintiff or in the defendant.

The respondents sued in their quality of trustees under the marriage contract.

The appellant and her co-executors availed themselves of the provision of the Code of Civil Procedure above quoted and, by way of exception to the form, they invoked the absence, in the respondents, of the quality assumed by them in bringing the suit. The respondents now claim that the judgment dismissing that exception is not a final judgment within the meaning of section 36 of the *Supreme Court Act* (c. 35, R.S.C., 1927).

Under the *Supreme Court Act*, "final judgment" means any judgment, rule, order or decision which determines, in whole or in part, any substantive right of any of the parties in controversy in any judicial proceeding (Section 2 (*e*)).

In that definition, the word on which we desire to lay emphasis is the word "determines." In order that a judgment may come under the definition, it must have, "in whole or in part," determined or put an end to the issue raised and in respect to which the judgment was rendered.

Now, it is a fundamental principle in the province of Quebec that, as a general rule, interlocutories do not determine the issue raised and that they are open to revision by the final judgment.

On this point, the decision in *Willson* v. *Shawinigan Carbide Company* (1) is conclusive.

The action in that case was brought by the company for a declaration that certain letters patent of invention should be declared invalid, to have a contract in respect thereto resiliated, and for the return of the consideration paid by the company to the defendant under the contract. The defendant, by declinatory exception, objected to the jurisdiction of the Superior Court to hear or adjudicate upon the plaintiff's demand, on several grounds which it is unnecessary to state here. In the Superior Court, Taschereau J. maintained the declinatory exception and dismissed the action with costs. On appeal, the Court of King's Bench

(1) (1906) 37 Can. S.C.R. 535.

dismissed the exception and ordered that the case should be proceeded with in the Superior Court and disposed of on the merits. The respondents moved to quash a further appeal by the plaintiff to the Supreme Court of Canada, alleging that the judgment complained of was not a final judgment within the meaning of the *Supreme Court Act*.

The motion to quash was granted on the ground that the objection as to the jurisdiction of the Superior Court might be raised, on a subsequent appeal from the judgment on the merits.

In the course of delivering his judgment, Girouard J. said:

> The reason for this ruling is that an appeal on the merits opens all the interlocutories, especially if a reservation or an exception be filed immediately after the rendering of the interlocutories. Such has been the well settled practice and jurisprudence of the province of Quebec. *Renaud* v. *Tourangeau* (1); *Jones* v. *Gough* (2); *Goldring* v. *La Banque d'Hochelaga* (3); *Benning* v. *Grange* (4); *Archer* v. *Lortie* (5); *Metras* v. *Trudeau* (6).

This court expressed the same views on several occasions and especially in *Molson* v. *Barnard* (7); *Hamel* v. *Hamel* (8); *Griffith* v. *Harwood* (9).

The only difference between that case and the present one is that, there, the exception was declinatory, while here it is an exception to the form.

The amendments to the *Supreme Court Act* do not alter the argument relied on in that case on the particular point we are now dealing with.

In the case of *Metras* v. *Trudeau* (10), referred to by Girouard J., the holding of the Court of Queen's Bench, composed of Sir A. A. Dorion C.J., and Monk, Tessier, Cross and Baby JJ., was:

> Que l'appel du jugement final de la Cour Supérieure soulève de nouveau tous les jugements interlocutoires rendus dans la cause, et que le défaut par un défendeur d'exciper ou d'appeler d'un jugement interlocutoire renvoyant son exception à la forme, ne l'empêche pas de discuter ce jugement sur l'appel du jugement final, l'interlocutoire n'étant pas *chose jugée* sur les questions soulevées par son exception à la forme.

The rule thus laid down was invariably followed since then by the Court of King's Bench in Quebec. *Bayard* v.

(1) (1867) 5 Moo. P.C. n.s. 5.
(2) (1865) 3 Moo. P.C. n.s. 1.
(3) (1880) 5 App. Cas. 371.
(4) (1868) 13 L.C.J. 153.
(5) (1877) 3 Q.L.R. 159.
(6) (1885) M.L.R. 1 Q.B. 347.
(7) (1890) 18 Can. S.C.R. 622.
(8) (1896) 26 Can. S.C.R. 17.
(9) (1900) 30 Can. S.C.R. 315.
(10) (1885) M.L.R. 1 Q.B. 347.

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Dinelle (1); *Perrault* v. *Grand Trunk Ry.* (2); *Longpré* v. *Dumoulin* (3); *Levine* v. *Serling* (4); *Compagnie des Champs d'or Rigaud-Vaudreuil* v. *Bolduc* (5).

In *Canadian Car & Foundry* v. *Bird* (6), Brodeur J. said at page 262:

> Dans cette province (de Québec), l'interlocutoire ne lie pas le juge * * * Lors du jugement final, ces interlocutoires peuvent être modifiés et renversés.

It follows that the judgment *a quo* is only provisional and has not determined, in whole or in part, any substantive right of the appellants in the controversy.

It may be, now that the Court of King's Bench has pronounced upon the point concerning the absence of quality of the respondents, that the Superior Court and the Court of King's Bench itself will be inclined to follow the ruling already made, when the question comes again for decision on the merits of the case. This will not be, however, because of lack of power to decide otherwise. It will be rather the effect of the application to the particular instance of the maxim *Stare decisis*. But we entertain no doubt that if the appellant ever comes before a higher court upon the merits, she will be at liberty to take up the point again and have it revised, should the judgment of the Court of King's Bench be erroneous (7).

More particularly is this true of this case, for the contention that the plaintiffs-respondents are not the true creditors of the debt and are not qualified to recover it is obviously a ground open to the appellant on the merits. (*Levine* v. *Serling* (8); *City of Montreal West* v. *Hough* (9).

At the hearing, the appellant relied mainly on the judgment of this court in *Dominion Textile Company* v. *Skaife* (10), in which the court unanimously reversed the decision of the Registrar refusing to affirm jurisdiction upon the defendant's appeal from a judgment of the Superior Court striking out a part of the defence on a demurrer.

(1) (1898) Q.R. 7 K.B. 480.
(2) (1905) Q.R. 14 K.B. 245.
(3) (1917) 24 R. de J. 1.
(4) (1911) Q.R. 23 K.B. 289.
(5) (1915) Q.R. 25 K.B. 97.
(6) (1922) 64 Can. S.C.R. 257.
(7) (1906) 37 Can. S.C.R. 535, at 539.
(8) [1914] A.C. 659.
(9) [1931] S.C.R. 113.
(10) [1926] S.C.R. 310.

Judgments maintaining demurrers, in whole or in part, are not analogous. If the demurrer be to the whole action and if it be maintained, the action is dismissed and *cadit questio*. In all other cases, the allegations struck out upon demurrer disappear from the record and no evidence whatever can be adduced in respect thereof at the trial. The trial judge is therefore powerless, and any attempt by him to remedy the situation by the final judgment would be ineffective and inoperative. The result is that judgments on demurrers striking out part of the allegations stand in a class by themselves and must be treated as final judgments.

The judgment in *Ville de St. Jean* v. *Molleur* (1), proceeds on that principle. The point is brought out forcibly by Fitzpatrick C.J., delivering the decision of the court. The learned Chief Justice first recalled the difference between a "jugement définitif" and the "jugement provisoire, jugement préliminaire et jugement interlocutoire," all of which come under the general classification of "jugements avant faire droit." He then points out that, in that case,

> There was one conclusion only; but there were several counts, each putting forward an independent title to the relief claimed; and the effect of the judgment appealed from was, as regards the counts in respect of which the demurrer was allowed, precisely the same as if the action had gone to trial and judgment had been given. The controversy regarding the matters raised by them is as effectually and conclusively disposed of. And it is this quality of conclusiveness which determines the character of a judgment as a final judgment, not its relation in point of time to other proceedings. When, by a judgment, a distinct and separate ground of action is, to use Lord Halsbury's words, "finally disposed of," it is, in the ordinary use of the words, a final judgment with respect to that ground of action.

It will thus be seen that, in *La Ville de St. Jean* v. *Molleur* (1), this court held a judgment on demurrer striking out material allegations of the declaration to be a "final judgment with respect to that ground of action"; and it is for that reason that jurisdiction was entertained. The same principle underlies the judgment in *Dominion Textile Co.* v. *Skaife* (2), and all other similar judgments upon demurrers.

Our conclusion is that the judgment appealed from on the appellant's exception to the form was not a final judgment within the meaning of the *Supreme Court Act*

(1) (1908) 40 Can. S.C.R. 139. (2) [1926] S.C.R. 310.

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and that this court has no jurisdiction to entertain the appeal from that judgment.

Having come to that conclusion upon that part of the appeal, it would not be competent for us to express any opinion upon the remaining question.

The motion to quash should be granted with costs.

Motion granted with costs.

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*Oct. 8, 9.
*Dec. 22.

R. K. CLAY AND A. K. CLAY (PLAINTIFFS) ..... APPELLANTS;

AND

S. P. POWELL & COMPANY, LIMITED, AND SYDNEY P. POWELL (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Company—Agreement to buy shares in company—Question whether agreement was for treasury shares or could be satisfied by transfer of shares held by individual shareholder—Claims against stock broker for damages for alleged failure to perform agreement as to short sales and for alleged delay in carrying out instructions to transfer accounts.

An agreement for the sale of treasury shares of a company is not satisfied by the transfer to the purchaser of an individual shareholder's personal stock (*International Casualty Co.* v. *Thompson*, 48 Can. S.C.R. 167).

It was *held* that, on the evidence, the agreement by plaintiff, in question, to purchase shares was an agreement to purchase treasury shares of the defendant company and not shares in that company held by the individual defendant, and that plaintiff was entitled to return of the sum taken from his funds in the company's hands to pay for transfer of personal stock from the individual defendant (*Smith* v. *Hughes*, L.R. 6 Q.B. 597, held not applicable).

The judgment of the Court of Appeal for British Columbia, 44 B.C. Rep. 124, was reversed on the above point, but was affirmed in its disallowance of two other claims against defendant company (viz., for loss sustained because of alleged failure to perform an agreement with regard to short sales of certain mining shares, and for damages for alleged delay in carrying out instructions to transfer plaintiffs' accounts to another stock broker).

APPEAL by the plaintiffs from the judgment of the Court of Appeal for British Columbia.(1)

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*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) 44 B.C. Rep. 124; [1931] 2 W.W.R. 325; [1931] 3 D.L.R. 538.

The action was brought upon three claims: (1) The plaintiff R. K. Clay claimed damages from the defendant company for loss sustained by reason of an alleged failure to perform an agreement with regard to short sales of certain mining shares. (2) The plaintiffs jointly claimed from the defendant company damages for alleged delay in carrying out instructions to transfer their accounts to another stock broker. (3) The plaintiff R. K. Clay claimed from the defendant company and the defendant Powell the return of the sum of $2,000 and interest in connection with the sale to plaintiff of twenty shares of the defendant company's stock.

The trial judge, D. A. McDonald J., allowed claims no. 1 and no. 2, and disallowed claim no. 3.

The Court of Appeal (1) disallowed all the said claims.

At the hearing of the present appeal, as mentioned in the judgment now reported, this Court held against claim no. 1. By its judgment now reported it held against claim no. 2 for the reasons stated by M. A. Macdonald, J.A., in the Court of Appeal (2); but held in favour of the plaintiff (appellant) as to claim no. 3, thus reversing the judgment of the Court of Appeal and of the trial judge on this claim, which is the only one dealt with at length in the present judgment. The material facts in connection with it are sufficiently stated in the judgment now reported.

J. A. MacInnes for the appellants.

J. A. Ritchie, K.C., and *E. F. Newcombe, K.C.*, for the respondents.

ANGLIN, C.J.C.—I would allow this appeal with regard to the $2,000 taken by defendants for shares supplied by Powell; otherwise, I would dismiss the appeal. In view of the disposition I make of it, I would allow no costs.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

RINFRET J.—The appellant R. K. Clay is an author residing in Vancouver, B.C., and the appellant A. K. Clay is his wife.

(1) 44 B.C. Rep. 124; [1931] 2 W.W.R. 325; [1931] 3 D.L.R. 538.

(2) 44 B.C. Rep. 124, at 129 *et seq.*; [1931] 2 W.W.R. 325, at 327 *et seq.*; [1931] 3 D.L.R. 538, at 540 *et seq.*

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The respondent company carries on a general business of stock brokers in Vancouver. The respondent Sydney P. Powell is a stock broker and also a shareholder and director in the respondent S. P. Powell & Company, Limited.

The appellants' action against the respondents was based on three separate transactions. It comprised:

1. A claim for loss sustained by reason of an alleged failure to perform an agreement with regard to short sales of certain mining shares.

2. A claim for damages arising out of the respondents' delay in carrying out instructions to transfer the appellants' accounts to another stock broker.

3. A claim for the return of $2,000 in connection with the sale of twenty shares of the respondent company's stock to the appellant R. K. Clay.

The trial judge allowed claim no. 1, but the Court of Appeal reversed his judgment and dismissed the action in regard to it. In this Court, after hearing argument by counsel for the appellants and without calling on counsel for the respondents, we were all satisfied that the claim failed. Announcement to that effect was made from the Bench by our Lord the Chief Justice.

Claim no. 2 was allowed by the trial judge and disallowed by the Court of Appeal. For the reasons stated by Mr. Justice M. A. Macdonald, with whom the majority of the other Judges of Appeal concurred, we think this claim also fails.

It remains to consider claim no. 3. This claim was disallowed by the trial judge, and his judgment was affirmed on appeal.

It is set out as follows in the statement of claim:

In or about the month of August, 1929, the Plaintiff, R. K. Clay, was solicited by the Defendant, S. P. Powell, to purchase 20 shares of the Treasury stock of the Defendant Company, at the par value of $100 each, and the said Plaintiff, believing that he was purchasing Treasury shares of the said Company, at a later date agreed to purchase 20 Treasury shares of the Defendant Company, at the par value of $100 each, namely, $2,000.

The Defendant Company never allotted or issued or caused to be allotted or issued to the said Plaintiff any of its Treasury shares, but at a date unknown to the Plaintiff and known to both Defendants, the Defendant, Sydney P. Powell, purported to transfer to the Plaintiff 20 shares in the Defendant Company which had already been allotted to and was then owned by the Defendant, S. P. Powell, and the Defendant Company thereupon debited the Plaintiff's account with the said sum of $2,000, and

at a date unknown to the Plaintiff but known to both the Defendants, purported to transfer the said sum to the Defendant, S. P. Powell, and the said S. P. Powell thereupon converted the said moneys to his own use.

On the 14th day of May, 1930, the said Plaintiff ascertained that the 20 shares of stock so purported to have been issued to him were not Treasury stock of the Defendant Company but were 20 shares of the issued capital of the said Company owned by S. P. Powell, and the Plaintiff thereupon repudiated the said transaction and demanded from the Defendants a return of the said sum of $2,000, but the Defendants and each of them has neglected and refused to refund the said moneys to the Plaintiff.

The defence was that:

R. K. Clay himself requested the said Defendants to sell him 20 shares of S. P. Powell & Co. Limited stock which the said Defendant agreed to do and that there was no offer or subscription at any time made by the said Plaintiff for unissued shares of S. P. Powell & Co., Limited, and the said Plaintiff well knew that he was purchasing shares the property of the Defendant Powell. The transfer of the said shares from the Defendant Powell to the said Plaintiff was made by one Ley, then an officer of the Defendant Company and the agent of the said Plaintiff, to buy and sell shares at his discretion.

The parties went to trial and we have to examine how far their respective contentions were borne out by the evidence adduced. It is preferable that we should do so by quoting from the testimony itself.

The following is taken from the evidence of Robert K. Clay:

Q. Were you ever approached at any time to buy any stocks in S. P. Powell & Company Limited?—A. I was.

Q. When and where was that?—A. About August, 1929, in a restaurant called the Bon Ton at lunch.

Q. You were approached by whom?—A. Mr. Powell.

Q. Any other person?—A. No, Mr. Ley was present.

Q. Mr. Ley was present, and what was your conversation with Mr. Powell regarding the stocks in S. P. Powell & Company Limited?—A. To the effect that I had surplus funds in my account and that it would be a good investment for me to put a certain amount of money in the company.

Q. Yes, was the price of the stock discussed?—A. No, I understand it was par—the par value was $100.

Q. And what was your answer to Mr. Powell?—A. That I would think it over.

Q. When did you next have any conversation with him?—A. The next transaction was after Mr. Powell had gone away.

Q. Yes?—A. And I spoke to Mr. Ley—

Q. No, just before you start on Mr. Ley, what was Mr. Ley's position with S. P. Powell & Company Limited?—A. Well, he was a partner, so far as I know.

THE COURT: He was not a partner in the limited company?—A. Well, he was associated with him as a partner.

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Mr. ARNOLD: Is my friend prepared to admit that he was at that time a director?

Mr. BULL: Yes.

The COURT: What?

Mr. ARNOLD: My friend admits that he was a director in the company.

Q. Well, what was your conversation with Mr. Ley regarding this stock?—A. I told him I was ready to take out stock in the company—

Mr. BULL: Of course any conversations with Ley—well, admissions by Ley at that time might be evidence against the company, would not be evidence against Powell as an individual defendant.

The COURT: I will keep that in mind.

Mr. ARNOLD: Q. Yes?—A. And he said that it would be necessary for him to see Mr. Tupper.

Q. Yes?—A. And as a result of his interview with Mr. Tupper, he wrote me a letter.

* * *

Q. Now, what were the contents of that letter?—A. They were to the effect that Mr. Ley had seen Mr. Tupper and that it was impossible for the stock to be issued until the return of Mr. Powell.

Q. I see. Did you see Mr. Powell at all after that?—A. When he returned.

Q. Do you remember when that was?—A. Well, he returned about January—sometime about January.

Q. Of 1930?—A. 1930.

Q. Did you have any conversation with Mr. Powell regarding the stock?—A. No.

Q. What was the next that you heard about this stock?—A. Well, the next that I heard about it was the transfer of Lot 8—on February 8th, of $2,000. I received a debit note for $2,000.

* * *

Q. Now, at any of the conversations between you and Mr. Powell, had you ever heard—had you ever been told or did you hear anything said by Mr. Powell that you were buying S. P. Powell's personal stock? —A. No.

Statements to the same effect were made by Clay throughout his testimony.

This evidence of Clay should be read in the light of what Ley testifies to. We have seen that, at the time, Ley was a director of the S. P. Powell & Company, Limited; or, to put it more exactly, a partner in that company—a private company really controlled by Powell. Before approaching Clay with the object of inducing him to buy the shares in question, Powell had discussed matters with Ley, and Ley gives the following account of their conversation:

Mr. ARNOLD: Q.What was your conversation with Mr. Powell?—A. The conversation was that we hadn't at that time sufficient money as working capital. We required more money for working capital. It was suggested by Mr. Powell to me that we should approach one or two of the more well-to-do of our clients with a view to asking them to take stock in the company.

Q. Now, what stock were they going to take in the company?—A. Well, obviously treasury stock.

Q. Treasury stock; and as a result of that conversation with Mr. Powell did you have a conversation with Mr. Clay?—A. We did, jointly.

Q. Whereabouts was that?—A. At the Bon Ton at a lunch.

Q. And what was the conversation?—A. It was suggested to Mr. Clay that the purchase of stock in the Company—S. P. Powell & Company Limited would be a good investment for him.

Mr. BULL: Q. What is that again?—A. For some of his surplus funds.

Q. I didn't hear the answer?—A. It was suggested to Mr. Clay that an investment in the stock of S. P. Powell & Company Limited would prove a good investment for some of his surplus funds.

Mr. ARNOLD: Q. Yes, when Mr. Clay was approached what did he say?—A. He said he would consider it.

Q. When next did you have any conversation about it?—A. I think not until about three months later.

Q. Where was Mr. Powell then?—A. Mr. Powell was on his way around the world on a pleasure trip.

Q. And you had a conversation with Mr. Clay, did you?—A. Yes.

Q. What was the conversation you had with Mr. Clay?—A. It was one of the routine conversations, I think, which took place in regard to his operations in general, and at the same time I informed him that the company was doing quite reasonably well, and asked him if he was still considering the question of taking stock in the company. I said I considered it would be a good investment for somebody and he said that he thought he would take it.

Q. That he would—— A. In fact he definitely decided to take it then.

We have thus the whole story of the transaction from the lips of Clay himself, and his story is corroborated by Ley.

Powell contradicts Clay, but, as to that, the trial judge said:

Speaking generally, I think Clay told the truth. I may be mistaken, but I have to size up the witnesses as best I can as I see them. Where Clay's evidence is in conflict with any other witness; I accept his. I think he spoke candidly, and he did not try to colour his evidence where he might have done so very much to his own assistance.

Now, accepting Clay's evidence as the learned trial judge did, we think the logical consequence is that he is entitled to succeed in respect of this part of his action.

Powell's proposition to Clay was that he should "put a certain amount of money in the company." The ordinary meaning that those words would convey to Clay was that he should buy the company's treasury stock. In no other way could he put money in the company, and certainly not by purchasing Powell's personal stock. That that was Clay's understanding of the transaction was held by the trial judge. That that was also what Powell had in mind when he made the proposition is, in our view, established

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beyond doubt by the fact that Powell's object, as disclosed by Ley, was to secure more money for the company as "working capital"—an object quite impossible of being secured by simply selling his own stock. That view is strengthened by the fact that Powell never at any time mentioned his personal stock, which, on account of the usual interpretation of the words he used, would have been well nigh, if not entirely, necessary in order to give them the meaning he now contends for. If he wished Clay to understand he was offering his own stock, the only way was to tell him.

The view is further supported by the terms of the letter above referred to and written by Ley after his interview with Tupper. Clay was told in that letter "that it was impossible for the stock to be *issued* until the return of Mr. Powell"—an expression applicable only to treasury stock.

We must decide, therefore, that what Powell proposed to Clay was the purchase of the company's treasury stock. And as, according to the evidence, no other proposition was ever made to Clay, it follows that what Clay accepted later was the proposition to buy treasury stock and not Powell's personal stock.

As a result, the matter stood in this way:

Clay had surplus funds in the hands of S. P. Powell & Company, Limited. For those funds the company has to account to Clay. They can only do so by showing that they used the funds in accordance with his instructions. They were authorized to debit his account of $2,000 for the purchase of the company's treasury stock. They never got authority to use the money otherwise. They are not properly accounting for it by showing that with that money they purchased Powell's personal stock.

It may be added that no stock of any kind, either treasury stock or Powell's own stock, was ever allotted, issued or transferred to Clay. The latter never received any certificate of any kind. When the accounts were given over by the respondents to Ley & Co. on the 15th of May, 1930, statements were delivered shewing the state of Clay's accounts. These statements purported to indicate the final settlement. Yet, neither of them shewed that any of the respondent company's stock was held for the credit of R. K. Clay.

The learned trial judge based his judgment on the authority of *Smith* v. *Hughes* (1), and we are referred by counsel for the respondents to a passage of the judgment of Blackburn J. in that case, where he said (2):

> I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality.

We do not think the case applies. In the present instance, it is not a question of quality, it is a question of identity. In *Smith* v. *Hughes* (1), the plaintiff offered to sell oats to the defendant and exhibited a sample. The defendant took the sample and, on the following day, wrote to say that he would take the oats. The defendant afterwards refused the oats on the ground that they were new, and he thought he was buying old oats. Nothing, however, was said at the time the sample was shewn as to the oats being old, but the price was very high for new oats. And the case went on the principle that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor.

Be that as it may, with due deference, we find no similarity between the two cases. It is sufficient to say that in *Smith* v. *Hughes* (1), the purchaser had got the specific article he bought, in the present case the purchaser did not. An offer duly accepted to sell treasury shares of a company is not satisfied by the transfer to the purchaser of an individual shareholder's personal stock (*International Casualty Co.* v. *Thompson* (3)).

The appellant R. K. Clay is entitled to the return of the sum taken out of his funds in the hands of the respondent company to pay for S. P. Powell's personal stock in the company. But he has already received $50, supposed to represent dividend earned by the stock. The company had no authority to issue the dividend cheque to Clay, for he never was registered as a shareholder. He accepted it then, because he understood the transaction to have been carried out as agreed and that treasury stock had been issued to him. As soon as he ascertained what really took place, he tendered back the $50 at once, through Messrs.

(1) (1871) L.R. 6 Q.B. 597. (2) *ibid.*, at 606-607.
(3) (1913) 48 Can. S.C.R. 167.

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MacInnes & Arnold, his solicitors, who signed and sent a cheque for that sum to the order of S. P. Powell & Co., Limited. The cheque was not cashed. It was produced in court by the company and marked as exhibit in the record. In view of the result, the company should get that money back. The most convenient way is to deduct it from the sum of $2,000, leaving a balance of $1,950 owing to R. K. Clay, together with interest thereon from the date when the money was debited to him in the books of the company. As a consequence, the cheque of MacInnes & Arnold should be cancelled and ordered returned to them.

The appeal should be allowed accordingly and judgment entered as stated in favour of the appellant R. K. Clay against both respondents. The respondent Powell got the money and must be condemned to repay it jointly with the company. The judgment entails cancellation of whatever transfer may have been made by Powell to R. K. Clay of any shares in the respondent S. P. Powell & Company, Limited, and also the rectification, if any be required, of the share register.

On the whole, the appeal is dismissed in respect of any claim with which the appellant A. K. Clay is concerned, and the appellant R. K. Clay succeeds only upon one of the three claims involved in the appeal and in which he was interested. In view of the disposition so made, we would allow no costs of the appeal to this court. Following the method of division adopted by the trial judge with regard to the costs of the action, the appellant R. K. Clay should have judgment for one-third of those costs in the court of first instance.

As for the costs in the Court of Appeal: The effect of our judgment is to confirm the decision of the Court of Appeal on the main appeal brought to that court. The adjudication as to costs on the main appeal before that court should not therefore be disturbed. But the appellant R. K. Clay now succeeds on what was the subject of his cross-appeal to the Court of Appeal, and the present respondents must pay the costs of that cross-appeal.

Appeal allowed in part.

Solicitors for the appellants: *MacInnes & Arnold.*
Solicitor for the respondents: *Stuart H. Gilmour.*

ALEXANDER JOHNSTON AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

CANADIAN CREDIT MEN'S TRUST ASSOCIATION (PLAINTIFF) ..... } RESPONDENT.

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*Feb. 2, 3.
*Mar. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Statute—Construction—"Officer"—Immunity for acts done under ultra vires statute—Whether judicial or public officers—Magistrates Act, R.S.B.C., 1924, c. 150, s. 9.

The term "officer" in section 9 of the British Columbia *Magistrates Act* should not be limited in such a way as to exclude all officers who are not judicial officers from its denotation: such interpretation would involve the contention that an act or thing done by any person, in order to fall within the ambit of the section, must be an act or thing in its nature judicial.

Any public officer, not belonging to any of the specific classes of officers enumerated, is, when performing executive duties, within the descriptive words of the section, and, subject to the conditions prescribed, entitled to claim the benefit of it.

Judgment of the Court of Appeal (44 B.C.R. 354) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of McDonald J. (2), and dismissing appellants' motion.

An action was brought against the appellants for trespass and loss of profits incurred by reason of the appellants having in 1926 prevented the Somerville Cannery Company from carrying on the business of salmon-canner. Before the trial this company made an assignment and the respondent became trustee in bankruptcy. The appellant Johnston was the Deputy Minister of Marine and Fisheries, the appellant Found, Director of Fisheries Service, the appellant Motherwell, the Inspector of Fisheries for British Columbia, and the appellant Mackie, a fisheries officer for the district of Prince Rupert. In 1924, the cannery company constructed the bulk of an old steamship into a salmon cannery. In the summer of 1926, when the boat was fastened to the wharf of a cannery on land and operated

*PRESENT: Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) (1931) 44 B.C.R. 354; [1931] 3 W.W.R. 33; [1931] 4 D.L.R. 569.
(2) (1931 44 B.C.R. 44; [1931] 3 D.L.R. 318.

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for canning salmon, it was seized by the appellants, the fish that were canned were seized, and the company was prevented from operating. The acts of the appellants complained of were performed by them in the execution of their respective offices, and as a result of the company having operated in breach of certain sections of the *Fisheries Act*, which sections were later declared to be *ultra vires* the Dominion Parliament. The appellants moved under marginal rules 282 and 283 of British Columbia for a decision on a point of law raised in the pleadings, namely, that they were protected from an action such as this by reason of the provisions of section 9 of the *Magistrates Act*.

W. N. Tilley K.C. for the appellants.

W. E. Williams K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—The section to be construed is in these words,

Sec. 9. No action shall be brought against any Judge, Stipendiary or Police Magistrate, Justice of the Peace, or officer, for any act or thing by him done under the supposed authority of a Statute or statutory provision of the Province or of the Dominion, which Statute or statutory provision was beyond the legislative jurisdiction of the Province or of the Parliament of Canada, as the case may be, provided such action would not lie against him if the said Statute or statutory provision had been within the legislative jurisdiction of the Parliament or Legislature which assumed to enact the same.

We can find no ground in what is known as the *ejusdem generis* doctrine, for limiting the term "officer" in such a way as to exclude all officers who are not judicial officers from its denotation. The rule is a working rule of construction which, properly applied, is of assistance in elucidating the intention of the legislature; although there is too much reason to think that sometimes the result of applying it has been to override that intention. In the present case, we think the governing words are "for any act or thing by him done under the supposed authority of the statute or statutory provision of the province or of the Dominion." It may be that the context would justify the limitation of the scope of the term "officer," so as to restrict its application to public officers; but, beyond that, we can think of no limitation to which it is properly subject, other than that expressed by the words we have just quoted. The

argument that only judicial officers are contemplated logically involves the contention that an act or thing done by any person, in order to fall within the ambit of the section, must be an act or thing in its nature judicial.

Now we find it quite impossible to say that a county judge or a justice of the peace, performing executive duties under a statute, and many such duties are imposed upon such functionaries, is not within the protection of section 9. We can find no reason, no shadow indeed of justification, for so limiting the plain words of the enactment. That being the case, we can perceive no ground for holding that a public officer, not belonging to any of the specific classes of officers enumerated, is not, when performing executive duties, within the descriptive words of the section, and, subject to the conditions prescribed, entitled to claim the benefit of it.

As to the title of the Act, it is to be observed that the title, taken from R.S.B.C., 1924, is "An Act respecting the justices of the peace and other magistrates." These words do not, when read according to common usage, include judges; and they do not, obviously, indicate adequately the character of the provisions of the statute. The title does not, in our view, materially assist in the construction of section 9.

We do not think it is convenient to deal with the contention that the action should be dismissed on the ground that the determination of this question of law virtually disposes of the controversy between the parties. The action is not exclusively based upon the allegation that the relevant provisions of the *Fisheries Act* were *ultra vires*. It is, in part, based upon the proposition that, if *intra vires*, the *Fisheries Act* would afford no protection. No application was made in the court below to strike out the pleading as disclosing no reasonable cause of action, or to dismiss the action as vexatious, and in the factum the only point substantially argued is that just dealt with; and, although the statement of claim seems, in more than one respect, to be objectionable, we think we ought to limit the judgment on this appeal to setting aside the judgments below and declaring that the appellants are "officers" within the meaning of the *Magistrates Act*. The respondents, however, must undertake to go to trial within a reasonable time; the precise date can be fixed on the settlement of the minutes.

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Duff J.

The appellants may have liberty to apply to strike out the statement of claim as embarrassing, or as disclosing no reasonable cause of action, or for particulars, or to dismiss the action as vexatious. The respondents must pay the costs of the appeal to the Court of Appeal of British Columbia, and to this court, the costs of the proceedings before Mr. Justice D. A. MacDonald to be costs in the cause.

Appeal allowed with costs.

Solicitor for the appellants: *Knox Walkem.*

Solicitors for the respondent: *Williams, Manson, Gonzales & Taylor.*

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*Oct. 26, 27.

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*Mar. 1.

THE BELL TELEPHONE COMPANY OF CANADA, IN RE D'ARGENSON STREET SUBWAY, MONTREAL..... APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS ..... RESPONDENT.

THE BELL TELEPHONE COMPANY OF CANADA IN RE ST. ANTOINE STREET SUBWAY, MONTREAL..... APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS ..... RESPONDENT.

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED, IN RE D'ARGENSON STREET SUBWAY, MONTREAL APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS ..... RESPONDENT.

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*Present at hearing: Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.; Newcombe J. took no part in the judgment, having died before the delivery thereof.

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED IN RE ST. ANTOINE STREET SUBWAY, MONTREAL...	APPELLANT;	1932 THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)
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THE MONTREAL TRAMWAYS COMPANY AND THE MONTREAL TRAMWAYS COMMISSION IN RE D'ARGENSON STREET SUBWAY, MONTREAL.....	APPELLANTS;	THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)
AND		
THE CANADIAN NATIONAL RAILWAYS	RESPONDENT.	THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)
THE MONTREAL TRAMWAYS COMPANY AND THE MONTREAL TRAMWAYS COMMISSION IN RE ST. ANTOINE STREET SUBWAY, MONTREAL.....	APPELLANTS;	THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.
AND		
THE CANADIAN NATIONAL RAILWAYS	RESPONDENT;	
THE BELL TELEPHONE COMPANY OF CANADA IN RE ST. CLAIR AVENUE SUBWAY, TORONTO	APPELLANT;	
AND		
THE CANADIAN NATIONAL RAILWAYS	RESPONDENT.	
THE BELL TELEPHONE COMPANY OF CANADA IN RE SUBWAYS, ETC., IN THE CITY OF HAMILTON	APPELLANT;	
AND		
THE TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY AND THE CORPORATION OF THE CITY OF HAMILTON	RESPONDENTS.	

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THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Orders of Board of Railway Commissioners—Authorizing construction of subways in connection with highway crossings—Directing appellants to move utilities—Railway Act, sections 39, 255, 256, 257—Jurisdiction of Board under the Act—Whether these sections apply to Canadian National Railways—Whether appellants "interested or affected by" the Orders—Railway Act, R.S.C., 1927, c. 170, ss. 33 (5), 39, 44 (3), 52 (2), 162, 252, 255, 256, 257, 259, 260—Expropriation Act, R.S.C., 1927, c. 64—Canadian National Railways Act, R.S.C., 1927, c. 172; 19-20 Geo. V, c. 10—Canadian National Montreal Terminals Act, (D) 19-20 Geo. V, c. 12.

The Canadian National Railways, a railway company within the legislative authority of the Parliament of Canada, applied to the Board of Railway Commissioners for the approval of plans and profiles for carrying its tracks across certain highways. The Board, in final Orders granting the applications, authorized the construction of subways or other structures in connection with the highway crossings and, at the same time, directed the present appellants, amongst others, to move such of their utilities as may be affected by the construction or changes so authorized. The appellants urged that the Board was without jurisdiction to make the Orders in so far as it directed the appellants to move their utilities; that, in any event, the orders were made irregularly and not in accordance with the rules binding upon the Board; that sections 255, 256 and 257 of the *Railway Act* were not applicable to the Canadian National Railways and that the Board had not the power to compel public utilities companies to remove their facilities without previous compensation.

Held that these Orders were made within the exercise of the powers vested in the Board by the *Railway Act*, and more particularly by the provisions of sections 39, 255, 256 and 257 of that Act.

Per Duff, Rinfret and Lamont JJ.—The powers of the Board, under the sections above mentioned, are set in motion not alone at the request of the railway companies, but equally at the request of the Crown, of any municipal or other corporation or of any person aggrieved; or the Board may act *proprio motu*. The primary concern of Parliament in this legislation is public welfare, not the benefit of railways. With that object in view, almost unlimited powers are given the Board to ensure the protection, safety and convenience of the public, and it may prescribe such terms and conditions as it deems expedient, its decisions being conclusive as to the expediency of the measures ordered to be taken.

Per Duff, Rinfret and Lamont JJ.—The appellants fall within the class of companies or persons "interested or affected" by the Orders, within the meaning of section 39 of the *Railway Act*, and, therefore, could competently be ordered to do the works in the manner specified in these Orders, unless it be "otherwise expressly provided" in some other part of the Act. But there is no other section of the Act which provides that the Board may not order a subway or any other work contemplated by sections 256 and 257 to be constructed in whole or in part by a person other than a railway company.

Per Duff, Rinfret and Lamont JJ.—Sections 39, 252, 255, 256 and 257 of the *Railway Act* apply to the Canadian National Railways, as there

are no other provisions, either in the *Special Act* or *Terminals Act* of the Canadian National Railways which are inconsistent with these sections of the Railway Act. Moreover, that being so, it is unnecessary to inquire whether they are inconsistent with the *Expropriation Act*, as that Act cannot prevail against the provisions of the *Railway Act* relating to highway and railway crossing plans.

Per Duff, Rinfret and Lamont JJ.—Applications under sections 252, 255, 256 or 257 of the *Railway Act* are not complaints within the meaning of subs. (*a*) of section 33 and the Board may conduct its proceedings in these matters in such manner as may seem to it most convenient. The Board itself is the proper judge of the circumstances under which section 59 of the Act and Rule 6 of its Regulations should be acted upon.

Per Duff, Rinfret and Lamont JJ.—Sections 367 to 378 of the *Railway Act* deal with telephones or telephone companies *qua* telephones or telephone companies; but there is nothing in them to detract from the authority of the Board to exercise its powers over telephone companies *qua* companies or persons, in the same manner and with the same effect as against any other company or person.

APPEALS by The Bell Telephone Company of Canada, The Montreal Light, Heat & Power Consolidated, The Montreal Tramways Company and The Montreal Tramways Commission, by leave of a judge of this court, from Orders of the Board of Railway Commissioners for Canada.

The Canadian National Railways, a railway company within the legislative authority of the Parliament of Canada, applied to the Board of Railway Commissioners for the approval of plans and profiles for carrying its tracks across certain highways, and the Board, in the final Orders granting the application, authorized the construction of subways, or other structures in connection with the highway crossings and, at the same time, directed the appellants, amongst others, to move such of their utilities as may be affected by the construction or changes so authorized.

The Canadian National Railways, acting in pursuance of the provisions of the *Canadian National Terminals Act*, was constructing a line of railway from Victoria Bridge, in Montreal, to its new Terminal Station on Lagauchetière street. That line of railway was crossing St. Antoine street and d'Argenson street at a point where was located the underground conduit system of The Bell Telephone Company of Canada and of The Montreal Light, Heat & Power Consolidated. The railway line would be carried over St. Antoine street on a bridge and St. Antoine street would be

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carried under the tracks by means of a subway, the construction of which would involve the lowering of the grade of the street. Also, the elevation of the railway line running from St. Henri to Point St. Charles, crossing d'Argenson street, necessitated the reconstruction of the existing subway at that place.

In 1913, The Bell Telephone Company of Canada constructed an underground conduit system under the surface and within the limits of St. Clair Avenue, in Toronto and placed its telephone lines and cables therein; and, in 1930, the Canadian National Railways applied to the Board of Railway Commissioners for authority to divert its Newmarket Subdivision line to the west and to construct a subway under the diverted line where it crosses St. Clair Avenue, and for an order directing the Bell Telephone Company to make such changes in its facilities as may be necessary.

The Bell Telephone Company of Canada owns and maintains telephone lines constructed upon and under certain streets in the city of Hamilton. The Canadian National Railways, for the purpose of elevating and diverting its line of railway running through that city, made an application to the Board of Railway Commissioners, in which the city of Hamilton joined as an applicant, for, *inter alia*, the approval of the plans, for the diversion and other works incidental thereto, and for an order directing the Bell Telephone Company to reconstruct, alter or change its works in order to carry out the changes planned by the railway company.

Pierre Beullac K.C. and *N. A. Munnoch* for the appellant The Bell Telephone Company of Canada.

Geo. H. Montgomery K.C. for the appellant The Montreal Light, Heat & Power Consolidated.

Thomas Vien K.C. for the appellant The Montreal Tramways Company.

F. Béique K.C. for the appellant The Montreal Tramways Commission.

W. N. Tilley K.C. and *Geo. F. Macdonnell K.C.* for the respondent The Canadian National Railways.

G. W. Mason K.C. and *A. J. Polson* for the respondent The City of Hamilton.

W. N. Tilley K.C. and *J. A. Soule* for the respondent The Toronto, Hamilton and Buffalo Railway Company.

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Rinfret, and agree in his conclusions.

His reasoning, speaking generally, strikes me as being forcible, especially in the early part of his judgment. Taking everything into account, I would dismiss the appeal with costs.

The judgment of Duff, Rinfret and Lamont JJ. was delivered by

RINFRET J.—These appeals were heard together. There are in each case special features with which it will be necessary to deal separately, but the main point involved is common to all the appeals and may be conveniently disposed of by a single set of reasons.

In all the cases a railway company within the legislative authority of the Parliament of Canada applied to the Board of Railway Commissioners for the approval of plans and profiles for carrying its tracks across certain highways, and the Board, in the final order granting the application, authorized the construction of subways or other structures in connection with the highway crossings and, at the same time, directed the appellants, amongst others, to move such of their utilities as may be affected by the construction or changes so authorized.

The point raised by the appellants is that the Board of Railway Commissioners was without jurisdiction to make the orders in so far as it directed the appellants to move their utilities. There is a further point that, in any event, the orders were made irregularly and not in accordance with the rules binding upon the Board.

The appellants got leave to bring these matters before the court pursuant to subsection 2 of section 52 of the *Railway Act*.

We shall now proceed to discuss the first point.

The applications of the railway companies and the orders of the Board professed to be made under sections 255, 256 and 257 of the *Railway Act*. It is in those sections and, of

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course, in the enabling enactment contained in s. 39, that the authority of the Board to pronounce the Orders must be found, if at all—and we did not understand the respondents to contend otherwise, nor that the impugned Orders were sought to be supported by any other legislation. The logical way to approach these cases therefore is to begin by an examination of the powers conferred on the Board by the several sections just mentioned.

In the *Railway Act*, sections 255, 256 and 257 form part of a series of sections grouped under the heading: Highway Crossings. They provide for what is to be done in the case of a railway crossing a highway or *vice versa*. The first two sections deal with projected crossings and the other deals with existing crossings. Under section 255, before the railway may be carried upon, along or across an existing highway, leave therefor must first be obtained from the Board. There is a proviso that "the company shall make compensation to adjacent or abutting landowners," but only "*if the Board so directs*," in which case the compensation is to be determined under the arbitration sections of the *Railway Act*. Special provisions are made where the railway is to be carried along a highway, and also to take care of traffic on the highway during the construction of the railway. The highway must be restored "to as good a condition as nearly as possible as it originally had."

On account of their bearing on the present cases, sections 256 and 257 ought to be quoted *in extenso:*

256. Upon any application for leave to construct a railway upon, along or across any highway, or to construct a highway along or across any railway, the applicant shall submit to the Board a plan and profile showing the portion of the railway and highway affected.

2. The Board may, by order, grant such application in whole or in part and upon such terms and conditions as to protection, safety and convenience of the public as the Board deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, or that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, in the opinion of the Board, arising or likely to arise in respect of the granting of the application in whole or in part in connection with the crossing applied for, or arising or likely to arise in respect thereof in connection with any existing crossing.

3. When the application is for the construction of the railway, upon, along or across a highway, all the provisions of law at such times applicable to the taking of land by the company, to its valuation and sale and con-

veyance to the company, and to the compensation therefor, including compensation to be paid to adjacent or abutting landowners as provided by the last preceding section, shall apply to the land exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

4. The Board may exercise supervision in the construction of any work ordered by it under this section, or may give directions respecting such supervision.

5. When the Board orders the railway to be carried over or under the highway, or the highway to be carried over or under the railway, or any diversion temporarily or permanently of the railway or the highway, or any works to be executed under this section, the Board may direct that detailed plans, profiles, drawings and specifications be submitted to the Board.

6. The Board may make regulations respecting the plans, profiles, drawings and specifications required to be submitted under this section.

257. Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

2. When the Board of its own motion, or upon complaint or application, makes any order that a railway be carried across or along a highway, or that a railway be diverted, all the provisions of law at such time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land, exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

3. The Board may exercise supervision in the construction of any work ordered by it under this section, or may give directions respecting such supervision.

Let it be observed that, under the sections quoted, the powers of the Board are set in motion not alone at the request of the railway companies, but equally, as occasion requires, at the request of the Crown, of any municipal or other corporation or of any person aggrieved; or the Board may act *proprio motu*. The primary concern of Parliament in this legislation is public welfare, not the benefit of railways. With that object in view, almost unlimited powers

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are given the Board to ensure the protection, safety and convenience of the public. It may prescribe such terms and conditions as it deems expedient. It may order that such work be executed or that such measures be taken as, under the circumstances, appear to it best adapted to remove the danger or obstruction; and, amongst the things that the Board may do, the following are particularly mentioned: it may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted. As to the expediency of the measures so ordered to be taken, the Board is given the entire discretion to decide, and its decision is conclusive (Section 44-3 of the *Railway Act*).

In the cases now before this court, four distinct undertakings are involved:

1. The St. Antoine street subway, in the city of Montreal. In connection with a comprehensive scheme for readjusting its terminal facilities in that city, the Canadian National Railway Company applied to the Board for the approval of a plan showing *inter alia*, the proposed crossing of St. Antoine street by its railway. Up to that time, the street was not crossed by the tracks of the railway and the plan was to carry the street under the railway by means of a subway.

Pursuant to subsection 5 of section 256 of the *Railway Act*, the Board directed that detailed plans be served upon the appellants and other interested parties, some of whom filed written answers to the application. The Board subsequently made the order, approving the plan and the construction of the subway and making the directions the validity of which is challenged by The Bell Telephone Company of Canada, The Montreal Light, Heat & Power Consolidated, The Montreal Tramways Commission and The Montreal Tramways Company.

2. The d'Argenson street subway, in the city of Montreal. This work is part of the same general scheme of the Canadian National Railway Company. The circumstances are similar, except that there was already a subway at d'Argenson street, and the Order provides for its reconstruction on a wider scale. The parties opposing the Order are the same as in the St. Antoine street appeal.

3. The St. Clair avenue subway, in the city of Toronto. In this case, the order of the Board came as a result of an application made by the city of Toronto. The application was that the Canadian Pacific Railway Company and the Canadian National Railways be required to collaborate with the city in the preparation of a joint plan for the separation of grades in the northwest portion of the city. It is unnecessary to recite the successive proceedings that took place. The outcome was a judgment ordering, *inter alia*, the construction of a subway under the Newmarket subdivision of the Canadian National Railways at St. Clair Avenue. No steps were taken for some time, but later the procedure already outlined under subsection 5 of section 256 was followed and an Order was made by the Board, similar in character to that in the St. Antoine and d'Argenson streets cases, directing The Bell Telephone Company of Canada and other public utilities' companies

to move such of their facilities as may be affected by the construction of the said subway, when requested to do so by the chief engineer of the applicants.

In this matter, The Bell Telephone Company is the sole appellant.

4. The Toronto, Hamilton & Buffalo Railway Company's lines in the city of Hamilton. This was a joint application of the railway and the corporation of the city of Hamilton for an order approving and sanctioning plans and profiles showing deviations and alterations in the railway company's lines between certain points in the city of Hamilton, and authorizing the railway company to construct, maintain and operate that portion of its railway between the points described in accordance with the change in grades shown in these plans and profiles, to carry its elevated tracks over certain highways therein designated by means of bridges, and to carry the highways beneath the tracks by means of subways, also directing the city to close certain streets, and authorizing a new location of the railway company's station and terminals building, at the same time directing the Hamilton street railway to reconstruct its tracks through and at each side of the subway at James street, and all public utility companies affected to

reconstruct, alter or change the respective works of each in order to carry out the changes of the railway shown on said plan and profile.

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In this case, as in the former one, The Bell Telephone Company is the sole appellant. The Toronto, Hamilton & Buffalo Railway Company and the city of Hamilton are the respondents.

The short description just given of the nature of the works forming, in each case, the subject-matter of the orders, is sufficient to establish—and, if necessary, a more complete reference to the text of the formal orders themselves, as well as the proceedings leading thereto, would demonstrate—the following propositions:

The whole works,—or at least the constructions or changes with which the appellants are concerned—were designed

> to remove or diminish the danger or obstruction, in the opinion of the Board, arising or likely to arise in respect of the granting of the applications in whole or in part in connection with the crossings applied for, or arising or likely to arise * * * in connection with existing crossings.

(*Railway Act*, sections 256 and 257.)

The orders, subject to what remains to be said of the directions affecting the appellants,—were made in the exercise of the powers vested in the Board by the *Railway Act*, more particularly sections 255, 256 and 257. In fact, the appellants did not take exception to the authority of the Board to pronounce orders of that kind in matters concerning railway companies governed by the *Railway Act*. What they disputed was the applicability of the sections relied on to the Canadian National Railway Company and the power to compel the public utility companies to remove their facilities without previous compensation.

We shall deal first with the last of these two objections of the appellants, which is common to all the appeals.

In the exercise of the powers vested in the Board, it is not clear, under the sections referred to, on whom it may impose the terms and conditions which, in its discretion, it finds expedient to insert in the orders it makes, nor by whom it may order the prescribed measures to be taken or the prescribed works to be executed. Whatever be the construction of those sections, any doubt on the point just mentioned is removed beyond question by section 39 of the *Railway Act*, which reads as follows:

> 39. When the Board, in the exercise of any power vested in it, in and by any order, directs or permits any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed,

altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

2. The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid.

The effect of this section was the subject of several pronouncements on the part of the Judicial Committee of the Privy Council. It is now settled that the section

> applies to every case in which the Board by any order directs works and gives it power to order by what company, municipality or person interested in or affected by such order they shall be constructed.

(*Toronto Railway Company* v. *City of Toronto* (1); *Canadian Pacific Railway Co.* v. *Toronto Transportation Commission* (2).

There is, of course, the decision in *British Columbia Electric Ry. Co.* v. *Vancouver, Victoria and Eastern Ry. Co.* (3) relied on by the appellants. But, as pointed out by Viscount Finlay in *Toronto Railway Co.* v. *City of Toronto* (4), the order of the Board in the British Columbia case was

> not regarded as proceeding on any consideration of danger arising from the level crossing or as having anything to do with the railways as such. The matter was treated as one merely of street improvement for which a permissive order was given by the Railway Board, and as such not falling within either s. 59 (now 39) or s. 238 (now 257) of the *Railway Act;* indeed the latter section is not even mentioned in the "judgment."

Another point of distinction which should be emphasized is this: In the *Vancouver* case (3), the Board's order was held merely permissive and as former section 59 was interpreted as applying only in cases where the order was "in substance mandatory," the discussion centred (as it did also to a certain extent in the *Toronto* case (4)), on the question whether the terms of the impugned order satisfied the words of the enactment as it then was. The point is no longer open for discussion now that the provisions of the

(1) [1920] A.C. 426, at 435.
(2) [1930] A.C. 686, at 695.
(3) [1914] A.C. 1067.
(4) [1920] A.C. 426, at 442.
(3) [1914] A.C. 1067.
(4) [1920] A.C. 426, at 436 to 443.

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new section 39 have, by amendment, been declared to extend both to an order which "directs" and to an order which "permits." Further, we would add, applying the reasoning of the Privy Council in *Toronto Railway Co.* v. *City of Toronto* (1), that there can be no question here that the orders appealed from are mandatory.

We have it so far that the works involved in the orders now before us are works which the Board, in the exercise of the powers vested in it by the particular sections of the *Railway Act,* could competently direct or permit to be done, and to which accordingly section 39 of the *Railway Act* applies. It follows that the works in question were in the nature of those where the Board may

> order by what company, municipality or person, interested or affected by such order, as the case may be * * * the same shall be provided and constructed;

and, consequently, that the appellants could competently be ordered to do the works, unless it be "otherwise expressly provided" somewhere else in the *Railway Act.*

We have no doubt that the appellants fall within the class of companies or persons "interested or affected" by the orders, within the meaning of section 39. In terms, the orders are directed against the companies only so far as "affected" by the words or changes therein involved; and the consequence would be either that the appellants are "affected" and therefore they come within the section, or they are not "affected" and the orders do not concern them.

But it seems evident that the appellants are companies "affected" as contemplated by the section. In *Canadian Pacific Ry. Co.* v. *Toronto Transportation Commission* (2), Lord Macmillan, delivering the judgment of the Judicial Committee, made the following observation at page 697:

> Sect. 89 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.

The question is primarily one of fact and the decisions herein carry the full weight that attaches to the finding of

(1) [1920] A.C. 427, at 436. (2) [1930] A.C. 686.

the Board on any question of fact (*Railway Act*, ss. 33-5, and 44-3). Nevertheless, we apprehend that we are called upon to consider the point on appeal as a question of law so as to determine the jurisdiction of the Board in the premises (1). In the *Toronto Transportation* case (2), the test was laid down in this way:

> The question is * * * whether the company was interested in or affected by the engineering works designed for the removal of the level crossing.

If that test be applied here, the answer is plainly in the affirmative. In the present case, the alteration of the appellants' facilities is necessitated by the construction orders and they are obviously within the meaning of the statute.

In coming to that conclusion, we are further influenced by the consideration that, as was authoritatively decided in *Toronto Railway Co.* v. *City of Toronto* (3), the class of persons who may be ordered to contribute towards the cost and expenses under subs. 2 of section 39 is the same exactly as the class of persons who may be ordered to do the works under subs. 1. So far as we know, the question as to what constitutes a person "interested or affected" under subs. 1 comes before the courts for the first time, but it has been discussed in a number of cases under subs. 2; and, although fully aware that any decision on that point must depend largely on the particular circumstances of each case, we are satisfied that if we should apply to the present instances the line of reasoning which obtained, amongst others, in the two *Toronto* cases (4), the conclusion is inevitable that the appellants fall within the relevant provisions of section 39.

If therefore, by force of sections 256 and 257, in respect of the highway crossings and so far as material here, the works were—as we decide they were—competently ordered by the Board, it may not be denied that the orders could be made on the railway companies or on the municipal corporations interested; and, as a mere matter of jurisdiction, we must hold that the orders could also be made with equal competence on any company or persons affected by the orders and, therefore, on the appellants.

(1) [1930] A.C. 686, at 696.
(2) [1930] A.C. 686, at 702-703.
(3) [1920] A.C. 426, at 435.
(4) [1920] A.C. 426, and [1930] A.C. 686.

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Now there is nothing in section 39 to indicate that the Board must direct the whole of the works to be provided or constructed by the same company or person. We see no reason to doubt that, in the exercise of the powers therein given, the Board may direct part of the work to be executed by one person and another part to be executed by another person. The moving of the utilities of the appellants as directed would obviously be part of the works designed and which could competently be ordered. It would seem, moreover, that the moving could be done much more advantageously by the companies owning and operating the utilities. So that, in the carrying out of the present orders, each company is called upon to contribute its part of the work in the manner best calculated to suit the convenience of all concerned. Nor are we impressed by the contention that the relevant sections of the Act so interpreted are likely to work hardship. It need not be repeated that this is a matter for Parliament's concern, which must not influence the construction of statutes where the intention is clear. But it may not be out of the way to point out that section 39 gives ample scope to the Board for making such provisions as to time, terms, conditions, and "as to the payment of compensation or otherwise," as may be found necessary to meet all situations, and for clothing the orders it makes under it with all the guarantees of fairness. In our view, the enactment as framed allows for directions that advances in money be made on account, by all or some of the parties interested or affected, towards the cost of construction ordered executed by one or more of them (1), or that compensation, if any, be previously paid. We should not assume that in these, or in any other instances, the Board will make use of its powers in a way that would be unreasonable. At all events, this court has only to decide whether the Board has jurisdiction to require the appellants to contribute to the works as it did. The propriety of requiring them to do so is entirely a matter for the Board (2).

It remains to consider whether, as the appellants contend, these are cases where the *Railway Act* "otherwise ex-

(1) See [1920] A.C. 431. (2) [1930] A.C. 703.

pressly provided" so as to take them outside the application of section 39.

Let it be first observed that in the section, the words "except as otherwise expressly provided" are inserted in the following sentence:

> it (i.e., the Board) may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order * * * the same (i.e., the structure or works) shall be provided, constructed, etc.

The meaning of the words, in the place in which they are found, is to the effect that the Board may order the works to be constructed by any company interested or affected, unless it be otherwise expressly provided in some other part of the *Railway Act*. We know of no other section of the Act, and none was pointed out to us, which expressly provides otherwise, that is: which provides that the Board may not order a subway or any other work contemplated by sections 256 and 257 to be constructed in whole or in part by a person other than a railway company.

Sections 162 and following are nothing but an enumeration of the several powers of a railway company under the Act. They provide for what the company may do "for the purposes of its undertaking," and how it may do it and for its obligations in the way of avoiding damage and making compensation. But section 162 is only permissive. That and the sections immediately following (which are only corollary thereto) apply where the railway, for itself and of its own volition, does the work or exercises the powers granted therein. Besides, under section 162, the powers are granted and may be exercised only "subject to the provisions in this and the Special Act contained"; and thus we are carried back to section 39.

Then, there are in subs. 3 of section 256 and in subs. 2 of section 257, certain provisions in regard to the taking of land. The appellants urge that the Board has no jurisdiction in matters of expropriation or of obtaining possession of lands; that the utilities ordered removed are in the nature of lands, and that the Board cannot make orders dispensing with the taking of proper expropriation proceedings, nor can it determine the compensation to be paid for the lands taken, nor can it order the owner thereof to vacate and deliver them up to the respondent railway com-

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panies; and the conclusion follows that the orders to remove the facilities are therefore invalid.

The fallacy of the foregoing proposition lies in the fact that it is altogether predicated on the assumption that orders of this kind call for the taking of lands by the railway company. Of course, the orders appealed from do not. They provide for the works to be executed partly by the railway company and partly by the utilities companies—since removing the utilities is just as much part of the works as would be, for example, the removing of the earth in the subways. In the carrying out of the orders as framed, the railway company is not supposed to even touch the facilities of the appellants. So that, assuming the appellant's interest is in the nature of lands, the orders here do not call for the taking by the railway company of the lands of the appellants.

But the appellants say that the orders are not as they should be, and that orders of that nature properly made under sections 255, 256 and 257 necessarily involve the taking of lands by the railway company. We do not think they do. It is not difficult to imagine cases where the measures directed to be taken under these sections would necessitate the taking of lands by the railway. Subs. 3 of 256 and subs. 2 of 257 are there to take care of such cases. But an order, without more, that the railway be carried over or under a highway or that a highway be carried over or under a railway is hardly one of these cases. The orders with regard to the subway at St. Antoine or d'Argenson streets, in Montreal, are not; nor is the order in respect of the subway at St. Clair Avenue in Toronto. As for the Hamilton order, we have the admission of the appellant, The Bell Telephone Co. that

> the changes in the appellant's plant are only necessitated by the construction of the subways and the closing of the streets authorized by

the order. We shall take up later the question about the closing of streets. For the moment, we deal only with the matter of subways, with which all the appeals herein are concerned.

Now, "the provisions of law * * * applicable to the taking of land by the company" referred to in subs. 3 of 256 and in subs. 2 of 257 plainly mean the provisions applicable to the taking of land for the purposes of the rail-

way or for the undertaking of the railway. It may be said generally that an order such as those we are now discussing is not made "for the purposes of the railway proper." The fact that the railway comes across a highway is no doubt the occasion for the order, but the reason or the purpose of the order is the protection or convenience of the public. All the railway needs is to cross the highway. But there are cases where this may not be done without danger or obstruction. Hence the order to carry the highway over or under the railway. As a result, the utilities are not to be removed in order to allow the railway to pass. They must be removed because, for motives of public safety and convenience, the highways are to be lowered or carried above. It is idle to say that lowering a highway will not make it part of the railway undertaking, and neither will its being carried over the railway. This very question is dealt with by Viscount Dunedin delivering the judgment of the Judicial Committee in *Boland* v. *Canadian National Railway Company* (1). The noble lord puts the question: "Is the subway part of the undertaking of the railway?" And the answer is:

> Their Lordships consider that it is not. The expression "subway" has been used, and it is convenient, but in fact, what has been done is merely a lowering of the road and the construction of a new railway bridge. Their Lordships do not doubt that the lowered road still remains, as it was, part of the road belonging to the municipality. They might put sewers under it or gas pipes along it, and could not be restrained by the railway authorities—assuming, of course, that those things so done did not interfere with the position of the railway proper.

Whether, in matters of railway crossings, the subsections invoked by the appellants apply to land at the crossing proper,—and the provision therein inserted: "shall apply to the land exclusive of the highway crossing" might indicate that they do not—it is not necessary, for the moment, to consider. We are of opinion, for the reasons stated, that the works ordered, by their very nature and quite independently of the direction concerning the appellants, do not call for the taking of land by the railway company, or for the undertaking of the railway. There is, in the present cases, no occasion for the application of subs. 3 of 256 or subs. 2 of 257; and those subsections do not, in these instances at least, preclude the application of section 39.

(1) [1927] A.C. 198, at 209.

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Incidentally it may be added that the provisions in subs. 4 of 256 and subs. 3 of 257 fully authorized the direction made in the impugned Orders to the effect that the works shall be carried out under the supervision of "the Chief Engineer, Operating Department of the Applicant."

The only other sections of the *Railway Act* invoked by the appellants were sections 259 and 260. It was expressly held in *Toronto Railway Co.* v. *City of Toronto* (1), that section 259 (or subs. 3 of section 238 as it then was) does not exclude section 39, in respect to the costs and expenses of providing the works. Of section 260, before it is said to have any application at all to the cases herein, it may be asked whether it is meant to cover any new construction made by any railway after the 19th of May, 1909, or whether it affects only railway lines or possibly railways wholly constructed after the date mentioned; whether the application of the whole section is or is not "subject to the order of the Board," and whether the section does not refer solely to level crossings (as a close analysis of the language used in section 260 compared with the language in sections 256 and 257 might show). Section 260 is not even mentioned in the judgments in the two Toronto cases (2).

But it is sufficient to say that sections 259 and 260 deal with quite a different thing from that with which we are now concerned. They deal with the apportionment of cost —a question which, in the orders appealed from, the Board did not pretend to decide and which, on the contrary, it expressly reserved for future consideration. The applicability of the two sections will therefore properly come up for discussion when the question of the apportionment of costs stands to be considered. It may have a bearing on subs. 2 of section 39, it has none on subs. 1. In our view, there is nothing in sections 259 and 260 to put an end to the application of section 39 subs. 1 (3).

Having now dealt with the main objection of the appellants, we come to the other point about the regularity of the proceedings and the contention that the applications were not brought in conformity with the rules binding upon the Board. The question submitted has to do with the

(1) [1920] A.C. 437.

(2) [1920] A.C. 426, and [1930] A.C. 686.

(3) [1920] A.C. 426 at foot of 437.

ERRATA

In the March number, at page 241, line 10, "although there was *an* oral argument," should read "although there was *no* oral argument."

absence or sufficiency of notice to the appellants, who urge that they were not accorded the hearing to which they were entitled.

Assuming the objection raises a question of jurisdiction —and our present view would be that it does not, but that it is rather a question of practice and procedure—the fact is that the Orders in each case were not issued until some time after the appellants had had an opportunity—of which they availed themselves—of filing their submissions in writing, although there was afterwards an oral argument before the Board. We feel confident that the Board must have given proper consideration to the written submissions so made and have taken them into account in drafting the orders subsequently issued. In an earlier part of this judgment, attention was drawn to the fact that in these matters—as well as in any number of similar matters constantly coming before it—the Board is "dealing with what are obviously administrative provisions" of the *Railway Act*. Circumstances imperatively required that these matters may be disposed of with expedition and simplicity of procedure. For that reason, no doubt, the *Railway Act* provided that

> the commissioners shall sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business. (Section 19.)

They may sit either in private or in open court. The only exception is

> that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court.

What is meant by a complaint is shown, we think, in section 33 of the Act. Complaints are the applications described in subparagraph (*a*) of that section. The applications leading to the orders we are now discussing were not complaints. They were requests of the kind described in subparagraph (*b*) of the section. They were applications in respect of which, under the Act, the Commissioners were at liberty to "conduct their proceedings in such manner as may seem to them most convenient."

The Board made and published rules regulating its practice and procedure, as it was authorized to do under

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the Act (sections 20, 50 and 53). One of those rules reads in part as follows:—

> When the Board is authorized to hear an application or make an order, upon notice to the parties interested, it may, upon the ground of urgency, or for other reason appearing to the Board to be sufficient, notwithstanding any want of or insufficiency in such notice, make the like order or decision in the matter as if due notice had been given to all parties; and such order or decision shall be as valid and take effect in all respects as if made on due notice; but any person entitled to notice, and not sufficiently notified, may, at any time within ten days after becoming aware of such order or decision, or within such further time as the Board may allow, apply to the Board to vary, amend or rescind such order or decision; and the Board shall thereupon on such notice to all parties interested as it may in its discretion think desirable, hear such application, and either amend, alter, or rescind such order or decision, or dismiss the application, as may seem to it just and right.

The above rule is the reproduction practically *verbatim* of section 59 of the *Railway Act*. We need not say that the Board itself is the proper judge of the circumstances under which the rule and the section should be acted upon; and we do not think that the orders, upon their face, need show the existence of the circumstances which prompted the action of the Board. (See section 48.)

In our view, the rules and sections of the *Railway Act* to which we have referred are conclusive of the appeals on this point. We apprehend, however, that the appellants may yet find in the remedial parts of rule 6 and of section 59, the remedy to which they may be entitled—although of course it is not our province to express any opinion in regard to it.

That disposes of both of the appellants' points common to all the appeals. Incidentally, it also finally disposes of the appeal in the Hamilton case, for whatever remains to be considered is peculiar to the Canadian National Railways, who are not concerned in the Hamilton appeal.

We do not forget that The Bell Telephone Company raised the contention that, by force of subs. 12 of section 375 of the *Railway Act*, sections 256 and 257 thereof do not apply to telephone companies. We are not pressed by that objection. Section 375 appears in the Act in a fasciculus of sections (ss. 367-378) under the heading "Telegraphs, Telephones, Power and Electricity." Those sections deal with telephones or telephone companies *qua* telephones or telephone companies. There is nothing in them to detract from the authority of the Board to exercise the powers

vested in it under sections 39 or 256 or 257 or under any section of the *Railway Act*, over telephone companies, *qua* companies or persons, in the same manner and with the same effect as against any other company or person.

But we should not part with the Hamilton appeal without making one more observation. The order provides for the closing of certain streets in the city of Hamilton. The Bell Telephone Company objects that the Board has no jurisdiction to order the closing of a highway. There is much to be said in favour of the proposition that

> the power vested in the Board to order that a highway be temporarily or permanently diverted and the wide power to order such measures to be taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected, confers authority upon the Board to order that part of a highway be closed or, at all events, authority to require the proper municipal authority to close it.

(*See Brant* v. *Canadian Pacific Railway Company* (1). But the point does not come up for decision here. The Board did not order the closing of the streets in Hamilton. The city agreed to close them. All that the Board did, so far as that point is concerned, was

> confined entirely to the extinguishment of the public right to cross the railway company's right-of-way.

(In *re* Closing Highways at Railway Crossings (2)), to "permit" the closing by the city, so far as that was necessary; (*Railway Act*, sect. 39),—and the incidental authority to make the orders, so far as concerned the utility companies, is amply provided for in section 39 of the *Railway Act*. The Order comes as the result of an agreement between the railway company and the city. The city submits to it; it joined with the railway in the application to the Board; it was a party to all the proceedings before the Board and it is now respondent in this appeal, supporting the Order with the railway company. Under the circumstances, we do not think the point is open to the Bell Telephone Company. There is however a statement made in the factum of that company which reads as follows:

> The closing of Hughson street was only agreed upon and ordered to enable the respondent railway to build its new station upon the portion to be closed.

(1) (1916) 36 Ont. L.R. 619, at 628.

(2) 15 Can. Ry. Cases, 305.

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So far as we can remember, in these rather involved and complicated appeals, no particular argument was addressed to us on that special point. Were it not that the appeal is on a question of jurisdiction, the point should be dismissed on the simple ground that it was not taken at bar. But if the situation be as represented in the factum, the powers of the Board to make the direction complained of, so far at least as concerns the rights of the appellant in respect of that particular work, may have to be inquired into. The result may not be the same as in the case of works ordered in connection with the crossings. However, we have no facts or admissions on which to decide that issue. It was apparently lost sight of in the midst of the numerous other points submitted. It may be that it does not arise. If it does, when properly and rightly taken, it is no doubt susceptible of redress by the Board itself under subs. 2 of section 59 of the *Railway Act*. As for this court, it would have to be brought back before it upon a new statement of facts specially addressed to that feature. If the parties wish their rights to be reserved for that purpose, the point may be spoken to. Subject to that, the appeal of The Bell Telephone Company of Canada from Order No. 45813 of the Board of Railway Commissioners, and wherein the Toronto, Hamilton and Buffalo Railway Company and The Corporation of the City of Hamilton are respondents, should be dismissed with costs.

We may now turn our attention to the special features involved in the other appeals. They are of the same character in each case and they may be discussed together.

The main feature concerns what we would call the railway status of the Canadian National Railway Company, the sole respondent in each of the remaining appeals;— and what is to be discussed is whether sections 39, 255, 256 and 257 of the *Railway Act* apply to the Canadian National Railways.

The Canadian National Railway Company was incorporated by a special Act of the Parliament of Canada now known as the *Canadian National Railways Act* (c. 172 of R.S.C., 1927). The application of the *Railway Act* to the undertakings of the company was provided for in section 17 of the Act, and the power to construct and operate railway lines was covered by section 21 thereof. Section 21

remained as it was up to the institution of these proceedings; but section 17 was replaced (section 2 of c. 10, 19-20 Geo. V) by a new section. The new section 17 is what falls to be considered. It runs in part as follows:

17. (1) All the provisions of the *Railway Act* shall apply to the Company, except as follows:

(*a*) such provisions as are inconsistent with the provisions of this Act;

(*b*) the provisions relating to the location of lines of railway and the making and filing of plans and profiles, other than highway and railway crossing plans;

(*c*) such provisions as are inconsistent with the provisions of the *Expropriation Act* as made applicable to the Company by this Act.

(2) (*a*) All the provisions of the *Expropriation Act*, except where inconsistent with the provisions of this Act, shall apply *mutatis mutandis* to the Company.

The first point to be noted in the section is that "all the provisions of the *Railway Act*" apply to the company, unless they are excluded by what follows. Now, if we look at what follows, we find that, by subs. (*b*) some provisions of the *Railway Act* are specially excepted. They are: "the provisions relating to the *location of lines* of railway and the making and filing of plans and profiles, other than *highway* and *railway crossing* plans." The effect of the enactment is that the provisions of the *Railway Act* relating to "highway and railway crossing plans" are applicable to the Canadian National Railways. That was plainly the intention of Parliament, as otherwise there would be no conceivable explanation why those provisions should be expressly excepted from the exclusion prescribed in subs. (*b*). To appreciate the full meaning of this exception, it will be useful to consider the manner in which the provisions referred to are grouped in the *Railway Act*. "Location of Line" is the heading of a series of sections beginning with section 167 and ending with section 188. They deal with the map showing the general location of the proposed line of railway, the plan, profile and book of reference, the deviations, the branch lines, the industrial spurs and the location of stations. Then, passing a number of sections, we come to another series grouped under the heading "Matters incidental to construction" beginning with section 244 and ending with section 275. In that group, under subheading "Crossings and Junctions with other railways," are

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sections 252 to 254 inclusive, and, under the sub-heading "Highway crossings," are sections 255 to 267 inclusive. It seems obvious that what subs. (*b*) of 17 (1) intends to exclude is the series of sections of the *Railway Act* (167-188) under the heading "Location of line"; and what it intends to preserve is the series of sections (252-267) under the sub-headings "Crossings and Junctions with other railways" and "Highway crossings." It follows that sections 252, 255, 256 and 257 are preserved in any event and also, by way of consequence, section 39; and that they apply to the respondent, the Canadian National Railways. If that be so, we have not to inquire further whether they are inconsistent with the *Expropriation Act.*

We should add however that we are unable to find in the Special Act of the Canadian National Railways provisions inconsistent with the sections of the *Railway Act* just referred to. As for the *Expropriation Act,* plainly it cannot prevail against them. The effect of section 17-2 (*a*) is to make the *Expropriation Act* applicable, "except when inconsistent with the provisions of this Act," i.e., the *Canadian National Railways Act.* It is part of "this Act" (to wit: the *Canadian National Railways Act*) that the provisions of the *Railway Act* relating to "highway and railway crossing plans" should apply in any event (section 17-1-*b*). Therefore, so far as they apply, they exclude the *Expropriation Act.* This is further supported by section 17-1-(*c*). The only provisions of the *Railway Act* thereby excluded are those that are inconsistent with the *Expropriation Act "as made applicable,"* and this carries us back to the reasoning we have just made.

Now, it would be interpreting the words "highway and railway crossing plans" too strictly if they were held to apply only to that part of the relevant sections dealing with the plans proper, as was argued by The Montreal Tramways Company. That point was discussed by Viscount Dunedin in the *Boland* case (1). He said:

> It does not seem to matter whether you read the expression "plans" and "railway crossing plans" as including the authorization of the construction of the crossing indicated by the plans, or if you confine the word "plans" to the meaning of a piece of paper with a drawing on it. In the latter view authorization of a railway crossing is not included in the

(1) [1927] A.C. 198-205.

enumerated exceptions. In the former it is included in the exception upon the exception, so that in either case the matter remains subject to the *Railway Acts*.

The section so construed by the Judicial Committee was the former section 17, before the amendment of 1929, but there was no material change, at least so far as concerns the present appeals, and the interpretation there given is conclusive on the matter: "The matter remains subject to the *Railway Acts*." And the same should be said about the *Canadian National Montreal Terminals Act*, 1929, which has reference to the two Montreal subways. We do not agree with the appellants that the *Terminals Act* is an Act by itself, nor that the whole power of the company to carry out the Terminals scheme of development must be found exclusively in the *Terminals Act*. In considering the question how far an enactment in a general statute is varied or excepted by the Special Act, Lord Chancellor Westbury laid down the following rule: that if the particular Act gives in itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the general Act. (*Ex parte St. Sepulchre, In re The Westminster Bridge Act* (1); *London, Chatham & Dover Ry.* v. *Board of Works for the Wandswork District* (2).

The *Terminals Act*, 1929, does not in any way give "a complete rule" on the subject matter of the present appeals. It merely authorizes the Governor in Council to provide for the construction and completion by the Canadian National Railway Company of certain works described in a schedule attached to the Act. The St. Antoine street subway and the d'Argenson street subway are part of the works so described. The following provision is to be found at the end of the schedule:

Nothing in this schedule is to be taken to restrict the general powers of the company as expressed in the foregoing Act or other Acts relating to the Company.

In no respect is the Act self-contained. The powers therein referred to could never be carried out unless they were implemented by the *Canadian National Railways Act* and by the provisions of the other Acts applying under section 17 thereof. Far from detracting from the powers of

(1) (1864) 33 L.J. Ch. 372. (2) (1873) L.R. 8 C.P. 185 at 189.

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the Board of Railway Commissioners under sections 252, 255, 256 and 257, the Act, on the contrary, implicitly confirms those powers, as will be apparent by a reference to section 8:

> 8. Where streets or highways are affected by the said works but are not crossed by the Company's tracks or diverted incidental to any such crossing and by reason thereof the Board of Railway Commissioners for Canada has no jurisdiction under the *Railway Act* with respect thereto, etc.

The necessary inference is that the Board has jurisdiction with respect to the crossings under the relevant sections of the *Railway Act*.

The reference to crossings in section 8 is of the same order as the exception in regard to crossings in section 17-1 (*b*) of the *Canadian National Railways Act* previously discussed. It is consistent with it. It shows on the part of Parliament continuous intention of preserving the jurisdiction of the Board in matters of crossings. There is nothing to the contrary in section 9 of the *Terminals Act*. It deals in a general way with the vesting in His Majesty of the lands required for the undertaking and specifies out of what funds the compensation, if any, is to be paid. Obviously it does not give the " complete rule on the subject " which Lord Westbury said was the test as to whether " a general statute is varied or excepted by the Special Act." Section 9 does not deal with highway or railway crossings and leaves untouched all that we have said in regard to the application of sections 256, 257 and 39 of the *Railway Act*. It would be a question how far section 9 may be resorted to as being " the provisions of law at such time applicable to the taking of land by the company " referred to in subs. 3 of 256 and subs. 2 of 257. But we have already indicated that the occasion does not arise here.

Our conclusion is that the appellants fail in their contention that there is, in any of the Acts they invoked, anything to put an end to the application of sections 255, 256, 257 and 39 of the *Railway Act;* and as, in our view, those sections support the impugned Orders, the appeals should be dismissed.

We need not add that the Orders were competently issued notwithstanding that three of the appellants affected are provincial companies. The point is conclusively settled by several decisions of the Judicial Committee (*Toronto Cor-*

poration v. *Canadian Pacific Railway* (1); *Toronto Railway Co.* v. *City of Toronto* (2); *Canadian Pacific Ry.* v. *Toronto Transportation Commission* (3).

In the course of the judgment, in dealing with the matter of crossings, we have referred throughout to sections 255, 256 and 257 of the *Railway Act* as giving the law applicable in the circumstances. With regard to the Montreal Tramways Company, the orders are further supported by sections 252 and following relating to railway crossings. They apply to the Tramways Company by force of section 8 of the *Railway Act*. They are similar in all material respects to the sections relating to highway crossings. If anything, the provisions therein conferring jurisdiction on the Board are even more direct and decisive.

As for The Montreal Tramways Commission, it may have a distinct interest in these appeals, but from the legal viewpoint its position does not differ from that of The Montreal Tramways Company.

The appeals are dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellant, The Bell Telephone Company of Canada: *Pierre Beullac.*

Solicitors for the appellant The Montreal Light, Heat & Power Consolidated: *Brown, Montgomery & McMichael.*

Solicitors for the appellant The Montreal Tramways Company: *Vallée, Vien, Beaudry, Fortier & Mathieu.*

Solicitors for the appellant The Montreal Tramways Commission: *Béique & Béique.*

Solicitor for the respondent The Canadian National Railways: *Alistair Fraser.*

Solicitors for the respondent The Toronto, Hamilton and Buffalo Railway Company: *J. A. Soule.*

Solicitor for the respondent The City of Hamilton: *A. J. Polson.*

(1) [1908] A.C. 54. (2) [1920] A.C. 426.
(3) [1930] A.C. 686.

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VIRGINIA FRANCES MAUD HEAKE (PLAINTIFF) ..... APPELLANT;

AND

CITY SECURITIES COMPANY LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Landlord and Tenant—Fire in apartment building—Tenant of suite killed and his wife injured, in escaping; and property loss—Claim by wife against owner of building for damages—Negligence alleged, and found by jury, in owner of building, in arrangement existing for garbage disposal—Insufficiency of alleged negligence, under the circumstances, to constitute actionable negligence in law.

Plaintiff's husband leased from defendant a suite in defendant's apartment building. On each floor, beside the freight elevator, and separated from the hall by swinging wooden doors, was a platform on which were garbage receptacles. A fire occurred in the building and in efforts to escape the plaintiff was injured and her husband was killed. For this and for property loss, the plaintiff sued for damages. The jury found that defendant was negligent in that it caused or allowed inflammable refuse to be deposited beside the elevator shaft and failed to safeguard such refuse against the danger of fire; that such condition amounted to a trap or concealed danger created by defendant and caused the injuries, death and loss; and judgment was entered for damages. The judgment was set aside by the Court of Appeal for Manitoba. Plaintiff appealed.

Held, affirming judgment of the Court of Appeal (39 Man. L.R. 399), that plaintiff could not recover (Anglin C.J.C. *dubitante*).

The principle of *Rylands* v. *Fletcher* (L.R. 3 H.L. 330) held not applicable.

The mere deposit and accumulation of inflammable material on an owner's premises does not make him responsible for damages resulting from a fire started in that material by some one else without his knowledge (*Laidlaw* v. *Crow's Nest Southern Ry. Co.*, 42 Can. S.C.R. 355).

Plaintiff could not recover for her husband's death unless he would have had a right of action arising out of the wrong complained of, had he lived (*C.P.R.* v. *Parent,* 51 Can. S.C.R. 234; [1917] A.C. 195).

A tenant takes the premises as they are and at his own risk, no matter what condition of visible danger there may be (*Robins* v. *Jones,* 15 C.B., N.S., 221; *Lane* v. *Cox,* [1897] 1 Q.B. 415, at 417; *Taylor* v. *People's Loan & Svgs. Corp.,* [1930] Can. S.C.R. 190). Defendant's obligation to plaintiff's husband was a contractual one, under which the latter leased the premises and the approaches by which he had access to them, as they were. During his occupancy prior to, at the time of, and subsequent to the making of the lease, the arrangement for garbage disposal existed the same as at the time of the fire, and

*Present at hearing of the appeal: Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ. Newcombe J. took no part in the judgment, as he died before the delivery thereof.

he and plaintiff knew of the condition and made use of the facility provided. Any danger therefrom was not a hidden danger, but one as obvious to the tenant and plaintiff as to defendant.

For plaintiff to succeed in her action for personal injuries and loss, she must establish the existence of some concealed trap; and there was no evidence of such. The negligence found by the jury did not in law constitute actionable negligence. (*Cavalier* v. *Pope*, [1906] A.C. 428; *Groves* v. *Western Mansions Ltd.*, 33 T.L.R. 76; *Lucy* v. *Bawden*, [1914] 2 K.B. 318; *Fairman* v. *Perpetual Investment Bldg. Soc.*, [1923] A.C. 74, cited. *Indermaur* v. *Dames*, L.R. 1 C.P. 274, explained and distinguished).

APPEAL by the plaintiff from the judgment of the Court of Appeal for Manitoba (1) allowing the defendant's appeal from the verdict of the jury at the trial and the judgment entered pursuant thereto for damages to the plaintiff for the death of her husband and for personal injuries and property loss. The Court of Appeal set aside the verdict and judgment at trial and ordered judgment to be entered dismissing the plaintiff's actions.

The plaintiff's claims were for damages for the death of her husband and for personal injuries and loss of property, as the result of a fire which occurred in an apartment building owned by the defendant. The plaintiff's husband was tenant of a suite in the building. At the time of the fire the plaintiff and her husband were in the building, and in endeavouring to escape the husband suffered injuries from which he died and the plaintiff suffered injuries. The plaintiff claimed that the fire and the resulting death, injuries and loss of property were caused by negligence of the defendant.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

F. M. Burbidge K.C. for the appellant.

H. A. Bergman K.C. for the respondent.

ANGLIN C.J.C.—While gravely doubtful as to the proper result in this case, I am inclined rather against the respondent but shall not formally dissent from the judgment of my learned brothers who constitute the majority of the court.

(1) 39 Man. L.R. 399; [1931] 1 W.W.R. 782.

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Anglin C.J.C.

On the whole case, I do not feel so strongly in favour of the appellant as to justify my so dissenting, without further research, from the judgment dismissing the appeal.

The judgment of Duff, Rinfret and Smith JJ. was delivered by

SMITH J.—The respondent (defendant) was the owner of a five-story apartment building in the city of Winnipeg, known as the Casa Loma Block, the four upper floors of which are divided into suites, which are let to tenants for residential purposes. There was a passenger elevator with a front stairway adjoining, and a freight elevator with a back stairway adjoining, affording access to and from the various suites.

The freight elevator was separated from the hall by swinging wooden doors opening outwards into the hall. Behind these doors, and within the shaft, there was a platform approximately four feet wide, extending across its full width, and in front of the platform was the opening in which the elevator ran, which extended from the basement to the roof. On the platform, at each side of the doorway closed by the swinging doors, were garbage cans. The plan, Exhibit 5, filed, shows two cans at each side.

The appellant (plaintiff) and her husband moved into suite 58 in this Casa Loma Block on the fifth floor, first taking over the unexpired part of a former tenant's lease. On August 25, 1927, after having lived in the suite for over two months, the appellant's husband took a written lease of this suite for a term of one year, commencing October 1, 1927. While occupying the premises under this lease, the fire which gave rise to this action occurred, about two o'clock in the afternoon of the 14th of April, 1928. The appellant and her husband were asleep when the fire broke out, and when they were roused the fire had gained such headway that they felt that they could not escape by the door leading into the hall, and jumped from the window. The husband was killed, and the appellant sustained the injuries complained of in this action.

The appellant sues for the damage resulting from the injuries sustained by herself, for loss of property and for damages for loss of her husband, under the Manitoba Act which

is the equivalent of *Lord Campbell's Act*. The alleged ground of action is the negligence of the defendant in allowing refuse and inflammable material to be deposited and to accumulate in or at the elevator shaft, where the defendant knew or ought to have known that the same would be in danger of causing a fire. There were other allegations of negligence, such as the lack of fire escapes and fire-fighting apparatus, but all were abandoned at the trial except the allegation of negligence just mentioned.

At the trial, the vice-president of the defendant company testified that,

> There were on each floor two cans, and possibly a box for the small cans like fruit cans that we did not want to get mixed with the garbage, because we had to burn the garbage. The tenants were requested to wrap the garbage and deposit it in the cans.

He says that there may have been only one can, and that in the first place there were covers for them. Some of these were found after the fire, and some were found in the basement.

The appellant (plaintiff) testifies that the garbage, paper, and stuff like that, would be taken by the tenants to the freight elevator shaft, and left in any of the containers there. She further testifies as follows:

> I have taken magazines, newspapers, and stacked them up on the platform there, and there was no other place to put them, in a wooden box or a cardboard box the things were delivered in. There was a bushel basket there as a container.
>
> * * *
>
> Q. There was a garbage tin, a bushel basket and a wooden barrel?
> A. Yes, and a wooden box.
> Q. And there was no cover on the tin?
> A. No, sir.

Arthur H. Sutherland, a policeman, testifies that he was coming along the hallway on the second floor, and saw flames coming out from underneath the swinging doors of the elevator shaft referred to, and, opening the door, found it on fire on the inside; and he says:

> I looked around at the back, and it looked like there was some waste paper in a basket burning.

He says the door itself was on fire, and the flames and smoke were coiling up to the ceiling. There were cinders flying, and what appeared to be charred paper or something like that. He yelled "Fire," and ran out to the fire alarm box, and from there saw fire coming out at the eaves at the top of the building.

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The jury found, as to the claim for death of the husband,

(1) that the defendant caused or allowed inflammable refuse to be deposited beside the elevator shaft and failed to safeguard such refuse against the danger of fire;

(2) that the defendant was thereby guilty of negligence causing the death of the plaintiff's husband;

(3) that the defendant assumed a contractual obligation expressed or implied, to the plaintiff's husband, to provide reasonably adequate provision for the deposit of refuse;

(4) that the defendant, in breach of such contractual obligation, was guilty of negligence causing the death of the plaintiff's husband;

(5) that such condition amounted to a trap or concealed danger created by the defendant and caused the death of the plaintiff's husband.

(6) that the plaintiff's husband was not guilty of contributory negligence.

They assessed the damages at $10,000.

As to the claim for personal injuries, the jury made the same findings as those set out above in numbers 1 and 2, and found that the condition amounted to a trap or concealed danger which caused the plaintiff's injuries and loss; and that the plaintiff was not guilty of contributory negligence; and that her damages were $5,000, and expenses to date, $2,300, and judgment was entered for the plaintiff accordingly.

This judgment was set aside by the unanimous judgment of the Court of Appeal (1).

The first argument in the appellant's factum is that the principle of *Rylands* v. *Fletcher* (2) applies. In that case, the defendant constructed a reservoir on his own land, and the water escaped into an adjoining mine, and flooded the mine. The defendant was held liable. The principle laid down is as follows:

> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

(1) 39 Man. L.R. 399; [1931] 1 W.W.R. 782.

(2) (1868) L.R. 3 H.L. 330.

This principle has no application here, because the garbage brought to the cans did not escape and do the damage complained of.

Musgrove v. *Pandellis* (1) likewise has no application. There, petrol in the carburettor of an auto for an unknown reason took fire when the unskilled operator of the auto started the engine. The operator negligently omitted to turn off the tap to prevent further petrol flowing from the tank to the carburettor; and the fire spread and did damage to the plaintiff. The ground of the decision was the negligence of defendant's servant in failing to control the fire after it started, which he could easily have done.

In *Job Edwards Limited* v. *Birmingham Navigations* (2), there is nothing that in any way assists the appellant, as the question was as to control of a fire after it had started accidentally.

In *Smith* v. *London and Southwestern Railway Company* (3), workmen employed by a railway company in cutting grass and trimming the hedges bordering the railway, placed the trimmings in heaps near the line and allowed them to remain there fourteen days, during very hot dry weather in the month of August. Fire from a passing engine of defendant company ignited one of these heaps and spread to the dry hedge, and was thence carried by a high wind across a stubble-field and a public road and burned the goods of the plaintiff in a cottage. It was held that the defendants were liable, although there was no suggestion that the engine was improperly constructed or driven. This, of course, is the case of a fire started by the defendants, and the negligence was that it was known to the defendants that their engine emitted sparks, and that they might, under the circumstances, have contemplated the probability of these sparks igniting the dry heaps of refuse and the hedge, and thus spreading, so as to cause damage.

Laidlaw v. *Crow's Nest Southern Railway Company* (4), is a case in this court where it was held that, where the railway company had no knowledge of the existence of a fire on their right of way not caused by the operation of the

(1) [1919] 2 K.B. 43.
(2) [1924] 1 K.B. 341.
(3) (1870) L.R. 5 C.P. 98.
(4) (1909) 42 Can. S.C.R. 355.

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railway, the fact that the condition of the right of way, covered with fallen timber and dry brush of a very inflammable character, which facilitated the spread of the fire to adjoining property, did not constitute actionable negligence. This case seems to apply here, as it holds that the mere deposit and accumulation of inflammable material on an owner's premises does not make him responsible for damages resulting from a fire started in that material by someone else without his knowledge, though he might become responsible, after becoming aware of the existence of the fire, for neglecting to prevent its spread to the property of another. In the present case there is no pretence that the fire was started by the respondent proprietor, or that the proprietor was negligent in failing to prevent its spread.

So far as the appellant's action for damages for the death of her husband is concerned, it is perfectly clear, under the authorities, that she cannot recover unless the husband would have had a right of action arising out of the wrong complained of if he had lived. *C.P.R.* v. *Parent* (1). The plaintiff's husband, at the time of the fire, was the tenant of the respondent company under a written lease, and it is settled law that a tenant takes the premises as they are and at his own risk, no matter what condition of visible danger there may be. *Robins* v. *Jones* (2).

In *Lane* v. *Cox* (3), Lopes, L.J., has the following:

> A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant, or to the customers or guests of the tenant, for any accident which may happen to them during the term, unless he has contracted to keep the house in repair. * * * There cannot be a liability for negligence unless there is a breach of some duty; and no duty exists in this case to the tenant, and none can be alleged to strangers.

See also *Taylor* v. *The People's Loan and Savings Corporation* (4).

The obligation of the respondent to the appellant's husband was a contractual obligation, under which he leased the premises and the approaches by which he had access to them, as they were. From his residence there prior to, at the time of, and subsequent to the making of the lease, the arrangement for the disposal of garbage existed just as it

(1) (1915) 51 Can. S.C.R. 234; [1917] A.C. 195.
(2) (1863) 15 C.B. (N.S.) 221.
(3) [1897] 1 Q.B. 415, at 417-418.
(4) [1930] Can. S.C.R. 190.

did at the time of the fire, and he and the plaintiff knew of that condition, and made use of the facility provided for the disposal of garbage, just as other tenants did, and, according to her evidence, the plaintiff herself was a chief offender in creating the condition of danger that she complains of. If this garbage, deposited as it was, constituted an evident danger, it was not a hidden danger, but a danger that was as obvious to the tenant and his wife, the appellant, as to the landlord. The suggestion is that the fire occurred through the negligence of some of the other tenants. If so, the appellant's husband in his lease contracted that the landlord should not be liable to him for such negligence.

Numerous decided cases make it abundantly clear that the plaintiff under the circumstances is not entitled to recover damages for her own injuries and loss. In *Cavalier* v. *Pope* (1), the owner of a dilapidated house covenanted with his tenant for repair, but failed to do so. The tenant's wife, who lived in the house and was well aware of the danger, was injured by an accident caused by the want of repair. Held, that the wife, being a stranger to the contract, had no claim for damages against the owner. Lord Macnaghten, at page 430, makes the following statement:

> The wife, who was not the tenant, cannot be in a better position to recover damages than a customer or guest.

In *Groves* v. *Western Mansions Limited* (2), the plaintiff was the wife of the tenant of a room on the first floor of a building which was let by the defendant in separate tenements. Several of the tenements, including that of the plaintiff, were approached by a common staircase. The plaintiff went out of her room to the landing in order to draw water from a tap on the landing. She found that a tap on the landing immediately above had been left running, and she went to the upper landing to stop it. On the way down she slipped on a defective step and suffered personal injuries. She sued the defendants for damages for negligence. Held, that proof of the existence of a concealed trap was essential to the cause of action, and, as the plaintiff could not show that, it was held that she was not entitled to damages.

(1) [1906] A.C. 428. (2) (1916) 33 T.L.R. 76.

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In *Lucy* v. *Bawden* (1), the defendant was the owner of a house which consisted of a basement and two upper floors, the rooms on each floor being separately let. The house was entered by a front door on the ground floor level, which was approached from the street by a flight of six or seven steps protected on each side by a coping about eight inches high. On either side of the steps was an area. The steps remained in the defendant's possession and control. The plaintiff, wife of one of the tenants occupying the house, slipped on the steps and fell into the area, sustaining injuries. The jury found that the defect in the steps consisted in the absence of a railing, which was due to the negligence of the defendant, and that both plaintiff and defendant knew before the accident of the existence of the defect. It was held that, as the danger was patent, the landlord was not liable.

In *Fairman* v. *Perpetual Investment Building Society* (2), the defendants owned a block of flats, which they let to various tenants, the defendants keeping control of the staircase giving access to the flats. The stairs were made of cement reinforced by iron bars embedded in the cement. Owing to wear, the cement became scooped out, and the plaintiff, who lodged with her sister in a flat on the fourth floor, of which the sister's husband was tenant, while descending the stairs, caught her heel in a depression so formed, and was injured. It was held that the only duty owed by the defendants to the plaintiff was not to expose her to a concealed danger or trap, all of the five judges agreeing in this view of the law. Two of them, however, dissenting from the majority, were of opinion that the defect in fact constituted a trap. The previous cases are reviewed, and *Miller* v. *Hancock* (3) is held to be incorrect, unless upon the assumption that there was in that case a concealed trap, the existence of which is not stated in the case. At page 84, Lord Buckmaster says:

> I have only to add that the plaintiff was a lodger to one of the defendants' tenants; she had therefore a material interest in the use of the premises and could not be regarded as a mere guest or casual visitor.

(1) [1914] 2 K.B. 318. (2) [1923] A.C. 74.
(3) [1893] 2 Q.B. 177.

Lord Atkinson points out that, as between the plaintiff and the tenant, the plaintiff had an interest, but goes on to state (p. 86) that,

> The plaintiff, being only a licensee, was therefore bound to take the stairs as she found them, but the landlord was on his side bound not to expose her, without warning, to a hidden peril, of the existence of which he knew, or ought to have known. He owed a duty to her not to lay a trap for her. But even if the plaintiff was in the position of an invitee of the defendants, her rights and duties in that character would be those described and measured by the well-known passage from Willes J.'s judgment in *Indermaur* v. *Dames* (1).

In the latter case, upon the premises of the defendant, a sugar refiner, was a hole or chute on a level with the floor, usual and proper in the defendant's business. When not in use, it was necessary that it should be open for the purpose of ventilation, but it was not necessary, when so open and not in use, that it be unfenced. The plaintiff was a gas-fitter in the employ of a patentee who had fixed a patent gas regulator on defendant's premises, for which he was to be paid if it effected a saving in the consumption of gas. He went upon the premises with his employer's agent to test the new apparatus. Without negligence on his part, as the jury found, he fell through the hole and was injured. Held, that as plaintiff had a right to go there, defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced. At page 289, the plaintiff is given a right to amend the declaration by stating the facts as proved:

> * * * in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was there near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, etc.

I make this quotation because it shows that a necessary allegation was that the defendant knew of the dangerous condition, and the plaintiff did not know.

It is clear, therefore, that in order to succeed in her action for personal injuries and loss it was necessary that the appellant should establish the existence of some concealed trap. There is no evidence of anything of the sort; and the negligence on the part of the defendant found by the jury does not in law constitute actionable negligence. There

(1) (1866) L.R. 1 C.P. 274, 288.

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was, of course, no evidence of the contractual obligation found in the answers to Questions 3 and 4.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Alex. Farquhar.*

Solicitors for the respondent: *Johnson & Bergman.*

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*Oct. 21.
*Dec. 22.

EDWARD GLESBY (PLAINTIFF).....APPELLANT;

AND

J. BERT MITCHELL (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Promissory note—Consideration—Alleged agreement not to negotiate after maturity—Admissibility of evidence—Questions for jury—Appeal—Jurisdiction—Appeal from order directing new trial—"Exercise of judicial discretion" (Supreme Court Act, R.S.C., 1927, c. 35, s. 38).

Plaintiff sued upon two promissory notes made by defendant to L. and transferred, after maturity, and not for value, to plaintiff. They were renewals for the balance unpaid of a previous note from defendant to L. There was conflicting evidence as to the reason and consideration for giving the original note. L. asserted that the note was given for the amount owing to him by defendant on a loan. Defendant asserted that the note was for L.'s accommodation; that the loan from L., asserted by L. to have been made to defendant, had in fact been made to one R., that subsequently L. wanted the money, R. could not then pay, that defendant gave the note (for the same amount as that owing by R.) to enable L. to raise money, but received no consideration, that it was agreed that defendant was not to be called upon to pay the note or any renewals, and that the note or any renewals would not be negotiated after maturity. The trial judge withdrew the case from the jury and gave judgment for plaintiff, holding that any verdict, other than that the original note was given in consideration either of a loan by L. to defendant or of a debt due by R. to L. (the taking of the note in such case involving a forbearance or suspension of L.'s remedy against R.) could not be sustained, and that, in either case, defendant was liable. The Supreme Court of Nova Scotia *en banc* (by a majority) ordered a new trial. Plaintiff appealed.

Held, affirming judgment of the Court *en banc* (3 M.P.R. 507), that there should be a new trial, as the questions whether the note was given simply for L.'s accommodation or in consideration of a debt due by

*Present at hearing of the appeal: Newcombe, Rinfret, Lamont, Smith and Cannon JJ. Newcombe J. took no part in the judgment, as he died before the delivery thereof.

defendant or by R., and whether there was an agreement, as alleged by defendant, that the note should not be negotiated after maturity, should have been submitted to the jury.

Parol evidence is admissible to shew that a promissory note was given without consideration, even though it contains the words "value received." In the present case, should it be found as a fact on parol evidence that the note was given simply for L.'s accommodation, the action must be dismissed, as plaintiff stood in no better position than L.

Extension of time for payment of a debt owing by a third person may be a good consideration from the payee to the maker of a promissory note. But in the present case, on the evidence, the jury, while they might have found, were not bound to find, that there was given such an extension of time in consideration of the note. A person, unable for the time being to collect from a debtor, may arrange with another to take that other's note for the same amount for his own accommodation, without thereby extending the time for payment by his debtor, and without imposing liability to him on the maker.

Even should the jury find that the note was given for a valuable consideration, but should find that the alleged agreement existed not to negotiate it after maturity, plaintiff's (though not L.'s) right to recover would be defeated. Oral evidence of such an agreement was admissible.

Per Lamont J.: Evidence of an oral agreement that the maker of a note is not to pay it at maturity, or that it is to be renewed, is not admissible.

Held, also, that this Court had jurisdiction to hear the appeal; the order of the Court *en banc* directing a new trial was not one "made in the exercise of judicial discretion" within the meaning of s. 38 of the *Supreme Court Act* (discussion as to when or when not an order for a new trial may be said to have been made in the exercise of judicial discretion). Where a party is held entitled to a new trial as a matter of right, the order granting it cannot be said to be made in the exercise of judicial discretion; and it is a matter of right where he is entitled under the law to have the facts of his case determined by the jury and that has been denied him.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *en banc* (1), setting aside the judgment of Ross J. (2) in favour of the plaintiff, and ordering a new trial.

The action was upon two promissory notes. The trial judge, Ross J. (2), after hearing the evidence and argument of counsel, withdrew the case from the jury and subsequently filed his decision allowing the plaintiff's claim with costs. The Supreme Court *en banc* (1) ordered a new trial, holding that the case should not have been withdrawn from the jury.

(1) 3 M.P.R. 507; [1931] 2 D.L.R. 675.
(2) 3 M.P.R. 507, at 508; [1931] 2 D.L.R. 675, at 675-6.

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The material facts of the case and the questions at issue are sufficiently stated in the judgments now reported and are indicated in the above head-note. The plaintiff's appeal to this Court was dismissed with costs.

The respondent (defendant) moved by way of appeal from an order of the Registrar affirming the jurisdiction of this Court to hear the appeal, the ground taken by the respondent being that the judgment of the Supreme Court of Nova Scotia *en banc* ordering a new trial was an order "made in the exercise of judicial discretion" within the meaning of s. 38 of the *Supreme Court Act*. Respondent's motion was dismissed with costs.

H. P. MacKeen for the appellant.

A. W. Greene K.C. for the respondent.

The judgment of Rinfret and Smith JJ. was delivered by

SMITH J.—The respondent, Mitchell, and one Robinovitch, were interested in a joint stock company in the City of Halifax, and one, Lerner, was for a time an employee of the company. In the spring of 1924 Lerner received the sum of $19,000 from St. John, which Lerner in his evidence says he turned over to the respondent, Mitchell, as a loan. Mitchell in his evidence denies that this money was lent to him, and says that he never received any of it, but that Lerner lent it to his (Lerner's) brother-in-law, Rabinovitch, who, in turn, lent it to the company of which he was manager and chief stockholder. Four thousand dollars was paid to Lerner on this loan, which Mitchell says was paid by Rabinovitch out of the funds of the company. On March 7, 1925, Mitchell gave his promissory note to Lerner for $15,000 which was the amount of the balance then owing on Lerner's advance of $19,000. Two promissory notes payable to Lerner, one for $10,000, dated July 9, 1925, and the other for $2,500, dated December 23, 1925, were signed by Mitchell, the respondent, and given to Lerner, which are renewals for the balance unpaid of the $15,000 note. After maturity of these two notes Lerner transferred them to the plaintiff, appellant, Glesby, who paid nothing for them and holds them simply for collection on behalf of Lerner. The appellant, therefore, has no higher rights

against the respondent than if Lerner himself were the plaintiff. The learned trial judge, at the conclusion of the evidence, withdrew the case from the jury upon the following ground:

> I thought that any verdict of the jury, other than that the note was given either in consideration of an actual loan made by Lerner to defendant or in consideration of the debt due by Rabinovitch to Lerner, could not possibly be sustained. The taking of the note in the latter case involved a forbearance or suspension of plaintiff's remedy against Rabinovitch and would, it seems to me, constitute a good consideration. On the evidence of the defendant himself and his own witness, Mr. Dickie, it was clear that Lerner was pressing Rabinovitch for his money, and hence the reason for the making of the note by defendant. Russel on Bills, 2nd edit., pp. 203-208; Byles on Bills, 18th edit., p. 127.

A promissory note, like any other promise, cannot be enforced, as between the parties, unless there is a consideration for the promise, and it is open to the promisor, by parol evidence, to show the lack of consideration; *Abbot* v. *Hendricks* (1). Here the maker, Mitchell, swears that no money was advanced to him, that he owed Lerner nothing at the time of giving the note, that Lerner's loan was to Rabinovitch, and that the note was for Lerner's accommodation. It was open to the jury to believe all this.

Nevertheless, if, in consideration of the note, Lerner agreed to extend the time for payment by Rabinovitch, there was a good consideration. There is no evidence that any such agreement was made in express language and the effect of Mitchell's evidence is that there was no such agreement. There was, however, the evidence of what was said by Rabinovitch, Lerner and Mitchell in connection with the giving of the note and the jury could, had they seen fit, have drawn from that evidence the inference that there was given such extension of time in consideration of the note, but they were not bound to draw such inference. A party, being unable for the time being to collect a debt due to him from a debtor, may arrange with another to take that other's promissory note for the same amount for his own accommodation, without thereby extending the time for payment by his debtor, and without imposing liability to him on the maker.

It is a question of what the bargain in connection with the giving of the note really was, and where there is a dis-

(1) (1840) 1 Man. & G., 791.

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pute as to what the terms of the bargain were, the fact must be determined, in a jury trial, by the jury.

The learned trial judge here withdrew this question from the jury and undertook to decide it for himself under the erroneous impression that on the evidence the question could only be decided in one way, namely, that there was an agreement for extension of time.

The respondent, Mitchell, had a legal right to have this question with others passed upon by the jury, and the Appellate Court in granting a new trial was not exercising a discretion but, as in duty bound, was granting to the respondent what was his legal right.

Mitchell in his examination in chief says, " and the note was never to pass out of his hands, not to be placed for collection with anybody else."

Then on cross-examination he says that two affidavits made by him and filed as exhibits " truly set forth the circumstances to which they relate."

Next he says, Lerner told him he was going to raise money on the notes and supposes he would discount them.

One of the affidavits filed has the following statement:

> And it was expressly agreed between said Lerner and myself that the said note for $15,000 and any renewal or renewals thereof would not at maturity or thereafter be negotiated.

Mitchell's witness, Dickie, gives a somewhat different story of the conversation about negotiation of the note, but if the evidence was admissible it was open to the jury to find that there was an agreement between Mitchell and Lerner that the note should not be negotiated or transferred after maturity, as it in fact was.

It is urged on behalf of the plaintiff, appellant, that this oral evidence was not admissible because it tends to vary the terms of the written instrument.

The rule against the acceptance of oral evidence to contradict or vary a promissory note is not different in principle from the rule in reference to other written documents, but there are cases in which, as among parties other than a holder in due course, parol evidence may be given to control what would, in the absence of other evidence, be the effect of the document. Byles on Bills, 19th ed., 104.

In the present case, if the jury should find that the note in question was made for the accommodation of Lerner the

action must be dismissed, because the plaintiff, having taken the note after maturity without giving any consideration for it, stands in no better position than Lerner himself. If, however, the jury should find that the note was given for a valuable consideration, then the question of the alleged agreement not to negotiate after maturity and of the admissibility of the oral evidence as to such an agreement must be considered.

That oral evidence of such an agreement is admissible seems to be settled by authority.

In *Sturtevant* v. *Ford* (1), Erskine J. says:

> The circumstance that the bill was overdue might have operated as evidence that the bill was an accommodation bill, but it should have been averred. A jury might infer that the bill was accepted upon an understanding that it was not to be negotiated after it became due. But that would not be an inference of law; it should therefore have been made the subject of an averment.

He is evidently speaking of an inference to be drawn from oral evidence.

In *Parr* v. *Jewell* (2), the judgment is as follows:

> The court are unanimously of opinion in this case,—and after some little doubt at first entertained by one of its members,—that there should be a *venire de novo*. The case mainly relied on for the defendant in error was that of *Charles* v. *Marsden* (3), where it was held, that it is not a defence to an action by the indorsee of a bill of exchange, to plead that it was accepted for the accommodation of the drawer, without consideration, and was indorsed over after it became due. But, in that case, the question arose upon the pleadings; whereas, here it is presented upon the evidence. And we think that, under the circumstances stated in this bill of exceptions, there was evidence for the jury of an engagement on the part of Allen not to negotiate the bill mentioned in the second count after it became due; therefore, without going further into the case, it is enough to say that there must be a *venire de novo*.

The evidence there referred to was oral evidence. Platt B., in the course of the argument, says, "The fact of its being an accommodation bill is evidence for a jury that it was given for the purpose of being used before it should become due," and again, "Here it is a question of evidence."

In these cases their Lordships were dealing with an accommodation note, but an accommodation note is a written document just as a note for value is a written document and the same principle as to admissibility of oral evidence of a collateral agreement in connection with the one must

(1) (1842) 11 LJ.C.P. 245; 134 Eng. Repts. 42.
(2) (1855) 16 C.B. 684, at 712; 139 Eng. Repts. 928, at 939.
(3) (1808) 1 Taunt. 224.

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be applied to the other though the effect of such an agreement may be different according to circumstances. In the present case the effect of the agreement, if the jury should find that it existed, is to defeat this plaintiff's right to recover but not Lerner's right to recover if the note was for value.

It is, of course, always competent in such a case for the court to substitute or add as plaintiff, with his consent, the proper party to sue, and, if justice requires it, to impose terms.

The appeal must be dismissed with costs.

The motion must also be dismissed with costs.

LAMONT J.—In this action the appellant sues on two promissory notes, one for $10,000, dated July 9, 1925, and due 90 days after date, and the other for $2,500, dated December 23, 1925, and due one month after date and on which there was a balance claimed of $1,000. Both notes were made by the respondent in favour of M. H. Lerner, and were renewals of the amount unpaid on a note for $15,000, dated March 7, 1925, between the same parties. The defences of the respondent are:—

1. That the original note was given for the accommodation of Lerner and the respondent received no consideration therefor, and

2. That the renewal notes were negotiated to the plaintiff after maturity and in breach of an agreement between the respondent and Lerner that neither the note nor any renewal thereof would be negotiated after maturity.

At the trial the appellant did not give evidence but Lerner admitted that the appellant acquired the notes after maturity.

The story of the respondent is that in the spring of 1924 Lerner, his brother-in-law H. Rabinovitch, Rabinovitch's brother and himself were all interested in the Franco-Canadian Import Company; that the company was controlled by Harry Rabinovitch, but that he (respondent) was the financial man behind it and that the company's moneys were kept in a bank in a special account in his name, and that he was the one who signed cheques on behalf of the company; that during that spring Lerner received a bank manager's cheque for $19,000, his share of another trans-

action, which cheque was indorsed over to Rabinovitch who put it into the Franco-Canadian Import Company's business, and that the transaction constituted a loan from Lerner to Rabinovitch. The respondent further says that in November, 1924, the company paid to Lerner $4,000 on the loan; that shortly afterwards Lerner left the company's employ but before leaving he demanded from Rabinovitch the payment of $15,000, the balance of the loan; that Rabinovitch had not the money, nor could the company furnish it; that Rabinovitch offered Lerner his note but that Lerner said he was going west to start in business and he could not use either the note of Rabinovitch or that of the company, but that he could use the respondent's note. The respondent says that, after some consideration, he agreed to give Lerner a note to enable him to obtain money to start in business in the west but received no consideration therefor and it was understood and agreed that he was not to be called upon to pay it as it was not a debt of his, but that Rabinovitch or the company would meet it at maturity, or, if they could not, it would be renewed on the same terms.

Lerner's story is very different. He says that when the cheque for $19,000 came to him the respondent asked for the loan of the money; that he indorsed the cheque and handed it to the respondent; that $4,000 had been paid upon it by respondent's cheque, "possibly on the special account," and that when he was leaving for the west he asked the respondent for the balance of the loan; that the respondent said he did not have the money but would give him a note for it, which he did. He said that Rabinovitch had not borrowed the money and did not owe it to him, and he makes no suggestion that he loaned it to the company.

The $19,000 cheque was not produced at the trial nor was Rabinovitch called to give evidence.

Another witness, one Fred W. Dickie, who for a time had been secretary of the company, testified that at the time Lerner was leaving for the west, he, Lerner and Rabinovitch were in the office together when there was a discussion between Lerner and Rabinovitch as to the repayment of the balance of the $19,000 loan made to Rabinovitch. Rabinovitch said he did not have the money and

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that the company could not raise it, but that he would give Lerner his note. Lerner was not willing to take his note, and just then the respondent came in and there was a general discussion in which the respondent was asked to sign or indorse a note, which at first he did not want to do, but finally agreed to do so on the understanding that it was to be paid by Rabinovitch or the company and that it would not be negotiated in a Halifax bank.

On the above evidence the trial judge withdrew the case from the jury on the ground that any verdict given by them, other than that the original note was given in consideration of a loan made by Lerner to the respondent or in consideration of a debt due by Rabinovitch to Lerner, could not be sustained and that, in either case, the respondent would be liable. He therefore gave judgment for the plaintiff. On appeal to the Supreme Court of Nova Scotia *in banco,* the court, by a majority, ordered a new trial, thinking that the case should have been left to the jury. From that decision this appeal is brought.

The appellant's first contention was that, if the jury accepted Lerner's evidence that the notes were given in consideration of a loan from Lerner to the respondent, judgment for the appellant would follow. The soundness of this proposition is admitted by the respondent.

The appellant's next contention was that, if the jury disregarded Lerner's evidence, no verdict, other than that the notes were given in consideration of a debt due by Rabinovitch to Lerner, could be sustained, and that, if given for such consideration, the defence based on the ground that it was an accommodation note must fail.

In support of this contention the appellant referred to Byles on Bills, 19th ed., at page 129, where the learned author says:—

> A subsisting debt due from a third person is a good consideration for a bill or note, at least if the instrument is payable at a future day, for then it amounts to an agreement to give time to the original debtor, and that indulgence to him is a consideration to the maker.

This statement of the law is quoted with approval by this court in *Gallagher* v. *Murphy* (1).

In *Allen* v. *Royal Bank of Canada* (2), Lord Atkinson, in giving the judgment of the Privy Council, said:—

(1) [1929] Can. S.C.R. 288, at 293; [1929] 2 D.L.R. 124, at 127.

(2) (1925) 95 L.J. P.C. 17, at 20-21.

In the last edition of *Byles on Bills*, that is, the edition of 1923, at p. 232, the rule of the law is stated in these terms: "If a bill or note be taken on account of a debt and nothing be said at the time, the legal effect of the transaction is this—that the original debt still remains, but the remedy for it is suspended till maturity of the instrument in the hands of the creditor." And the remedy is equally suspended if the bill or note be given, not by the debtor, but by a stranger.

With these statements of the law the respondent has no quarrel. He does quarrel, however, with their application to this case. He contends that here there could be no agreement, express or implied, to extend the time for payment by Rabinovitch of his debt, nor any forbearance to sue him, because Lerner himself swore that Rabinovitch did not borrow the money and was not indebted to him in respect thereof. If Rabinovitch was not indebted to Lerner, Lerner's acceptance of the respondent's note could not amount to an agreement to give time to Rabinovitch, which is the only consideration suggested for the respondent's note, other than that he borrowed the money himself.

In his notes the trial judge says:—

I thought that any verdict of the jury, other than that the note was given either in consideration of an actual loan made by Lerner to defendant or in consideration of the debt due by Rabinovitch to Lerner, could not possibly be sustained. The taking of the note in the latter case involved a forbearance or suspension of plaintiff's remedy against Rabinovitch and would, it seems to me, constitute a good consideration. On the evidence of the defendant himself and his own witness, Mr. Dickie, it was clear that Lerner was pressing Rabinovitch for his money and hence the reason for the making of the note by defendant.

It is quite clear that the trial judge did not believe Lerner when he swore that he had loaned the money to the respondent, and it may be that the jury would not have believed him either, but, even so, they might have had difficulty in ascribing to Lerner "a suspension or forbearance of his remedy against Rabinovitch" in the face of his own sworn statement that Rabinovitch did not owe him any money. Apart from that, however, the respondent argues that if the jury had rejected Lerner's evidence they were not driven to find that the note was given for Rabinovitch's indebtedness; that they had another alternative, testified to by the respondent, namely, that the note was given simply for the accommodation of Lerner to enable him to raise money with which to start business in the west and on the understanding that the respondent was not to be called upon to pay it, but that it was to be paid by

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others, and if they did not meet it at maturity, it was to be renewed.

As against this, the appellant contends that evidence of an oral agreement that the respondent was not to be called upon to pay the note or that it would be renewed or was not to be negotiated, is inadmissible as it would contradict or vary the terms of the written contract contained in the note.

In my opinion, evidence of an oral agreement that the maker of a note is not to pay it at maturity, or that it is to be renewed, is inadmissible. *New London Credit Syndicate* v. *Neale* (1); *Young* v. *Austen* (2); *Abrey* v. *Crux* (3). The terms of the contract contained in each of the notes sued on are that at a certain time after date the respondent will pay to M. H. Lerner the sum therein set out at the place therein specified. Parol evidence to contradict these terms is not admissible. Parol evidence, however, is admissible to shew that the original note was given without consideration even although it contained, as do the renewals, the words "value received." Taylor on Evidence, 11th ed., 780 and 781.

In Phipson on Evidence, 7th ed., at page 563, the author says:—

> Want or failure of consideration may, under proper pleadings, always be proved to impeach a written agreement not under seal, even though, as in the case of bills and notes, the words "for value received" are inserted.

And in *Barton* v. *Bank of New South Wales* (4), the Privy Council stated the law as follows:—

> Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where in the deed itself the reasons for making it, and the considerations for which it is granted, are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution.

In Falconbridge on Banking and Bills of Exchange, 4th ed., at page 662, the rule is summed up in these words:—

> Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value (s. 58), but evidence may be given of absence of consideration, or its failure, total or partial.

(1) [1898] 2 Q.B. 487.
(2) (1869) L.R. 4 C.P. 553.
(3) (1869) L.R. 5 C.P. 37.
(4) (1890) 15 App. Cas. 379, at 381.

In my opinion, the words " value received " do not constitute a term of the contract the varying or altering of which by parol evidence is prohibited by the rules. They are no more than an acknowledgment or receipt which in general is only *prima facie* evidence, and does not prevent the real consideration from being shewn. Original absence of consideration for the giving of a note is a matter of defence against an immediate party or a remote party who is not a holder for value. *Bills of Exchange Act,* s. 55 (2). Parol evidence was, therefore, admissible to shew that the note was given simply for the accommodation of Lerner.

There is no evidence before us that the appellant was a holder for value. In the statement of claim it is not alleged that he was, and his counsel admitted on the argument that he could not stand in any better position than Lerner himself had be brought the action. If, therefore, it should be found as a fact that the note was given simply for Lerner's accommodation, it would, in my opinion, be a good defence, for where an accommodation note is paid in due course by the party accommodated, the note is discharged. *Bills of Exchange Act,* sections 139 and 186. And if Lerner ever discounted the renewals, he must have paid them himself at maturity for they were in his possession when he indorsed them after maturity to the appellant. The duty of determining whether the note was given simply for Lerner's accommodation or in consideration of a debt due by the respondent or by Rabinovitch, was a matter for the jury and, in my opinion, the trial judge erred in withdrawing the case from them.

The respondent also raises a further point. In his affidavit put in as evidence by the appellant, he states as follows:—

> And it was expressly agreed between said Lerner and myself that the said note for $15,000 and any renewal or renewals thereof would not at maturity or thereafter be negotiated as I did not want said original note or renewal notes to fall into the hands of any person or persons for collection.

If the note was given pursuant to such an agreement, its negotiation, in breach of the agreement, would, in my opinion, constitute a defence against the plaintiff. In *MacArthur* v. *MacDowall* (1), Mr. Justice Patterson says:

(1) (1893) 23 Can. S.C.R. 571, at 594-595.

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The plaintiff took a note which was overdue and which was an accommodation note. The circumstance that it was an accommodation note would not in itself interfere with the negotiation of it after it was due; but, being overdue, the plaintiff could take it only as subject to its equities. An agreement not to negotiate an accommodation note after it was due would be such an equity. We find that asserted in a series of cases from *Charles* v. *Marsden* (1) downwards. All the cases on the subject, as late as the year 1868, will be found commented on by Mallins V.C. in *Ex parte Swan* (2), in a dissertation which may be referred to in place of citing the various cases.

See also Falconbridge on Banking and Bills of Exchange, at page 663; Byles on Bills, 19th ed., page 178.

If the note was not given for value the fact that it was given pursuant to such an agreement is immaterial. But if it be found that the note was given for value, and also found that it was given pursuant to the alleged agreement, the action would fail unless Lerner were made a party plaintiff. Whether or not there was such an agreement is a question of fact to be determined by the jury.

The respondent launched a motion to quash the appeal. That motion was based upon the contention that this court had no jurisdiction to hear the appeal because the order directing a new trial was made by the court *in banco* in the exercise of its judicial discretion, and from such an order no appeal lies to this court.

The relevant sections of the Act are sections 36 and 38, which read:—

36. Subject to sections thirty-eight and thirty-nine hereof, an appeal shall lie to the Supreme Court from any judgment of the highest court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such court is a court of appeal or of original jurisdiction (except in criminal causes and in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge, or in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty) where such judgment is,

(*a*) a final judgment; or

(*b*) a judgment granting a motion for a nonsuit or directing a new trial.

38. No appeal shall lie to the Supreme Court from any judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the province of Quebec.

An appeal, therefore, lies to this court from an order directing a new trial made by the highest court of final

(1) (1808) 1 Taun. 224. (2) (1868) L.R. 6 Eq. 344.

resort in a province unless the order was made by the court in the exercise of its judicial discretion.

We were not directed to any case in which this court laid down the test by which to determine when an order for a new trial would be appealable under section 36, and not appealable as made in the exercise of judicial discretion. The circumstances of each case must be considered. One thing, however, is clear, and that is, that where a party in whose favour the order is made is entitled to a new trial as a matter of right, the new trial cannot be said to have been made in the exercise of the court's discretion. Where a party is entitled under the law to have the facts of his case determined by the jury and that has been denied to him, he is entitled to a new trial as a matter of right.

On the other hand, where a new trial is directed because the first trial was unsatisfactory, whether from a failure on the part of the jury to so answer the questions as to enable the court to dispose of the rights of the parties, or where the evidence has left material matters in a state of uncertainty, the order for a new trial may be said to have been made in the exercise of judicial discretion. On this point the following authorities are instructive: *Barrington* v. *The Scottish Union and National Ins. Co.* (1); *Accident Insurance Company of North America* v. *McLachlan* (2); *Town of Aurora* v. *Village of Markham* (3); *Canada Carriage Company* v. *Lea* (4).

The respondent's motion should be dismissed with costs, as should also the appellant's appeal.

CANNON J.—The plaintiff, appellant, recovered judgment before the Supreme Court of Nova Scotia as endorsee against the defendant, respondent, as maker of two promissory notes dated the 9th day of July, 1925, and the 23rd December, 1925, for $10,000 and $2,500 respectively, in favour of one Moses Harry Lerner and endorsed by him to the appellant. An amended defence was filed on the 24th February, 1930, in which the respondent pleaded in effect:

(*a*) that the notes sued on were given for the accommodation of Lerner, the respondent receiving no consideration therefor;

(1) (1891) 18 Can. S.C.R. 615.
(2) (1891) 18 Can. S.C.R. 627.
(3) (1902) 32 Can. S.C.R. 457.
(4) (1906) 37 Can. S.C.R. 672.

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(*b*) that the said notes were negotiated to the appellant after maturity, in breach of an agreement between the respondent and Lerner, made in April, 1925, whereby it was agreed that the said notes should not be negotiated after maturity.

The appellant appealed from the order allowing the amendment, on the ground that the respondent's own affidavit, used in support of his application to amend, showed that the amended defences were false and no answer to respondent's claim.

The court *in banco* (Harris C.J. and Paton J. dissenting) dismissed the appeal; and Mellish J., with whom Chisholm and Graham JJ. concurred, said:

> The amended defence allowed by Mr. Justice Ross in chambers is to the effect that the note sued on was given for the accommodation of the payee who negotiated it after maturity. This defence is, I think, a good one if established and I do not think it is disproved by the evidence before us.
>
> The appeal should therefore be dismissed with costs.

The case then proceeded on the merits before the Honourable Mr. Justice Ross, with a jury. The presiding judge withdrew the case from the jury and gave judgment for plaintiff for the following reasons:

> At the conclusion of the trial and on the application of counsel for the plaintiff I withdrew the case from the jury as I was of opinion that there was no evidence on which the jury could properly find in favour of the defendant. Whether the note was given in consideration of a loan made by Lerner to the defendant or in consideration of the debt due by Rabinovitch to Lerner, in either case the defendant would be liable. I thought that any verdict of the jury, other than that the note was given either in consideration of an actual loan made by Lerner to defendant or in consideration of the debt due by Rabinovitch to Lerner, could not possibly be sustained. The taking of the note in the latter case involved a forbearance or suspension of plaintiff's remedy against Rabinovitch and would it seems to me constitute a good consideration. On the evidence of the defendant himself and his own witness, Mr. Dickie, it was clear that Lerner was pressing Rabinovitch for his money and hence the reason for the making of the note by defendant. Russell on Bills, 2nd edit., pp. 203-208; Byles on Bills, 18th edit., p. 127. Plaintiff will have judgment for his claim with costs.

Defendant gave notice of appeal and asked for an order setting aside the decision of the trial judge and directing a new trial with a jury. The case came a second time before the Supreme Court of Nova Scotia *in banco,* and defendant's demand for a new trial was granted by Mellish, Graham and Carroll JJ., Paton and Chisholm JJ., dissent-

ing. This second judgment of the appellate court of Nova Scotia is now before us.

The jurisdiction of this court was affirmed by the Registrar, and notice of appeal from his decision was duly given and the respondent moves to quash the appeal under section 38 of the *Supreme Court Act,* upon the ground that the judgment or order of the Supreme Court of Nova Scotia directing a new trial was made in the exercise of judicial discretion.

Section 36 (*b*) of our Act gives an appeal to this court from any judgment of the highest court of final resort in any province of Canada directing a new trial, subject, however, to sections 38 and 39. The requirements of section 39 as to the amount in controversy in the appeal are assumed to be fulfilled in the present case; the only question raised by the motion is whether or not the judgment directing a new trial was made in the exercise of judicial discretion.

Order LVII of the Nova Scotia *Judicature Act,* paragraph 5, enacts:

* * * The court shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case requires. * * *

6. If upon the hearing of an appeal, it appears to the court that a new trial ought to be had, it shall be lawful for the court to order that the verdict and judgment be set aside, and that a new trial be had.

The following is found in Stroud's Judicial Dictionary, second edition, *verbo* Discretion, pp. 541-542:

"There be several degrees of Discretion,—*Discretio generalis, Discretio legalis, Discretio specialis,*—

"*Discretio generalis,* is required of every one in everything that he is to do, or attempt;

"*Legalis discretio,* is that which Sir E. Coke meaneth and setteth forth in *Rooke's and Keighley's Cases* (1), and this is merely to administer justice according to the prescribed rules of the law;

"The third Discretion is where the laws have given no certain rule . . . and herein Discretion is the absolute judge of the cause, and gives the rule."

* * *

You cannot lay down a hard-and-fast rule as to the exercise of Judicial Discretion, for the moment you do that "the discretion of the Judge is fettered" (per Brett, M.R., *The Friedeberg* (2); Vf, per Bowen, L.J., *Jones* v. *Curling* (3).

(1) *Rooke's Case,* 5 Rep. 100 a; *Keighley's Case,* 10 Rep. 140 b.

(2) (1885) 54 L.J.P.D. & A., 75; 10 P.D. 112.

(3) (1884) 53 L.J. Q.B. 373, 13 Q.B.D. 262.

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Bouvier's Law Dictionary, Rawle's Third Revision, *verbo* Discretion, says:

That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.

The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

In *National Life Assurance Company* v. *McCoubrey* (1), the present Chief Justice of this court, in discussing section 38, stated that

the judge in chambers (in granting speedy judgment), and the Court of Appeal in affirming him, necessarily determined judicially that the matters urged in answer to the plaintiff's plea were devoid of merit and afforded no substantial ground of defence. Such a decision and the order giving effect to it are not discretionary, although an order dismissing a motion for judgment, if based on the view that the suggested defences disclose matter which should be disposed of after trial rather than summarily upon motion, may be discretionary as well as not final.

This pronouncement, which was the unanimous judgment of this court composed of Anglin C.J.C., and Idington, Duff, Mignault and Newcombe JJ., should help us to determine the merits of the motion to quash. Can the judgment *a quo* be considered as given "*proprio motu*" by the appeal court under section 6 of the above Rule, or is it simply the giving, on legal grounds, of the order which ought to have been made by the trial judge? It is, I believe, the exercise of the power and duty of the court to enforce the rule that the jury must be allowed to pass on the facts as alleged by the parties, when the pleadings disclose a good defence in law and there is evidence to support it. Let us examine the reasons given by the majority judges of the Supreme Court of Nova Scotia. Have they determined judicially that the matters urged in answer to the action afforded a substantial ground of defence?

Mr. Justice Mellish says, in part:

This is an amended defence allowed in Chambers by Mr. Justice Ross. This court last year refused to strike out this defence as false on an appeal from that judge's decision allowing the amendment, the court being of opinion that the case should go to trial on the issues on the record.

The action came on for trial before Mr. Justice Ross with a jury. After the evidence was taken, he decided there was no case for the jury and gave judgment for the plaintiff.

(1) [1926] Can. S.C.R. 277, at 282.

I think the case should have been left to the jury.

We are bound by our previous decision and I think the evidence given on the trial strengthens it.

The term "accommodation note" was freely used by some of the witnesses without perhaps precisely realizing what it meant. There is a good deal of evidence that the notes were not to be negotiated at any time, and a jury, I think, would be quite justified in so finding, and if the notes were given without consideration such evidence would be quite admissible whether they were accommodation notes or not in the ordinary sense. Of course, as ordinarily understood, an accommodation note is intended to be negotiated before maturity but a note given as security for another man's debt may be without consideration and evidence, I think, can be adduced as against an overdue holder to show this and that the note was not to be negotiated. These questions are, I think, open on the evidence and have not been tried. The Defendant, whether legally bound to do so or not, recognized his liability to Lerner on the notes, but repudiated liability when they were negotiated. There must be consideration for a contract of guarantee or suretyship and there is, I think, none proven here.

There remains a further question which does not appear to have ever been decided, viz: whether the defence can be successfully maintained, by the maker as against the overdue holder from the payee of a note for good consideration, that it was negotiated, when overdue, in breach of an oral agreement entered into when the note was made between the maker and the payee. The answer to this, I think, depends upon whether evidence of such an agreement is admissible, and I have come to the conclusion that evidence of an oral agreement not to negotiate a note after it becomes due is admissible as it does not contradict the terms of the note.

The appeal should be allowed with costs and a new trial ordered.

Mr. Justice Graham agreed that there should be a new trial. These two learned judges exercised not a discretion, but considered themselves bound by their previous decision and their interpretation of certain rules of law.

And Mr. Justice Carroll:

I think, with deference, that there was a question which should have been submitted to the jury, namely: Was there an agreement between Mitchell and Lerner that the note or notes should not be negotiated after maturity? I think there is not any doubt that if the note was an accommodation that such an agreement is an equity which attaches to the note in the hands of a holder who takes it after maturity. *MacArthur* v. *MacDowall* (1); *Grant* v. *Winstanley* (2).

* * *

On the appeal or motion for a new trial defendant's counsel took the objection that the evidence concerning the agreement was not admissible in that it added to or changed the contract evidenced in writing by the note. This objection was not taken before the trial judge, but in any event I am of opinion that the rule regarding oral extrinsic evidence is not applicable here, as the evidence complained of here is introduced to

(1) (1893) 23 Can. S.C.R. 571. (2) (1871) 21 U.C. C.P. 257.

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prove a distinct collateral agreement, which I think is not inconsistent with the agreement set out in the written document.

I think there should be a new trial to determine the issue of facts outstanding.

There again, in my opinion, we find the judicial determination of legal questions and not the mere exercise of discretionary power. Paton J., who also dissented in the first appeal, held that evidence of a verbal agreement not to negotiate a time note is not admissible, as it contradicts the express words of the note. Here we have the application of the law, as understood by the learned Justice, and not the exercise of any discretionary power. I take it that the obvious sense of these words in section 38 refers not to "discretio legalis" as described in the first part of these notes, but to judgments rendered by a court, not according to fixed rules of law, but in the exercise of the power of acting, in certain cases and within certain limits, according to its will. And even in such cases, this court would be entitled, before granting a motion to quash under section 38, to reserve the motion until after hearing the merits of the appeal, in order to see, "that a case for the exercising of the judge's discretion has been raised by the evidence." See *Williams* v. *Guest* (1). We cannot, therefore, grant the motion to quash the appeal and it should be dismissed with costs.

Besides, on the merits of the judgment *a quo*, I clearly reach the conclusion, with my brother Smith, that the trial judge was wrong in deciding that there were no facts to submit to the jury.

Contradictory evidence by respondent and Dickie on one side and Lerner on the other having been given as to the facts, the respondent, under his plea, as previously approved by the Court of Appeal, was entitled, as a matter of right, to have this evidence weighed by the jury and to secure a definite finding as to these facts. If no evidence had been given to support the plea, the case might have been properly withdrawn; but such a situation does not exist here. The issues cannot be satisfactorily disposed of, according to the record of this case, in the summary manner adopted by the learned trial judge. I also agree that

(1) (1875) L.R. 10 Ch. App. 467.

oral evidence of the agreement not to negotiate after maturity is admissible.

The appeal should be dismissed with costs.

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GLESBY v. MITCHELL.

Cannon J.

Appeal dismissed with costs.

Respondent's motion to quash dismissed with costs.

Solicitor for the appellant: *C. B. Smith.*

Solicitor for the respondent: *A. W. Jones.*

ROY E. BELYEA (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PROSECUTOR) RESPONDENT.

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*Feb. 2.

HARRY WEINRAUB (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PROSECUTOR) RESPONDENT.

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

Criminal law—Combine—Conspiracy—Combines Investigation Act, R.S.C., 1927, c. 26—Cr. Code, s. 498 (1) (a) (b) (d)—Sufficiency of findings to establish guilt—Findings of participation in original scheme, but not of participation in subsequent overt acts—Misdirection of himself by trial judge—Appeal by Attorney-General from acquittal at trial—Cr. Code, s. 1013 (4), as enacted in 1930, c. 11, s. 28—"Question of law"—Objection to form of indictment and conviction.

Appellants were acquitted by Wright J., [1931] O.R. 202, on charges of offences against the *Combines Investigation Act*, R.S.C., 1927, c. 26, and of conspiracy, in violation of s. 498, subs. 1 (*a*), (*b*) and (*d*), of the *Cr. Code*, but, upon appeal by the Attorney-General under s. 1013 (4) of the *Cr. Code*, as enacted in 1930, c. 11, s. 28, they were convicted by the Appellate Division, [1931] O.R. 699. They appealed.

Held: The appeals should be dismissed.

The trial judge's material findings of fact were fully justified on the evidence and established appellants' guilt. The trial judge misdirected himself, in that, while finding that appellants had taken an active part in the original scheme—the formation of the organizations in question which, as found, amounted to the formation of an illegal combine, and to a conspiracy within s. 498, *Cr. Code*—yet he acquitted them on the ground that they were not proved to have taken part in subsequent overt acts. The original scheme constituted the conspiracy

*PRESENT: Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

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which formed the basis for the prosecution; the overt acts were not the conspiracy, though evidence of its existence. It was not essential to a finding of appellants' guilt, that they be held to have had actual knowledge of, or to have actually participated in, the subsequent overt acts. Once it is established that a combine or conspiracy existed, it is unnecessary, to warrant conviction for the formation of a combine, or of the agreement to conspire, to shew accused's complicity in subsequent illegal acts done by, or with the connivance of, the body against members of which conspiracy or unlawful combine is charged; provided there is sufficient proof of their complicity in the original formation of the combine, or in the agreement charged as conspiracy.

While the Attorney-General's right of appeal, conferred by s. 1013 (4), is confined to "questions of law," this does not exclude the appellate court's right, where a conclusion of mixed law and fact, such as is the accused's guilt or innocence, depends, as in the present case, upon the legal effect of certain findings of fact made, to enquire into the soundness of that conclusion, which must be regarded as a question of law—especially where, as in this case, it is a clear result of misdirection of himself in law by the trial judge.

Held, further, that appellants' objection to the form of the indictment, based on the ground that there were several offences charged in the alternative, and to the form of the convictions (which strictly followed the form of the indictment), could not be sustained; they expressed the offences in the very terms of the statutes. (*Cr. Code,* ss. 852 (3), 854, 1010 (2), cited).

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which allowed the appeal of the Attorney-General of Ontario from the judgment of Wright J. (2) acquitting the present appellants on charges of offences against the *Combines Investigation Act,* R.S.C., 1927, c. 26, and of conspiracy contrary to the provisions of s. 498, subs. (1) (*a*), (*b*) and (*d*), of the *Criminal Code.* The Appellate Division set aside the acquittal of the present appellants and adjudged them guilty.

W. F. O'Connor K.C. for the appellants.

D. L. McCarthy K.C. and *J. C. McRuer K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—These two appeals were heard together.

The appellants, Belyea and Weinraub, were both acquitted (2) on trial before Wright, J., without a jury, (R.S.C., 1927, ch. 26, s. 39; *Cr. C.,* s. 581); but, upon appeal by the Attorney-General under s. 1013 (4) of the *Criminal Code,* as enacted by c.11, s. 28, of the Statutes of Canada, 1930, the Appellate Division (1) was of the opinion that the

(1) [1931] O.R. 699. (2) [1931] O.R. 202.

learned trial judge had misdirected himself, in that he held that, although it was proven, if not admitted, that they (the appellants) "took an active part in the original scheme,—the conspiracy which formed the basis for the prosecution, * * * because (they) were not proved to have taken part in subsequent overt acts," they should be acquitted, saying of one of the respondents, "There is no evidence that connects him with any of the illegal operations." The Appellate Division found that

> Belyea and Weinraub were most active in carrying out the projects of the conspiracy; were originally united with Singer himself in the conspiracy of which the latter was found guilty. They should have been convicted as were Singer, Paddon and Ward. Their part in the illegal acts was much greater than that of Paddon and Ward, but less than that of Singer.

Having found them guilty, that Court then proceeded to fine each of them one-half the amount of the fine imposed upon Singer.

After careful consideration of the evidence, of the very lengthy argument before this Court, which lasted more than two days, and of the "memorandum of points" and the supplementary factum of the appellants, we are of opinion that the appeals fail and must be dismissed.

In the course of the trial, the learned judge refused the accused leave to move to quash the indictment under s. 898 of the *Cr. C.*, on the ground that ss. 854 and 855 applied to it, and that s. 891 of the Code was directly relevant. No motion under the latter section was made on behalf of the accused. Here, this refusal of leave, although approved by the Appellate Division, was made a substantial ground of complaint. We are of opinion that the objection is ill-founded, being based, as it was, on the ground that there were several offences charged in the alternative. As the Appellate Division said, the indictments "follow the Statutes under which they are laid, and their form is sanctioned by ss. 852, 954 (*sic.*) and 1010 (2) of the Code." Having regard to ss. 852 (3), 854 and 1010 (2), the position taken by the accused is hopeless. By s. 1010 (2) it is provided that

> * * * the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they (*sic.*) are disjunctively stated or appear to include more than one offence, or otherwise.

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Upon this statutory provision being stressed by the Court, however, counsel for the appellants sought to turn his objection into a present objection to the form of the convictions which had strictly followed the form of the indictment. It was pointed out to him that, in our opinion, it was not open for him to do so. No doubt s. 852 deals with objections to an indictment; but, as the convictions here strictly follow the form of the indictment, and express the offences of which the accused were found guilty in the very terms of the statutes, this point seems now to be concluded against the appellants. (S. 1010 (2)). As Mr. McCarthy (counsel for the Crown) put the matter to the Court, the convictions by the Appellate Division are in the words of the statutes themselves, the offences of which the accused were found guilty being the formation and operation of an illegal combine contrary to the provisions of the *Combines Investigation Act*, as therein defined, and conspiracy in violation of s. 498, subs. 1 (*a*), (*b*) and (*d*), of the *Criminal Code*. The words " or of services," etc., in the indictment are introduced merely as illustrative of the methods employed by the accused in operating the combine, and in carrying out the conspiracy in question. We are, accordingly, of the opinion that any objection based on the form of the indictment, or of the convictions, cannot now be upheld.

Counsel for the appellants at the outset of the argument stated that the question he intended to raise was whether there was any evidence in the record to warrant the findings of the trial judge; and not at all as to the weight of such evidence. We are, however, of the opinion that—although, no doubt, the position so taken is sound—it is unnecessary to rely upon that as an answer to the appeal, being of the view that the weight of evidence fully justified, if, indeed, it did not require, all the material findings made by the learned trial judge.

The following findings of Wright J., in the course of his judgment, seem to us to be vital and leave no doubt as to the appellants' guilt. Moreover, they are all supported by the evidence. Indeed, as stated by counsel for the appellant in his memorandum, the fact-finding of the learned trial judge was good.

After setting out the indictment, and the circumstances leading up to the trial, and discussing the application for leave to move to quash the indictment, the learned judge said that, in the prosecution of this case, being the first case in the province under the *Combines Investigation Act*, the whole question should be fully considered. We take the following somewhat copious extracts from the judgment of the learned judge. They contain the findings which we consider material:

Prior to March, 1927, there was in existence in Ontario, an Association known as the Ontario Society of Domestic Sanitary and Heating Engineers. This Association had been somewhat dormant for years, but at a Convention held in Guelph in March, 1927, it was resolved to revive the Association with a view to extend its usefulness.

At that Convention the accused Belyea and Weinraub were elected as directors * * * Plans were then laid to hold a meeting at a subsequent date, in order to get all the allied trades into one organization. It was also suggested that a Commissioner with plenary power should be appointed as head of the organization.

Next followed a letter dated March 22, 1927, from Singer to Belyea in which suggestions were made by the former as to holding a conference to discuss the proposed new organization.

On April 9th a meeting was held in the office of Singer at which both Weinraub and Belyea were present. At this meeting it was temporarily arranged that Singer be paid $7,500 to organize and incorporate a new organization. Following this meeting a letter was written by Singer to Belyea under date of April 11, 1927, outlining the proposed objects of the organization.

Next followed a series of speaking tours throughout the Province in which Belyea and Weinraub took a leading part. This was to interest the members of the different trades affected or proposed to be affected by the formation of the new organization.

Windsor, among other centres was visited and a meeting was held of those interested at which the accused, Belyea and Weinraub, were present.

The only objection taken at bar by counsel for the appellants to the accuracy of this set of findings is that he contended that Weinraub was not present at the Windsor meeting. This, however, seems to us to be not very material.

As a result of this campaign a largely attended convention was held at Hamilton on June 11th, 1927, at which * * * it was decided to proceed to form a new association and to have a Commissioner appointed to guide and govern its affairs.

Letters of Incorporation of the Canadian Plumbing and Heating Guild were granted on June 30th, 1927.

It should here be noted that this incorporation is not an incorporation as a trade union under the *Trade Unions Act*.

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Prior to the granting of this charter, the sum of $7,500 was paid to Singer as his charges for his services in connection with the organization and incorporation of the Guild.

The purposes and objects of the Guild as set forth in the Letters of Incorporation did not disclose the real purposes or objects as shown by the future operations of the Guild. Two of the accused, namely, Belyea and Weinraub, were among the incorporators of this Guild.

The membership in the Guild included manufacturers and wholesalers of plumbing supplies, but shortly after the incorporation these parties became restless owing * * * to a legal opinion received by them to the effect that it was illegal for them to be in the same organization as the Master Plumbers, * * *

At a meeting held on the 24th of August, 1927, by the wholesalers and manufacturers, the following resolution was passed:

That this meeting of manufacturers and jobbers recommend to manufacturers and jobbers of plumbing and heating goods that they become members of the Dominion Chamber of Credits Limited without any further obligation than their subscription.

This incorporation was, likewise, not effected under the *Trade Unions Act.*

It was also arranged that the application fees already paid by manufacturers and jobbers to the Guild should be transferred to the new organization.

* * * From what appeared in the evidence at the trial, and the subsequent operations of the two organizations, it is quite clear that the new organization was formed for the purpose of having two organizations, —one consisting of Master plumbers, and the other of manufacturers and jobbers, acting under the direction of one Commissioner and in close contact and co-operation with each other.

A Convention was held at Toronto on January 26th and 27th, 1928, which was addressed by O'Connor at considerable length * * *

The only objection taken at bar to the accuracy of this finding was that Singer was not actually named as "Commissioner" for the new, or second, organization. There was, in fact, no "Commissioner" of that body; but Singer was in charge of, and responsible for, its operations throughout, and the burden of his $25,000 salary was equally borne by each body.

Shortly after this meeting, Singer conceived the idea of another organization, and on April 13th, 1928, it was arranged that a new organization to be known as the Amalgamated Builders Council should be registered under the Trade Unions Act, and the same was duly registered on the 8th day of June, 1928, with the Deputy Registrar General of Canada, as required by the Trade Unions Act. Of this organization, the accused Belyea was appointed President, and Weinraub as Secretary.

The President, on the 9th July, 1928, appointed Singer as Commissioner under rule 3 of the By-laws of the new organization.

On July 19th, 1928, Singer and O'Connor interviewed the Department of Labour at Ottawa and submitted in writing a document known

as Canadian Cartels * * * The document is important not for that reason but for certain statements contained in the draft Cartel relating to the activities of Singer and O'Connor in connection with the formation and operation of the organization.

Certain Master Plumbers residing in Windsor * * * made application for a charter for a local section of the Amalgamated Builders Council and on September 25, 1928, a charter was granted to the branch at Windsor to be designated as Local Section No. 112. * * *

This organization continued to function until the 31st day of December, 1929, when, after an investigation under the Combines Investigation Act, the certificate of registration of the Amalgamated Builders Council was cancelled by the Secretary of State and Registrar General of Canada.

The evidence disclosed that the organizations were the creation and creatures of Singer.

His (Singer's) was the guiding hand throughout the entire operation of the different organizations.

Under the terms of the by-law which will be referred to, he was invested with wide powers, and the evidence disclosed that he exercised them to the limit.

* * *

The Canadian Plumbing and Heating Guild was the first to be incorporated. By reference to its charter it will appear that its purposes or objects were very wide and embraced almost every conceivable subject relating to the plumbing industry.

* * *

Of these organizations Singer was the Commissioner, Belyea was President, and Weinraub was secretary. * * *

* * * The powers of the Commissioner (were) defined in clauses 2 and 3 of By-law No. 1 (of the Guild) which read as follows:

"(2) The general management shall be entrusted to a Commissioner, who shall establish and maintain the Guild and supervise and control its policies and affairs according to his best judgment, and in that behalf shall do and cause to be done such acts and things as he may from time to time think necessary or desirable and shall employ such help as he may deem necessary. He shall investigate prevailing conditions in the plumbing and heating industry and shall oversee the gathering and distribution of information. He shall examine prospective members as to their eligibility and shall admit to membership those who are eligible and shall expel from membership those who become ineligible.

"(3) The Commissioner shall have the right to veto any resolution or by-law of the Board of Directors or any decision of any officer."

This organization had officials known as Zone Chairmen in the various centres. In Windsor, one Pragnell was the first of such Chairmen, * * *

* * * The evidence clearly established that the Windsor group was composed solely of members of the Guild and Singer, in his capacity of Commissioner, attended some of the meetings, and delivered addresses to the members. * * * It is quite clear this (Windsor) group was recognized by the chief executive officers of the Guild as a constituent though informal branch of the organization.

Next in chronological order is the Dominion Chamber of Credits, of which Singer was one of the incorporators, and one of the directors. No minutes of this organization were produced at the trial * * * The following significant clause appears among (its) objects:

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"(g) To subscribe to, become a member of, become associated and co-operate with any other association or corporation whether incorporated or not, whose objects or purposes are altogether or in part similar to those of the company and to procure from and communicate to any such corporation such information as may be likely to further the objects of the company."

As already indicated, this organization was formed so as to permit the manufacturers and jobbers who were members of the Guild, to retain their connection with it under the guise of another body. The fees already paid by them to the Guild were to be transferred to the new organization.

The last organization to be formed was the Amalgamated Builders' Council * * * Had it confined its operations to those authorized by (the Trade Unions) Act, no objection could well be taken, but from its operations it is clearly evident that the purpose of those responsible for its creation and operation was to avail themselves of any immunity provided by this Act, and, if possible, evade the provisions of the Combines Investigation Act, and the Criminal Code.

Counsel for the appellants fully accepted this finding at bar; indeed, he rather gloried in the attempt so made to evade the law.

Of this organization Singer was the duly appointed Commissioner. Belyea was the first president, and Weinraub was the first secretary-treasurer. * * *

At the convention of September 3rd, 1928, it was decided unanimously that henceforth only members of Amalgamated Builders' Council actually engaged in the plumbing and heating industry should be eligible to be or to continue members of the Guild. This policy was also stated in a circular letter of September 7th, 1928, by Singer in his capacity as Commissioner, in the following words:

"No member will be admitted to Amalgamated Builders' Council unless he is a member of the Guild. Membership in the Guild will be conditional upon membership in the Amalgamated Builders' Council."

Many of the foregoing findings were referred to by counsel for the appellants, in the course of the argument, as historical in their character. This, however, does not prevent them being findings of fact, fully supported by evidence, and many of them material to the existence or non-existence of the combine or conspiracy charged.

Summarizing the essential findings of fact contained in the foregoing, they include the following:

(a) That the Canadian Plumbing and Heating Guild was formed as the result of an effort, in March, 1927, to revive a dormant body, called the Ontario Society of Domestic and Sanitary Heating Engineers, of which Belyea and Weinraub were elected as directors; the former becoming President, and the latter, Secretary-Treasurer of the new body;

(*b*) That Singer was the prime mover in this and subsequent matters, being paid $7,500 by Belyea and Weinraub and their associates as a fee for the organization and incorporation of the new body known as the Canadian Plumbing and Heating Guild;

(*c*) That, as a result of a speaking tour, in which Belyea and Weinraub took a leading part, many Master Plumbers and others were interested in the organization, Windsor being amongst the centres visited;

(*d*) That Singer was appointed Commissioner of the new body in 1927, with absolute powers and to act as the *alter ego* of the directors;

(*e*) That the real purposes of the Guild were not those stated in its incorporation; and that Belyea and Weinraub were among the incorporators thereof;

(*f*) That the Guild membership originally included manufacturers and wholesalers as well as master plumbers; that the former became dissatisfied, and transferred their membership to another organization formed under Singer's auspices, called the "Dominion Chamber of Credits," of which all the wholesalers and manufacturers were urged to become members; their subscriptions being transferred from the Guild to the Dominion Chamber of Credits;

(*g*) That the new organization was formed for the purpose of having two organizations,—the one for master plumbers, the other for wholesalers and manufacturers, both under the full control of Singer, and acting in close co-operation one with the other;

(*h*) That Singer conceived the idea of a third organization, called the Amalgamated Builders' Council, to be registered under the *Trade Unions Act;* of this organization Belyea was elected President and Weinraub Secretary-Treasurer. On the 9th of July, 1928, Belyea, as President, appointed Singer "Commissioner" of this third organization with plenary powers;

(*i*) That Singer's was the guiding hand in all three organizations and that he was invested with the widest possible powers, which he exercised to the limit;

(*j*) That membership in the Guild was essential to membership in the Amalgamated Builders' Council;

(*k*) That from the operations of the A.B.C. it was evident that its real purposes were to avail itself of any

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immunity provided by the *Trade Unions Act*, and, if possible, to evade the provisions of the *Combines Investigation Act* and s. 498 of the *Criminal Code*.

(*l*) That, at a Convention of the A.B.C., on September 3, 1928, it was unanimously decided that, henceforth, only members of the A.B.C. should be eligible to membership in the Guild; and membership in the A.B.C. should be conditional upon membership in the Guild;

(*m*) That the Windsor group was recognized by the Guild as a constituent, though informal, branch of the organization.

Having made the foregoing findings, the learned judge proceeds to sum up the situation as follows:

> From the foregoing it is manifest that these three organizations were formed and operated for the express purpose of controlling the plumbing and heating industry in its various branches, including manufacturing and jobbing, and to further that end absolute control and direction of these organizations were vested in one individual styled "Commissioner," which in itself was a vicious and indefensible system.

Except as to styling Singer "Commissioner" of the three organizations, an office actually held by him only in two of them, although, in respect to the other, the Dominion Chamber of Credits, he exercised all the powers of "Commissioner," the accuracy of this finding as to the purposes for which the organizations were formed and operated was not challenged at bar.

The learned judge then proceeds to deal with a number of overt acts which, as Mr. McCarthy informs us, were put into the record merely to show the methods by which the conspiracy and combine was worked out, and not at all to show the existence of the conspiracy or combine, of which, he contends, there was abundant evidence apart from the proof of any such overt acts.

This finding may be regarded as a further summarizing of the nature of the purpose of the combine and conspiracy charged and found to have existed. The evidence supports it and objections, if any, taken to its accuracy would be futile.

The acts complained of in connection with the Windsor group may be summarized as follows:

(*a*) There was a fixing of a common price both of material and labour, as the method of computing prices of

material was standardized and the cost of labour was fixed; and also a fixing of a rate of profit to be added to cost;

(*b*) That the public was forced to pay tribute to the Guild.

The learned judge proceeds:

The evidence established that at one stage of the operations of this organization schedules were adopted by the members whereby 30 per cent. was to be added to the cost of the materials for labour and to the total cost of labour and materials a further addition of 30 per cent. was to be added as profit.

There is also proof of action by the Windsor group towards creating a monopoly or limiting competition in the plumbing and heating industry.

At a meeting of Local Section 112, held on October 4, 1928, at Windsor, a resolution was adopted in the following terms:

"Resolved that the members of this Local ought not to purchase and after communication of this resolution will not purchase from any supplier who directly or indirectly sells plumbing, heating or radiation fixtures, goods, materials or systems in or about or for installation or use in or about the border cities to persons, firms or corporations other than members of this Local."

The minutes show that the secretary-treasurer was directed to communicate the foregoing resolution to such suppliers as customarily sell within the territory of the local, and this was done accordingly.

This resolution was either drafted by Singer or submitted to him for approval, * * *

The evidence established that this resolution was acted upon in many instances and non-members of the Amalgamated Builders' Council at Windsor found great difficulty in procuring supplies and were greatly embarrassed in their business operations.

From time to time manufacturers and wholesalers of plumbing and heating supplies were furnished with lists of members of the local Section 112 of the Amalgamated Builders' Council and there was a tacit, if not an express agreement, that the dealers would refuse to sell to non-members and this was actually done in many instances.

* * *

In order to finance those organizations, a levy was made upon the members * * * If default was made by a member in payment of his assessment, he was liable to expulsion by the Commissioner, Singer, and this power was exercised in several instances. The resulting effect was that the expelled member was precluded from obtaining labour or supplies wherewith to carry on his operations.

These various activities built up an autocratic and despotic organization of the plumbing and heating industry in Windsor, * * *

That the learned judge had in mind the nature of the indictment to which the accused were called upon to answer is evidenced in the following reference. He says:

Section 32 of the Combines Investigation Act, (R.S.C., 1927, c. 26) declared it to be an indictable offence on the part of anyone who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of the Act.

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He concludes by saying:

I have no hesitation in holding that the evidence in this case established that there was a combine.

* * *

The deductions I have already drawn from the evidence clearly establish that the combine in this case falls within the class indicated in this subsection (s. 2 (1)).

* * *

To come within the Statute, the combine must also be a merger, trust or monopoly so-called, or (*a*) result from any actual or tacit contract, agreement, arrangement or combination which has or is designed to have the effect of any of the results set forth in subsections 1, 2, 3, 4, 5 or 6 of sec. 2.

* * *

The indictment * * * alleges that the combine resulted from an actual or tacit contract, agreement, arrangement or combination which has or is designed to have the effects set forth in subs. 1, 3, 4 and 5 of s. 2.

The evidence in my view, as already indicated, clearly establishes that there was an actual or tacit agreement, arrangement or combination, but it is still open for decision as to the actual or designed effect of such combine.

In my opinion the evidence establishes, and I so find, that the combine did have or was designed to have the following effects:

(*a*) limiting facilities for supplying or dealing in plumbing and heating supplies within the purview of ss. 1.

(*b*) fixing a common price within the meaning of ss. 2.

(*c*) enhancing the price or cost of articles within the meaning of ss. 4.

(*d*) preventing or lessening competition or substantially controlling within the City of Windsor and adjoining district the purchase, sale or supply of plumbing and heating materials.

Summarizing these findings, the result is that I hold the combine disclosed in the evidence falls within the class of combines prohibited by s. 2 of this Act.

The learned judge then proceeds to deal with the *Trade Unions Act* and makes the following comment (with which we fully agree):

It would be a travesty on justice if acts and transactions such as those disclosed in the evidence in this case could be justified or excused merely because the offenders were members of a Trade Union.

Taking up the conspiracy charges (counts nos. 5, 6 and 7) under clauses (*a*), (*b*) and (*d*) of subs. 1 of s. 498, the learned judge proceeds:

The evidence applies to these charges as well as to those already reviewed, and the findings of fact will also apply to these counts.

The evidence establishes a conspiracy to unduly limit the facilities for supplying and dealing in plumbing and heating supplies.

I need only refer to the evidence as to the arrangement restricting the sale or supply of materials to members of the organization in question, which clearly establishes an offence under this section.

The evidence also establishes a conspiracy to unduly prevent or lessen competition in the sale or supply of plumbing and heating materials within the meaning of ss. (*d*) of s. 498.

I find upon the evidence that there was a conspiracy to restrain or injure trade or commerce as defined in ss. (*b*).

* * *

It is strenuously argued that the provisions of s. 497 apply to the situation in this case.

It was contended by counsel for the Crown, and I think properly, that the provisions of s. 497 relate only to offences charged under clause (*b*) of s. 498 (1).

* * *

It is quite evident that it was never intended by Parliament that s. 497 should operate as a complete defence to all the offences created by s. 498 of the Code.

* * *

Having arrived at the conclusion that offences were committed against both the Combines Investigation Act and the Criminal Code, it now becomes necessary to decide as to the complicity or participation of the accused in the offences established.

After disposing of the cases of Singer, Paddon and Ward, whom he found guilty on all the counts in the indictment, the learned judge proceeds to discuss the cases of the other accused who were before him. He says:

The case of the accused O'Connor rests upon a different basis. He was retained by Singer as his counsel and from time to time advised the latter in reference to Guild matters. He gave two written opinions * * * * * * He also addressed a meeting of the Canadian Plumbing and Heating Guild at its annual convention at Toronto on January 25th, 1928, in which he made an attack upon The Combines Investigation Act and also on section 498 of The Criminal Code but did not directly advise evasion or disregard of the provisions of these Acts. In that address he stated, among other things, that the Commissioner Singer had explained to him his conception of the Guild and further stated he had an intimate connection with the Commissioner and had been since the birth of the Guild in daily contact with its affairs. He further stated that as the result of close scrutiny of the charter documents and actions of the Guild since incorporation, it was a lawful association, lawfully organized, lawfully conducted and that every action thereof up to that time could be shouted from the housetops without fear.

In conjunction with Singer he also appeared before the Department at Ottawa and presented a draft document known as the Canadian Cartels. In that document it was stated that Singer and O'Connor in the beginning conceived and elaborated the idea which Amalgamated Builders' Council exemplified.

For these statements and declarations by O'Connor the Crown seek to hold him liable as a party or privy to or knowingly assisting in the formation or operation of these combines.

I am of the opinion, however, and so hold, that where the formation of an organization is for professedly legitimate objects but the organization or its members afterwards participate in unlawful operations, the party to the original formation is not criminally liable unless and until

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he participates either as party or privy to or knowingly assists in the illegal operations of the organization and I cannot find on the evidence here any participation by O'Connor in the illegal operations of these organizations or of the members of same.

In arriving at this conclusion I have in mind the provisions of s. 69 of the Criminal Code, but, notwithstanding that section, I cannot find upon the evidence that there was any participation or complicity by O'Connor in the offences established in evidence and therefore a verdict of not guilty must be found in this case.

The provision of s. 70, *Cr. C.*, is also of value in this connection.

These findings are relevant only because they are incorporated by the learned trial judge in the part of his judgment dealing with the present appellants.

The report of the Guild Convention held on the 25th and 26th of January, 1928, was sent out by Belyea. It contained the following significant passage:

ACTING COMMISSIONER: During your Commissioner's enforced absence through sickness, your President will, at the Commissioner's request, act in his stead under the guidance and direction of Mr. W. F. O'Connor, K.C.

In the course of dealing with the case against the defendant W. F. O'Connor, the learned judge refers to "an organization * * * for *professedly* legitimate objects," thereby implying that the actual objects of the organization, as established by the evidence, were not legitimate.

The learned judge then proceeds to deal with the cases of Belyea and Weinraub. It is true he goes on to speak of subsequent unlawful operations, to which it was necessary, in his opinion, to show that the appellants were either parties or privies, or that they knowingly assisted therein. At the very outset he makes the momentous finding that

Undoubtedly these men took an active part in the formation of the organization under review.

This very important finding may have escaped the attention of counsel because it occurs in the body of a paragraph dealing with other matters. Its significance, however, is too marked to permit of its being overlooked by us. It stands unchallenged and unmet. Presumably on the ground that the purpose of the organization was "professedly" (i.e., ostensibly) lawful, and that there is not sufficient evidence that the appellants participated in, or were privy to, the subsequent admittedly illegal acts of the Windsor group, the learned judge acquitted them.

Counsel for the appellants, in his memorandum of argument, which is really a long factum of seventy-six pages, has seen fit to divide his argument under some nine heads. I have read the " factum " through and find it unnecessary to follow him in that division. In his supplementary factum (consisting of one hundred closely typewritten pages) counsel proceeds to discuss at inordinate length, though, no doubt, skilfully from his point of view, all the evidence, oral and documentary, in the record. He deals lengthily with many matters quite immaterial, his point of view apparently being that it would aid his clients if he could succeed in showing their innocence regarding matters not really vital to the charge against them; whereas, if the facts found by Wright, J., were true, and the evidence supports such findings, and those findings fairly lead to the conclusion of the guilt of the appellants, all the rest must indeed be immaterial.

In respect to the only finding of fact by Wright, J., in regard to which anything approaching error was shown to have been made by that learned judge, in his supplementary factum counsel for appellants apparently demonstrates that Wright, J., was wrong in holding that, after the institution of the Zone System, all the meetings of " the Windsor Group " were presided over by the Zone chairman.

But it will be noted that, in setting out the material findings of the trial judge above, no allusion has been made to this particular finding. That was because we regarded it as quite immaterial and beside the question. Of course, much is made by counsel for the appellants of this alleged error, but it cannot affect the issue before us, and we allude to it merely to show that the matter has not been overlooked.

Neither do we accede to the argument of counsel for the appellants that, if there be evidence that the accused were not implicated in some particular matters in which Singer or others were involved, that fact would afford an answer to the opinion of the Appellate Division that the findings of the learned judge, and facts admitted by the appellants themselves, sustain the holding

that these respondents (Belyea and Weinraub) took an active part in the original scheme,—the conspiracy which formed the basis for the prosecution,—is admitted;

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That view was not seriously controverted at bar, counsel insisting rather that there was no evidence of actual complicity of the appellants in, or of their privity to, the admittedly illegal acts done by the Windsor group, alleged by the Crown to be merely illustrative of the ways and means adopted—if not directed by the head office (in Toronto) of Singer and the two appellants—to carry out the objects of the organization, which they controlled and over which they presided. On the contrary, if there be evidence to warrant convictions of the appellants for breach of the *Combines Investigation Act* by actual participation in the formation of a combine within the meaning of that statute, and evidence to justify convictions for conspiracy under s. 498 of the *Criminal Code*—and we think there was abundant evidence to support the convictions for both offences—we cannot understand the materiality to the validity of the convictions of evidence bearing upon such other matters.

Moreover, we think the Appellate Division was entirely right in its conclusion that the trial judge had misdirected himself when, although it was his opinion that both Belyea and Weinraub had "undoubtedly * * * (taken) an active part in the formation of the organization," he held that, because there was not sufficient evidence to warrant his finding that they had also actually taken part in the Windsor operations, or were parties or privies thereto, they were not implicated in the conspiracy charged, or in the formation of the illegal combine. We are in accord with the view of the Appellate Division expressed in these words:

> That these respondents took an active part in the original scheme,—the conspiracy which formed the basis for the prosecution,—is admitted; the error in law into which the learned judge fell was in not distinguishing between the conspiracy itself and overt acts which, while not themselves the conspiracy, were evidence of the existence of the conspiracy. Because these respondents were not proved to have taken part in these subsequent overt acts, the learned judge acquitted them, saying of one of the respondents, "There is no evidence that connects him with any of the illegal operations."
>
> We are of opinion that the appeal of the Crown must succeed. Belyea and Weinraub were most active in carrying out the projects of the conspiracy; were originally united with Singer himself in the conspiracy of which the latter was found guilty. They should have been convicted as were Singer, Paddon and Ward. Their part in the illegal acts was much greater than that of Paddon and Ward, but less than that of Singer.

If sitting as a jury, we should have no hesitation in finding that the illegal acts done at Windsor were a result intended by the defendants and their fellow conspirators when they formed the organizations found to have been a combine and a conspiracy. But we do not proceed on this ground, since to do so would involve making a finding of fact contrary to a finding of the trial judge.

Counsel for the appellants argued at considerable length that the Appellate Division had exceeded its jurisdiction in this case because it reversed the trial judge on what counsel called a finding of fact, i.e., the innocence of the accused of participation in the formation of an illegal combine and of conspiracy within s. 498, *Cr. C.* This, it seems to us, involves a clear misconception of the true question in issue.

Having determined that the formation of the various organizations in question amounted to the formation of an illegal combine, and to a conspiracy within s. 498, *Cr. C.*, the learned judge proceeded to deal with the questions as to who had incurred criminal responsibility. He convicted Singer, Paddon and Ward on evidence which, in our opinion, clearly implicated Belyea and Weinraub, in much the same manner in which Singer and his companions were involved, in the formation of the combine and conspiracy in question. He fell into error, however, when he proceeded to find that it was essential to a finding of guilt of the accused, that they should be held to have had actual knowledge of, or to have actually participated in, the overt acts at Windsor.

Mr. O'Connor, somewhat ingeniously, argued that, where there is an " inferred conspiracy," or an " inferred combine," as he termed them, proof of the existence of which depends largely on certain overt acts, it is necessary to show privity of the accused to, or participation by them in, such overt acts, in order to make them liable for the formation of the combine or the conspiracy. This seems to us to be a fallacy. The moment it is established that a combine or conspiracy existed, it is unnecessary, in order to warrant a conviction of the appellants for the formation of the combine, or of the agreement to conspire, to show their complicity in subsequent illegal acts done by, or with the connivance of, the body against members of which conspiracy or unlawful combine is charged; provided, always, of course,

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that there is, in the evidence, sufficient proof of the complicity of the accused in the original formation of the combine, or in the agreement charged as conspiracy. Here, the learned trial judge apparently had already found facts from which the conclusion was inevitable that there was participation on the part of Belyea and Weinraub in the formation of the illegal combine and the conspiracy, the existence of which he had already found to be proven. On these findings, coupled with the admissions made by Belyea and Weinraub in their testimony, and the documents of which they were proved to have had knowledge, their convictions, as was held by the Appellate Division, were a necessary consequence.

Although counsel for the appellants devotes one entire part of his Memorandum of Points, viz., Part 4, to alleged "Errors of Fact on the Trial," i.e., errors of fact to be found in the judgment of the learned trial judge, speaking of the trial judge, he, himself, makes this formal admission, in the Memorandum, "His fact-finding was sound." His clients certainly cannot complain if they be held to this admission, especially so since it appeals to us as being, with the one exception above adverted to, entirely correct.

Upon the material facts found by the learned trial judge, we think that manifestly his conclusion, resulting in the acquittal of the appellants, was erroneous, and that such error was the direct result of a misdirection in law.

The right of appeal by the Attorney-General, conferred by s. 1013 (4), *Cr. C.*, as enacted by c. 11, s. 28, of the Statutes of Canada, 1930, is, no doubt, confined to "questions of law." That implies, if it means anything at all, that there can be no attack by him in the Appellate Divisional Court on the correctness of any of the findings of fact. But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the legal effect of certain findings of fact made by the judge or the jury, as the case may be, to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law,—especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge.

Finally,—a point not raised by counsel for the appellants during his two-and-a-half-day argument, or in his Memorandum of Points, or supplementary factum, but which would seem to call for some notice from us, is this.—By s. 1014 of the *Criminal Code,* the powers of the Court of Appeal, on hearing a criminal appeal by a person convicted, are defined. These powers, under subs. 3 are, in the event of the appeal being allowed, to

> (*a*) quash the *conviction* and direct a judgment and verdict of *acquittal* to be entered; or
>
> (*b*) direct a new trial;
>
> and in either case (it) may make such other order as justice requires.

This section is made applicable on any appeal by the Attorney-General against an acquittal by the provision of s. 28, c. 11, of the Statutes of Canada, 1930, that *mutatis mutandis,* on the appeal thereby given, the court shall have the same powers as it has on an appeal by the accused. It does seem rather a strong thing to hold that the effect of the words *"mutatis mutandis"* is that clause (a) must be made to read, on an appeal (by the Attorney-General) being allowed, to

> (*a*) quash the *acquittal* and direct a judgment and verdict of *conviction* to be entered;

yet that, apparently, was the construction put upon this provision by the Appellate Division.

It occurred to some members of this Court that, under such circumstances as are here present, the correct course would be to apply clause (*b*) and to direct a new trial. That idea, however, would seem to involve a lurking suspicion that we are, in fact, reversing the trial judge on a question of fact, whereas, in reality, we do nothing of the kind, but, on the contrary, we affirm the facts found by him, and, upon them, we reach the conclusion that the only course open to the Appellate Division was to allow the appeal and convict the present appellants, giving to the words *"mutatis mutandis"* the effect given them by the Appellate Division, which we certainly are not convinced was wrong.

For these reasons, we are of the opinion that the appeals fail and must be dismissed.

Appeals dismissed.

Solicitor for the appellants: *J. Gerald Kelly.*

Solicitor for the respondent: *The Attorney-General for Ontario.*

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*Feb. 2.

LOUIS BERGMAN MAYTAG AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

RURAL MUNICIPALITY OF HANOVER, RURAL MUNICIPALITY OF DE SALABERRY, OLIVA AUDETTE AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Liability in damages for failure to keep drainage ditches in repair—Land Drainage Act, Man., R.S.M., 1913, c. 56, ss. 45, 46—Flooding of lands—Cause of damage.

Plaintiffs claimed damages from defendant municipalities for flooding of lands caused, as alleged, by the municipalities failing to keep drainage ditches in repair.

Held: Plaintiffs could not recover from the municipalities because, while the municipalities would be liable for loss suffered by their failure to keep the ditches in repair, yet it was not shewn that any of the damage suffered arose from such failure; rather, it appeared that the damage was due to the unprecedented character of the rain storms, the inadequacy of the drainage system (for which the municipalities could not be held liable) to drain lands lying as low as those of plaintiffs, and the damming of the main ditch by the other defendants. (Judgment of the Court of Appeal, Man., 39 Man. L.R. 214, on this ground affirmed.)

The *Land Drainage Act*, R.S.M., 1913, c. 56, ss. 45, 46, imposes on a municipality the legal obligation of keeping the ditches, constructed under the Act, within its border in repair, and an action for damages lies, at the instance of any person for whose benefit the obligation is imposed, for loss sustained by failure to perform it. A different legislative intention is not indicated by the provision for the Municipal Commissioner to keep in repair on the municipality's failure to do so, or by the history of the legislation.

History of the legislation in question, and the principles as to liability of municipalities for non-performance of statutory duties, reviewed and discussed. *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, at 415-416; *Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L. 93, at 110; *City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194, and other cases, cited.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), which reversed in part the judgment of Adamson J. (2).

*Present at hearing of the appeal: Newcombe, Rinfret, Lamont, Smith and Cannon JJ. Newcombe J. took no part in the judgment, as he died before the delivery thereof.

(1) 39 Man. L.R. 214; [1930] 3 W.W.R. 577; [1931] 2 D.L.R. 508.
(2) [1930] 1 D.L.R. 247.

The action was for damages for loss of crops and injury to lands from flooding. The plaintiff Maytag was the owner of the lands damaged, the plaintiff McMurdo was his tenant, and the other plaintiffs were sub-tenants. The lands are situated in Drainage District No. 5, part of which district is within the rural municipality of Hanover and part within the rural municipality of de Salaberry. The lands were flooded in July, 1928, and it was claimed that the damage sustained was the result of negligence of the defendant municipalities in failing to keep in repair (as, it was claimed, they were required to do under the *Land Drainage Act*, R.S.M., 1913, c. 56, ss. 45, 46) certain drainage ditches, and the negligence or wrongful act of the other defendants in obstructing the flow of water in the main drainage ditch by constructing blocks or dams therein.

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

The trial judge, Adamson J., allowed the plaintiffs damages against all the defendants, which damages he assessed at $2,750, and he directed that the same be apportioned and paid by the respective defendants as follows: by the R.M. of Hanover, $1,412.50; by the R.M. of de Salaberry, $506.25; by the other defendants, $831.25.

Upon appeal, the Court of Appeal allowed the appeal of the defendant municipalities, dismissing the action as against them, but dismissed the appeal of the other defendants, adjudging that the plaintiffs recover from them the sum of $831.25 in accordance with the judgment of Adamson J. The cross-appeal of the plaintiffs to have the amount of the damages increased was dismissed.

The plaintiffs appealed to the Supreme Court of Canada. (Leave to do so was granted by the Court of Appeal for Manitoba).

By the judgment now reported, the appeal to this Court was dismissed with costs.

H. M. Hannesson for the appellants.

H. V. Hudson K.C. for the respondent, Rural Municipality of de Salaberry.

J. B. Haig for the respondent, Rural Municipality of Hanover.

No one for the other respondents.

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The judgment of the court was delivered by

LAMONT J.—The plaintiffs brought this action to recover damages from the defendants for injury to certain lands and loss of crop thereon caused by the flooding of the lands in the early part of July, 1928, which flooding, the plaintiffs allege, resulted from (1) the neglect of the defendant municipalities to maintain and keep in repair, as required by statute, the drainage ditches protecting and serving the lands in question, and (2) the wrongful act of the individual defendants in obstructing the flow of water in the main drainage ditch by constructing a dam therein.

The plaintiff Maytag is the owner of the lands in question, namely, sections 2, 13 and 23 in Tp. 7, R. 4, E. of the principal meridian; while the plaintiff McMurdo in his tenant, and the plaintiffs Friessen and Thiessen are sub-tenants. These lands are situated within Drainage District No. 5, part of which district is within the R.M. of Hanover, and part within the R.M. of de Salaberry. The drainage works affecting these lands are:

1. Ditch " A " running east and west, which is the main ditch, approximately 24 feet wide and built on the south side of the road allowance which divides the rural municipalities of Hanover and de Salaberry; the R. M. of de Salaberry being to the south. The easterly four miles of this ditch is wholly within the R. M. of Hanover. The ditch was intended to take care of the surface waters coming from Tourond Coulée or swamp, which is a large watershed about four miles long stretching southeast, the mouth of which is crossed by Ditch " A," about the west part of section 36-6-4E. Opposite the place where the waters of the coulée entered the ditch, a dyke or embankment, three or three and a half feet high, had been raised on the north side of the ditch to intercept the waters and turn them westward along the ditch.

2. Ditch " D " parallel to Ditch " A " and three miles to the north.

3. Ditch " D5 " commencing a short distance north of Ditch " A " and running north on the road allowance to Ditch " D."

4. A ditch called the "South Lateral" three miles east of Ditch "D5", running north and south and connected with the east end of Ditch "D."

These ditches were built by the Government of Manitoba in 1907, and were intended to have, and did have, a capacity of a peak load of 25 or 26 cubic second feet. At the time the ditches were built the country was practically unsettled. With the settlement of the country, however, the cultivation of the land, and the construction of roads and ditches, the flow of the waters into the watershed was greatly accelerated and the volume thereof was also augmented by the Davidson drains, which drained an additional 100,000 acres.

During the last of June and the first part of July, 1928, the section of the country in which Drainage District No. 5 is situate, was subjected to unprecedented rains which were particularly heavy on July 4, 5 and 6. According to the Meteorological Department, the rain falling on July 6 amounted to 1·61 inches, while the total rainfall for June was $3\frac{5}{8}$ inches, and for July 4·44 inches. Witnesses state that it was the worst flood in forty-seven years. By July 7 the watershed, of which the mouth was Tourond Coulée, was full. Ditch "A" was full and overflowing, but the dyke and the dump of the road on the north side of Ditch "A" were preventing the bulk of the waters from Tourond Coulée from continuing their natural direction to the northwest, with the result that the waters followed the ditch westward for a distance of half a mile and then flowed over it to the southwest on to the lands of the individual defendants. To save their crops from being drowned out, these defendants, on July 7, built a dam across Ditch "A" just west of the mouth of the coulée, and also cut a number of openings five or six feet wide and two or three feet deep in the dyke and road grade, so that the water would be able to cross the ditch and the road and continue its natural course to the northwest. The distance of the most easterly of these cuttings from the most westerly was 100 to 150 feet, and one witness testified to seeing a volume of water, 100 feet wide and 5 feet deep, pouring over the road. Some of these waters in the natural course of events would have crossed Ditch "D5", but the R. M. of Hanover, in order to protect its road grade along the ditch, built up its road,

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which it had a right to do. This also had the effect of sending more of the water north on to section 23, the most northerly of the plaintiffs' lands.

As to the effect of the damming up of Ditch "A", we have the evidence of the plaintiff McMurdo, who gave the following testimony:—

Q. The flooding didn't take place until after that dam was put in. Now is that correct?

A. Yes, that is right.

Q. There was no flooding until after the dam was put in? In 1928, and that is correct?

A. Yes, surely that is right. Yes.

Then we have the evidence of Bowman, Chief Engineer of the Provincial Reclamation Branch of the Department of Public Works, and Affleck, District Engineer, who testified that the result of the failure of the municipality to keep the ditches in repair was to lessen their efficiency by 50 per cent. They also gave this further important evidence, that even if the ditches had been properly maintained at their original capacity, they would have been able to take care of only one-tenth of the water coming upon these lands during the flood conditions that existed in July, 1928.

On July 11, the R. M. of Hanover blew up the dam which the individual defendants had erected in Ditch "A", and the evidence is that immediately thereafter the water began to subside. The water, however, had been lying on the plaintiffs' lands for a sufficient length of time to ruin their crops. The learned trial judge found in favour of the plaintiffs against all the defendants and fixed the loss by flooding at $650 for section 2, and $2,000 for section 23. In addition he allowed $100 for some small items. He held that there was a legal obligation on the defendant municipalities to keep the ditches in proper repair and that they had failed to do so. He also held the individual defendants liable for the damage caused by their blocking up of Ditch "A." The loss he apportioned as follows: to the individual defendants $831.25; to the R. M. of Hanover $1,412.50; to the R. M. of de Salaberry, $506.25. No apportionment was made among the plaintiffs, as they had informed the court that they would agree among themselves as to their respective shares of any damage awarded.

On appeal the Court of Appeal maintained the judgment as against the individual defendants, but reversed it as against the rural municipalities on the ground that it had not been proved that the flooding was due to the failure of the municipalities to maintain the ditches in repair.

Before us the main question was as to the liability of the municipalities, under the existing legislation, to maintain the ditches in proper repair, and we were urged to determine that question.

The statutory provisions upon which the plaintiffs rely are sections 45 and 46 of the *Land Drainage Act*, R.S.M., 1913, cap. 56. They read as follows:—

45. Where a drainage work does not extend beyond the limits of one municipality, it shall be maintained and kept in repair by such municipality in the manner provided for in this Act, and if such municipality fail to do so the Municipal Commissioner may do, or cause to be done, everything necessary to maintain and keep in repair such drainage work, and collect the expense thereof from such municipality from time to time by levies made in accordance with "The Municipal Commissioner's Act."

46. Any drainage work constructed under the provisions of this Act, or any Act or Acts for which this Act is substituted, which is continued through more than one municipality, or which is commenced in one municipality and continued thence into any other municipality or municipalities, shall, after the completion thereof, be maintained by the former municipality from the point of commencement thereof to a point at which the drainage work crosses the boundary line into another municipality and by every other municipality in like manner through or into which the drainage work is continued, at the expense of the lands in any way assessed for the construction thereof and in the proportion determined by the Minister in his report and assessment for the original construction of the work; and for the purpose of collecting the cost of such maintenance each and every municipality interested shall have all the powers and authority for the levying and collection thereof against the lands liable therefor, as aforesaid, as provided for the levying and collection of ordinary municipal rates by "The Assessment Act" and amendments thereto, and, in case of default by any such municipality, the Municipal Commissioner may do or cause to be done everything necessary to maintain and keep in repair such drainage work, and collect the expense thereof from such municipality from time to time by levies made in accordance with "The Municipal Commissioner's Act."

I do not find any difference in meaning between the phrase "shall be maintained" in section 46 and "shall be maintained and kept in repair" in section 45, and the question is, do these words impose upon a municipality the legal obligation of keeping the ditches within its border in repair, and, if so, does an action for damages lie at the instance of an individual injured by the failure of the municipality to perform that obligation?

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It is now well established that the liability of a public body to a person injured by the non-performance of a statutory duty, must, in each case, in the last resort, depend upon the intention of the legislature to be gathered from the statute "as a whole, interpreted in the light of such circumstances as may properly be considered, and according to the canons of construction properly applicable." Duff J., in *City of Vancouver* v. *McPhalen* (1).

Liability for an omission to do something depends entirely upon the extent to which a duty is imposed to cause that to be done. It may be that the statute clearly imposes the duty or it may be, as pointed out by McCardie J., in *Rex* v. *Marshland Smeeth and Fen District Commissioners* (2), that the statute indicates with reasonable clearness that there shall be no civil remedy at all for a person injured by a breach of the statute, or it may be that the statute provides a particular method, otherwise than by action, of claiming damages for breach of the statutory duty. In each case the statute must be examined to ascertain the legislative intention. There are, however, certain general rules which, I think, are applicable to all cases. One is that laid down by Vaughan Williams, L.J., in *Groves* v. *Lord Wimborne* (3), where his Lordship says:—

> Where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *primâ facie*, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.

Another is the rule of construction stated by Blackburn J. in *Mersey Docks Trustees* v. *Gibbs* (4), as follows:—

> In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things.

The leading authorities on the point involved in this action, in so far as the liability of the municipalities for non-feasance is concerned, were all reviewed in this court in the case of *City of Vancouver* v. *McPhalen* (5). In that case the statute, in the interest of the public of which the

(1) (1911) 45 Can. S.C.R. 194, at 211.
(2) [1920] 1 K.B. 155, at 170.
(3) [1898] 2 Q.B. 402, at 415-416.
(4) (1866) L.R. 1 H.L. 93, at 110.
(5) (1911) 45 Can. S.C.R. 194.

plaintiff was one, imposed a duty upon the municipality to keep its streets in repair. In going along the sidewalk the plaintiff tripped over a loose plank and was injured. The municipality was held liable on the ground stated in the head-note, as follows:—

Where a municipal corporation is guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect, persons suffering injuries in consequence of such omission, may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly provided for by statute, unless something in the statute itself or in the circumstances in which it was enacted justifies the inference that no such right of action was to be conferred.

Other instructive authorities are the recent cases of *Blundy, Clark & Co.* v. *L. & N.E. Ry. Co.* (1) in which the English authorities are again reviewed, and *Pierce* v. *Rural Municipality of Winchester* (2), in which the municipality was held not to be liable for the non-repair of its drains under section 740 of the *Municipal Act,* as the plaintiff was not a person for whose benefit the duty of maintaining the ditch in repair was imposed on the municipality.

In the case before us the statute provides for the maintaining of the ditches by the municipality, in clear and explicit language. They are to be maintained for the benefit of the owners of the lands of the drainage district in which the lands are situate. The owners of these lands have, therefore, a special and particular interest beyond the rest of the public in having the ditches maintained, and provision for the securing of adequate means for that purpose is to be found in the statute. If, therefore, the plaintiffs, as the owners of the lands in question or the crops thereon, have suffered loss by the non-performance by the municipalities of their statutory duty, they are, in the absence of anything in the statute shewing a contrary intention, entitled to maintain an action of damages for such loss.

Is there anything in the statute from which a contrary legislative intention can reasonably be inferred?

Two matters are suggested, first, that the statute provides that in case of failure by the municipality to keep the ditches in repair the Municipal Commissioner may

(1) [1931] 2 K.B. 334. (2) [1931] Can. S.C.R. 628.

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maintain them and collect the expenses from the municipality, and second, that the history of the legislation justifies the inference that it was not intended to impose liability on the municipality. I shall deal with these two together.

By the Act of 1893 the responsibility for both the construction and the up-keep of drainage ditches rested upon the municipalities and it was expressly enacted that the municipality should be liable in pecuniary damages to the person who, or whose property, was injuriously affected by the municipality's neglect or failure to keep the drainage works in repair. It was, however, soon apparent that many of the municipalities were unequal to furnishing the money required for necessary drainage purposes and that in many cases a district which it was advisable to drain by a single drainage system was not confined to the lands of one municipality. The Legislature, therefore, in 1895, repealed the Act of 1893 and created drainage districts which commonly included lands in several municipalities. In these districts the drains were constructed by the Provincial Government but at the expense of the lands of the drainage districts, through debentures issued against them. The amount for which each piece of land was liable was fixed by the Minister of Public Works in proportion to the estimated benefits accruing to each from the construction of the works. No provision was made in the Act for maintenance after construction, and the only connection the municipality had therewith was the collection of the debenture indebtedness from the lands burdened therewith.

Apparently realizing the futility of constructing drainage ditches by the Government unless these ditches were kept in reasonable repair, the Legislature, in 1898, imposed the duty of maintaining them upon the municipalities, they being doubtless considered as the most convenient instrumentality at hand for the purpose. The Act, however, provided that the cost of these repairs should be borne by the lands of the drainage district, and it authorized the municipality to levy and collect the *pro rata* share which the lands situate in the municipality should bear. In its practical working out the legislation did not secure the maintenance of the ditches. In his evi-

dence Mr. Bowman, speaking of the provision imposing the duty of maintenance on the municipalities, said that the clause in the Act had been a dead letter ever since it had been enacted; that the municipalities generally had not carried it out for the reason that they had neither the men nor the equipment to do so. He pointed out that the maintenance of the larger ditches called for dredging machinery which the municipalities did not have. Generally speaking, therefore, where the ditches had been repaired, the repairs had been made by the Reclamation Branch at the request of the municipalities. Whether it was because this state of affairs existed in 1913, or for some other reason, the Legislature in that year amended the *Land Drainage Act* by adding to sections 45 and 46 the clause giving the Municipal Commissioner a discretionary right to make the repairs.

Although the Act of 1893 contained an express provision giving a right of action for breach of the statutory duty to repair, and the Act of 1898, which reimposed the duty upon the municipality, contained no such express provision, and although the amendment of 1913 gave discretionary power to the Municipal Commissioner to make necessary repairs, I am unable to see in these or any other statutory enactment any indication of a legislative intention that the municipality was not to be held liable for breach of its duty to a person for whose benefit the ditches were to be maintained, and who was injured by such breach. The Act of 1893 was repealed and the drainage system entirely altered by the Act of 1895. The imposition, in 1898, of the duty to maintain the ditches constructed by the Government under the new system was a new obligation placed upon the municipalities which carried with it a liability to the individual, unless something to the contrary appeared. In the legislation of 1898 nothing is found indicating an intention that the municipalities were not to be subject to that liability. In enacting the amendment of 1913 the Legislature had an opportunity of relieving the municipalities from the duty of maintenance and placing that obligation on the provincial government. This it did not do. All it did was to give the Municipal Commissioner a discretionary power to repair if the municipalities failed to do so. Even when the Commissioner exercised his

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powers and made repairs he was authorized to collect the expense thereof from the municipalities. This, to my mind, is very far from indicating a legislative intention that the municipalities were to be relieved from liability to an individual injured by their failure to perform their statutory duty. In my opinion, therefore, the municipalities are liable for loss suffered by their failure to maintain these ditches.

What portion of the plaintiffs' loss due to the flooding of their lands resulted from the omission of the municipalities, or either of them, to maintain the ditches in repair?

In determining this question we must take into consideration the unprecedented character of the rainfall. Mr. Mueller, the Reeve of the R. M. of Hanover, testified to losing half of his crop, and other farmers testified to losing a considerable part of theirs, as a result of the rains—without any flooding from the ditches. The learned trial judge held that 25 per cent. of the damage was due to the rain alone. Then we must consider the evidence of the engineers that even if the ditches had been in proper repair they could not have carried off more than 10 per cent. of the water during the flood. The municipalities cannot be held liable for the inadequacy of the drainage system. In view of the evidence of the plaintiff McMurdo that, while without the flood he would have lost a certain percentage of his crop due to the rains, the bulk of his loss was due to the flood, and his evidence that there was no flood until after Ditch " A " had been blocked up and a passageway for the waters of Tourond Coulée cut across the road; and in view of the finding of the trial judge that, after the damming up of Ditch " A," " practically all the water from the coulée went north over the plaintiffs' and other lands while the dam was in, and very little water went down Ditch " A," from the coulée," it is difficult to escape the conclusion that the flooding, and therefore the damage, was due to the damming of Ditch " A," the inadequacy of the drainage system and the unprecedented character of the rain storms, rather than to the non-repair of the ditches. How could the non-repair of Ditch " A " possibly cause the plaintiffs any damage? From the time the dam was erected by the individual defendants until it was blown up on July 11, it could make no difference to the plaintiffs whether the

ditch was out of repair or in repair, the waters from the coulée could not flow down it on account of the dam. Yet these were the very days in which the damage was done by the flood waters lying on the plaintiffs' land, and the evidence is that immediately the dam was taken out the waters began to go down. The plaintiffs' action, therefore, so far as it is founded upon the failure of the municipalities to keep Ditch " A " in repair, must fail, and, as that ditch is the only one within the municipality of de Salaberry, the action against that municipality should be dismissed on that ground alone. Apart from that, however, I agree with the judges of the Court of Appeal in thinking that the plaintiffs have not shewn that any of the damage which they suffered arose from a failure to keep the ditches in repair. Much damage had already been done by the rains but, in my opinion, the evidence is conclusive that the bulk of the damage was caused by the flood from Tourond Coulée, caused by the damming up of Ditch " A," for which the individual defendants are responsible; and by the inadequacy of the drainage system to drain lands lying as low as those of the plaintiffs.

I also agree that there is nothing in the evidence to shew any obligation upon the Municipality of Hanover, as part of its duty to repair, to fill in the washout on the road south of section 23. The small quantity of water which in any event would get on to the plaintiffs' land through that opening, as well as the small quantity that might have been carried away by Ditch " D " had it been in proper repair, would be inappreciable in comparison with the volume of the flood waters which did the damage.

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

Appeal dismissed with costs.

Solicitors for the appellants: *Hannesson & Freeman.*

Solicitors for the respondent, Rural Municipality of Hanover: *Haig & Haig.*

Solicitors for the respondent, Rural Municipality of de Salaberry: *Hudson, Ormond, Hudson & Spice.*

Solicitor for the respondents Audette: *W. H. August.*

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MARJORIE PRICE, WIFE OF ANDREW FREDERICK PRICE, DECEASED, AND MARJORIE PRICE AS NEXT FRIEND OF OLIVE PRICE, IRENE PRICE, BERTRAM PRICE, FREDERICK PRICE, KENNETH PRICE AND ANNIE MARJORIE FREDA PRICE (PLAINTIFFS) ..... } APPELLANTS;

AND

B.C. MOTOR TRANSPORTATION LIMITED AND WILLIAM LEDBURY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Motor vehicles—Collision—Responsibility—Action under Families' Compensation Act, R.S.B.C., 1924, c. 85 (Lord Campbell's Act)—Application and effect of Contributory Negligence Act, B.C., 1925, c. 8.

Plaintiff sued for damages for her husband's death in a collision between his automobile and defendant company's motor bus, on a wet morning, on Connaught Bridge, Vancouver. The trial judge gave judgment for plaintiff, which was reversed by the Court of Appeal, which dismissed her action (44 B.C. Rep. 24). She appealed.

Held (Anglin C.J.C. and Cannon J. dissenting): Plaintiff's appeal should be dismissed. Deceased was himself guilty of negligence, and the evidence did not establish negligence in the bus driver.

The question arose whether or not, deceased being guilty of negligence contributing to the accident, plaintiff's action was maintainable under the *Families' Compensation Act*, R.S.B.C., 1924, c. 85 ("Lord Campbell's Act"), having regard to the *Contributory Negligence Act*, B.C., 1925, c. 8. The judgment of the majority of the court, without deciding the question, assumed, for purposes of the judgment, that the action was maintainable.

Per Anglin C.J.C., dissenting: On the evidence, both deceased and the bus driver were equally guilty of negligence causing the accident, the fault of each being in driving at a speed which, under conditions existing, was excessive, and the effect of which continued right down to the impact. A case was thus made for the application of the *Contributory Negligence Act*. That Act is applicable to cases under the *Families' Compensation Act* for the purposes both of enabling plaintiff to maintain an action under the latter Act notwithstanding contributory negligence of deceased, and of providing for apportionment of the liability for damages; and as, in the present case, the evidence did not satisfactorily establish degrees of fault, the liability should

*PRESENT: Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

be apportioned equally, and defendants held liable for one half the damages found.

Per Cannon J., dissenting: On the evidence, the bus driver was guilty of ultimate negligence, in that prior to the impact he did not do everything reasonably required of him to avoid the possible consequence of deceased's loss of control of his car; and the judgment at trial in plaintiff's favour should be restored.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1), which reversed the judgment of D. A. McDonald J. in favour of the plaintiff (and of the infant children of the deceased, on whose behalf also she sued) in an action for damages for the death of the plaintiff's husband in a collision which occurred about 8.40 o'clock a.m. on September 1, 1929, on Connaught Bridge, Vancouver, between his automobile and a motor bus of the defendant company which was driven by the defendant Ledbury. The Court of Appeal set aside the judgment of D. A. McDonald J., and dismissed the plaintiff's action. The material facts of the case are sufficiently stated in the judgments now reported. The appeal to this Court was dismissed with costs, Anglin C.J.C. and Cannon J. dissenting.

E. F. Newcombe K.C. for the appellant.

R. L. Maitland K.C. and *W. A. Riddell* for the respondents.

The judgment of the majority of the court (Rinfret, Lamont and Smith JJ.) was delivered by

LAMONT J.—The one question in this appeal is, was there evidence on which the trial judge could find the respondents guilty of negligence causing the death of the late A. F. Price, the plaintiff's husband? The injuries received by Price resulted from a collision between a 29 passenger bus belonging to the respondents the B.C. Transportation Limited, driven by the respondent William Ledbury, and a Star touring car driven by Price. The collision took place on Connaught Bridge which connects the north and south shores of False Creek—an arm of the sea—in the city of Vancouver. In the middle of this bridge is a swing span or draw, which opens to permit the passage of water traffic.

(1) 44 B.C. Rep. 24; [1931] 2 W.W.R. 350; [1931] 3 D.L.R. 548.

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This span is 264 feet long and the bridge is a little over 57 feet wide. On each side of the bridge is a steel hand railing, 4 feet high. Next to the railing on each side is a sidewalk, 6 feet 9 inches in width, then a roadway for vehicular traffic, 8 feet 9 inches wide. On the inside of each roadway there is a steel parapet consisting of three horizontal steel girders, 2 feet 4 inches in thickness, with flat steel bar lattice work in between. These parapets extend to a height of from 15 to 20 feet and continue throughout the entire span. In the centre of the span on the top of these parapets is the bridge tenderer's house from which he commands a view of the span. The space between these parapets is 21 feet 6 inches wide and on this space two street car tracks have been laid. It is common ground that if there were no street cars passing along this space both busses and motor cars travel between the parapets. Also that at the time of the accident the bridge was very slippery and it was raining heavily.

As the trial judge pointed out, the plaintiff in this case is in the unfortunate position of having to rely upon the evidence of the respondent Ledbury for an account of the manner in which the accident actually happened, as well as of the occurrences immediately preceding it. The deceased, Price, did not recover consciousness after receiving his injuries, and no one, so far as the evidence discloses, other than himself and Ledbury, saw the accident.

Ledbury's story shortly is, that he was on his way north to the Canadian Pacific Railway depot to pick up his passengers and had to cross Connaught Bridge; that when he reached the centre span, there being no traffic on the bridge, he took the inside route on the east side; that he had his right wheels between the most easterly street car rail and the easterly parapet, and his left wheels between the rails of the most easterly track; that when he got to the centre of the span or a little past he saw an automobile coming towards him which was then approximately about 200 feet from the north end of the span but, as it was on the westerly car track and there was room for them to pass each other, he kept on; that when he got almost to the end of the span another car, which he had not seen before, pulled out to the left from behind the automobile, apparently with the intention of passing and getting into the span ahead of

it; that it got almost alongside of the automobile when its driver—who later was found to be Price—noticed the bus approaching and evidently put on his brakes to check his speed and get back behind the automobile, with the result that Price's car, which was a light Star touring car, commenced to skid and also to come over to the east. Ledbury says that when he saw the Star car turn out he took his foot off the accelerator and put it on the brake; and when he saw it skidding in front of him he applied his brakes, but, notwithstanding the application of the brakes, the bus " went right on a certain amount ahead "; that, as the Price car was now over on his side, he realized that a collision was inevitable if he kept going on, so he turned his wheel to the left and " tramped on everything " he had in an attempt to get clear but, just as he turned, the impact took place. As to what happened to the Star car he had no knowledge, but he himself with his bus shot ahead and went over the west side of the bridge and fell 50 feet to the flats below. The bus alighted upside down with Ledbury underneath. Fortunately he was not killed but he spent two months in the hospital.

The trial judge found that Ledbury had been guilty of negligence causing the accident and gave judgment for the plaintiff. This judgment was reversed by the Court of Appeal, Mr. Justice M. A. MacDonald dissenting (1).

The learned trial judge states the reasons for his finding as follows:

> I cannot blame him at the immediate moment before the accident for having decided to turn to the right or to the left. One has not the time to give it proper consideration. Nevertheless I fix him with liability in this case and on this ground. I think his car was out of control shortly before the time of the impact. He himself states that even on that day and under those conditions and on that street and with that bus at fifteen miles an hour he could stop in from thirty to thirty-five feet. Later on in his cross-examination, he went further and said that even at twenty-five to thirty miles an hour he could still stop on that street, on a wet street within thirty to thirty-five feet. Now, if so, and accepting his own evidence, in my opinion he ought to have and he could have stopped his car when he saw Price turn out, as Price had a right to do, or at least he ought to have slowed his car down and he could have done so on his own evidence, to such an extent that he had it under absolute control, and if he had done either, I am satisfied that this accident would not have happened.

(1) 44 B.C. Rep. 24; [1931] 2 W.W.R. 350; [1931] 3 D.L.R. 548.

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None of the judges of the Court of Appeal found any evidence to support the view that the bus was "out of control" shortly before the impact and, in my opinion, there is no evidence upon which that finding can be upheld. I am also unable to agree with the learned trial judge that Price had a right to attempt to pass the car in front of him at the entrance of a narrow passageway (21 ft. 6 inches) without first ascertaining that there would be room to get by, which there would not be if either a bus or a street car were crossing the span to the north and opposite the automobile. The distance from each parapet to the nearest street car rail is 3 feet 3 inches. The rails of the street car are 5 feet apart, which is also the width of the devil strip. Ledbury says the automobile was running with its right wheels just over the westerly street car rail, and that he had his bus in the same position on the east side. The distance between the east and west street car rails is 15 feet. The bus was 8 feet 8 inches wide, while the width of the automobile, although not stated in the evidence, would not be less than 6 feet. With the right wheel of each vehicle just over the street car rail on their respective sides, it is clear that there would be no room for the Star car to get between them. To attempt to pass while both were approaching the entrance of the span, without first seeing that the road ahead was clear, was not the part of a prudent or cautious man.

Price being guilty of negligence contributing to the accident, the question arises whether or not the plaintiff's action is maintainable under the *Families' Compensation Act*. Without deciding the question I will assume that it is.

In his dissenting judgment Mr. Justice M. A. MacDonald said:—

> Appellant's driver was not called upon to take precautions (beyond ordinary care in driving) until deceased's car drifted over to his side of the road. He was not obliged to take precautions when he saw deceased turn out to pass the car in front of him as that manoeuvre could and should be executed without danger to any one. If it could not, it should not have been attempted.

I agree that Ledbury was not called upon to act when he saw the Star car turning out to pass unless it was so close to him as to make a collision probable. Ledbury had a right to expect, as he says he did expect, that on seeing the bus the driver of the Star car would check his speed and pull

back behind the automobile. It was, therefore, only when he became aware, or should have become aware, that Price did not intend or was not able to get back into line that Ledbury had the duty cast upon him of taking whatever steps he could to avoid a possible collision. The learned judge also said:—

> After the deceased skidded in front of the on-coming bus, however, he was helpless: he could not do anything to avoid the accident. His original negligence was exhausted. Only one person could avoid it, viz., appellant's driver fifty or sixty feet away. By his own evidence, as stated, he might easily have stopped within that distance—he said he could stop in thirty or thirty-five feet—and if he had done so the accident would not have occurred.

Assuming that the bus and plaintiff's car were 50 or 60 feet apart at the time Ledbury realized there was danger of a collision, I am, with deference, of opinion that the conclusion that he had that distance in which to stop his bus is not warranted. It is based on the assumption that Price's car was not skidding south to meet him. Ledbury says it was. The pavement was wet, the car was equipped with hard pressure tires which skid more easily than balloon tires. According to Ledbury the rear end skidded south until the front was pointing east. The question is, at what rate was it skidding south? If it was going south as fast as the bus was going north Ledbury did not have 50 or 60 feet in which to stop his bus, but only 25 or 30 feet. If the Price car was skidding south at a faster rate than that at which the bus was going, he would not have even that distance. Now, it is a well known fact that cars do sometimes skid rapidly and by skidding turn completely around. There is absolutely no evidence as to the rate of speed at which Price's car was skidding south and, in the absence of such evidence, it is, in my opinion, impossible to say that Ledbury, after becoming aware of the danger, could have stopped his bus in time to avoid a collision.

On the argument before us, counsel for appellant also contended that there was evidence from which an inference could be drawn that the bus was being driven at an excessive rate of speed. Ledbury says he was driving across the span at 20 or 21 miles per hour; that when he saw Price's car turn out to pass the automobile, it was about 100 feet from the north end of the span. At that moment he was still in the span but almost at the end of it; that he slowed

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his car to 15 miles per hour; that when he saw Price's car over on the car track on which he was driving, he applied his brakes and had, he thinks, practically stopped before the impact. Ledbury, it is true, makes a number of inconsistent statements: for instance, in one place he states that when the impact took place his bus was half in and half out of the span. In another place he says the collision took place 50 or 60 feet north of the span. He says in one place that at 15 miles per hour he could have stopped the bus in 30 or 35 feet, and, in another place, that at 25 or 30 miles per hour he could have stopped it in 35 feet.

Fortunately, however, we are in a position to fix by independent evidence some of the more material points bearing upon the accident. We have the evidence of Bennett, the bridge tenderer, who heard the crash of the collision while in his house, and immediately looked out. The trial judge accepted Bennett's testimony and we must give it full effect. Bennett did not see the collision, but when he looked out he saw the Star car turning around to the left and it finished by facing in a southerly direction, having made a complete circle. He also saw the gray bus which was on the devil strip. His evidence is:—

THE COURT: Q. You saw the Gray bus travelling along, going north? —A. Yes, towards the west side of the road.

Q. How far, having regard to the west street car tracks?—A. It travelled right from the east side to the west side, or I might say, from the centre of the span to the west side of the street. When I saw it first it was in the centre of the span.

Q. Had it got off the span?—A. I wouldn't say whether it was just at the outside edge of the span.

Q. Just get it clear when you saw it first?—A. It had just gone off the span and travelled to the west side of the road.

Q. Then pointing north?—A. Yes.

Q. And as from east to west where was it, say, with reference to the devil strip?—A. It was on the devil strip when I saw it.

Q. When you first saw it?—A. Yes.

Q. Then what happened?—A. It travelled right to the west side of the road, and the girder-work took it from my sight.

* * *

Q. Did you observe the roadway, the surface of the bridge, rather. Did you look to see if there were any marks on it?—A. Oh, yes, casually I glanced round.

Q. Were there any marks?—A. I didn't see any marks whatever—oh, yes, I saw where the Star car had swung around.

Q. Where was that, on the west or east side of the bridge?—A. Around about ten feet away from the gate, lower down on the span on the north end.

Q. And how far from the sidewalk?—A. About six or eight feet.

Bennett's evidence fixes definitely the place of impact at about 10 feet north of the span. This accords with the statement of Ledbury that at the moment of the impact his bus was half way out of the span—his bus being 29 feet long. It establishes also that the Star car spun around to the left and ran against the steel buttress at the end of the west parapet, throwing Price to the sidewalk. At this time the bus was on the devil strip going northwest.

Then we have the evidence of Caulfield, who, at the time of the accident, was walking north on the sidewalk of the bridge with a Mr. Hill, since deceased. Caulfield says the bus entered the span well over on its own side and was travelling at an ordinary rate of speed. He says he heard a crash and climbed through the girders to the inside of the span to see what had happened. He saw the Star car turn around and then come to "the west side of the span at a kind of an easterly triangle next the roadway." It struck the north end of the parapet on the west side of the bridge, throwing a man to the sidewalk, and bounced back in a northeasterly direction, a distance of 6 feet; that at this time the front of the bus was about the middle of the west street car track and was to the north of the Star car.

As the impact took place ten feet north of the span and prior to the time when Bennett saw the bus on the devil strip pointing northwest, and as the Star car swung clear around in a circle to the west side of the bridge, the manner in which the impact took place may, in my opinion, be reconstructed with reasonable certainty. Two witnesses were called by the plaintiff to give their views as to how it must have occurred. The first was K. S. Patrick, the plaintiff's father and a civil engineer. He testified that he had examined the Star car three days after the accident and found that the right fender had been crushed in and the hood dented on its right side and the engine and everything underneath was badly pushed back. He said that he figured the Star car was going southeast and, from the markings on the hood, the bus must have been going north and a little to the east, for the car was hit on the right-hand front corner. His evidence is:—

Q. That is your theory?—A. Yes.

Q. The left side of the front of the bus hit the car on the right-hand corner in front?—A. There is no doubt about this part of it.

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Q. Swinging the Star car around to the left in a complete circle?—A. Yes.

Q. And the bus proceeding beyond the other car further north and to the west side?—A. That is the only way it can be explained. * * *

On cross-examination Patrick said that after the impact the bus would be "going northwest but more to the west I fancy."

Then we have the evidence of Alexander Bell, a police officer who was at the scene of the accident a few minutes after it occurred and who came to certain conclusions as to how the accident happened from seeing the condition of the Star car and from questioning the people who were present when he arrived, and also by questioning Ledbury in the hospital.

He gives the following testimony:—

Q. From your deductions there from what you saw, the Star car had skidded in front of the bus?—A. It looked that way.

Q. Would you draw that conclusion?—A. In my opinion both cars—the bus was travelling on the street car tracks and the car that Price was driving was coming south on the street car tracks, too, and skidded right in front of it, and went over running east, and he got hit a glancing blow.

* * *

Q. Your idea is the Star car skidded before it was hit and was pointing nearly east?—A. Yes, and then carried clean around until the front end was facing south.

No witness saw the marks on the bus where it came in contact with the Star car, for, as soon as Ledbury was removed from under it, the owners had it taken away by a wrecking crew as the tide was coming in.

Viewing the evidence as a whole, I think the reasonable conclusion is that Ledbury saw the Star car turn out to pass the automobile when it was about 100 feet from the north end of the span, as he says; that when Price saw the bus he realized the impossibility of passing the automobile and applied his brakes; that on applying the brakes, the pavement being slippery, his car commenced to skid and he went skidding forward and a little to the left until the front of his car was pointing east, or perhaps north of east, when it received a glancing blow either on the side of the car or on the engine from the left front end of the bus and was sent spinning around to the left, while the bus, which a moment before the impact, had been turning to the left, proceeded in a northwest direction until it went over the edge of the bridge. Ledbury's suggestion that the right half of the bus

hit the right half of the Star car is not consistent with the facts established by Bennett and other witnesses and must, in my opinion, be disregarded, as I think we must disregard the statement he makes in one place that, just prior to the impact, his front end was facing west. His statements as to what occurred just at the time of the accident shew that he had no clear recollection of the events, and that perhaps is not to be wondered at. He admitted that in the hospital he had been trying to work out in his mind how the accident must have occurred, and it may be that in endeavouring to reconstruct the final scene he failed to keep clear and distinct the line of demarcation between what he actually remembered and what, in his enfeebled condition, he imagined must have happened. As I read Ledbury's testimony, it is not that of a man who is wilfully endeavouring to mislead the court, but is that of a man who, until the moment his mind became affected by the agony of the collision, has a clear recollection of what actually happened, but who from that time has only a confused remembrance of the events which took place, and says so, but in answer to questions states what he thinks happened. Weighing his evidence upon that footing or even disregarding his entire testimony from the moment he became aware that Price was not able to get his car back into line behind the automobile, I am unable to find any evidence that he was at any time driving at an excessive rate of speed.

Then can any inference be drawn from the events which happened? Taking Ledbury's statement, from which he has never varied and upon which no doubt has been cast, that the Star car turned out to pass the automobile when it was about 100 feet from the north end of the span and that at that time he " was in the span almost coming out " or " practically at the end of the span," as he says in another place, we know that Price travelled 90 feet to the point of impact, while the bus travelled the 10 feet from the end of the span plus the distance the front of the bus was back from the north end of the span, at the moment Price turned out. The bus, therefore, must have travelled a much shorter distance than the Star car to the point of impact. The relative distance travelled by the two vehicles supports Ledbury's statement that he had slowed down considerably, and it may be that he had practically stopped,

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for who can say that if a light car (weighing only 1,190 pounds), skidding rapidly on wet asphalt, comes against a five and a half ton bus almost stationary, the impact would not produce the same result as we have in this case so far as the Star car is concerned? To my mind the result of the collision is just as consistent with the rate at which Ledbury says he was driving as with the suggestion that he must have been going much faster.

In my opinion the decision of the Court of Appeal was right and the appeal should be dismissed with costs.

ANGLIN, C.J.C. (dissenting).—I have given this case very thorough consideration, having read every word of the record through once at least, most of it twice, and some parts of it, notably the testimony given by Ledbury, three or four times. After carefully digesting the evidence of Ledbury, I am satisfied that he is an utterly unreliable witness, either because of a disinclination to tell the truth, or, more probably, because of inability to recollect the material facts due to his physical condition immediately following the accident. Of this witness, I take much the same view as did the learned trial judge, who appears to have accepted his testimony only when given against himself, or when corroborated, or entirely in accord with facts otherwise proved. In my opinion, therefore, the proper course will be to examine this case on the independent testimony and on Ledbury's evidence where he makes admissions against his own interest, or where his statements are fully corroborated and also, where they are wholly consistent with facts, either admitted, or otherwise satisfactorily proved.

Adverting to the reasons given for the judgment of the Court of Appeal (1), I find that of the majority, who allowed the appeal, Macdonald, C.J.B.C., contented himself with stating that " there is no evidence upon which a judgment can be supported." Martin, J.A., merely agrees in allowing the appeal, giving no reasons for his conclusion. Only two judges of the majority give reasons—McPhillips and Galliher, JJ.A. The former said, " the *onus probandi* rested upon the plaintiffs to make out their case beyond any

(1) 44 B.C. Rep. 24; [1931] 2 W.W.R. 350; [1931] D.L.R. 548.

reasonable doubt" (1). With respect, there is here a clear misdirection (*Cottingham* v. *Langman* (2)) of himself by the learned judge, practically at the outset of his judgment, on a vital point. He applies to this civil case a rule applicable exclusively to the Crown's case in a criminal prosecution. (*Clark* v. *The King* (3)). The learned judge assumes all the facts as deposed to by Ledbury in the defendant's favour. He even goes further. For instance, he says,—

> The motor car was, when first seen, upon its proper side following another motor car and when the vehicles were somewhere about 50 or 60 feet apart the deceased driving the motor car turned out to pass the motor car ahead of him, etc.

although Ledbury himself says that he did not see the deceased's motor while it was following the preceding car nor, indeed, until it was turning out to pass the preceding car, and adds that there was then about "100 feet" between "the end of the span" and the car which preceded the deceased's motor car, which would imply that there must have been well over 100 feet between his omnibus and the deceased's motor car at that time. This latter fact is also asserted in the respondent's factum. From the assumption thus made, the learned judge draws the inference that

> the driver of the motor bus was placed *immediately* in the "agony of collision" and he vainly in an attempt to avoid a collision turned sharply to the west—but in so doing struck the motor car a glancing blow on its right side.

The learned judge continues:

> the motor bus, in thus attempting to avoid the motor car, mounted the board walk which runs along the west side of the bridge and crashed through the bridge rail,

ignoring the all-important fact, that the omnibus actually went through the bridge rail at a distance of 86 feet north of the point of collision, as will presently appear.

Having thus dealt with the facts, the learned judge proceeds:

> Upon these facts must be gleaned some sufficient piece of evidence which can reasonably establish that the driver of the motor bus was reasonably at fault and was guilty of some negligence that can be said to have been the proximate cause of the accident or rather was it upon all the facts inevitable accident produced by the conduct of the driver of the motor car?

(1) 44 B.C. Rep. at p. 28.
(2) (1913) 48 Can. S.C.R. 542, at 544.
(3) (1921) 61 Can. S.C.R. 608, at 626-7.

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Mr. Justice Galliher would seem to have based his judgment largely on Ledbury's discredited evidence. Upon it he finds as a fact that Ledbury

realized it was getting dangerous when the other car continued coming over in front of him and not straightening out *at a time too late* to take effective action.

Speaking of Ledbury's evidence as to his ability to stop within thirty to thirty-five feet under the circumstances then existing, when going 15 (or even 25) miles per hour, he says:

His answer as to stopping within 30 to 35 feet at 15 miles an hour should not be taken with regard to the situation as it had arisen as deposed to but that if called upon to come to a stop ordinarily under the condition of the pavement that morning he could do so in that distance.

He adds that

if liability cannot be fixed upon Ledbury on his own testimony then I consider no case is made out by plaintiff.

He finally bases his judgment largely on

the view that the learned judge below misconceived the effect that should be given to the answer as to the distance in which Ledbury could have stopped his car.

Of course, if one should assume all the facts to be as deposed to by Ledbury, the appellant's case would be at an end.

In his dissenting judgment, Mr. Justice M. A. Macdonald refers to the testimony at some length and comes to the conclusion that, on the whole case, there was enough to warrant the finding that

accepting the evidence of appellant's driver * * * his negligence * * * (was) the substantial cause of the accident.

He also finds that it was

because of the negligent driving of the deceased that his car skidded or drifted in front of the motor bus,

but, he adds, that after that happened "he was helpless" and the only person who could have avoided the accident was the "appellant's driver (then) fifty or sixty feet away." He holds the latter bound by his answer that, on the occasion in question, "he could stop in thirty or thirty-five feet" and finds that

he negligently adopted a course which did not prevent the accident, a course which if successful would allow him to proceed without loss of time (and there was some slight evidence that he was in a hurry) whereas he might have adopted another course, viz., to stop, that would effectually prevent it. Even if he only reduced his speed the impact would be slight.

It is common ground that the collision occurred on the Connaught bridge in the City of Vancouver on the morn-

ing of Sunday, the 1st of September, 1929, about 8.40 o'clock, between a Star car driven by Price, the deceased, and a motor bus of the defendant company in charge of one Ledbury.

The precise point at which this collision occurred is, however, in dispute, the appellant claiming it was at the exit from the swing span and within the arms or uprights of the latter, the defendants claiming that the actual place of impact was some fifty feet north of that point. The only satisfactory evidence on this particular matter is given by Bennett, of whom the learned trial judge says that he accepts his evidence,—

I am satisfied, *from a view*, that Bennett saw what he testified to having seen.

The learned judge had, by consent, taken a personal view of the bridge.

Bennett, the bridge tender, who was in his house situated above the middle of the bridge, although he did not see the actual collision at the moment of the crash, tells us that his attention was *immediately* drawn to the colliding cars. On going down to the bridge below he found marks upon the surface of the bridge indicating where Price's Star car had spun around immediately upon its being struck by the oncoming bus. These marks were at a distance of about 10 feet north of the northern upright of the bridge and indicate fairly closely the actual point of impact. This evidence was substantially corroborated by Caulfield, who said:

Q. Then what is the next thing you know of the accident?—A. Well, the next thing we heard was the crash. We did not see it.

Q. What did you do?—A. We went right through the girders into the centre of the span.

* * *

Q. What did you see?—A. At that time the Star car was coming like this, making this turn, and it hit some portion of the bridge and it came back; at that particular moment the man Price went out.

Upon this evidence, I find as a fact that the impact occurred at a point about 10 feet to the north of the swing span, or draw, of the bridge and some 86 feet south of the place where the motor bus eventually crashed through the rail on the west side, at a point by actual measurement 96 feet north of the north end of the draw-span. Ledbury in at least two places confirmed this view when, in his examination for discovery, he said:

Q. Did it come into the draw?—A. Yes, it came into the draw. It faced me, and I was paying too much attention to the other car at the

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time being and I didn't really notice it, but it came into the draw anyway—because he was coming into the draw, and this other car went to go around him to get into the draw—

* * *

and again,

Q. You were clear of the draw, weren't you, before the impact?—A. I wasn't quite clear of the draw. Half of the car was outside the draw.

It is also common ground that, prior to the accident, the motor bus was going north and the Star car going south.

The rate of speed of the motor bus, however, is not conceded. Ledbury admits he may have attained a speed of 21 miles per hour:

Q. Will you swear positively you were not going more than 20 miles an hour?—A. I won't swear positively I was not going more than 20 miles an hour. I might have been going 21 miles an hour.

On the other hand, the witnesses, Caulfield and Philp, both called for the defence, do not attempt to fix the precise speed. Caulfield, however, said:

Q. Cars on the bridge usually travel pretty fast?—A. Pretty sharp. They all do.

Q. You have observed that yourself?—A. Yes.

Q. Was this bus at the time you saw it, holding its own with the general rate of traffic?—A. I don't know. It was travelling no faster than they do when the bridge is full of traffic.

* * *

Q. What speed do they maintain?—A. Across the bridge as best they can, I suppose.

Q. But you are a man that has observed cars on the bridge, apparently. Do they travel rapidly, or very slowly on the bridge?—A. I don't know. They travel no faster on that bridge than they do on any ordinary highway, I don't suppose.

Bennett gave the following evidence:

Q. Did you hear anything before you heard the crash?—A. I might say just prior to the crash something came along at what I term a good rate, a high rate of speed.

THE COURT: Q. You mean by the sound of the engine?—A. Yes, the sound it made at the end of the span. We have cover plates that cover the gap over, and when anything hits that it gives a severe jar. I heard that and then the smash of the crash. That is what brought it to my mind that it was travelling very quick.

* * *

Mr. SINNOTT: Q. I am not quite clear, Mr. Bennett, about the large bus. Was that the bus from which you heard the sound?—A. Yes.

Q. Was there any other bus there?—A. There was nothing else. *I didn't see any other on the street at all.*

* * *

Q. But does a heavy vehicle going fast make a different noise to a heavy vehicle going slowly?—A. Yes, it gives a different jar.

Mr. MAITLAND: Q. His lordship has put a suggestion now and I presume that your lordship means that you are going to have a view.

THE COURT: Yes.

Mr. MAITLAND: Q. Then you can demonstrate that to his lordship when he is there, can you?—A. If we get an example while we are there, you will recognize it yourself.

Upon the whole case, I am satisfied that Ledbury had actually attained a sped of between 23 and 25 miles per hour and that the Star car was coming towards him about equally fast.

There is not a little controversy as to whether or not there was a third car immediately preceding the Star car when Ledbury first looked in its direction. Ledbury speaks of the Star car as turning out behind the other to pass it. It is extraordinary, if this be so, that there is not any corroborative evidence of the presence of this third car. Bennett, Caulfield and notably Philp were each in a position to see such a car, if it were there; but no one of them told of having seen anything of such a car on the bridge at any relevant time. Apart from Ledbury's testimony, there is no evidence whatever of the presence of a third car and, if required to decide upon this issue, I would certainly determine that the presence of this car had not been established.

My own idea is that, when giving evidence, Ledbury really thought two cars had been approaching him prior to the accident. That may be accounted for in this way,—when he first looked he saw only one car, which was in fact the Star car coming straight towards him, at a distance of about 350 feet. His failure to recognize it as such may have been due to the heavy rain then falling, or to his paying insufficient attention to it at the time. When he again looked he saw a car coming towards him at an angle, at a distance of 100 feet beyond the end of the span, and, as he thought, beginning to skid towards his side of the bridge. This was, undoubtedly, the Star car. He is not pressed to say what became of the alleged preceding car after it passed him at about the entrance. He has no idea what became of it. Brooding over the matter during his more than two months in the hospital, as he admittedly did, when he says, The way I had it figured out in the hospital, I had it doped out * * * he gradually began to think, and eventually firmly persuaded himself, that he had seen two cars where, in fact, there was only one, which he had noticed in two different positions.

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But, for the purpose of this judgment, I shall assume that there was a car immediately preceding the Star car, as stated by Ledbury. The case appears to have proceeded on this footing and appellant's counsel at bar seemed to be ready to accept it as correct. If so, it would seem reasonably clear that Price turned out to pass the other car, much as Ledbury says. Ledbury also says that he was paying close attention to this leading car and did not see the Star car following, as he admittedly should have done had he been looking carefully ahead.—

Q. Why didn't you see the second car?—A. I don't know. I guess I was not looking for it.

Of this state of facts, however, we have only Ledbury's evidence, there being no other witness. Otherwise, the only way one could account for Price being on the wrong side of the road and in front of the bus, as Ledbury alone says he was, would be that his car had skidded, not improbably on the greasy tram rails, and that it was already out of control when Ledbury says he saw it skid over in front of him.

We also have the fact conclusively proven that the motor bus crashed through the west railing of the bridge at a distance of 96 feet from the north end of the north girder of the draw and about 86 feet to the north of the point of impact and fell some 50 feet to the creek below, Ledbury being imprisoned in it.

It is also common ground that the bridge was in a very dangerous condition that morning, owing to the first rain of the season having fallen. The pavement of the swing span of the bridge was very slippery, it being made of wood blocks ("the portions north and south being covered with asphalt"), so much so that Philp admits these facts. He adds:

Q. And 25 miles an hour is not a safe rate of speed at which to travel over that bridge under those conditions?—A. Not under those conditions.

It is true that, only three questions further on, in answer to the court, Philp said:

The COURT: Q. But if anybody was going 25 miles, would you say that was too fast?—A. No, if there was no traffic on the bridge.

But this only serves to show the facility with which this witness can accommodate his answers to momentary exigencies.

Speaking of the dangerous condition of the bridge on the morning in question, and of the difficulty of driving motor cars occasioned by it, Ledbury himself says:

Q. What is your average general rate of speed when travelling over the bridge, when you are driving the motor bus?—A. Very seldom over 20 miles an hour, but on really dry pavements we can go 25.

Q. I suppose your reason for that is that it is rather dangerous driving faster than 20?—A. Very dangerous. It isn't too bad when it is dry, but it is a very dangerous bridge when it is wet.

Q. So proceeding fast on that bridge would be a dangerous matter on a wet pavement?—A. Yes, yes.

Q. And it would be particularly dangerous on that portion of the bridge known as the draw—the draw bridge?—A. The span, yes.

And also,

Q. What condition was the bridge in that morning?—A. Well, that bridge is always a bad bridge on a wet morning. Everybody knows that, that has driven over there.

and again,

Q. Question 154. I asked you "At 15 miles an hour it is very easy to control the speed of the car—with your steering apparatus and your four-wheel brakes?—A. Well I don't know. I doubt it, on that morning, if you could control a car at five miles an hour. You would have difficulty in controlling it to any extent—the control was beyond any person on account of the condition of the bridge that morning." Now you said you could not control your car at 5 miles an hour. Is that right?—A. Well, you may have misunderstood me in that statement.

Q. What is your explanation of it now?—A. My explanation is that I would not—with the condition of the roadway that morning on that bridge, at 5 miles an hour I would not be able to bring my car to a dead stop.

Q. You said you could not control your car?—A. That is what I meant by controlling.

Q. At 5 miles an hour you could not bring your car to a dead stop? —A. No.

The COURT: Q. You say you could not bring it to a dead stop at 5 miles? What do you mean by that?—A. I mean to say at 5 miles an hour even if you put your brakes on right there, you will skid.

Q. You mean you cannot stop instantly?—A. Yes.

Q. You mean within a foot or two?—A. Yes, within a foot or two.

and,

Q. Do you mean to say that a bus cannot, in an emergency be pulled up on these wet pavements of Vancouver, within a distance of 100 feet, or that they are going to skid 80 to 100 feet in an emergency application of the brakes?—A. No, I didn't say so.

The COURT: He has already answered that; at 15 miles an hour under these conditions that morning, he could stop in 30 or 35 feet.

Mr. SINNOTT: Yes.

The COURT: Then what is the good of pressing it?

There is also no dispute that, after describing one complete circle (if not two), the Star car either plunged forward or, still gyrating, struck the draw of the bridge at the

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north end on the west side and rebounded about 6 feet northward. Caulfield, a very careful witness, deposed to this, and his evidence must be accepted as reliable.—

Q. You left the sidewalk?—A. We left the sidewalk and went right into the centre of the span.

Q. Through the girders?—A. Yes, through the girders, into the centre of the span. And as soon as we done that——

Q. Did you look up the span?—A. We looked up the span.

Q. What did you see?—A. At that time the Star car was coming like this, making this turn, and it hit some portion of the bridge and it came back; at that particular moment the man Price went out.

The COURT: I don't quite get that.

Mr. HUTCHESON: He said it hit a portion of the span, sir, hit a portion of the span, and then went back.

The WITNESS: Jumped back as it hit the span, it came back.

The COURT: Q. At the north?—A. At the west side of the span.

Q. And the north end?—A. Yes.

Q. But when you say it jumped back, it jumped towards the west?—A. No, the car came to the west side of the span at a kind of an easterly triangle next the roadway.

Ledbury gave this evidence:

Q. Draw a line from the nose of his car.—A. He came about here.

Q. Mark that "P" again please.—A. Yes. Then I saw right away that there was no chance, that I would have to hit him. There was no chance of stopping because on account of the wet pavement I knew; he is almost practically in front of me then.

The COURT: Q. Are your wheels locked now?—A. No. Then I tramped on everything I've got and swung my wheel right over to the left like that.

Mr. MAITLAND: Q. That would put your car trying to shoot her over to the west?—A. Yes.

The COURT: Q. Did you notice that other car any more?—A. No. I never paid any more attention. I don't know where this car went to at all. My vision went all on this car. I swung right over to the left, and just as I turned my wheels, I just had my wheels turned like that, bang he went like that. That is all I know.

Mr. MAITLAND: Q. Well, now, how was the Price car travelling?—A. Well, I would not like to say at what speed or anything like that. He was travelling—the first car was coming towards me just as fast as I was going, if not faster, and he must have been going a little bit faster to try and get around this car into the span.

Ledbury attempts to account in this way for the fact that the bus ran some 86 feet after the impact before plunging into the creek. He says:

Q. What happened to your car then, do you know?—A. Yes. I felt my end come around almost, and the next thing that loomed up in front of me was the railing of the bridge. The railing of the bridge was practically almost facing me, maybe at a slight angle.

Q. As your car came right around, or swung, that is what you mean?—A. Yes.

Q. In what direction were your wheels pointing?—A. Well, my front wheels would be to the west, but not directly west. I imagine it would not be directly west.

Q. And then what happened?—A. Well——

Q. You went over the railing?—A. No. Well, I went over the railing I will admit, but I tried to save myself going over the railing, and to try and save himself when a person gets into a skid, the first thing any driver would do would be to take his foot off the brakes, step on the gas and try and take his car out of the skid.

Q. That gives you better control?—A. Well, that does not give me better control. It gives me control to try and get her out of the skid.

Q. Why could you not straighten her out?—A. Because the wheels appeared to be locked.

Q. What did that?—A. The impact I imagine.

Q. The collision?—A. Yes. The way I had it figured out in the hospital, I had it doped out, that the fender must have caught on the wheel and held the wheel and I could not bring it back.

Bennett, who, as already stated, was explicitly found by the trial judge to be a very satisfactory witness, and whom we can entirely believe, said:—

I saw the Gray bus travelling along, and then there was a blind space in the girder work. Ordinarily I should have seen it again.

The COURT: Q. You saw the Gray bus travelling along, going north? —A. Yes, towards the west side of the road.

Q. How far, having regard to the west street car tracks?—A. It travelled right from the east side to the west side, or I might say, from the centre of the span to the west side of the street. When I saw it first it was in the centre of the span.

* * *

Q. Just get it clear when you saw it first?—A. *It had just gone off the span* and travelled to the west side of the road.

Q. Then pointing north?—A. Yes.

Q. And as from east to west where was it, say, with reference to the devil strip?—A. It was on the devil strip when I saw it.

Q. When you first saw it?—A. Yes.

Q. Then what happened?—A. It travelled right to the west side of the road, and the girder-work took it from my sight.

Q. And when you caught it again where was it?—A. I thought to myself the thing is gone. It is a most mysterious disappearance. And we have a door on the side, and I opened the door, and there was nothing there, just a gap in the hand rail.

Q. Where was that gap in the hand rail in regard to the Star car, north of it?—A. North of it, yes.

Q. How much?—A. About 100 feet. The Star car was right down by the end of the span.

Q. You saw it turning?—A. Yes.

Q. And then it faced north?—A. Faced south.

Q. Came right around, making a complete circle?—A. Yes. Of course, I am not saying directly south. I wouldn't say directly south, but approximately.

Q. No, no, but approximately?—A. Yes.

Mr. SINNOTT: Q. I am not quite clear, Mr. Bennett, about the large bus. Was that the bus from which you heard the sound?—A. Yes.

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Q. Was there any other bus there?—A. There was nothing else. I didn't see any other on the street at all.

* * *

Mr. SINNOTT: Q. If any vehicle entering the draw at the north end that morning at that particular time when the bus was there, could it have escaped being hit?—A. That I can't say. According to the position of the bus when I saw it there was no room for anything else.

Caulfield evidently did not see the bus until later as he only speaks of it as "facing west and east," about the time it crashed through the railings.

Dealing with the question of his speed before and at the moment of the impact, Ledbury says:

Q. Did you say you maintained a speed of 15 miles an hour until you struck this car driven by Price?—A. No, no.

Q. You cut down your speed before that?—A. My nose was just at the end of the span.

Q. Then you were going less than 15 miles an hour when you collided with Price?—A. Oh, yes.

Q. And much less than that?—A. Oh, yes.

Q. How much less would you be going than 15?—A. I had practically stopped I guess.

Q. When you struck Price?—A. Yes.

Q. Almost stopped when you struck Price?—A. Yes.

Ledbury was not pressed to say why, if his car was "practically stopped" at the moment of the impact, he did not allow it to rest there, but "tramped on everything" he had. Ledbury himself, in his earlier evidence, had, in fact, contradicted his statement that his car had "practically stopped" before the impact when he said:

Q. Draw a line from the nose of his car.—A. He came about here.

Q. Mark that "P" again please.—A. Yes. Then I saw right away that there was no chance, that I would have to hit him. There was no chance of stopping because on account of the wet pavement I knew.

Ledbury had, unguardedly perhaps, admitted that his bus was going "about 15 miles an hour * * * right at the moment of the impact." He, almost immediately afterwards, made the statement that I have quoted above from his evidence, viz., that he had "practically stopped," etc. But, when one looks at his testimony given elsewhere in the book, it is apparent that his possibly unguarded admission was nearer the truth. Thus, he says on discovery:

Q. Now, before the impact, did you apply your brakes?—A. Yes, absolutely, my wheels were locked.

Q. Which brake did you apply?—A. My air brake.

Q. Your air brake?—A. Yes.

Q. That is the four-wheel brake?—A. That is the brake we always use.

Q. Did you apply your emergency brake?—A. No, I didn't need to, because that is absolutely no good under those conditions.

Q. What made you apply your brakes?—A. Well, I seen that he was coming towards me.

Q. Yes, and how far were you from the other car when you applied your brake?—A. Well, he was—he had just turned out and he was in front of me when I applied the brake.

Q. Mr. SINNOTT: When you applied the brake?—A. Yes.

Q. And your car didn't stop?—A. No.

Q. It carried right on?—A. Yes, it carried on a certain amount ahead.

Q. And you struck the other car?—A. He struck me—or we both struck together—there was no argument about that.

Q. You both came together?—A. Yes.

On examination-in-chief at the trial, he said:

Q. Mark that "P" again please.—A. Yes. Then I saw right away that there was no chance, that I would have to hit him. There was no chance of stopping because on account of the wet pavement I knew; he is almost practically in front of me then.

The COURT: Q. Are your wheels locked now?—A. No. Then I tramped on everything I've got and swung my wheel right over to the left like that.

Mr. MAITLAND: Q. That would put your car trying to shoot her over to the west?—A. Yes.

The COURT: Q. Did you notice that other car any more?—A. No. I never paid any more attention. I don't know where this car went to at all. My vision went all on this car. I swung right over to the left, and just as I turned my wheels, I just had my wheels turned like that, bang he went like that. That is all I know.

And, on cross-examination:

Q. Well, you had ample time; you were only travelling at 15 miles an hour; what explanation have you got to offer now for doing what you did on that occasion.—A. If he had done what I imagined he was going to do, I had ample room to pass him, the direction which I turned.

Q. You began to calculate in your mind and figure things out for yourself?—A. To a certain amount, yes.

Q. But you did not figure out that it would be a good thing to stop your car dead at that time, at that point?—A. Well no.

Q. Don't you think that would be the most natural thing for a careful driver to have done?—A. No, because I have run against the same kind of a position practically, before; other times before.

* * *

Q. You said you have—— —A. I have seen cars doing the same thing.

* * *

Q. That is, you were travelling less than 15 miles an hour?—A. About 15.

* * *

Mr. SINNOTT: Q. Did your air brakes lock your wheels?—A. They did at the impact, certainly.

Q. They did not before that?—A. No, because that is the reason I left the clutch out.

The COURT: Q. Just at the moment of the impact?—A. Yes.

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Mr. SINNOTT: Q. So that your wheels were not locked before the impact?—A. No, the wheels would not be locked.

* * *

Q. Is it good or bad practice to lock the wheels?—A. It is bad practice in bad weather.

Q. But you locked your wheels?—A. Not at that time.

Q. Later on?—A. Yes.

The COURT: Q. You were up against it then? It did not make much difference what you did then?—A. It is just a matter of putting on everything you have, and turning to try and make a miss if you can. It is just a chance, that is all.

* * *

Q. Did you shut the power off in your bus?—A. No.

Q. You never did that?—A. No.

Q. Is that not the proper practice in an emergency?—A. No, no.

Q. It is not?—A. No.

* * *

Q. So then it would be considerably reduced when it was receiving no gas?—A. It would not be considerably reduced because the momentum carries her.

Q. You were travelling on your own momentum?—A. Yes.

Q. Without the aid of your engine at all?—A. Oh, that is only for a distance of about 25 feet.

Q. That is for 25 feet?—A. Yes.

Q. What did you do at the end of the 25 feet? You were 25 feet inside the draw?—A. No, I would not be 25 feet inside the draw. I would say half the bus would be over a kind of plate there, and one-half would be in the span, and one-half outside the span. Just then I would put my foot on the gas again.

Q. What gear were you travelling in then?—A. In high gear, just the same gear.

For my part, I do not believe that Ledbury had "practically stopped" his car before striking the Star car; otherwise, several facts cannot be accounted for. In the first place, one cannot account for the violent spinning around of the Star car, which, on the evidence of Caulfield and Bennett, occurred immediately after the impact. Moreover, the fact that the bus continued straight ahead, eventually turning west and crashing through the rails some 86 feet further on, is, to me, entirely inconsistent with the idea, as deposed to by Ledbury, that he had his car "practically stopped" at the moment of the impact. In my opinion, he had slowed down very little, if at all, and was still travelling at from 15 to 20 miles per hour at the moment of the impact.

The fact that the Star car afterwards either had momentum or power sufficient to cause it to run ahead about ten feet, strike the upright of the swing bridge and rebound some six feet, or that, in its gyrating movement, it swung forward sufficiently to strike the northern upright

of the draw on the west side, shows that that car also had been travelling at a high rate of speed prior to the impact. This inference may be subject to some doubt—greater than any that can be suggested in regard to that which I have drawn as to the speed of the omnibus. At all events, Ledbury admits that after, as the learned judge said, the Star car was "in difficulties,". Price did everything humanly possible to avert a collision. His evidence is:

Q. From your description that you have given on the map, then I take it that when you realized that he was coming over—do you say whether that was a skid or not, that caused him to come over in front of you; what was it?—A. As a driver I would say he skidded, because my opinion would be that he saw me and he did everything I imagined he would do, or anybody else would do under the circumstances, to put on his brakes, because this car was in his way and he would have to put his brakes on to ease up his car, to get behind this car again, and I imagine him putting on his brakes that must have thrown his car over.

Q. Was he coming towards you then?—A. Yes, right in my path. He was kind of at an angle. He had just come out.

The foregoing circumstances make it perfectly clear to me that both cars had been travelling at a rate of speed quite unreasonable, having regard to the conditions existing on the morning in question. As my brother Smith very pertinently remarked during the argument, Price's duty to stop his car was just as clear and just as urgent as was that of the driver of the motor bus, in order to avoid the impending collision.

We must, however, not forget that the Star car was available for examination and inspection after the accident, whereas the bus was immediately dismantled (it may have been necessary to do so) and was put into such a condition that no inspection of it would be of any value for evidential purposes. Moreover, no one deposes to seeing any skid marks on the roadway made by the bus, whereas the marks made by the Star car, as it spun around were plainly visible to Bennett. These circumstances give rise to suspicion against the dependability of the defendants' case. In addition to this is the fact that the emergency brakes on the bus were, to his knowledge, to quote Ledbury, "no good" to stop the car in an emergency.

Both drivers would seem to have been in somewhat of a hurry on the morning in question. Macdonald, J.A., says:

* * * there was some slight evidence that he (Ledbury) was in a hurry;

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no doubt referring to the fact that Ledbury was due at the station at eight o'clock that morning. His story is, that on arriving at the car sheds at about 8:00 o'clock he found his bus had a flat tire. He was told he would have to wait for the mechanics to repair it and the latter took considerable time to do so; so much so that his boss, Reynolds, telephoned him to enquire the cause of delay and, upon being told of the flat tire, he instructed Ledbury to be on hand for the nine o'clock load. Reynolds was not called, as he apparently might have been, to corroborate the statement of Ledbury as to the fact, the effect and purport of the telephone communication. Philp, who gave evidence of meeting Ledbury at the garage, is not asked to corroborate him as to the time he left there. On discovery, Ledbury says that he "was supposed to be on duty anywhere around eight o'clock * * * at the C.P.R. station." He also says he arrived at the garage on Cambie Street "about 7:30," when he found he had "a flat tire," and had to wait some time before he could get a tire man to attend to it. Asked when he left the garage, he said, "* * * somewhere around about 8:30 I would imagine." On examination-in-chief, at the trial, he varies this statement by saying he reached the garage at "a quarter to eight," and he speaks of the delay in waiting for the tire man and of Reynold's telephone call while he was waiting. As to the time of departure, he says:

Q. What time did you leave?—A. About 8.30. I am not very sure. I did not look at the clock.

On cross-examination he said, it was his duty to be at the C.P.R. depot "somewhere around 8 o'clock." He does not say at what hour he reached the garage, but proceeds to tell of finding a flat tire, of a telephone call from Reynolds which he describes as not "a hurry up call." He says it was only a call "to find out what was wrong with me, why I was not down at 8 o'clock." Asked when he got the flat tire changed, he answers "I don't know what time. I was ready to pull out about half-past 8." He does not fix the exact time when the tire was changed. He speaks of meeting Philp coming into the garage but said he had no conversation with him. When the accident occurred, Ledbury says he was on his way to take up his 9:00 o'clock load. As to Price, he had been at work all night and was going

home on Sunday morning, no doubt, to have breakfast and rest.

From the foregoing, I am satisfied that there was abundant evidence to warrant a finding of negligence on the part of the bus driver in travelling at too high a rate of speed having regard to the conditions at the time of the accident, and that that was really what prevented Ledbury from stopping and avoiding the impact. If made by a jury, these findings could not be disturbed. Such findings of a trial judge differ little, if at all, in their weight from the findings of a jury. No doubt, it is the duty of the Court of Appeal to act upon its own conclusions on questions of fact as well as of law (*Coghlan* v. *Cumberland* (1)). Stated otherwise, it is the duty of the Court of Appeal to draw proper inferences where the issue does not depend on the veracity of witnesses, and the facts are clear (*per* Lord Dunedin in *Cooper* v. *General Accident, &c., Corp.* (2); *Admiralty Commissioners* v. *SS. Volute* (3). But, what Lord Chancellor Loreburn said, in *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corp.* (4):

> I need not repeat what has often been said as to the advantages enjoyed by a judge who has heard the witnesses. When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. The former practice of Courts of Equity arose from the fact that decisions often rested upon evidence on paper, of which an Appellate Court can judge as well as a Court of first instance.

still holds good. (*Montgomerie & Co. Ltd.* v. *Wallace-James* (5); See *Dominion Trust Co.* v. *New York Life Ins. Co.* (6)).

The findings of the trial judge are expressed as follows:

> * * * accepting his (Ledbury's) own evidence, in my opinion he ought to have and he could have stopped his car when he saw Price turn out * * * or at least he ought to have slowed his car down and he could have done so on his own evidence, to such an extent that he had it under absolute control, and if he had done either, I am satisfied that this accident would not have happened.
>
> Otherwise, he is on the other horn of the dilemma, that he is mistaken as to the speed at which he was going and his car was going at such a rate of speed that, under all the circumstances, he was unable to stop or to hold it under control, so that he could stop it in the event of something coming in his way. I hold, therefore, that the defendant, the B.C. Motor Transportation Company, and Ledbury, are responsible for this accident.

(1) [1898] 1 Ch. 704.
(2) [1922] 2 Ir. R. 214, at p. 219.
(3) [1922] 1 A.C. 129, at 135.
(4) [1908] A.C. 323, at 326.
(5) [1904] A.C. 73, at 75.
(6) [1919] A.C. 254, at 257-8.

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It will be noted that I agree with the alternative view of the learned trial judge as to "the cause" of the accident, viz., antecedent, disabling excessive speed. I think, however, that he was in error in ascribing the fault which caused the accident entirely to Ledbury. I think Price was, probably, equally to blame and was guilty of like fault with Ledbury, and that both should be held responsible for the consequences.

Antecedent, disabling negligence in maintaining too high a speed may well be found, under such circumstances as existed at the time, to amount to "ultimate" negligence. (*British Columbia Electric Ry. Co. Ltd.* v. *Loach*) (1). Ledbury's conduct might have amounted to "ultimate" negligence were it not for the fact that Price had, apparently, the same opportunity to stop as had Ledbury and the same duty was cast upon him to do so. In his case, too, his inability to stop was due to the same cause as Ledbury's, viz., excessive speed. He, too, might have been guilty of "ultimate" negligence, had Ledbury not been in the like plight. As the case stands, it appears to me that dangerously excessive speed on the part of both drivers was alike the cause of the inability of each to stop in time to avoid the collision; and that both cars were practically out of control at a time when, if his car had been under control, it was the clear duty of each driver to stop to avoid collision. Both appear to me to be at fault in this regard; the fault consisting in excessive speed, the effect of which, in the case of each, continued right down to the impact.

A case is thus made for the application of the *Contributory Negligence Act* (Statutes of B.C., 1925, c. 8, s. 2), the case being clearly one, in the language of that statute "where by the fault of two or more persons damage or loss is caused to one or more of them." The statute goes on to provide that "the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault." There is nothing here to suggest that the plaintiff in the action must be one of the persons so at fault. It would seem to be enough that the defendant should be a party to whom responsibility for the fault of one or other of the persons causing the damage may be attributed.

Something was suggested at bar by counsel for the respondent to the effect that this statute is inapplicable to

(1) [1916] 1 A.C. 719, at 723, 725-6.

cases under *Lord Campbell's Act*. On examination, I cannot find anything to justify this contention. As there was no argument on the point, I am at a loss to conceive on what it rests; nor does the factum aid in this respect. But, as this question is *res nova*, it may not be passed over without due consideration.

The statute, commonly known as *Lord Campbell's Act* ((1846) 9 & 10 Vict., c. 93), adopted in British Columbia by virtue of Ordinance No. 70 (1867), is part of the English law introduced into that province, and deals with the situation in which the maxim *ex morte hominis non oritur actio* (or, as sometimes put, *actio personalis moritur cum persona*), was applied at common law to exclude actions for damages occasioned by the death of a person by reason of a wrongful act of the defendant.

At present, this statute is to be found as c. 85, R.S. B.C. 1924, ss. 3, 4 (1) and (2), and 5, of which read as follows:

3. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to an indictable offence.

4. (1) Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the Court or jury before which the action shall be tried may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs, not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the Court or jury by their judgment or verdict shall find and direct, or as may be determined by the Court upon motion for judgment or further consideration.

(2) Provided that if there be no executor or administrator of the person deceased, or, there being such executor or administrator, no such action as above mentioned shall within six calendar months after the death of such deceased person have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons as if it were brought in the name of such executor or administrator.

5. Not more than one action shall lie for and in respect of the same subject-matter of complaint; and every such action shall be commenced within twelve calendar months after the death of such deceased person.

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The presence of the condition of the right of action, i.e., that it must be

> such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof,

has been held to require that the deceased would have had an enforceable cause or right of action for the injury had he survived. To this cause of action, contributory negligence on his part would, of course, have been a defence. That being so, he could not have successfully maintained an action where contributory negligence was established, had he survived, and his personal representative or widow, etc., could, accordingly, maintain no action for damages caused by his death.

The ground now taken by the plaintiff is that the defence of contributory negligence being done away with by the statute of 1925 leaves the right of action under *Lord Campbell's Act* absolute and unqualified. In other words, the other provisions of the *Contributory Negligence Act* would have no application to a case under *Lord Campbell's Act.*

I find nothing in the *Contributory Negligence Act* to exclude its application as a whole to cases under *Lord Campbell's Act,* which are so common. On the contrary, everything in the former statute indicates that such cases must have been present to the mind of the Legislature which enacted it.

Contributory negligence is a defence which the statute does away with, but only conditionally, the condition being 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.

I cannot conceive that the Legislature intended that this Act should apply for the purpose of enabling the plaintiff to maintain an action under *Lord Campbell's Act,* notwithstanding the establishment of contributory negligence imputable to her, and yet should not also apply for the purpose of providing for the apportionment of her damages under section 2.

That this case comes within section 2 is perfectly clear, the term or condition of its application thereby provided being that, where contributory negligence is shown, there shall be an apportionment of damages in proportion to the degree in which each person was at fault. Any person taking ad-

vantage of the *Contributory Negligence Act* must do so on the terms and conditions laid down by the Legislature.

Had there been a counterclaim, or a demand for set-off or " compensation " by the defendant Ledbury in respect to his physical injuries, or by his co-defendants for the loss of their bus, there would have been considerably more difficulty in applying to such a claim the provisions of the *Contributory Negligence Act*. Particularly is this so in view of clause (*b*) of the proviso to section 2, since such a claim would be made against the plaintiff in the present action, who in no wise represents the estate of the deceased Price, but brings an action for statutory damages given her by *Lord Campbell's Act*, which is independent entirely of any possible right of action derived from Price, although it is a condition of her right of action that her husband, had he survived, would have had a good cause of action.

The burden is, however, now cast on this Court to determine the proportion in which the damages sustained should be borne. Having regard to all the circumstances of the case, I deem it impossible to find that the evidence has satisfactorily established degrees of fault, with the result that the liability should be apportioned equally (section 2 (*a*)). In the result, therefore, of the $24,000 damages found to have been caused to the plaintiff, she should recover $12,000, i.e., $7,500 to the mother and $4,500 to the six children in equal shares. The plaintiff is entitled to her costs in this Court; but, as the defendants were obliged to go to the Court of Appeal to escape the consequences of the more onerous judgment of the trial court, I would not disturb the order as to costs in that Court. The plaintiff is entitled also to recover from the defendants the costs of the action; subject, however, (except as to costs, if any, expressly awarded to her " in any event of the action " by orders of the court) to the provision of section 4 of the *Contributory Negligence Act*, that

> the liability for costs of the parties shall be in the same proportion as the liability to make good the loss or damage.

CANNON J. (dissenting).—I have had the advantage of perusing the carefully prepared judgments of my Lord the Chief Justice and of my brother Lamont. With great respect, I cannot agree with either of them.

After reading the evidence, I have reached the conclusion that both the respondents, the employer, and the employee,

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Ledbury, are bound by the latter's version of the circumstances which accompanied the death of appellant's husband.

Even admitting that Ledbury was entitled to assume that Price would observe the statutory obligation imposed by R.S.B.C., 1924, ch. 103, sec. 21, and would, after finding it impracticable to turn out to the left, " so regulate the speed of his vehicle as to allow " the other car, which he was trying to overtake, " to precede him to some point on the highway where such turning-out to the left and a passing (could) safely be effected," the whole case hinges on the answer to the following question:

Was the accident inevitable after Price tried to overtake the third car? Have Ledbury and his employer exculpated themselves in answer to the *prima facie* case resulting, in favour of plaintiff, from the fact, admitted by Ledbury, that, in order to dodge Price's car, he " tramped on everything and swung his wheel right over to the left " invading the other car's side of the roadway which of necessity was to be used by it, if it succeeded in coming back to its place behind the third car? Ledbury erred when he abandoned the right side of the roadway to cross over to his left, instead of stopping his car, as he acknowledges he could have done in that space and time, as soon as he realized that the other vehicle, through skidding or otherwise, was in difficulties and unable to get out of his way. The version of the accident, as given by Ledbury, the only surviving eyewitness of the circumstances leading to it, whose physical and mental conditions were such when he gave evidence, as to be acceptable, perhaps of necessity, to both parties who now rely on his testimony, shows, in my opinion, that the latter was guilty of ultimate negligence and did not do everything that could reasonably be required of him to avoid and prevent the possible consequence of Price's loss of control of his own car in his effort to get ahead of the car preceding him.

For the reasons given by the trial judge, and by Mr. Justice M. A. Macdonald in his dissenting judgment, I would allow the appeal with costs and re-establish the judgment of the trial judge in favour of plaintiff.

Appeal dismissed with costs.

Solicitors for the appellants: *Clearihue & Straith.*
Solicitors for the respondents: *Maitland & Maitland.*

WINSTON *v.* NELLES

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*Nov. 23, 24.

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

Negligence—Motor vehicles—Injury to pedestrian—Damages claimed against two motor drivers—Jury finding each driver guilty of negligence—Appeal by one driver—Question as to his responsibility for accident, having regard to evidence and jury's findings—Emergency through negligence of another—Control of car—Divided court—New trial.

APPEAL by the defendant Winston from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, on an equally divided court, dismissed his appeal from the judgment of O'Connell, Co. C.J., who, on the verdict of a jury, gave judgment for the plaintiff against both defendants (the present appellant and one Wright) for damages for personal injuries caused by being struck, while on the sidewalk near the intersection of St. Clair and Wells Hill Avenues, Toronto, by the appellant's motor car. The jury found that the defendant Wright's negligence was " in cutting in on Winston's car without giving due notice to (*sic.*) such intention," and that the defendant Winston's (appellant's) negligence was " in not having his car under proper control to meet an emergency." The appellant contended that there was no evidence to support the jury's finding of negligence against him, and that it should have found that he was not guilty of any negligence causing the accident.

On the appeal to this Court, after hearing argument of counsel, the Court delivered judgment orally. Anglin C.J.C. would order a new trial; Rinfret and Smith JJ. would allow the appeal and dismiss the action as against appellant; Lamont and Cannon JJ. would dismiss the appeal. In the result, the judgment of the Court, delivered by the Chief Justice, was that the appeal be allowed and a new trial ordered, the costs of the abortive trial and of the appeals to the Appellate Division and to this Court to follow the event of the new trial.

*PRESENT: Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) (1931) 40 Ont. W.N. 313.

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Anglin, C.J.C., stated that, in view of the divided opinion, and of the fact that he found, personally, that the trial already had was most unsatisfactory, he would order a new trial, agreeing with the two Judges who would allow the appeal, to the extent of setting aside the verdict, and with the two other Judges who would dismiss the appeal, to the extent of refusing to enter judgment for the defendant, contrary to the verdict of the jury, a power undoubtedly possessed by the Court, but very rarely to be exercised, and then only in the clearest cases.

Lamont J. (with whom Cannon J. concurred) stated that in his opinion there was no sound reason for interfering with the judgment as it stood; that the meaning of the jury's verdict was plain; they found an emergency due to cutting in, and found that the appellant was guilty of negligence in not having his car under control; from appellant's own evidence, he was driving at 18 to 20 miles an hour, and he had put his foot on the brake; the evidence was that the curb was five inches high, and that appellant not only jumped the curb and caught the plaintiff, but also that his car then ran 38 feet; on these facts it was open to the jury to say that the accident would not have occurred if he had had his car under control.

Smith J. (with whom Rinfret J. concurred) stated his opinion that the jury had not made any finding on which the judgment against appellant could be sustained; the only negligence on his part that the jury was able to find —and finally undertook to find—was that he had not his car under control to meet an emergency; implying that he should have been prepared in advance to meet this emergency, which he could not foresee; that the jury did not make any finding that appellant was negligent in what he did after being placed by Wright in the emergency; that there is no obligation imposed by law on a driver to keep himself specially prepared for action in connection with some possible unforeseen emergency in which he may be placed; and there was no evidence, up to the time he was interfered with by the negligence of Wright, that appellant was not in full control of his car; that what the jury pretended to say was negligence does not in law constitute negligence. The learned judge agreed with the

opinions expressed by Riddell and Fisher J.J.A. in the Appellate Division, and was of opinion that the action should be dismissed as against the appellant.

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WINSTON v. NELLES.

Appeal allowed and new trial ordered.

T. N. Phelan K.C. for the appellant.

F. J. Hughes K.C. for the respondent.

DAOUST, LALONDE & CIE. LTEE (DEFENDANT) ..... APPELLANT;

AND

DAME ROSE A. FERLAND (PLAINTIFF) . RESPONDENT;

AND

NEW YORK LIFE INSURANCE CO. (MISE-EN-CAUSE)

1931

*Nov. 10.

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*Mar. 15.

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

Husband and wife—Life insurance policy—Wife as beneficiary—Transfer by husband and wife as security for debts of husband—Validity—Doctrine of stare decisis—Finding of fact—Art. 1301 C.C.

When a transfer by a married woman of an insurance policy on her husband's life, under which she is the beneficiary, has been found by the trial judge, which judgment was affirmed by the appellate court, to have been made as collateral security for the husband's debt, such transfer will be held to be null and void as being in contravention of the provisions of article 1301 C.C. *Klock* v. *Chamberlin* (1887) 15 Can. S.C.R. 325; *Laframboise* v. *Vallières* [1927] Can. S.C.R. 193; *Rodrigue* v. *Dostie* [1927] Can. S.C.R. 563; *Banque Canadienne Nationale* v. *Carette* [1931] Can. S.C.R. 33; *Banque Canadienne Nationale* v. *Audet* [1931] Can. S.C.R. 293.

Cannon J., *dubitante,* as to whether the evidence had clearly established that the transfer, being absolute on its face, had been made by the wife to secure the husband's debt, and also, whether the appellant, being a creditor contracting in good faith and having paid the premiums, should not be entitled to receive the benefit of the amendment to art. 1301 C.C., enacted in 1904 by 4 Ed. VII, c. 42.

Judgment of the Court of King's Bench (Q.R. 51 K.B. 193) aff., Cannon J. *dubitante.*

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*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Smith and Cannon JJ.

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DAOUST, LALONDE & CIE LTÉE. v. FERLAND.

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

On the 23rd December, 1907, Joseph A. Bilodeau, the respondent's husband, took out a policy of insurance upon his life with the New York Life Insurance Company in the sum of $5,000, and the policy itself indicated as beneficiaries the wife of the assured, the present respondent, together with a daughter of the assured by a previous marriage in equal shares. The policy provided that it would lapse in the event of failure to pay the premiums within thirty days of their maturity, and would then have no cash surrender value. The assured was engaged in business, and in course of time became indebted to the appellant company to a considerable extent. On the 15th December, 1925, the assured, together with the two-named beneficiaries, executed a transfer of the policy to the appellant company to which, at that date, the assured was indebted in the sum of $7,500. During the year 1926 the assured made an authorized assignment in favour of his creditors and in the month of August, 1929, he died. The premiums of insurance payable in respect to this policy, for the last three years prior to the death of the assured, were paid by the appellant company. The insurance company, on or about the 31st August, 1929, paid to the appellant company, in virtue of the transfer above referred to, the sum of $5,026.62. In the month of October of that year, the respondent instituted proceedings against the appellant company, asking that she be declared the beneficiary under this policy and entitled to the proceeds thereof; that the transfer in favour of the appellant be declared illegal, null and void; that the payment made by the insurance company to the appellant be declared null and void; and that the appellant be condemned to pay to her the sum of $5,200.

L. E. Beaulieu K.C. for the appellant.

E. J. Flynn for the respondent.

(1) (1931) Q.R. 51 K.B. 193.

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ANGLIN C.J.C.—Although impressed by the views of Mr. Justice Howard in the Court of King's Bench, I find it impossible to follow him to his conclusions. To give effect to them here, I think, would be to exhibit a vacillation in the opinion expressed by this court on the subject of the scope and application of Art. 1301 C.C., which could not fail to be disastrous. We might as well at once forego any idea that the doctrine of *stare decisis* (*Stuart* v. *Bank of Montreal*) (1) forms part of our jurisprudence.

As Mr. Justice Howard, the dissenting judge in the Court of King's Bench, points out, parol evidence given to shew the true purpose and character of the instrument,—which, in form, is as absolute as a transfer can be made, and was executed by Mr. and Mrs. Bilodeau and their daughter, Marie Antoinette Bilodeau, the interest of the latter being similar to that of Mrs. Bilodeau,—was clearly admissible (*Rodrigue* v. *Dostie*) (2); although that learned judge differs from the majority in his court as to the effect of such evidence. The learned dissenting judge seems to agree, however, that this latter question depends largely on the view taken as to the meaning and effect of the testimony of the appellant Daoust. As put by him, "this document is in terms an absolute alienation" by the respondent Rose-Anna Ferland (Bilodeau) of all her interest in the policy to the appellant, a document which, if intended to operate according to its form, it was entirely competent for her to execute (*Laframboise* v. *Vallières* (3); *Banque Canadienne Nationale* v. *Carette* (4)). However, it is open, in any case where the validity of a document is challenged on a ground of public policy (as it is here under Art. 1301 C.C.), for the person so challenging to adduce oral evidence at the trial to shew what was the true and real purpose or intention of the transaction which resulted in its being given. The respondent having pledged her oath that, when she executed the document in question, she did so on the understanding that it was to be used as collateral security to her husband's debt, and in no sense for her own benefit, and that she had, in fact, derived no benefit whatever from the transaction—testimony fully

(1) (1909) 41 Can. S.C.R. 516.
(2) [1927] Can. S.C.R. 563, at 570.
(3) [1927] Can. S.C.R. 193, at 197.
(4) [1931] Can. S.C.R. 33.

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corroborated, *quantum valeat,* by her son-in-law, Charles Caron,—as put by Mr. Justice Howard,

there remains to be considered only the testimony of Mr. Daoust,

a small portion of which he quotes, commenting thus:—

The respondent has analyzed it, pointing out that, though Mr. Daoust under examination-in-chief took the position that the transfer of the policy to the appellant was absolute, he admitted under cross-examination that it was in reality a transfer for security. With respect, I do not think that that is the correct conclusion to be drawn from Mr. Daoust's evidence. As I read it he maintained throughout that the transfer conveyed to the appellant the absolute ownership of the policy and that it was accepted and retained by the appellant as such. He does say that, on a subsequent occasion, Mr. Bilodeau assured him, that he would pay his debt to the appellant in full and promised to keep the policy in force in the meantime, and he adds that, if Mr. Bilodeau had done so, the policy would have been transferred back to him, because he (Daoust) was unwilling to keep what was not due to him.

"Q. Et s'il vous avait payé, je comprends que vous lui auriez remis, avec plaisir, sa police que vous déteniez?

R. Oui, même s'il avait payé les cinq mille piastres, s'il avait payé * * * disons qu'il nous devait seulement que deux mille piastres, les héritiers de Bilodeau auraient retiré la différence. Comprenez-vous? Je ne veux pas avoir ce qui ne m'est pas du."

I cannot see in that any admission, direct or indirect, that the transfer of the policy was anything but an absolute alienation of it.

The way the appellant subsequently dealt with this policy is quite consistent with its submission that the policy by the transfer became its absolute property. It is true that it did not give any tangible consideration—did not pay anything—for the transfer of the policy even by way of credit; it did not enter the policy on either side of the ledger in its account with Mr. Bilodeau;

"R. Il n'a jamais été appliqué comme garantie collatérale.

Q. Mais il n'a jamais été appliqué non plus comme paiement?

R. Comme paiement, évidemment que non, tant qu'il ne serait pas mort."

Personally, although the learned appellate judge, who dissented, declined to accept this testimony, I am prepared to do so at its face value, in accord with the view of the learned trial judge and with that of the majority of the Court of King's Bench. For me, these questions of the meaning and effect of Daoust's testimony and of his credibility are purely matters of fact, on which I am not prepared to reverse the judgment of the Superior Court, confirmed by that of the Court of King's Bench.

This case resembles *Banque Canadienne Nationale* v. *Carette* (1), where Rinfret J., delivering the judgment of this court, said,

(1) [1931] Can. S.C.R. 33, at 38.

En plus, la banque, dans son factum, admet "que les polices d'assurance en question ont été données à la Banque Canadienne Nationale par J.-Ed. Poulin, le mari de l'intimé, pour *garantir* son compte général."

Il en résulte que le litige doit être envisagé du point de vue d'un transport par une femme mariée en garantie des dettes de son mari, et non pas, ainsi que la plaidoirie écrite l'avait d'abord soumis, comme un transport pur et simple d'une femme mariée en paiement des dettes de son mari.

Cette distinction est très importante; car, comme nous l'avons fait remarquer entre autres dans la cause de *Laframboise* v. *Vallières* (1), "l'on est d'accord, en effet, pour interpréter l'article 1301 du code civil 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* (2)." Par conséquent, si l'intimée avait cédé purement et simplement ses droits dans les polices, la question de l'application de l'article 1301 C.C. se présenterait sous un jour tout différent.

See, too, page 39 of the *Carette* judgment (3), from which I take the following extract:

Cependant, l'admission que les transports des polices d'assurance ont été faits par l'intimée non pas en cession pure et simple à la banque, mais seulement en garantie collatérale des dettes du mari, entraîne comme conséquence l'application de l'article 1301 du code civil en vertu duquel

"La femme ne peut s'obliger avec ou pour son mari qu'en qualité de commune; toute autre obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet, sauf les droits des créanciers qui contractent de bonne foi."

La banque a prétendu que la prohibition contenue dans cet article ne visait que la garantie personnelle de la femme mariée et ne comprenait pas la garantie réelle. L'honorable juge Lafontaine, le présent juge-en-chef de la province de Québec, dans la cause de *Joubert et Turcotte* v. *Kieffer* (4), a fait de cette question une étude approfondie, à laquelle nous ne saurions rien ajouter, et où il a démontré que par le mot "s'obliger" il faut entendre "tout engagement quelconque par lequel une femme mariée prend à sa charge le paiement d'une dette de son mari, soit qu'elle contracte une obligation personnelle, comme dans le cautionnement, ou qu'elle engage ses biens seulement, comme dans le contrat d'hypothèque ou de gage."

C'est ce que cette cour a décidé dans la cause de *Klock* v. *Chamberlin* (5), et de nouveau dans la cause de *Rodrigue* v. *Dostie* (6).

As I read the facts and Mr. Daoust's testimony, they admit of only one conclusion, viz., that his company never had any absolute power over the policy, or any unqualified interest in it, but that interest was always in the nature of collateral security for the indebtedness of Mr. Bilodeau to his company.

(1) [1927] Can. S.C.R. 193, at 197.
(2) [1913] R.L. n.s. 16.
(3) [1931] Can. S.C.R. 33.
(4) [1916] Q.R. 51 S.C. 152.
(5) [1887] 15 Can. S.C.R. 325.
(6) [1927] Can. S.C.R. 563.

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For instance, when Bilodeau became insolvent, this policy was not included as part of his estate, and in making claim as creditor, the appellant "put in" for the whole amount thereof, not taking anything off on account of the policy, neither making any reduction for it in the amount of its claim as presented to the assignee, nor making any reference to its being held by the company as security or otherwise. Daoust had admitted in his evidence at the trial that "it had never been applied by him in any way as a payment". I agree with the learned trial judge and with the majority of the Court of King's Bench that Daoust's testimony, taken as a whole, is consistent only with the appellant having had no real title to the policy in question as owner, but that it held the same always merely as collateral security for Bilodeau's debt.

I refer again for an instant to the judgment of this court in *Banque Canadienne Nationale* v. *Carette* (1),

> Il faut dire, par conséquent, que les transports d'assurance dont l'intimé demande la nullité tombent sous le coup de l'article 1301 du code civil; * * * L'article 1301 du code civil a pour but la protection de la femme mariée contre le danger d'engager ses biens ou sa responsabilité personnelle, où elle pourrait se laisser entraîner sous l'influence de son mari ou même par simple affection pour lui.

In *La Banque Canadienne Nationale* v. *Audet* (2), my brother Rinfret excludes all cases in which a married woman had been held not responsible (although she had contracted with (*avec*) her husband), where it was demonstrated that she had herself obtained the benefit of any advance made on her obligation (such as *Banque d'Hochelaga* v. *Jodoin* (3)), and he proceeds (at pp. 307-8)

> Tous ces jugements peuvent s'expliquer par le motif que ces cas ne tombent vraiment pas sous l'article 1301 du code civil. * * * Il est conforme à l'histoire de cette législation, depuis le droit romain jusqu'aux statuts antérieurs au code, de comprendre, par l'expression "s'obliger" de l'article 1301 C.C., uniquement le cautionnement de la femme avec ou pour son mari.
>
> Cette interprétation est maintenant fixée dans la jurisprudence *Lebel* v. *Bradin,* Cour du Banc du Roi (4); *Laframboise* v. *Vallières* (5); *Banque Canadienne* v. *Carette* (6). (Voir 4 Ed. VII, c. 42, qui déclare que l'article 1301 C.C. ne s'est jamais appliqué aux achats, ventes ou échanges d'immeubles, ni aux baux emphythéotiques faits par la femme mariée.) Il en résulte que l'obligation de la femme mariée pour ses

(1) [1931] Can. S.C.R. 33, at 41 and 42.
(2) [1931] Can. S.C.R. 293.
(3) [1895] A.C. 612.
(4) [1913] 19 R.L. n.s. 16.
(5) [1927] Can. S.C.R. 197.
(6) [1931] Can. S.C.R. 33.

propres affaires ou pour son propre compte, qu'elle soit ou non commune avec son mari, n'étant jamais, à proprement parler, un cautionnement de sa part, ne constitue pas un acte où elle "s'oblige" au sens de l'article 1301 C.C., et ne tombe pas sous le coup de cet article.

I accept, as applicable to the case now before us, the following passage from *La Banque Canadienne Nationale* v. *Audet* (1), where Rinfret J., delivering the judgment of this court, says,

Le premier élément dans la présente cause est que l'intimée s'est portée caution avec son mari pour la dette d'un tiers en une autre qualité que celle de commune en biens. De ce chef, la cause paraît donc de prime abord être réglée par le principe général posé dans l'article 1301 du code civil (*Lebel* v. *Bradin* (2).

and also this passage, from p. 310,

D'autre part, la preuve ne laisse aucun doute sur le fait qu'elle n'a certainement tiré aucun profit de l'obligation qu'elle a contractée.

In *Trust and Loan* v. *Gauthier* (3), Lord Lindley, in giving the judgment of the Judicial Committee, said,

Except in dealing with their common property, she is not to bind herself with him, i.e., she is not to join in any obligation which affects him.

and, at p. 101,

Their Lordships gather from the decisions referred to in the argument and in the published commentaries on the Code Civil that the words "for her husband" are now judicially held to mean generally in any way for his purposes as distinguished from those of his wife; and that ignorance on the part of her obligee (créancier) cannot avail him, if it is proved that she in fact bound herself for her husband. These conclusions are, in their Lordship's opinion, sound and in accordance with the language of art. 1301 and with its evident object.

As to the history, purpose and purport of the amendment to article 1301 C.C., enacted in 1904 (4 Ed. VII, c. 42), and said to have been passed in consequence of the judgment of the Privy Council in *Trust and Loan* v. *Gauthier* (4), I cannot do better than refer again to the following passage from the decision of this court in *Banque Canadienne Nationale* v. *Audet* (5), in which my brother Rinfret deals, entirely to my satisfaction, with that amendment and its effect. He says,

Dans la cause de *Leclerc* v. *Bédard* (6), la Cour de Révision à Québec (Dorion J.) s'est demandé quelle était la portée de cet amendement. Elle fait remarquer avec justesse qu'il "ne peut pas être question de bonne foi lorsque le contrat prend la forme d'un cautionnement par la

(1) [1931] Can. S.C.R. 293, at 309.
(2) [1913] 19 R.L. n.s. 16 at 33.
(3) [1904] A.C. 94
(4) [1904] A.C. 94.
(5) [1931] Can. S.C.R. 293.
(6) [1913] Q.R. 45 S.C. 129.

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femme de l'obligation du mari. C'est là ce qui est expressément prohibé par la loi."

Lorsque l'obligation a été contractée avec le mari, l'amendement vient certainement confirmer le droit du créancier de prouver que la femme s'est obligée pour sa propre affaire. Mais ce droit avait déjà été reconnu au créancier par la jurisprudence.

Il reste le cas où la femme mariée s'oblige seule avec l'autorisation de son mari. Les tribunaux ont toujours annulé cette obligation lorsqu'il était démontré à leur satisfaction que nonobstant ses termes apparents, l'obligation avait été assumée par la femme, suivant l'expression du Conseil Privé "in any way for her husband's purposes". Mais le jugement du Conseil Privé dans lequel cette expression se rencontre (*Trust & Loan* v. *Gauthier*) (1) ajoutait:

"Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed."

Leclerc v. *Bédard* (2) a donc décidé que l'amendement de la loi 4 Ed. VII, c. 42, s. 1, fait naître la présomption que le prêt fait à la femme séparée seule, quoique autorisée de son mari, lui a profité à elle-même. Par suite, si elle invoque la nullité de son obligation pour violation de l'article 1301 C.C., c'est sur elle que tombe le fardeau de la preuve que le prêt a profiité à son mari à la connaissance du prêteur.

The learned judge says, at p. 312,

Le jugement de la Cour du Banc du Roi dans la cause de *Lebel* v. *Bradin* (3), dont nous avons déjà parlé, contient une étude très complète de toutes les questions qui se soulèvent en vertu de l'article 1301 C.C., et de l'amendement de 1904. Sa conclusion est que, sous l'effet de cet amendement, le créancier qui prête à la femme mariée séparée de biens seule, pour être réputé de bonne foi, doit verser le produit de l'emprunt à la femme elle-même, et il doit ignorer et n'avoir aucune raison de croire que cet argent pourra servir les intérêts du mari. Le créancier, dans ce cas, n'est pas responsable si subséquemment la femme remet les fonds empruntés à son mari; car depuis l'amendement il n'est plus tenu de surveiller l'emploi des deniers provenant du prêt qu'il lui a fait.

Rinfret J. then concludes as follows:

Il n'est pas nécessaire de dire que les définitions que nous venons de rapporter épuisent tous les cas où le créancier pourra, en vertu de l'amendement, établir une bonne foi suffisante pour sauvegarder ses droits à l'encontre de la nullité édictée par l'article 1301 C.C. Mais à la suite de ces définitions, l'on doit sûrement décider qu'il ne peut être question de bonne foi dans le cas d'une obligation contractée expressément par la femme séparée pour son mari. Dans le cas d'une obligation contractée par la femme mariée seule, soit expressément soit apparemment pour elle-même, les droits du créancier seront sauvegardés même si l'argent est subséquemment employé pour les fins du mari, lorsque les circonstances établiront les éléments de bonne foi indiqués par la Cour du Banc du Roi dans la cause de *Lebel* v. *Bradin* (4).

Dans le cas où la femme s'oblige avec son mari, l'amendement permet d'établir la bonne foi du créancier. Mais la loi présume contre lui; et c'est donc à lui qu'il incombe de la prouver.

(1) [1904] A.C. 94.
(2) [1913] Q.R. 45 S.C. 129.
(3) [1913] 19 R.L. n.s. 16.
(4) [1913] 19 R.L. n.s. 16.

Nous ne trouvons pas, en l'espèce, la rencontre des éléments nécessaires pour arriver à la conclusion que l'appelante peut invoquer le bénéfice de l'amendement. Dès l'époque où furent signés les deux actes de garantie, elle connaissait toutes les circonstances qui entraînent la nullité de ces actes: le fait que l'intimée était mariée à l'un des cosignataires et le fait que son mari était actionnaire dans la compagnie pour laquelle elle se portait caution. Par suite, il est impossible de dire que l'appelante a contracté de bonne foi. Il s'agit, bien entendu, de la bonne foi au sens légal et suivant le texte de l'article 1301 du code civil.

I agree with Mr. Justice Hall's view in the case at bar, who, concurring in the judgment of Mr. Justice Bond, says,

Further, it is, in my opinion, evident that Bilodeau always intended to pay his debt during his life time. He was perhaps over-optimistic in his expectation that he would be able to do so, because, shortly afterwards, he went into bankruptcy. Nevertheless, there is nothing to suggest that either Mr. Daoust or Bilodeau himself anticipated that the company-appellant would be obliged to hold the policy and keep it in force until the latter's death, at which time only would it acquire any definite value. This view is borne out by Mr. Daoust's own admission that he was always ready and willing to return the policy at any time on the payment of the debt, and it is further borne out by the fact that he made several demands upon Bilodeau for the payment of the premiums which matured subsequent to the assignment. He even goes so far as to say that it was agreed that the premiums should be paid by Bilodeau.

That agreement was entirely incompatible with Mr. Daoust's contention that his company had become the absolute owner of the policy, as a payment, rather than as security for the debt.

In the case at bar, being perfectly satisfied that the document in question was a violation of Art. 1301 C.C., it would never do, because of the extremely high character of the appellant Daoust, or of the patent honesty of the respondent's husband, to make an exception from the clear rule laid down by this court in *Carette's* case (1). Nor will it do to say that, although *stare decisis* may be a good enough doctrine for the rest of Canada, it forms no part of Quebec jurisprudence and it, therefore, should not be applied in this court to cases from that province. Here, the old idea, *ubi jus est aut vagum aut incertum, ibi maxima servitus praevalebit,* still obtains. In my opinion, the doctrine of *stare decisis* must equally apply in the determination of any case which comes before this court, whatever may be the province of its origin.

For the foregoing reasons, I would dismiss this appeal with costs

(1) [1931] Can. S.C.R. 33.

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DUFF AND RINFRET JJ.—We agree with the conclusion of our brother Smith, and with his reasons. It is settled by several decisions of this court that the ambit of article 1301 is not restricted to personal obligations; a real guaranty falls within its scope. Only one question can be regarded as susceptible of debate. That question is, whether or not the instrument of 15th December, 1925, would, but for the disability imposed by that article, have effected a transfer of the respondent's rights under the policy of insurance to the appellants, as security for her husband's debt.

It seems to us to be a case of *res ipsa loquitur*. By the policy, the New York Life Insurance Company promised to pay, on proof of the death of the husband, at the expiration of a stipulated period, the sum of $5,000, less any moneys due the company, to the respondent and to Marie-Antoinette Bilodeau, the respondent's daughter, in equal shares. By the document of 15th December, 1925, the husband, the wife and the daughter executed a transfer in these terms:

> Pour valeur reçue, nous majeurs, cédons, transfère et abandonne par les présentes à Daoust, Lalonde et Cie de Montréal, Carré Victoria, Qué., la police d'assurance portant le numéro 4050533, émise par la New York Life Insurance Company sur la vie de Joseph Aliace Bilodeau, de Québec, Qué., 161 Grande-Allée, ainsi que tous droits, titres, bénéfices et intérêts qui s'y rattachent ou qui résultent, et ce, sous réserve des conditions de ladite police et sans préjudice des règles de la compagnie.

This transfer, with the policy, was delivered to the appellants, to whom the husband was indebted in some $7,500, and who, thereafter, paid the premiums, and, on the death of the husband, collected the proceeds.

Let it here be observed, that it was in virtue of the respondent's transfer of her rights under the policy to them, that the appellants were entitled to demand, and did in fact demand, from the insurance company, the moneys which, by the terms of the policy, had, in the event which happened, become payable to her. It was the transfer which enabled them to obtain payment to themselves of these moneys. It is self-evident that they must have accepted the transfer either in payment or in part payment of the debt, or as security. It is, of course, not suggested that it was given or accepted as a gift. It is, moreover, admitted, and it is indisputable, in fact, that it was not accepted as payment in whole or in part. Indeed, it is plain, on the

face of the facts, that the appellants accepted the transfer with the intention of making use of it just as they did—namely, to collect any moneys which might, during the currency of the debt, become payable under the policy to any of the transferors, and to apply these moneys in payment, or part payment, of the debt. This is really not disputed. They accepted, that is to say, the transfer of the respondents' rights under the policy, as security for the payment of the husband's debt.

It is argued that the appellants are protected by the reservation, in the article, in favour of creditors dealing in good faith. The onus is, of course, upon the creditor who takes refuge under that reservation, to shew that the circumstances bring his case within it. Knowledge must be imputed to him of the facts appearing plainly on the face of the transaction. In the present case these included, first, the fact that the debt was the debt of the husband, and second, the fact that the rights which were transferred by the respondent as security for that debt (and of which the appellants now claim the benefit), were her personal rights. In these circumstances, and in the absence of some evidence shewing that they were under some delusion touching the actual facts, they cannot escape from the operation of the articles. It is to be noted, moreover, that Daoust was called as a witness, and that he did not state that he was ignorant of a single fact necessary to bring the transfer within the article. His defence, as put by himself, was a justly unsuccessful attempt to convince the court that he had not accepted the transfer as security.

The appeal should be dismissed with cost.

SMITH J.—On the 23rd December, 1907, Mr. Joseph A. Bilodeau took out a policy of life insurance with the New York Life Insurance Co. in the sum of $5,000—the beneficiaries named being, his wife, the respondent, and a daughter of the assured by a previous marriage.

On the 15th December, 1925, Bilodeau was indebted to the appellant company in the sum of $7,500, and on that date he, his wife the respondent, and the daughter Marie-Antoinette Bilodeau, joined in a transfer of the policy, which was then in force, to the appellant, the operative words of which are as follows:—

Pour valeur reçue, nous majeurs, cédons, transfère et abandonne par les présentes à Daoust, Lalonde et Cie de Montréal, Carré Victoria, Qué.,

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la police d'assurance portant le numéro 4050533, émise par la New York Life Insurance Company, sur la vie de Joseph Aliace Bilodeau, de Québec, Qué., 161 Grande-Allée, ainsi que tous droits, titres, bénéfices et intérêts qui s'y rattachent ou qui résultent, et ce, sous réserve des conditions de ladite police et sans préjudice des règles de la compagnie.

En foi de quoi ma signature; fait ce quinze décembre mil neuf cent vingt-cinq.

(Sgd.) Joseph Aliace Bilodeau,
(Sgd.) Rose-Anna Ferland-Bilodeau,
(Sgd.) Marie-Antoinette Bilodeau.

In the year 1926 the assured, Joseph A. Bilodeau, made an authorized assignment in favour of his creditors and the appellant filed with the assignee a claim for the full amount of his account, upon which the liquidator awarded him a dividend of $209.85.

The assured Bilodeau died in August, 1929. He had failed to pay the annual premiums subsequent to the assignment of the policy and these were paid by the appellant.

The insurance company paid the amount of policy to the appellant in virtue of the transfer referred to, and the respondent then brought this action, claiming to be declared beneficiary under the policy and entitled to the proceeds thereof and asking that the transfer in favour of the appellant, as against her, be declared null and void under the provisions of Article 1301 C.C., which provides as follows:

A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect, saving the rights of creditors who contract in good faith.

Evidence was adduced at the trial on behalf of the respondent to shew that the real object of the transaction was to guarantee an existing debt of the respondent's husband and, on objection taken to this evidence, the trial judge held that, a matter of public order being at stake, evidence was admissible to shew the true nature of the transaction notwithstanding that the assignment was in form absolute, and this ruling seems not to be seriously challenged.

Coupling the document with the evidence of the surrounding circumstances connected with the making and delivery of the document, and the other evidence, the trial judge held that the transfer was made to secure the debt of the husband owing to the appellant, and this finding is concurred in by four of the five judges of the Court of King's Bench of Quebec.

It seems to me that the only question involved in the present appeal is whether or not this finding should be upheld or reversed.

I am unable to discover any ground upon which it should be reversed. Daoust himself testifies that the assignment was not made in payment of the debt or in payment of any part of it. It was not made in consideration of an extension of time for payment of the debt, and it cannot be contended that it was made as a gift to the appellant.

What, then, was the object of the transfer? The appellant did not release his debt against the deceased Bilodeau, or any part of it, but retained all his rights to collect the full amount of the debt against the deceased, just as if no assignment of the policy had been made. He filed his claim with the assignee for $7,494.71, without making any mention of the policy or giving any credit on the account, by reason of the transfer to him of the policy and received a dividend on that full amount.

If the dividend paid by the liquidator had reduced the indebtedness to less than the amount of the moneys received on the policy, it seems clear that the appellant could not have retained the surplus as his own but would have been obliged to account for it to the assignors of the policy.

It is argued that he would, in such a case, have been obliged to account to the deceased Bilodeau or his estate only, and that because of having joined in the absolute transfer, the respondent would have no right to call for such accounting.

The transfer is made by all three parties to the policy and if it was made as a security for the account by one of these parties, it was to the same effect as to all three. It seems to me impossible to say that this single document, signed by the three parties, took effect as an absolute assignment by one and an assignment as security by the others.

I am of opinion that the trial court and the Court of King's Bench properly found that the transfer was made by all three parties as a security for the debt of the husband Bilodeau and, that being the fact, article 1301 C.C. applies as was held by this court in *La Banque Canadienne Nationale* v. *Carette* (1).

(1) [1931] S.C.R. 33.

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There, as here, the transfers of four policies were absolute in terms, on their face, and imposed no personal liability on the wife. The assignee, however, admitted that they were, in fact, given as security for the husband's debt. It was because of the fact established by the admission that it was held that article 1301 C.C. applied. The only difference here is that the fact is established by evidence instead of by admission.

In my opinion the appeal should be dismissed with costs.

CANNON J. (*dubitante*).—L'appelante se plaint d'un jugement en date du 7 octobre 1930 de la Cour Supérieure du district de Québec, confirmé, sauf le dissentiment de l'Honorable Juge Howard, par un arrêt de la Cour du Banc du Roi du 31 mars 1931, annulant le transport-cession d'une police d'assurance qui lui avait été consenti par les bénéficiaires, l'intimée et une fille de l'assuré, conjointement avec ce dernier, feu Aliace Bilodeau, en son vivant marchand, de la cité de Québec, client de l'appelante, compagnie manufacturière de chaussures. Le jugement annula et mit à néant, quant à l'intimée, le transport consenti par elle en faveur de l'appelante et condamna cette dernière à payer à l'intimée la somme de $2,031.96 avec intérêt et les dépens.

I.

Il serait inutile d'exposer de nouveau la doctrine que cette cour a adoptée dans plusieurs arrêts: *Klock* v. *Chamberlin* (1); *Laframboise* v. *Vallières* (2); *Rodrigue* v. *Dostie* (3); *Banque Canadienne Nationale* v. *Carette* (4); *Banque Canadienne Nationale* v. *Audet* (5). Je ne saurais rien ajouter à ce qui a été dit, et je me contente, pour éviter les répétitions, d'y référer. Il ressort de ces décisions que si le transport de cette police d'assurance a été fait par l'intimée, non pas en cession pure et simple à l'appelant, mais seulement en garantie collatérale des dettes du mari, cela entraînerait comme conséquence l'application de l'article 1301, en vertu duquel

la femme ne peut s'obliger avec ou pour son mari qu'en qualité de commune; toute obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet, *sauf les droits des créanciers qui contractent de bonne foi.*

(1) [1887] Can. S.C.R. 325.
(2) [1927] Can. S.C.R. 193.
(3) [1927] Can. S.C.R. 563.
(4) [1931] Can. S.C.R. 33.
(5) [1931] Can. S.C.R. 293.

Cette cour a déjà adopté l'opinion de l'honorable juge-en-chef Lafontaine, de la province de Québec, dans la cause de *Joubert et Turcotte* v. *Kieffer* (1), démontrant que par le mot " s'obliger " il faut entendre

> tout engagement quelconque par lequel une femme mariée prend à sa charge le paiement d'une dette de son mari, soit qu'elle contracte une obligation personnelle, comme dans le cautionnement, ou qu'elle engage ses biens seulement, comme dans le contrat d'hypothèque ou de gage.

D'après la preuve, sommes-nous en présence d'une renonciation de la part de l'épouse, d'un abandon et d'une cession de ses droits, suivant le texte du document, ou, au contraire, ce texte est-il simulé et l'intimée a-t-elle, en réalité, engagé ses biens avec l'idée de retour? Avait-il été convenu entre les parties que les biens transportés devaient revenir à l'intimée si les dettes du mari étaient par ailleurs payées? Enfin, l'appelante a-t-elle contracté de bonne foi?

Examinons le dossier pour déterminer la réponse à ces questions dont dépend le sort de l'action.

Le 13 décembre 1907, Joseph Aliace Bilodeau obtint de la New York Insurance Company une assurance de $5,000 et désigna comme bénéficiaires sa femme séparée de biens, la présente intimée, et sa fille, Marie-Antoinette Bilodeau, à parts égales, sous réserve du droit de révocation, ce qui permettait à l'assuré de désigner un nouveau bénéficiaire aux lieu et place de l'intimée, sujet aux restrictions de la loi concernant l'assurance sur la vie des maris et parents, devenus le chapitre 244 des Statuts Refondus de Québec, 1925.

Une autre condition de cette police, qui ne pouvait être remise pour être payée comptant du vivant de l'assurée (no cash surrender value), exigeait le paiement à l'avance des primes, à peine de déchéance après un délai de trente jours.

Bilodeau, l'assuré, semble avoir payé ses primes régulièrement jusqu'au 13 décembre 1925 inclusivement. A cette dernière date, l'intimée avait certains droits éventuels pour une période d'une année en vertu de la police, sujet aux conditions suivantes: 1° que Bilodeau ne révoquât pas, en faveur de sa fille, ce bénéfice éventuel de l'intimée pour la moitié du produit de l'assurance; 2° que l'intimée survécût à son mari, s'il décédait pendant l'année.

(1) [1916] Q.R. 51 S.C. 152.

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Jusqu'à 1898, le statut qui permettait, contrairement au principe général posé à l'article 1265 du code civil, à un mari d'avantager sa femme durant le mariage au moyen d'une police d'assurance, décrétait que les polices d'assurances régies par la loi ne seraient pas saisissables pour dettes dues soit par la personne assurée, soit par la personne devant bénéficier de la police, et seraient incessibles par toutes telles personnes. La loi 61 Victoria, c. 40, a permis la cession et a ajouté à l'article 5604 des Statuts Refondus de 1888 les mots

> L'assuré et les parties avantagés peuvent de concert transporter la police.

Cette loi est maintenant l'article 30 du chapitre 244 des Statuts Refondus de 1925.

Le 15 décembre 1925, l'intimée signa le document suivant:

> Pour valeur reçue, nous majeurs, cédons, transfère et abandonne (sic) par les présentes à Daoust Lalonde et Cie de Montréal, Carré Victoria, Qué., la police d'assurance portant le numéro 4050533, émise par la New York Life Insurance Company, sur la vie de Joseph Aliace Bilodeau, de Québec, Qué., 161 Grande-Allée, ainsi que tous droits, titres, bénéfices et intérêts qui s'y rattachent ou qui résultent, et ce, sous réserve des conditions de ladite police et sans préjudice des règles de la compagnie.
>
> En foi de quoi ma signature: fait ce quinze décembre mil neuf cent vingt-cinq.
>
> Joseph Aliace Bilodeau
> Rose-Anna Ferland Bilodeau
> Marie-Antoinette Bilodeau

lequel fut accepté par la mise-en-cause et transmis à l'appelante. Comme la demanderesse-intimée l'admet, ce document constitue, à sa face même, une renonciation par l'intimée à ses droits comme bénéficiaire.

Mais peut-on dire, comme elle l'allègue et comme les jugements le décident, que la preuve verbale faite par l'intimée et M. Daoust, président de la compagnie appelante, démontre que cet abandon ou renonciation fut simulé et ne fut consenti par elle que pour garantir la dette de son mari? La demanderesse, après avoir allégué que ce document fut signé et consenti sur les instances du gérant de l'appelante, a seulement prouvé, par son propre témoignage, que son mari lui aurait dit qu'il voulait sa signature pour garantir ce qu'il devait à Daoust, Lalonde et Cie. Elle ajoute que son mari lui disait: "Je rembourserai et je te retournerai la police."

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Cette preuve verbale a été admise, malgré l'objection des procureurs de l'appelante, bien qu'elle semblât contredire l'écrit signé par la défenderesse; et je crois, vu qu'il s'agit de l'application possible d'une loi d'exception, mais d'ordre public, que le juge de première instance a probablement eu raison d'accueillir cette preuve testimoniale. Mais ces conversations entre mari et femme, en l'absence de M. Daoust et en dehors de la connaissance de l'appelante, ne sauraient lier cette dernière, qui a simplement reçu, sans l'avoir sollicitée de son débiteur, la police d'assurance avec le transport pur et simple et l'acceptation de l'assureur. M. Daoust, dans son témoignage, après avoir relaté que ce document lui a été adressé spontanément par son débiteur, a bien ajouté qu'il ne pouvait le considérer comme un paiement en acompte de sa créance, vu qu'il n'a retiré et ne pouvait recevoir aucun argent du vivant de l'assuré, mais il déclara aussi qu'il aurait été disposé, sans y être obligé par aucune convention à cet effet, à remettre, si sa créance avait été payée, la police en question. Cette transaction a été faite par Bilodeau, qui semble avoir été un homme d'affaires scrupuleusement honnête, et par M. Daoust avec la meilleure foi du monde; et à première vue, l'appelante semblerait avoir droit à la protection que la législature a assurée aux " créanciers qui contractent de bonne foi ", par le statut 4 Ed. VII, c. 42. Cette législation, sanctionnée le 2 juin 1904, paraît avoir été provoquée par l'interprétation donnée à l'article 1301 par le comité judiciaire du Conseil Privé, le 3 novembre 1903, dans l'affaire *Trust & Loan Company of Canada* v. *Gauthier* (1), où l'on semblait dépasser les limites jusqu'alors fixées par la jurisprudence canadienne pour décréter la nullité des obligations de la femme pour ou avec son mari.

En 1926, Bilodeau fit faillite et, contrairement à ce qui s'est présenté dans la cause de *La Banque Canadienne Nationale* v. *Carette* (2) où il était admis de part et d'autre que la police d'assurance avait été donnée en garantie collatérale, la maison Daoust, Lalonde & Cie produisit une réclamation pour le plein montant de sa créance, sans mentionner à l'acquit de Bilodeau, comme paiement ou garantie, la police qu'elle détenait. Le 13 décembre 1926, la police devenait caduque, à moins du paiement de la prime

(1) [1904] A.C. 94

(2) [1931] Can. S.C.R. 33.

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dans les trente jours. C'est l'appelant qui, cette année-là et jusqu'au décès de Bilodeau, survenu en 1929, paya les renouvellements. L'intimée prétend que ces paiements ont été faits à son bénéfice et avantage, et non pas pour le bénéfice et avantage de l'appelante, qui a payé pour protéger ses droits en vertu du transport. Avons-nous, dans le témoignage de M. Daoust, la preuve que la femme a cautionné pour son mari? Elle ne l'a certainement pas fait par écrit. Antérieurement à la signature du transport, Daoust ne l'a pas rencontrée; et c'est de son propre mouvement, pour satisfaire sa conscience, que Bilodeau a transmis à l'appelante, qui ne l'avait pas demandé, cette police d'assurance. Même en admettant comme prouvé que le créancier était disposé, sans s'y être obligé par une convention formelle, à remettre la police aux bénéficiaires après paiement de la dette, pouvons-nous dire que ceci constituait une dérogation aux termes de l'article 1301 du code civil, d'après la jurisprudence établie? L'intimée n'a pas encouru une obligation personnelle vis-à-vis de l'appelante. Mais a-t-elle engagé l'avenir pour qu'on puisse dire que cette renonciation a été faite avec esprit de retour? N'oublions pas qu'il s'agit ici d'une loi qui, en 1841, a changé le droit commun tel qu'il existait alors. L'application même mitigée du sénatus-consulte Velléien auquel on nous réfère avait été abandonnée en France sous Henri IV, en 1606, et le Code Napoléon a fait disparaître complètement cette incapacité de la femme, tout en lui donnant le droit de se faire indemniser, s'il y a lieu, soit par la communauté, soit par son mari. La législation de 1841 aurait donc fait un pas en arrière; et cet article 1301, que nous avons conservé dans notre code, reste unique dans la législation moderne, comme l'a démontré M. J. J. Beauchamp, dès 1896, dans une étude très fouillée, au 2e volume de la Revue Légale, N.S. p. 320, et spécialement aux pages 383 et suivantes. La législature, en 1904, semble l'avoir reconnu et avoir voulu en diminuer la rigueur en adoptant un proviso en faveur des créanciers de bonne foi.

Il me fait plaisir de pouvoir citer une haute autorité, feu sir Louis Jetté, ancien juge-en-chef de la province de Québec, qui disait: *Re Hogue & Cousineau & La Société de Construction de Montarville* (1):

(1) 23 L.C.J. 276, at 280. (2) 6 L.C.J. 65.

Or dans la cause de *Boudrias* v. *McLean* (2), la Cour d'Appel a jugé que la femme peut valablement renoncer, en faveur de son mari, non seulement à son douaire, mais encore à l'hypothèque lui garantissant ses reprises matrimoniales.

Ce jugement, de l'aveu de l'Hon. Juge Meredith, qui faisait alors partie du tribunal, a surtout été basé sur un article remarquable publié dans le 3e volume de la Revue de Législation, p. 133 et suivantes, par feu M. Louis René Lacoste, et sur les autorités qui y sont citées.

La doctrine consacrée par ce jugement est que la loi du Bas-Canada, telle que modifiée par l'ordonnance d'enregistrement de 1841, défend, il est vrai, à la femme le cautionnement des dettes, des engagements contractés par son mari; elle lui défend de s'obliger pour lui, de se rendre responsable de ses obligations, autrement que comme commune en biens; *mais elle ne lui défend rien de plus.* Par suite, les actes qui n'exigent, qui ne contiennent, de la part de la femme mariée, aucune *responsabilité,* aucune *obligation,* elle peut les faire.

Ainsi *elle peut payer* pour son mari, car ce n'est pas là s'obliger pour lui, puisqu'elle ne contracte aucune obligation en ce cas.

De même *une femme mariée peut renoncer à son hypothèque légale* sur les biens de son mari *en faveur d'un créancier de ce dernier*; en faisant cette renonciation, *elle ne s'oblige point*; elle *aliène.*

C'est pourquoi 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.

Et nous trouvons la raison de cette distinction entre l'obligation de la femme et sa renonciation à son hypothèque dans les Pandectes:

"C'est parce qu'une femme se détermine plus aisément à s'obliger pour autrui qu'à donner; *quia facilius se obligat mulier, quam alicui donat.*"

Cette doctrine a été consacrée de nouveau en 1871, par la Cour d'Appel, dans la cause de *Lagorgendière* v. *Thibodeau,* mentionnée au 1er vol. de la Revue Critique, p. 478.

* * *

Mais après avoir établi la validité de cette renonciation, quant aux droits hypothécaires, il nous reste à en déterminer l'étendue et la portée.

C'est un principe admis par tous les auteurs que *les renonciations,* suivant l'expression de Merlin, *doivent être resserrées dans leurs termes précis* et qu'on ne doit jamais les étendre d'un cas à l'autre.

Répertoire, vo. Renonciations, §3.

Il est également certain que la renonciation que l'on appelle en droit *in favorem* n'est pas un abandon ou plutôt un anéantissement complet des droits hypothécaires de la femme, mais constitue simplement un acte *d'abstention par lequel la femme promet de ne pas se prévaloir des avantages qu'elle pourrait avoir sur le prêteur.*

4 Proudhon. Usufruit nº 2339.

Cette renonciation, à laquelle quelques auteurs attribuent, quant à celui qui l'obtient, les effets de la subrogation, ne prive néanmoins la femme renonçante, de ses droits hypothécaires qu'à l'encontre de celui qui l'a obtenue.

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Remarquons que ce jugement, unanimement confirmé en appel, le 3 février 1880 (1), par sir A. A. Dorion, C.J., Monk, Ramsay, Tessier et Cross, JJ., est de beaucoup antérieur à la modification de 1904.

Dans l'espèce, il est prouvé que l'appelante, après avoir accordé du délai et expédié de nouvelles marchandises à Bilodeau et après avoir payé les primes, en aurait demandé en vain le remboursement à Bilodeau. Est-ce que cette inutile demande de remboursement doit l'obliger à payer à l'intimée la moitié de ce qu'elle a reçu de la mise-en-cause, au décès de Bilodeau?

Ne pouvons-nous pas dire que l'appelante a reçu de bonne foi, non seulement présumée ici mais prouvée, la cession et le paiement de la police d'assurance dont elle s'est départie lors du paiement avec une égale bonne foi? Dans cette espèce, qui est peut-être la plus favorable de toutes celles qui se sont présentées devant les tribunaux, l'équité et la bonne conscience ne semblent-elles pas militer en faveur de l'appelante, qui a reçu, non de l'intimée, mais de la mise-en-cause, le paiement partiel de ce qui lui était dû, et ce, en vertu du titre que l'assuré lui avait adressé spontanément avec le consentement et la renonciation de sa femme?

La femme n'a pas signé un cautionnement, que l'article 1929 du code définit

> l'acte par lequel une personne s'engage à remplir l'obligation d'une autre pour le cas où celle-ci ne la remplirait pas;

mais la preuve démontre-t-elle une garantie ou un engagement de payer à même son patrimoine la dette de son mari? Les droits éventuels qu'elle aurait pu exercer en cas de prédécès de son mari dans l'année suivant le renouvellement du 13 décembre 1925, seraient certainement devenus caducs par l'omission de payer la prime. L'assuré en faillite, en décembre 1926, ne pouvait la payer et ne l'a pas fait. La police a été maintenue en vigueur grâce aux déboursés faits par l'appelante. Peut-on prétendre un seul instant que cette dernière aurait payé ces primes si l'intimée n'avait pas signé ce qu'elle appelle sa renonciation à ses droits? Peut-elle aujourd'hui avec équité demander à une cour de justice d'annuler ce document, en disant qu'elle l'a signé par erreur, ou qu'il ne veut pas dire ce que son texte comporte? Peut-elle dire que les parties se sont entendues pour simuler leur

(1) [1880] 3 L.N. 329.

contrat? Et, après avoir obtenu, sous ce prétendu faux prétexte, le concours de l'appelante pour payer les primes et maintenir la police en vigueur, peut-elle s'approprier aujourd'hui le produit de la police? Ni le sénatus-consulte Velléien, ni l'article 1301 C.C. n'ont été passés pour encourager la fraude par la femme mariée.

Lebel v. *Bradin* (1):

La femme qui agissait de mauvaise foi ne pouvait pas prendre avantage du sénatus-consulte. Il ne protégeait pas la fraude. "Il peut être invoqué", dit un rescrit de Septime Sévère, "par celles qui ont été trompées, et non par celles qui ont trompé. Si la faiblesse des femmes est susceptible d'indulgence, leur astuce n'en mérite pas."

Comme le disait en 1903 l'Honorable Juge Archambault, plus tard juge-en-chef de la province de Québec, dans son discours devant le Conseil Législatif, en discutant un amendement proposé à l'article 1301 et reproduit au long dans cette cause de *Lebel* v. *Bradin* (2).

D'ailleurs il n'y a pas lieu à changer la loi pour empêcher la femme d'invoquer le bénéfice de l'article 1301; car, aujourd'hui, comme à Rome, en vertu du rescrit de Septime Sévère, la loi est faite pour protéger la femme contre ceux qui veulent abuser de sa bonne foi, de son bon cœur ou de sa faiblesse, et non pour protéger la femme qui veut frauder les autres.

Avec respect, j'aurais été enclin à dire que l'exception au droit commun et à la loi des assurances de Québec que comporte l'article 1301 du Code civil ne devrait pas être appliqué aux circonstances de l'espèce. Mais la majorité de mes collègues, comme le juge de première instance et la majorité des juges de la Cour du Banc du Roi, ont trouvé que Daoust, par sa version de l'affaire, a établi, en fait, à leur satisfaction, que la femme ne s'est pas dépouillée de ses droits, mais s'est suffisamment obligée pour et avec son mari pour dire qu'elle a engagé son patrimoine à venir de façon à nécessiter l'application de la sanction de l'article 1301. L'interprétation exacte de cet article est trop importante et j'ai trop de respect pour la jurisprudence de cette cour et pour ceux qui l'ont établie dans les causes citées au commencement de ces notes pour enregistrer un dissentiment formel, mais je reste avec un doute sérieux qu'il y ait lieu, dans l'occurrence, d'appliquer cette doctrine.

Appeal dismissed with costs.

Solicitors for the appellant: *Beaulieu, Gouin, Mercier & Tellier.*

Solicitors for the respondent: *Bédard & Flynn.*

(1) [1916] 19 R.L. n.s. 16, at 26. (2) [1916] 19 R.L. n.s. 16, at 38.

1931
*Nov. 20.
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*Feb. 2.

ALBERT BERTRAND AND LOUIS V. LABELLE (PLAINTIFFS) ..... APPELLANTS;

AND

EMILE WARRÉ AND LA COMPAGNIE DES REMÈDES DE L'ABBÉ WARRÉ LIMITÉE, AND V. LAMARRE AND A. LAMARRE IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY OF THE DEFENDANT LA COMPAGNIE DES REMÈDES DE L'ABBÉ WARRÉ LIMITÉE (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Exchequer Court—Jurisdiction—Nature of claim—Relief—Trade-mark—Copyright

Held, that, although in this action plaintiffs claimed relief (expunging registration of trade-mark, injunction restraining use of trade-mark, damages for infringement of copyright and injunction restraining further infringement, etc.) in the nature of what, ordinarily and in a proper case, it would be within the province of the Exchequer Court to grant, yet they had not made out a case in which that court had jurisdiction to interfere. In support of their claim they relied exclusively on an agreement between them and the defendant W. and its alleged effect in preventing W. from entering into similar agreements with other persons for the territory covered; and that agreement (which was interpreted by this Court in *Warré* v. *Bertrand et al.,* [1929] Can. S.C.R. 303) was one, not in respect of a trade-mark or copyright, but in respect of the sale of goods; any reference therein to a trade-mark or copyright being only accessory and not carrying the meaning alleged by plaintiffs. There was nothing in the agreement to take away from W. the right to register any acceptable trade-mark for distinguishing his products, nor did plaintiffs allege or show anything of a nature to establish that, by force of any provision of the *Trade Mark and Design Act,* the registration complained of should have been refused or should now be expunged, nor did anything in the record support their alternative claim for expunging any entries relating to assignment of the trade-mark. As to copyright: plaintiffs were, at best, W's grantees of an interest in a copyright; their grant had not been registered; their action was one for infringement under the *Copyright Act;* and under that Act (now R.S.C., 1927, c. 32, s. 40 (3)), their grant not having been registered, they were precluded from maintaining the action (*Canadian Performing Right Soc. Ltd.* v. *Famous Players Canadian Corp. Ltd.,* [1929] A.C. 456). Plaintiffs' action was rightly dismissed by the Exchequer Court; their claim being one for the provincial courts.

*PRESENT: Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

APPEAL by the plaintiffs (by leave granted by a judge of this Court) from the judgment of Audette J., in the Exchequer Court of Canada, dismissing their action.

The plaintiffs alleged an agreement in writing made in 1922, whereby the defendant Warré constituted them his sole representatives in Canada and the United States for a period of twenty years for the sale of vegetable remedies manufactured by him, which they were to buy from him at certain specified prices, and also authorized them to effect the copyright registration of a book written by him called " La Santé par les Plantes," and to prepare and publish an English translation thereof, and to cause to be registered as trade-marks, if plaintiffs so desired, the name " Les Warrecures-Canada " and the word " Warrecures " (such names were, however, not registered or used). The plaintiffs further alleged that they duly entered on the performance of the agreement, sold considerable quantities of said defendant's products in Canada and the United States, and caused said book to be registered under *The Copyright Act, 1921*. They complained that, in breach of the agreement, the said defendant, in or about the year 1926, made an agreement with one Godbout, carrying on business in his own name or as " La Compagnie des Remèdes de l'Abbé Warré," by which Godbout or said company were appointed to act as agents for said defendant in Canada and the United States and were furnished by said defendant with the products of his manufacture, which Godbout or the company sold as agents and representatives of said defendant, with full knowledge of said defendant's agreement with plaintiffs; that Godbout had caused to be registered on said defendant's behalf a certain trade-mark (a photograph of said defendant, in a certain setting, with his signature) to be used in connection with the sale of vegetable remedies; and that said defendant had sold his copyright in said book to Godbout, acting for and in the name of said company, and had assigned to him or said company the said trade-mark; that subsequently Godbout or the company assigned the copyright and the trade-mark to La Compagnie des Remèdes de l'Abbé Warré Limitée, which is the defendant company; that the said defendant company had continued, with full knowledge of the agreement between plaintiffs and the defendant Warré, to act as agent for the sale of defend-

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ant Warré's products, had distributed the book and a translation, and had used the said trade-mark, all with the approval and consent of the defendant Warré.

The plaintiffs claimed: an order expunging the trade-mark registration, or, in the alternative, expunging the entries relating to the assignment thereof to the defendant company, and directing the correction of the register by vesting the trade-mark in the plaintiffs; damages for the infringement of the plaintiffs' copyright; an injunction restraining defendant from further infringing said copyright or making use of said trade-mark or any mark indicating that the goods sold by it were the products of the defendant Warré; and an injunction restraining the defendant Warré from selling or delivering any of his products to his co-defendant.

The agreement between the plaintiffs and the defendant Warré has been dealt with in a previous judgment of this Court (1).

The present action was dismissed in the Exchequer Court, the judgment being given orally. On this appeal, there was some dispute as to the interpretation of the judgment with regard to its grounds for disposal of the case. The appellants contended that the ground of the dismissal of the action was that the Exchequer Court was without jurisdiction, the granting of any relief being within the exclusive jurisdiction of the provincial court, and that the sole question for determination on this appeal was whether the action was one in which the Exchequer Court had jurisdiction to afford to plaintiffs any of the relief prayed for; and they submitted that, in his ground of dismissal, the trial judge was wrong, and they asked that the action should be remitted to the Exchequer Court for trial.

By the judgment of this Court, now reported, the appeal was dismissed with costs.

O. M. Biggar K.C. for the appellants.

Gregor Barclay K.C. for the respondents.

ANGLIN C.J.C.—While concurring in the conclusions of my brother Rinfret and, speaking generally, in his reasons therefor, my inability at present exhaustively to consider

(1) [1929] Can. S.C.R. 303.

all the questions he has raised prevents my giving an unqualified concurrence in all his reasons for judgment.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

RINFRET J.—The conclusions of the statement of claim in this action are for:

1. An order expunging the registration of a certain trade-mark or, in the alternative, expunging the entries relating to the assignment thereof and directing the correction of the register by vesting the trade-mark in the appellants; an injunction restraining the respondents from making use of the said trade-mark or of any mark indicating that the goods sold by them are the products of the respondent Warré; and an injunction restraining the respondent Warré from selling or delivering any of his products to the other respondent;

2. Damages for the infringement of a copyright and an injunction restraining the respondents from further infringing the said copyright.

There would seem to be little doubt that, with the exception perhaps of the prayer for an injunction restraining the sale or delivery of the products, these conclusions are in the nature of those which, ordinarily and in a proper case, it would be well within the province of the Exchequer Court to grant.

At first sight, the judgment *a quo* appeared to have dismissed the action entirely upon the ground that the Court was without "power and jurisdiction" in the premises. Such was the appellants' contention; and it was for that reason that leave to appeal had been granted.

At the hearing, counsel for the appellants again argued that the sole question for determination was whether the action was one in which the Exchequer Court had jurisdiction to afford to them any of the relief prayed for; but counsel for the respondents showed that the language of the judgment was susceptible of another construction. He pointed out that even the slightest difference in punctuation brought about a different meaning in the judgment—a consideration not without its importance in view of the fact that the decision was delivered orally.

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Now that we have had the opportunity of examining the whole record, we have no doubt that the judgment, read in the light of the discussion between court and counsel throughout the trial, must be interpreted as having disposed of the case upon the merits, so far at least as concerned the prayer with regard to the trade-mark. Our reasons for that conclusion will be developed as we proceed.

There was no limitation in the order granting leave to appeal. All questions affecting the judgment can therefore be discussed by the parties and may now be considered (*A. R. Williams Machinery Co. Ltd.* v. *Moore* (1)).

The appellants' case was submitted as follows:

They alleged a certain agreement made between them and the respondent Warré, in the months of October and November, 1922, in respect to the purchase of vegetable remedies manufactured by Warré, to a book called " La santé par les plantes " relating to such products and prepared by Warré, and to the exclusive right to sell the products in a defined territory. They further alleged that the agreement was made for a period of twenty years and contained certain provisions with regard to the copyright of the book and the registration as trade-marks, if they so desired, of the words: "Les Warrecures-Canada" and "Warrecures."

The complaint was that, " notwithstanding the said agreement and in breach thereof," in or about the year 1926, the respondent had made another similar agreement with one Godbout, " carrying on business in his own name or as ' La Compagnie des Remèdes de l'abbé Warré, ' " who had entered on the performance of this new contract " with full knowledge of the (respondent) Warré's agreement with the (appellants)"; that Godbout had caused to be registered on behalf of the respondent Warré a certain trade-mark to be used in connection with the sale of the vegetable remedies, and that l'Abbé Warré had sold his copyright in the book " La santé " to Godbout and had assigned to him the registered trade-mark. In turn, on the 14th of September, 1928, so it was stated, Godbout or his firm had turned over the copyright and the trade-mark to a joint stock company known as " La Compagnie des Remèdes de l'Abbé Warré Limitée," which was joined as defendant.

(1) [1926] Can. S.C.R. 692, at 705.

At the trial, the appellants contented themselves with filing a copy of their agreement with l'Abbé Warré, a copy of the trade-mark registered by Godbout in the name of l'Abbé Warré with the certificates of assignments thereof, and a certificate of the copyright for the book " La Santé " registered in the name of Albert Bertrand. Their counsel then stated that he would stay his case there and leave the rest for argument. No other evidence, either verbal or in writing, was adduced, not even the contract between l'Abbé Warré and Godbout.

It will thus be realized that, in support of the conclusions they took in their statement of claim, the appellants relied exclusively on the strength of the agreement of 1922 between them and l'Abbé Warré, and its possible effect in preventing the latter from entering, with other parties, into similar agreements for the territory therein covered.

Of the particular contracts complained of we know nothing, except what may be inferred from the admissions contained in the statements of defence; and there is no evidence to show that, at the time they were entered into, the other contracting parties had any knowledge of the existence of the agreement between l'Abbé Warré and the appellants.

Now, if we turn to the agreement so relied upon by the appellants as the sole basis of their claim, we find that it has already received judicial interpretation by this court in a case where the Abbé Warré was the appellant and the present appellants were the respondents (1). The unanimous judgment of the court was delivered by Mignault J., who said:

D'après ce contrat, il est convenu que les intimés achèteront au comptant, et en quantités pour au moins 1,000 francs l'achat simple, les produits de l'appelant aux prix stipulés dans une lettre de ce dernier. Ils achèteront également au comptant et en lots à leur convenance le livre " La Santé " publié par l'appelant, et cela aux prix mentionnés dans la même lettre. Enfin, ils s'engagent à dépenser en publicité, annonces, etc., au moins $1,000 par année, à commencer un an après la signature du contrat.

De son côté, l'appelant nomme les intimés ses agents, représentants et dépositaires exclusifs pour la vente de ses produits pour tout le Canada et les Etats-Unis, durant vingt années à compter de la signature du contrat. Il les autorise à faire enregistrer au Canada et aux Etats-Unis le livre " La Santé ", à en faire publier une traduction anglaise, et à se

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servir pour toutes fins commerciales et enregistrer comme raison sociale le nom "les Warrécures-Canada", de même que le mot "Warrécures" pour toutes autres fins de publicité.

* * *

* * * Le contrat en question est d'un type bien connu en ce pays. Il comporte le droit exclusif, dans le Canada et les Etats-Unis, de vendre les produits de l'appelant que les intimés doivent acheter de lui en quantités représentant au moins 1,000 francs la commande. Les marchandises que les intimés achètent et qu'ils paient comptant avant l'expédition leur appartiennent. Ils les vendent comme ils le veulent et n'en sont pas comptables envers l'appelant. La clause qui les nomme les agents et représentants de ce dernier, n'est un mandat que de nom, car les intimés ne gèrent aucune affaire pour l'appelant (art. 1701 C.C., définition du mandat), et malgré que la clause dise que les intimés sont les agents de l'Abbé Warré pour la vente de ses produits, ils ne peuvent obtenir ces produits qu'en les payant d'avance, et alors c'est leur propre marchandise qu'ils vendent.

In that case, l'Abbé Warré sought the annulment of the agreement upon the alleged failure of the appellants to carry out its terms. The court held that the contract was not revokable at the sole will of l'Abbé Warré; and, having found otherwise that no default was proven on the part of the present appellants, it dismissed the action.

Upon that interpretation, the agreement of 1922 is an agreement not in respect to a trade-mark or to a copyright, but in respect to the sale of goods. The subject-matter of the agreement is the sale of goods. The reference, if any, made therein to a trade-mark or copyright is only accessory and does not carry the meaning which the appellants give to it, as will be shown more conveniently by quoting from the document the clause itself relating to that matter:

2. La partie de seconde part (i.e. l'Abbé Warré) autorise les dits Albert Bertrand et Louis V. Labelle à:

(*a*) faire enregistrer au Canada et aux Etats-Unis le livre "La Santé";

(*b*) faire et publier une traduction en langue anglaise du dit livre "La Santé" aux conditions de sa lettre du 13 octobre 1922;

(*c*) se servir et employer pour toutes fins commerciales et enregistrer comme raison sociale, s'ils le veulent, le nom "Les Warrecures-Canada", de même que le mot "Warrecures" pour toutes autres fins de publicité.

Leaving aside for the moment sub-paragraphs (*a*) and (*b*), which deal with the copyright, and considering sub-paragraph (*c*), dealing with what the appellants call the trade-marks, the stipulation, on its face, is nothing more than a consent of l'Abbé Warré to the use by the appellants of the word "Les Warrecures-Canada" as a firm name, and of the word "Warrecures" for purposes of pub-

licity. No express mention is made of a trade-mark. Whether consent to registration of one or both names as trade-marks may be inferred from the language of the clause is not necessary to discuss, because the appellants admitted at the trial that registration never took place and that they never made use of the names. Incidentally it may be mentioned that the trade-mark complained of and which Godbout caused to be registered in the name of l'Abbé Warré does not consist in the words referred to and is of a very different character.

But the important point is that l'Abbé Warré, as manufacturer and vendor of the vegetable remedies he agreed to sell to the appellants, was undoubtedly entitled, under the *Trade Mark and Design Act,* to register any trade-mark accepted by the Minister for the purpose of distinguishing his products; nothing can be found in the agreement to take away that right from him; and there is no allegation in the statement of claim, nor was any evidence adduced or any point made at the trial, of a nature to establish that, by force of any of the provisions of the Act, the registration should have been refused or should now be expunged.

The appellants did not come before the court as persons aggrieved, complaining that the entries in the register relating to the trade-mark were made without sufficient cause within the meaning of the Act. Their cause of action, as disclosed in the statement of claim and during the proceedings at trial, is founded exclusively on an alleged breach of contract. And what the learned trial judge says in his judgment is that, having regard to the nature of the agreement, there was no breach in respect of any matter connected with a trade-mark, since " there is nothing that takes away from Warré the untrammeled right to get as many trade-marks * * * as he wishes." Having so found, the learned judge held that the balance of the action (always leaving aside for the moment the question as to the copyright) resolved itself into one for breach of a contract for the sale of goods, " a matter entirely involving civil rights within the province," and therefore a matter in respect of which the Exchequer Court had no power to enforce the remedy prayed for.

In effect, what the learned judge says is that the appellants have not made out a case in which the Exchequer

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Court may interfere. After what we have already said, we need not add that we find ourselves in complete agreement with that conclusion. Without discussing otherwise the question of jurisdiction, as to which we would refer to the judgment of this Court in *Consolidated Distilleries Limited* v. *Consolidated Exporters Corporation Limited* (1), we are clearly of the opinion that, in this case, the appellants having failed to establish any breach of contract relating to a trade-mark, they could not get their remedy from the Exchequer Court of Canada.

The same reasoning applies to the prayer for an order expunging the entries relating to the assignment of the trade-mark to the respondent " La Compagnie des Remèdes de l'Abbé Warré Limitée." As previously stated, the contracts between l'Abbé Warré and Godbout, as well as between Godbout and the respondent company, were not filed. The court's knowledge of the contents of these contracts is limited to what is admitted in the statement of defence. According to those admissions, l'Abbé Warré assigned his registered trade-mark to Godbout, and the latter, in turn, assigned it to the respondent company, under agreements whereby the good will in Warré's business in Canada became vested in them " together with the secret formula in accordance with which the goods to which the said trade-mark relates were manufactured, and the right to exclusive manufacture of the said goods in Canada." If the trade-mark in question was properly registered in the name of l'Abbé Warré—as, on the record before us, we hold that it was—that trade-mark was certainly assignable in law; and, so far as we know, the assignment made under the conditions above stated was no more a breach of duty in respect to a trade-mark than was the registration itself of the trade-mark by l'Abbé Warré; so that the argument which prevailed to refuse the order expunging the trade-mark equally applies, in the alternative, to the prayer for expunging the entries relating to the assignment. It should be understood, of course, that we refrain from saying more upon the nature and the effect of the agreements between the respondents, except so far as necessary to discuss the power of the Exchequer Court to interfere, as it is our purpose to

(1) [1930] Can. S.C.R. 531.

avoid prejudicing, one way or the other, the controversy involving the nature and extent of the civil rights of the parties, which properly belongs to the jurisdiction of the provincial courts.

Coming now to the consideration of the complaint concerning the copyright and of the prayer for relief in connection with its infringement, the point raised calls for the interpretation and the application of the *Copyright Act* and the question is whether, in view of the dealings between the parties and by force of section 3 and subsections 2 and 4 of section 12, the appellants became entitled to be treated, for the purposes of the Act, as the partial owners of the copyright, and whether the provisions of the *Copyright Act* should have effect accordingly.

If that be so, it could be reasonably argued that the Exchequer Court had jurisdiction over the subject-matter (s. 22 of the *Exchequer Court Act,* as amended by 18-19 Geo. V, c. 23, s. 3).

Unfortunately for the appellants, the appeal on that point is concluded by the judgment of the Privy Council in the case of *Canadian Performing Right Society Ltd.* v. *Famous Players Canadian Corporation Ltd.* (1). Under the *Copyright Act* (now c. 32 of R.S.C., 1927, s. 12), l'Abbé Warré, as the author of the book "La Santé par les plantes," was the first owner of the copyright therein. We shall not discuss whether, by virtue of the agreement of 1922, it was intended that the appellant Bertrand should register the copyright in his own name, nor whether the agreement itself may be construed as an assignment of the copyright. The right to prepare and publish a translation of the book in the English language was at least a partial assignment of or a grant of an interest in the copyright. In any view, the appellants were at best the grantees of l'Abbé Warré.

In the *Canadian Performing Right Society* case (1), the Privy Council decided that, upon its true construction, section 39, subsection 2, of the *Copyright Act* (now sec. 40, subsec. 3, of ch. 32, R.S.C., 1927) prohibits a grantee of an interest in a copyright, either by assignment or licence, from maintaining any action under the Act, unless his grant

(1) [1929] A.C. 456.

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and similar grants forming part of the chain of his title have been registered.

In the present case, the action is between a grantee and a subsequent assignee from the same author—a circumstance not present in the *Canadian Performing* case (1) before the Privy Council and which makes the application of the section only the more imperative in the premises.

The grant of the appellants has not been registered. Their action is an action for infringement under the *Copyright Act*, and no answer can be found to the contention that, under the circumstances, they are precluded from maintaining the action. The point was expressly raised at the trial and the appellants had full opportunity of meeting it.

It follows that the action of the appellants was rightly dismissed by the Exchequer Court, and that the appeal on both branches of the case should be disallowed with costs, without prejudice to any recourse the appellants may have before the provincial courts.

Appeal dismissed with costs.

Solicitors for the appellants: *Smart & Biggar.*

Solicitors for the respondents: *Henderson, Herridge & Gowling.*

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*Oct. 30.

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*Mar. 15.

LA CORPORATION DU VILLAGE DE LA MALBAIE (DEFENDANT) ..... } APPELLANT;

AND

ADJUTOR BOULIANNE AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

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

Municipal law—By-law—Voting—Municipal electors—Valuation roll—Whether roll is conclusive as to who are "proprietors"—Enquiry by court whether proprietor at time of voting—Jurisdiction—Art. 50 C.C.P.—Sale "à réméré"—Promise of sale—Which party is entitled to vote as proprietor—Arts. 16, 243, 670, 743, 758, 769, 771, 772 M.C.

When a by-law is submitted to the votes of the "proprietors" of taxable immoveable property who are municipal electors under the provisions of article 771 M.C., the fact that the name of an elector appears upon the valuation roll as being "proprietor" does not constitute con-

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Smith and Cannon JJ.

(1) [1929] A.C. 456.

clusive proof of his qualification as such. In an action to set aside a by-law on the ground that it had not received the approval of the requisite number of "proprietors," the trial judge is entitled to go behind the valuation roll and inquire into the qualification of the individual voters as actual "proprietors" at the time of the voting within the meaning given to that word by the municipal code. Anglin C.J.C. and Cannon J. dissenting.

Per Duff, Rinfret and Smith JJ.—The buyer in the deeds of sale *"à réméré"* and the vendor in the promises of sale herein are the contracting parties entitled to exercise the right of vote granted to the "proprietor" by Art. 771 M.C.—Anglin C.J.C. and Cannon J., owing to their opinions on the main question, did not express any opinion on this point.

Per Anglin C.J.C.—There was no jurisdiction conferred under Art. 50 C.C.P. upon the Superior Court to entertain the respondents' action, especially when there were involved in it collateral trials of the right to vote of voters who were not parties to the litigation.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Bouffard J., and maintaining the respondents' action to set aside a municipal by-law.

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

J. A. Prévost K.C. and *Antoine Cimon* for the appellant.

Ls. St. Laurent K.C. and *André Taschereau K.C.* for the respondents.

ANGLIN C.J.C. (dissenting).—Assuming that the Superior Court had jurisdiction to inquire (Art. 677 M.C.), in this proceeding, into the qualifications of individual voters, it appears to me that, on the merits, this whole case boils down to one question, viz., whether or not, under Quebec municipal law, "the valuation roll" in force in a municipality (Articles 650-3, 663 and 667-9, M.C.) is intended to be accepted as conclusive proof in all courts, not merely of the fact that a voter entered thereon is a municipal elector, but of the further fact that he is the actual proprietor of any lands, of which he is entered as such on that roll.

Article 771 M.C. provides that,

No local corporation may contract debts for any amount exceeding, in the aggregate, ten per cent of the value of the taxable immoveable property, if the municipality is a rural one, or fifteen per cent of the value of the taxable immoveable property, if the municipality is a village

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or town,—such amount including the share which such corporation has to contribute towards paying the debts of the county corporation,—unless the by-law is voted upon by at least two-fifths in number of the *proprietors* of taxable immoveable property in the municipality *who are municipal electors*, and who reside in the municipality, and approved by a majority of at least two-thirds in number and real value of all the *proprietors* whether resident or not in the municipality who have voted, and *who are entitled to vote*, upon such by-law, and by the Lieutenant-Governor in Council. (8 Geo. V, ch. 60, sec. 22 and 16 Geo. V, ch. 34). (See, too, art. 768 M.C.)

While I agree with the views taken below that several distinct qualifications are here imposed, I see no reason for thinking that the legislature did not intend that, if the valuation roll should be regarded as conclusive on one point, it should not have a like quality and effect in regard to the others, v.g., if conclusive as to a man being an *elector*, it should also be conclusive as to his being *proprietor* of the land in question. I cannot imagine that it was ever intended that there should be as many trials in the Superior Court as to the qualifications of individual voters as there may be voters objected to by anybody contesting either a municipal election or the validity of a vote on a municipal by-law, and that such trials should be had in a collateral proceeding, such as that now before us, and without the persons principally concerned, i.e., the voters, being parties thereto. I more than gravely doubt if any such jurisdiction is conferred by Art. 50 C.C.P. on the Superior Court (and yet the only justification invoked by the respondent for this proceeding is Art. 50 C.C.P.); but, if it is, I find in Art. 771 M.C., above quoted, no reason for distinguishing between the valuation roll *as evidence* in that court of the several qualifications imposed by that article as conditions of the right to vote, i.e., (1) as to *municipal electorship*, that it is evidence that the voter appears upon the roll as an elector (Art. 654 M.C., paragraphs nos. 2, 6 and 12), and (2) as to *proprietorship*, that the voter must be regarded as proprietor of the land of which the roll in force shews him to be such. For both purposes alike, the evidence of the roll, I think, must be equally conclusive if for no other reason on the score of overwhelming convenience. In my opinion, unless the valuation roll should be regarded as conclusive for all election purposes, including voting on municipal by laws, the greatest inconvenience must ensue, as otherwise such land as that now in question must be

wholly unrepresented on the vote taken, and there might well be an unseemly row in the polling booth.

Article 670, which provides that the valuation roll in force "serves as a basis * * * for any 'immoveable property qualification'" seems to me almost conclusive on the point now before us in favour of the appellant. Moreover, abundant provision is made for the correction of this roll by appeal. For instance, Art. 663 M.C. provides that the local council must, after proper notice, etc., deal with the roll, *inter alia,*

> by correcting the names of persons entered therein, or the description of the lands mentioned therein;

the decision of the Circuit Court of the county, or the district, or of the District Magistrate's Court, on further appeal, being declared by Art. 677 to be final.

Finally, by Art. 769 M.C., after a loan by-law has been approved by the electors, the secretary-treasurer is to transmit to the Minister for submission to the Lieutenant-Governor in Council, *inter alia,* the following:

> (9) a certificate from the secretary-treasurer specifying the total number of municipal electors who are proprietors of taxable immoveable property.

At least twice (notably in Arts. 665 and 666 M.C.) provision is made whereby the secretary-treasurer, expressly or impliedly, is forbidden to derive information from any other source than the valuation roll. How, therefore, is he to know who are proprietors of immovable property without having recourse to the valuation roll?

Finally, by Art. 772, provision is made for lenders or creditors, upon discovery of illegality or informality, having

> a right to recover their claims from the member or members of the council personally, and jointly and severally, who participated in any manner whatever, even tacitly, in effecting such loan or contracting such debt.

The purchaser *a réméré* did not take advantage of article 673 M.C. to be entered on the valuation roll as proprietor, which may have been because of some agreement to that effect between the parties that the names of the vendor *a réméré* should continue to appear on the roll as proprietor. At all events, the only person who, in my view, should now be regarded as having had the qualification of proprietor of the land in question at the time of the voting, by virtue of

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ownership thereof, is the elector whose name had been allowed to remain on the valuation roll as owner of such land.

For these reasons, I agree in the conclusion reached by my brother Cannon, basing my concurrence largely on the additional authorities cited by him.

The definition by Larousse and Littré of "*qualité foncière.*" With great respect, I differ from the view taken by my brother Rinfret as to the effect and meaning of the term "*qualité foncière.*" The English translation is "immoveable property qualification." The phrase "property qualification" implies no idea or notion of "valuation" whatsoever. Its connotation, like that of "*qualité foncière*" is that the voter has certain property rights as the basis of his "qualification." I find substantially no difference in meaning and effect between the term "*qualité foncière*" used in the French version and the words "immoveable property qualification" used in the English version. Therefore, in my opinion, no case is made for an application of the provision contained in Art. 15 of the code, although, had such a case been made, I agree that the English version, as the original text, is to be preferred to the French for the reasons stated by that learned judge.

Article 729 M.C. and the opinion of Taschereau J. (later C.J.C.) in *Les Listes Electorales de Kamouraska* (1), quoted by my brother Cannon. (See too Arts. 273 and 313 M.C.).

Another remedy would seem to have been that provided by Article 662 *et seq.* M.C., but which was not availed of. See also *McDonald* v. *Quinn* (2), especially the reasons given by Meredith J. at pp. 461-3, likewise quoted by my brother Cannon.

While, possibly, of some little value in construing the effect of the valuation roll as evidence of the qualifications of municipal voters, the requirement of the code that councillors should continue to hold these qualifications throughout their entire term of office seems to me, with great respect, to have little or no bearing on the point at issue.

(1) (1877) 3 Q.L.R. 308, at 310-14.

(2) (1854) 4 L.C.R. 457.

I am, for the foregoing reasons, of the opinion that the valuation roll in force is conclusive as evidence both of the right of the voter whose name appears thereon to be an elector, and, also, for the purposes of any voting at which such roll is properly used, of the fact that he is proprietor of land of which he is inscribed thereon as such.

While I fully recognize the force of the contention of the respondents that the jurisprudence of Quebec has been very largely to the contrary of the view above expressed, and the value and significance of the judgments of the Privy Council in such cases as *Webb* v. *Outrim* (1), (and am fully prepared to stand by what I said in *Gagnon* v. *Lemay* (2) as to the wisdom and importance of this branch of the doctrine of *stare decisis*), we must also be careful never to forget that we are not bound by the decisions of provincial courts and that it is our business to correct the errors of those courts when it is clear to us that such errors have, in fact, existed (*Bourne* v. *Keane*) (3).

Moreover, enough attention, in my opinion, has not been paid to the scope and language of Art. 50 C.C.P. which reads as follows:—

> Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the province, are subject to the superintending and reforming power, order and control of the Superior Court and of the judge thereof in such manner and form as by law provided.

Apart from the fact that nominal or consequential relief was asked originally against the mise-en-cause, Couturier, for the setting aside of the contract with him for the purchase of his land for the purpose of carrying out the scheme involved in the by-law, I find no ground whatever for suggesting that under Art. 50 C.C.P. there was any jurisdiction whatever conferred upon the Superior Court to entertain an action such as that now before us, especially where there are involved in it collateral trials of their right to vote, although the voters interested are not parties to the litigation. To say that the "superintending and reforming power, order and control of the Superior Court" extends to entertaining an action such as this is, to my mind, absurd, especially in view of the exclusive jurisdiction conferred on

(1) [1907] A.C. 81.

(2) (1918) 56 Can. S.C.R. 365, at 374.

(3) [1919] A.C. 815, at 859-860.

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the Circuit Court, or Magistrate's Court, of the district in which the municipality is situated, for the hearing and decision of contested elections (Art. 315 M.C.). I do not think it was ever intended, by tacking on to the proceeding of contesting the vote on a by-law, such as is now before us, a claim to set aside a contract incidentally involved, that the Superior Court would be given authority to oust the jurisdiction of the local courts, to whom matters of voting and election are exclusively entrusted.

I would, for these two reasons (*a*) want of jurisdiction of the Superior Court to entertain the action, and (*b*) the extreme inconvenience likely to result from the Superior Court having the right to determine the qualification of voters in such a proceeding as this, hold that the present action cannot succeed.

I would, accordingly, allow the appeal with costs here and in the Court of King's Bench and would restore the judgment of Bouffard J., including the appellant's costs of the motion to add Joseph Couturier, formerly mise-en-cause, as a respondent, which, in my opinion, were quite unnecessarily incurred.

The judgments of Duff, Rinfret and Smith JJ. was delivered by

RINFRET J.—L'appelante est une corporation de village régie par le Code Municipal de la province de Québec. Elle avait un règlement d'emprunt à faire approuver par les contribuables; et les deux parties conviennent que, dans les circonstances, avant que ce règlement puisse avoir vigueur et effet, les formalités prescrites dans l'article 771 du Code Municipal devaient être observées. Cet article se lit comme suit:

771. Une corporation locale ne peut contracter des dettes pour une somme excédant en totalité dix pour cent de la valeur des biens-fonds imposables s'il s'agit d'une municipalité rurale, quinze pour cent de la valeur des biens-fonds imposables s'il s'agit d'une municipalité de village ou de ville,—cette somme comprenant la part que cette corporation a à payer de la dette de la corporation de comté,—à moins que le règlement sur lequel ont voté au moins les deux cinquièmes en nombre des propriétaires de biens-fonds imposables de la municipalité, qui sont électeurs municipaux, et qui résident dans la municipalité ait été approuvé par une majorité d'au moins les deux tiers en nombre et en valeur immobilière de tous les propriétaires résidant ou non dans la municipalité, qui ont voté et qui ont droit de voter sur ce règlement, ainsi que par le lieutenant-gouverneur en conseil.

Il est admis que le nombre voulu de propriétaires ont voté. Cette première condition a été remplie.

Ce qui est contesté, c'est que le règlement

ait été approuvé par une majorité d'au moins les deux tiers en nombre et en valeur immobilière de tous les propriétaires résidant ou non dans la municipalité, qui ont voté et qui (avaient) droit de voter sur ce règlement.

La discussion porte sur les deux points suivants:

1. L'inscription au rôle d'évaluation est-elle concluante sur la question de savoir quels sont les propriétaires qui ont le " droit de voter " en vertu de l'article 771?

2. Dans la négative, le règlement a-t-il reçu la majorité requise des propriétaires qui ont voté et qui avaient droit de voter?

Le juge de la Cour Supérieure fut d'avis que,

au point de vue municipal, les propriétaires de biens-fonds sont ceux qui sont inscrits comme tels au rôle d'évaluation en vigueur, lequel lie la corporation et ses contribuables.

D'après le jugement, " le rôle d'évaluation, lors du vote, était la seule base du vote " et " la cour ne serait pas justifiable d'annuler les votes " de ceux qui n'étaient pas alors propriétaires, pourvu qu'ils fussent inscrits comme tels sur le rôle. Pour cette raison, il a débouté les intimés de leur action.

La Cour du Banc du Roi a été unanime à rejeter cette interprétation de l'article 771.

Le raisonnement des juges du tribunal d'appel, tel qu'il est exprimé dans leurs notes, nous paraît convaincant, et nous l'adoptons sans restriction. Nous voulons seulement y ajouter les quelques considérations qui suivent:

Ce qui ressort de l'article 771 du Code Municipal, et de l'article 758 qui en est la base, c'est que le législateur a voulu que les règlements d'emprunts fussent approuvés tout d'abord par les propriétaires de biens-fonds imposables. C'est la propriété qui va être affectée par la taxe imposée à raison de l'emprunt. Il est juste que ce soit celui qui détient la propriété qui se prononce. Il a non seulement ce privilège pour lui-même, mais il a un intérêt à ce que les non-propriétaires n'aient pas voix au chapitre. Si la propriété est subséquemment vendue pour taxes, ce sera le véritable propriétaire, inscrit ou non sur le rôle, qui la perdra. C'est donc le fait d'être propriétaire qui est la condition primordiale du vote. En pareil cas, la qualité d'élec-

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teur municipal n'est que supplémentaire. Et c'est bien ce que fait voir l'article 771. Il exige d'abord qu'on soit propriétaire; et cette exigence est exprimée au temps présent. C'est le propriétaire, c'est-à-dire celui qui a le titre au moment où la taxe va être imposée, qui peut voter. Comme le dit fort bien M. le juge Galipeault:

> Le propriétaire dont le nom n'apparaît pas sur le rôle est certainement privé de voter; le non-propriétaire dont le nom est inscrit au rôle ne possède pas plus de droits: à chacun d'eux il manque l'une des conditions essentielles.

Cet argument est renforcé par l'article 243 du code, qui définit ce qu'est un électeur.

Il faut, dit l'article, pour

> avoir le droit de voter * * * et d'exercer tous les droits et privilèges conférés aux électeurs par les dispositions du présent code, *sujet à l'application de l'article 758,* posséder *au moment d'exercer tels droits et privilèges,* les conditions suivantes etc.

On remarque immédiatement la référence spéciale subordonnant cet article à l'application de l'article 758 qui, comme nous l'avons déjà souligné, est l'article de base des votes des propriétaires sur les règlements d'emprunt. Mais on remarque surtout qu'il faut posséder les conditions requises pour être électeur, "*au moment d'exercer tels droits et privilèges*". Ce qui veut dire clairement que le fait de les avoir possédées lors de l'homologation du rôle d'évaluation n'est pas suffisant.

En plus, l'article 243 énumère en quatre paragraphes les conditions essentielles pour être électeur. Il faut posséder chacune d'elles, "au moment d'exercer tels droits et privilèges". Le quatrième paragraphe, qui se lit comme suit:

> Etre inscrit comme propriétaire, comme locataire ou comme occupant, sur le rôle d'évaluation en vigueur dans la municipalité,

est seulement une de ces conditions. Il faut, en plus, posséder les autres: être sujet de Sa Majesté; être majeur; être du sexe masculin ou être fille ou veuve; posséder soit comme propriétaire, soit comme locataire, soit comme occupant, un terrain d'une certaine valeur réelle ou annuelle, tel qu'il appert du rôle d'évaluation en vigueur.

S'il suffisait d'être inscrit sur le rôle, il était bien inutile de mentionner les autres conditions, puisque chacune d'elles figure parmi les mentions qui apparaissent au rôle en vertu de l'article 654 du Code municipal.

Cela fait bien voir qu'être inscrit sur le rôle ne constitue que l'un des éléments requis pour être électeur. Il est

nécessaire de réunir, en outre, chacune des autres qualités énumérées dans l'article 243. Et il faut posséder ces qualités et, en plus, être inscrit, dit l'article 243, " au moment d'exercer (les) droits et privilèges conférés ". Donc: au moment de voter sur un règlement d'emprunt.

D'où il résulte que le rôle d'évaluation n'est nullement une liste électorale, puisqu'il faut tout ensemble y être inscrit et, par surcroît, remplir au moment du vote toutes les autres conditions. Et si l'article 379 du code exige que le secrétaire-trésorier assiste à l'assemblée des électeurs " avec l'original ou une copie certifiée du rôle d'évaluation en vigueur ", ce n'est pas parce que ce rôle représente la liste de ceux qui ont le droit de voter (bien qu'il faille y figurer), mais c'est parce que ce rôle est nécessaire au secrétaire et est essentiel pour vérifier et contrôler la valeur des propriétés représentées par ceux qui votent. L'article 771 requiert " une majorité d'au moins les deux tiers en nombre et en valeur immobilière " de ceux qui ont voté. C'est au moyen du rôle d'évaluation que cette valeur immobilière est établie. C'est lui qui permet de déterminer si la majorité en valeur a été obtenue.

Il reste l'article 670 du Code Municipal, sur lequel le juge de la Cour Supérieure a surtout appuyé son raisonnement. Il s'agit du rôle d'évaluation; et l'article se lit comme suit:

670. Il reste en vigueur jusqu'à l'entrée en vigueur d'un nouveau rôle d'évaluation fait d'après les dispositions du présent titre; et, pendant ce temps, il sert de base aux taxes, contributions, répartitions en deniers, mains-d'œuvre ou matériaux imposés en vertu des règlements, procès-verbaux ou actes de répartition, ainsi qu'à toute qualité foncière, et au paiement de toute dette municipale, sauf les cas particuliers où il en est autrement ordonné par les dispositions du présent code.

Le juge de première instance a insisté sur les mots " qualité foncière ". Faisons d'abord remarquer que la version anglaise de l'article donne comme l'équivalent de " qualité foncière ", l'expression " immoveable property qualification ". Le code actuel a succédé à celui de 1870. Si l'on se reporte au texte de 1870, tel qu'il se trouve au statut de Québec, 34 Victoria, c. 68, art. 743, on constate que, dans ce statut originaire, les deux versions (anglaise et française) emploient le mot " qualification ". C'est dans les Statuts Refondus de 1888 que le mot " qualité " s'est glissé, sans explication, dans la version française, tandis que

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le mot " qualification " persistait dans la version anglaise. S'il y a divergence entre les deux textes, c'est la version anglaise, au besoin, qui prévaudrait, comme étant conforme au texte du statut de 1870 (C.M., art. 15—50 Vict. c. 5, art. 12, R.S.Q. 1888, p. CXX).

Mais un premier point bien décisif, suivant nous, qu'il est important de faire observer quand il s'agit de l'application de l'article 670, c'est qu'il se termine par la phrase:

sauf les cas particuliers où il en est autrement ordonné par les dispositions du présent code

qui doit qualifier tout le reste de l'article et dont il est impossible de ne pas tenir compte. Or, pour les raisons qui précèdent, nous sommes d'avis que les articles 758, 771 et 243, qui s'appliquent en l'espèce, sont des " cas particuliers où il en est autrement ordonné ".

Admettons cependant, pour les besoins de l'argument, qu'il n'en soit pas ainsi. L'article 670 a trait au rôle d'évaluation. Le but fondamental du rôle d'évaluation est d'établir " la valeur réelle des propriétés " pour les fins municipales. Art. 650. Sa fonction essentielle est de fixer l'évaluation foncière: et c'est bien ce qui résulte de l'article, lorsqu'il dit que le rôle

sert de base aux taxes, contributions, répartitions en deniers, mains-d'œuvre ou matériaux imposés en vertu des règlements, procès-verbaux ou actes de répartition, * * * et au paiement de toute dette municipale.

C'est dans cette énumération que figurent les mots " qualité foncière ", et il est raisonnable de penser qu'ils y ont été insérés pour les mêmes fins que tous les autres objets de cette énumération, surtout si l'on songe que l'insertion des noms des propriétaires d'immeubles n'est pas exigée par l'article 654 parmi les particularités qui " doivent être portées au rôle d'évaluation "; mais que, d'après le sous-paragraphe 6 de cet article, les noms des propriétaires ne sont insérés que " s'ils sont connus ". Il s'ensuit que l'indication des propriétaires dans le rôle d'évaluation n'est pas une partie essentielle de ce rôle. Aussi lorsque l'article, parlant du rôle d'évaluation, déclare que ce rôle sert de base à la " qualité foncière ", ou " qualification foncière " ou " immoveable property qualification ", il est logique d'entendre ces mots comme se référant à l'idée et à la notion de valeur ou d'évaluation. La valeur ou évaluation est d'ailleurs la seule chose sur laquelle les estimateurs, en préparant le rôle, sont appelés à se prononcer.

Or, cette conclusion est conforme à la jurisprudence constante de la province de Québec; et nous croyons que M. le juge Galipeault, dans son jugement, donne une idée exacte de la situation, lorsqu'il dit:

> Nos tribunaux ont toujours interprété l'expression "qualité foncière" comme voulant dire le cens d'éligibilité ou le cens requis pour exercer un droit ou une fonction en vertu du droit municipal.

Il cite plusieurs jugements à l'appui de cette observation et il conclut:

> Il ne paraît pas contesté aujourd'hui que le rôle d'évaluation ne fait pas preuve de la propriété; qu'il constitue simplement et uniquement une preuve péremptoire de la valeur des biens-fonds qui y sont portés.

Nous avons d'abord à examiner la portée de deux arrêts assez anciens: *McDonald* v. *Quinn* (1) et *In re Les listes électorales de Kamouraska* (2), qui, à notre humble avis, n'ont pas d'application à la présente cause, parce que les questions en litige étaient sans analogie avec celle qui est débattue dans l'espèce actuelle, et parce qu'il s'agissait là de lois et de textes différents.

McDonald v. *Quinn* (3) est un jugement de 1854, de beaucoup antérieur au premier Code Municipal. Le débat était quant à la validité de certains votes donnés à une élection municipale de la cité de Québec; et l'on a décidé que les juges étaient liés par les listes électorales préparées par le conseil. Le rapport fait voir (p. 463) que l'ordonnance qu'il s'agissait d'appliquer (3 et 4 Vict. c. 35, sec. 19) se lisait comme suit:

> It is provided that it shall be lawful for the said council of the said city, by a by-law or by-laws to be enacted in this behalf, *to make a provision for the making of lists* and the registration of all persons qualified to vote at the elections of Councillors and other city officers in the said city, *whereby the right to vote at such elections may be determined.*

La cour a jugé que la liste des électeurs faite en vertu de cette ordonnance était définitive et devait être considérée comme concluante du droit de voter à l'élection. Comme on le voit, le texte de l'ordonnance était décisif et ne pouvait se comparer à celui des articles 771 et 243 ou 670 C.M.

Dans *In re Les listes électorales du Comté de Kamouraska* (2), la question soulevée était celle de savoir quel était le devoir du secrétaire-trésorier de la municipalité, lorsqu'il préparait la liste des électeurs conformément à

(1) [1854] 4 L.C.R. 457. (2) [1877] 3 Q.L.R. 308.
(3) [1854] 4 L.C.R. 457.

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l'*Acte électoral de Québec* de 1875 (c. 7 de 38 Vict.). Le texte qu'il s'agissait d'interpréter était le suivant:

> 12. Chaque année, du premier au quinze du mois de mars, le secrétaire-trésorier de toute municipalité devra faire, en double, une liste par ordre alphabétique des personnes qui, *d'après le rôle d'évaluation alors en force* dans la municipalité pour les fins locales, et tel que revisé s'il l'a été même seulement pour des fins locales, paraissent être électeurs, à raison des biens-fonds possédés ou occupés par elles dans la municipalité.

L'honorable juge Taschereau décida qu'en vertu de ce texte seules les personnes inscrites au rôle d'évaluation pouvaient être portées sur la liste des électeurs par le secrétaire-trésorier; et voici comment il définit lui-même l'effet de sa décision (p. 309):

> Le législateur a donc voulu, il me semble; 1° que le rôle d'évaluation soit conclusif quant à la valeur de la propriété; 2° que personne ne soit sur la liste des électeurs s'il n'est sur le rôle; 3° que tous ceux qui apparaissent qualifiés par le rôle soient sur la liste électorale, à moins de disqualification personnelle de nature à ne pouvoir apparaître sur le rôle.

Sa conclusion sur le point qu'il avait à juger fut que

> Le secrétaire-trésorier n'a donc aucun droit de corriger le rôle d'évaluation; la loi lui dit, au contraire, de le suivre et de ne suivre que le rôle.

Il semblerait, en effet, que le texte de l'article 12 de l'*Acte Electoral* imposait cette conclusion. Mais, en outre que la question à décider était toute différente de celle qui nous occupe, il est facile de voir que la loi s'exprimait de façon tout autre que ce que nous trouvons dans les articles 771 et 243 ou 670 C.M. Sans doute, au cours de ses notes, l'honorable juge discute la portée de l'article 743 C.M. qui correspondait alors à l'article 670 actuel. Mais il reste que cette discussion n'était nullement nécessaire pour les fins de la décision; et il semble qu'on doive interpréter ce qu'il dit en ayant égard à la question qui lui était alors soumise. Si toutefois on voulait donner plus d'ampleur à ce jugement, il faudrait alors dire que l'opinion qui y est exprimée sur la portée de l'article 743 n'a pas été adoptée par la suite et que la jurisprudence de la province de Québec a été constamment et uniformément dans le sens contraire.

L'arrêt de Kamouraska date de 1877. Dès 1875, dans la cause de *Gratton* v. *Ste-Scholastique* (1), il avait été jugé que le rôle d'évaluation ne faisait preuve que de la valeur de la propriété et qu'il n'était pas

> destiné à prouver qu'un tel est propriétaire, occupant ou locataire d'un tel bien-fonds, surtout lors d'un événement futur. * * * C'est l'évaluation

(1) [1875] 7 R.L. 356.

qu'on a voulu établir par le rôle d'évaluation qui, d'après le S.R.C. c. 6, s. 5, signifie: Document contenant un état de l'évaluation de la propriété.

L'honorable juge Mathieu, de la Cour Supérieure, à deux reprises, en 1886, dans la cause de *Filiatrault* v. *Corporation de St-Zotique* (1), et en 1888, dans la cause de *Coupal* v. *Corporation de St-Jacques le Mineur* (2), a jugé que le rôle d'évaluation ne fait foi que de l'estimation des biens-fonds, et qu'il ne fait pas preuve des autres énonciations.

En 1890, dans la cause de *Vinet* v. *Fletcher* (3), l'honorable juge Cimon avait jugé que

celui dont le nom est inscrit sur le rôle comme propriétaire d'un terrain estimé à la valeur requise, mais qui réellement n'a jamais possédé ce terrain et n'a jamais été propriétaire, n'a pas droit de vote.

Et des décisions au même effet ont été rendues, en 1896, dans *Cadot* v. *Pelletier* (4); en 1901, dans *Tremblay* v. *Ménard* (5): "Le rôle d'évaluation ne fait pas foi de la propriété, mais seulement de la valeur".

A son tour, l'honorable juge Dorion, dans la cause de *Laframboise* v. *Ladouceur* (6), décide, en 1904, que

c'est la qualité de l'électeur lors de l'élection qu'il faut considérer, et non celle qui peut apparaître au rôle d'évaluation; mais si un électeur qui prête serment et vote comme occupant a cessé depuis deux mois, lors de l'élection, d'habiter la maison sur laquelle il se qualifie, son vote doit être mis de côté.

Puis viennent les deux décisions de l'honorable juge de Lorimier, en 1907 et en 1909, dans les deux causes (qui portent le même titre) de *Perrault* v. *Beaudry* (7). Au cours de son jugement dans la première de ces causes, l'honorable juge dit:

Il est évident qu'il ne suffit pas d'être inscrit au rôle d'évaluation pour avoir droit de vote; mais il faut de plus, au moment où l'on veut exercer ses droits et privilèges comme électeur municipal, posséder aussi les autres capacités exigées par la loi sous l'article 291 (maintenant 243). * * * En conséquence, n'est pas électeur qualifié à voter à une élection municipale, ni à contester une élection municipale, celui qui, bien que porté au rôle comme locataire d'un terrain estimé suffisamment, en fait, lors de l'élection, ne possédait plus ce terrain ni comme propriétaire, ni comme locataire, ni comme occupant.

En 1910, *re Desjardins* v. *Leclerc* (8), sir François Lemieux, juge-en-chef de la Cour Supérieure de la province, décide que les mots

(1) [1886] 14 R.L. 405.
(2) [1888] 16 R.L. 447.
(3) [1890] 18 R.L. 672.
(4) [1896] 3 R. de J. 19.
(5) [1901] 7 R. de J. 551.
(6) [1904] Q.R. 26 S.C. 85.
(7) [1907] 15 R. de J. 234; [1909] 15 R. de J. 491.
(8) [1910] Q.R. 37 C.S. 368.

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le cens d'éligibilité devant être établi par le rôle d'évaluation (dans l'article 108 de l'*Acte des Cités et Villes*) se rapportent uniquement à la valeur de la propriété (p. 372).

Au cours de son jugement, il dit ce qui suit (p. 373):

Or, le rôle ne fait pas preuve de la propriété, car un tel peut y paraître propriétaire et cependant ne pas l'être. On en voit des exemples fréquents. * * * La seule chose certaine que le rôle constate, c'est la valeur de la propriété, c'est-à-dire la quotité ou la quantité de biens requise pour donner le cens de l'éligibilité.

En 1911, dans la cause de *Levasseur* v. *Pelletier* (1), la question vint devant la Cour de Revision, composée des honorables juges Lemieux, juge-en-chef, Cannon et Letellier. Dans le jugement de la cour, qui confirmait le jugement de l'honorable juge Cimon, le juge-en-chef de la Cour Supérieure dit ce qui suit (p. 494):

Pelletier a soutenu qu'il était porté sur le rôle d'évaluation de la ville de Fraserville comme propriétaire de cet immeuble. L'inscription de son nom sur le rôle ne faisait qu'établir une présomption de propriétaire qui pouvait être détruite par une preuve au contraire.

L'honorable juge Letellier, en 1917, dans la cause de *Lapointe* v. *Cauchon* (2), juge comme suit:

Au point de vue du cens électoral, le rôle d'évaluation constitue une preuve péremptoire de la valeur des biens qui y sont portés; mais il ne fait pas preuve de la propriété.

L'un des considérants se lit comme suit (p. 396):

Considérant que le rôle d'évaluation est fait pour établir la valeur immobilière et, quant à la qualification des personnes, fait preuve *prima facie* mais peut toujours être contredit par une preuve directe; vu que c'est au moment de la mise en nomination que la qualification doit avoir lieu, il est permis de contredire le rôle lors de la mise en nomination, comme il est permis de le contredire après l'élection, si le maire ou le conseiller perd sa qualification.

En 1919, la Cour de Révision de Québec est encore saisie de cette question, dans la cause de *Parent* v. *Bouchard* (3). La cour est composée de sir François Lemieux, juge-en-chef, et de MM. les juges Letellier et Belleau. M. le juge Belleau, prononçant le jugement de la majorité de la cour, dit entre autres choses (p. 413):

On sait qu'en effet, si le rôle fait foi de la valeur des propriétés qui y sont portées, il ne fait pas foi du droit même de propriété. C'est ce qui a toujours été décidé par nos cours de justice.

Et si l'honorable juge-en-chef de la cour, dans cette cause, se déclare dissident, c'est parce qu'il exprime l'opinion que, non seulement le rôle ne fait pas preuve de la propriété, mais que les charges et hypothèques qui grèvent l'immeuble

(1) [1911] Q.R. 40 S.C. 490. (2) [1917] Q.R. 52 S.C. 393.
(3) [1919] Q.R. 56 S.C. 410.

doivent être déduites non de la valeur portée au rôle, mais "de la valeur réelle que l'immeuble peut réellement avoir" (p. 415); et la majorité de la cour ne voulait pas aller aussi loin.

Enfin, en 1926, le même principe est de nouveau affirmé par l'honorable juge Dorion dans la cause de *Benoît* v. *Phaneuf* et la *Corporation de St-Antoine-sur-Richelieu* (1).

Nous avons tenu à faire cette revue de la jurisprudence aussi complète que possible afin de démontrer la persistance avec laquelle, depuis 1875, les tribunaux de la province ont toujours décidé que le rôle d'évaluation est définitif seulement quant à la valeur des propriétés qui y figure, et que la mention au rôle de la qualité de propriétaire est peut-être une preuve *prima facie* mais n'est pas concluante, et elle peut toujours être contredite.

Cette série de décisions établit non seulement une uniformité d'interprétation judiciaire ininterrompue et qui remonte jusqu'aux premiers temps de l'entrée en vigueur du Code Municipal, mais l'on peut en déduire également que cette manière de voir est véritablement entrée dans la pratique courante des affaires municipales de la province et que c'est ainsi que la chose a été comprise et appliquée dans l'administration municipale.

Ce qui donne encore plus d'importance à cette revue, c'est qu'il ne s'y trouve pas un seul jugement en sens contraire. Il y a seulement l'opinion de l'honorable juge Taschereau, dans la cause de *Kamouraska* (2), en 1877, exprimée dans un litige où la question qui nous occupe ne se présentait pas. Il est peut-être significatif que, lors de l'audition, le savant procureur de l'appelante a pratiquement abandonné ce moyen d'appel; et que, d'ailleurs, les avocats des parties ayant été priés par la cour de lui envoyer une liste des jugements de part et d'autre sur cette question, alors que les procureurs des intimés en ont fourni une série imposante soutenant le point de vue que nous préconisons et d'où nous avons tiré, en grande partie, les arrêts que nous avons examinés, l'appelante n'a pu en soumettre aucun dans le sens opposé.

Pendant que la jurisprudence et la pratique de la province de Québec s'affirmaient ainsi avec persistance, le

(1) [1926] 32 R. de J. 56.

(2) [1877] 3 Q.L.R. 308.

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Code Municipal a été complètement refondu en 1916. C'est le code que nous avons actuellement. A cette époque, les décisions de nos tribunaux avaient invariablement interprété l'article 743 du code (maintenant l'article 670) de la façon que nous avons montrée; et cependant, en 1916, la législature n'a pas modifié le texte de l'article dans le but d'indiquer une intention contraire à celle que lui avait donnée la jurisprudence.

A cet égard, nous tenons à référer à ce que dit le Conseil Privé, dans la cause de *Casgrain* v. *Atlantic and North-West Railway Co.* (1):

> Their Lordships cannot assume that the Dominion Legislature, when they adopted the clause verbatim in the year 1888, were in ignorance of the judicial interpretation which it had received. It must, on the contrary, be assumed that they understood that sect. 12 of the Canadian Act must have been acted upon in the light of that interpretation. In these circumstances their Lordships, even if they had entertained doubts as to the meaning of sect. 12 of the Act of 1888, wold have declined to disturb the construction of its language which had been judicially affirmed.

Ce principe a été de nouveau réaffirmé, de façon encore plus précise, si possible, par le Conseil Privé, dans la cause de *Webb* v. *Outrim* (2), où nous trouvons ce passage, que nous extrayons du jugement prononcé par le Lord Chancelier, The Earl of Halsbury:

> It is quite true, as observed by Griffith C.J., in the above-mentioned case of *D'Emden* v. *Pedder* (3) that: "When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

Dans la cause de *Gagnon* v. *Lemay* (4), le très honorable juge-en-chef de cette cour disait, à la page 374:

> The wisdom of not overruling judical decisions of some years' standing, where numerous contracts must have been made and moneys paid on the footing of the law as established by them, and of not breaking away from previous decisions upon the construction of a well known document in constant use for a number of years, even in cases where, were the matters *res integra*, a different view might have prevailed is fully recognized in the English system of jurisprudence. *Palmer* v. *Johnson* (5); *Dunlop & Sons* v. *Balfour, Williamson & Co.* (6). I cannot think that anything so mischievous as unsettling the law in regard to matters affecting rights of property should be countenanced by courts administering the

(1) [1895] A.C. 282, at 300.
(2) [1907] A.C. 80, at 89.
(3) [1903] I Commonwealth L. R. 91, at 110.
(4) [1917] 56 Can. S.C.R. 365.
(5) [1884] 13 Q.B.D. 351, at 354, 357, 358.
(6) [1892] 1 Q.B. 507, at 517.

civil law. That would seem to have been the view of the learned judges of the Court of King's Bench in the present case.

La règle ainsi posée a été souvent suivie par le Conseil Privé (*Ruckmaboye* v. *Mottichund* (1); *Evanturel* v. *Evanturel* (2); *Migneault* v. *Malo* (3.)

Et si le principe est vrai en matière de contrat et de droit privé, à plus forte raison doit-il en être ainsi dans les affaires municipales qui, par leur nature même, sont davantage susceptibles d'être portées à la connaissance du public. Voici ce que disait, dans la cause de *City of Montreal* v. *Dupré* (4), notre collègue, M. le juge Duff, à la page 255:

> The authority of decided cases, it is needless to say, in the province of Quebec, stands upon a footing which is not the same as that upon which it is based in the law of England. Nevertheless, the central idea of *stare decisis* has not often been better expressed than in the sentence of Paul: "Minime sunt mutanda ea quæ interpretationem certam semper habuerunt". D.I. 3, 23; and the importance of adhering to an interpretation of a statute given in an authoritative decision which has been accepted for many years without challenge is recognized by writers on the French law; for example, I.B.L., section 261. It is impossible to suppose that the legal advisers of municipalities governed by the *Towns Act* and of municipalities governed by the Municipal Code have not been familiar, since the appearance of the report, with the decision in *Chambly* v. *Lamoureux* (5), or that they have failed to treat it as an authoritative exposition of section 943 in the sense ascribed to the decision by Mr. Justice Mathieu in the note quoted above; I cannot doubt that it must have been acted upon in that sense.

(et, au sujet de ce jugement, voir ce que dit le Conseil Privé dans la cause de *Canadian Spool Cotton Company Ltd.* v. *City of Montreal*) (6).

Il est à peine besoin d'ajouter, après ce que nous venons de dire, que, contrairement à la crainte exprimée par le juge de première instance, en annulant les votes des non-propriétaires, comme la Cour du Banc du Roi a unanimement décidé qu'elle en avait le droit, elle ne "porte pas atteinte au rôle" et elle ne s'est pas trouvée virtuellement à corriger "le rôle d'évaluation ou à l'annuler partiellement", puisqu'il ne fait pas preuve de la qualité de propriétaire (il ne doit même mentionner les noms des propriétaires que "s'ils sont connus"—C.M. art. 654-6); et pour cette autre raison que: prouver qu'une personne n'est pas propriétaire au moment du vote n'est pas contredire le

(1) [1852] 8 Moore's P.C. Cases, 4, at 20.
(2) L.R. 12 Priv. C. App. 462, at 488.
(3) [1822] L.R. 4 Priv. C. App. 123, at 137.
(4) [1924] S.C.R. 246.
(5) (1890) 19 R.L. 312.
(6) [1929] A.C. 137, at 141.

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fait qu'elle l'aurait été plusieurs mois auparavant, lors de l'homologation du rôle.

Nous sommes donc d'accord avec tous les juges de la Cour du Banc du Roi pour décider que le jugement de la Cour Supérieure doit être mis de côté.

Cela étant, nous partageons l'avis du juge de la Cour Supérieure et de la majorité de la Cour du Banc du Roi à l'effet que, en retranchant les votes des non-propriétaires au moment du vote, d'après la preuve faite à l'enquête, il ne reste pas en faveur du règlement une majorité d'au moins les deux tiers en valeur immobilière. Nous adoptons sur ce point le raisonnement de MM. les juges Bond et Galipeault, qui ont exprimé le point de vue de la majorité de la cour, tant sur la question des ventes à réméré que sur la question des promesses de vente. (*Sirois* v. *Carrier* (1); *Salvas* v. *Vassal* (2). Cela est suffisant pour disposer de l'appel.

Le Code Municipal divise les personnes, relativement aux biens-fonds, en trois catégories qu'il définit: les propriétaires (art. 16, parag. 20), les occupants (art. 16, parag. 21) et les locataires (art. 16, parag. 22). Nous sommes d'avis que, d'après les termes et conditions stipulés aux contrats qui ont été produits, celle des parties contractantes qui correspond au propriétaire, dans le sens de l'article 771 C.M. et suivant la définition du paragraphe 20 de l'article 16 C.M., est l'acheteur, dans les ventes à réméré, et le promettant vendeur, dans les promesses de vente. Il est évident que, sur un règlement d'emprunt, deux personnes ne peuvent voter comme propriétaires à raison du même immeuble. Entre le vendeur et l'acheteur dans les ventes à réméré dont il s'agit, comme aussi entre le promettant acheteur et le promettant vendeur dans les promesses de vente en question, il nous paraît que celui à qui appartient le vote, comme propriétaire, accordé par l'article 771, c'est, dans le premier cas, l'acheteur sujet à la clause de réméré (art. 1553 C.C.; Pothier, de la Vente, n° 387, cité par les codificateurs sous arts. 1546 et suiv. C.C. Voir aussi Cour de Cassation, 23 août 1871—D. 73. 1. 321) et, dans le second cas, le prometteur vendeur. A cause des stipulations spéciales contenues dans les actes, l'application de l'article 1478 C.C. est écartée.

(1) [1904] Q.R. 13 K.B. 242. (2) [1896] 27 Can. S.C.R. 68.

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Pour les fins de l'article 771, il ne faut pas faire état de la possession actuelle ou physique de l'immeuble, puisque, sur ce point, l'article est clair: La majorité qui est requise est celle des

deux tiers * * * de tous les propriétaires *résidant ou non* dans la municipalité.

Notre conclusion rend inutile toute discussion sur la motion des intimés pour casser l'inscription en Cour Suprême, par suite du fait que le mis-en-cause Joseph Couturier n'avait pas été cité devant cette cour. Les intimés en avaient fait une question de juridiction, mais nous ne serions pas prêts à admettre cette prétention Dans la cause de *La Corporation de la Paroisse de St-Gervais* v. *Goulet* (1), un point analogue a été décidé sur le mérite de l'appel. Ici, l'appelante faisait porter son appel sur toute la cause: règlement, résolution et contrat. Même si l'on pouvait dire que l'inscription en Cour Suprême était insuffisante quant au contrat, à cause de l'absence de Couturier, l'une des parties contractantes, il y avait quand même juridiction au moins pour décider cela. Il reste que nous ne pouvions nous prononcer sur la question de ce contrat sans que Couturier fût intimé devant cette cour. A la suite de la motion, nous avons ordonné sa mise en cause, qui était nécessaire. La motion a donc été utile et les frais de cette motion devront suivre le sort de l'appel.

Nous confirmerions le jugement de la Cour du Banc du Roi avec dépens.

CANNON J. (dissenting).—Il s'agit d'un jugement de la Cour du Banc du Roi, rendu à Québec le 31 mars 1931, infirmant un jugement de la Cour Supérieure du district du Saguenay, du 19 novembre 1930, par l'honorable juge Bouffard, rejetant l'action en invalidation d'un règlement et autres actes municipaux. Deux des savants juges de la Cour du Banc du Roi enregistrèrent leur dissentiment.

Le mis-en-cause Joseph Couturier était l'un des intimés devant la Cour du Banc du Roi, mais il n'a pas jugé à propos d'appeler du jugement de cette cour qui annulait la vente de sa propriété à la corporation municipale. Après l'audition devant cette cour, par une motion présentée le 23 novembre 1931, la corporation municipale a demandé

(1) [1931] S.C.R. 437.

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une réaudition pour demander le renvoi de l'appel pour manque de juridiction, pour les raisons suivantes:

1. The action taken by respondents, plaintiffs in the Superior Court, was to set aside as illegal and *ultra vires* by-law number 145 as it had not been approved by the required majority in number and value of the proprietors of immoveable properties qualified to vote thereon and also certain resolutions and proceedings passed and made by the said corporation on the strength of the said illegal by-law;

2. The respondents had also prayed the court to set aside a certain contract or deed of sale from Joseph Couturier (mis-en-cause in the Superior Court and in the Court of King's Bench) to the appellant corporation before J. Rolland Warren, N.P., the 3rd of October, 1930, by which the said corporation had purchased a property therein described for the sum of $9,500 to build the required dams for the construction of an electric system in the Village of La Malbaie and its environments;

3. The respondents' action in the Superior Court was dismissed by judgment of Mr. Justice Bouffard on the 19th of November, 1930;

4. The respondents appealed from this judgment to the Court of King's Bench and Joseph Couturier, mis-en-cause in the Superior Court, was made a party to the said appeal, notice of which was duly served on him;

5. The judgment of the Superior Court was reversed by judgment of the Court of King's Bench rendered the 31st of March, 1931, and the court declared the said by-law number 145 null and of no effect, as likewise the certificate of the secretary-treasurer purporting to establish that the said by-law has been duly approved by two-thirds of the electors being proprietors in the said municipality who had voted in respect to the said by-law; and further cancelled and annulled a deed of sale passed before Mtre. J. Rolland Warren, notary public, bearing date the thirtieth day of October, 1930, by Joseph Couturier to the said corporation respondent; and also declared null and void the three resolutions adopted by the council of the said corporation respondent on the second day of October, 1930, providing respectively for the authorization of the mayor and the secretary treasurer to sign the said contract, calling for tenders for the purchase of the said debentures, and for the execution of the works mentioned in the said by-law.

6. The appellant corporation appealed from the judgment of the Court of King's Bench to this court on the 14th of April, 1931, but failed to call Joseph Couturier before this court;

7. The judgment of the Court of King's Bench is therefore final (*res judicata*) as to the nullity of the contract of the third of October, 1930, passed between the appellant corporation and Joseph Couturier and consequently this question is not in controversy before this court;

8. The only question in controversy before this court is that of the validity of by-law number 145 of the appellant corporation, providing for the construction of an electric system in the village and its environments and of the three resolutions passed by the appellant corporation on the second of October, 1930, and providing for tenders for the sale of the bonds to be issued in execution of the by-law and for the works to be executed in conformity with the said by-law; and for the signature of the contract;

9. There is, therefore, in this appeal before the Supreme Court of Canada no amount, value or matter in controversy exceeding the sum of $2,000.

Quand cette motion fut présentée, cette cour ordonna de signifier à Couturier copie des procédures sur le présent appel; et ce dernier a produit un factum où, renonçant au droit de se faire entendre, il soumet que, en vertu de l'article 354 et de la sous-section (*a*) de l'article 356 du Code Municipal, la municipalité, par simple résolution, avait le droit d'acquérir son terrain, que cette résolution a été dûment adoptée, et, n'ayant jamais été contestée dans les trois mois par une action en nullité devant la Cour de Circuit ou la Cour de Magistrat, était maintenant inattaquable; et le mis-en-cause adopte pour le surplus les conclusions de l'appelante, se réservant tout recours futur en vertu de son contrat.

Dans ces conditions, les intimés peuvent-ils demander le renvoi de l'appel parce que la nullité du contrat serait chose jugée entre eux et Joseph Couturier, et qu'en conséquence le seul point en litige devant nous serait la validité de l'approbation du règlement numéro 145, ce qui ne laisserait pas un montant en litige excédant $2,000?

Comme j'ai eu l'occasion de le dire dans la cause de *Prudential Trust Company* v. *Leduc & al.*, suivant une décision de la Cour de Cassation du 9 janvier 1905 rapportée dans Sirey, 1907, 1, 13:

> Lorsqu'une décision de justice n'a été frappée d'appel que par quelques-unes seulement des parties qui y figuraient, la décision nouvelle qui intervient sur l'appel de ces parties n'a d'effet qu'à leur égard; en ce qui concerne les parties non appelantes, la première décision conserve toute sa force et acquiert l'autorité de chose jugée, quelles que soient les erreurs de fait ou de droit dont elle serait entachée.

Mais cette règle générale admet une première exception lorsque le litige est indivisible, n'est susceptible que d'une seule et même solution. En ce cas, l'appel interjeté par une des parties profite aux autres et relève celles-ci de la déchéance qu'elles ont encourue, soit en ne faisant pas appel dans le délai, soit en acquiesçant au jugement.

La demande en nullité de vente a été considérée comme indivisible (S. 1902, I. 316). Voir Glasson et Tissier, Précis de Procédure Civile, 1929, p. 299 et suivantes.

L'ordonnance de cette cour, la signification des procédures et la comparution du mis-en-cause placent ce dernier suffisamment devant nous pour régulariser l'appel et nous permettre de décider si l'appelante avait le droit d'acheter et de payer le terrain par lui vendu. Dans cette cause,

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contrairement à ce qui s'est présenté dans l'affaire de *St-Gervais* v. *Goulet* (1), cette cour, ayant à sa disposition le moyen de remédier à l'insuffisance de l'inscription en appel, l'a fait. Les frais de la motion devant nous devront suivre le sort de l'appel.

Quant au mérite des questions soulevées devant nous, l'appelante a d'abord prétendu que la Cour Supérieure n'avait pas juridiction pour entendre la présente cause. Sur cette question de procédure, et vu qu'il s'agit, entre autres choses, de l'annulation d'un contrat de $9,500, je crois devoir mettre ce moyen de côté et me rallier aux opinions exprimés à ce sujet par tous les juges en cette affaire.

Il nous faut ensuite accepter ou rejeter les raisons de l'honorable juge de première instance qui, sans scruter la légalité des votes qui auraient été enregistrés en faveur du règlement, a accepté comme électeurs dûment qualifiés ceux dont les noms apparaissaient comme propriétaires au rôle d'évaluation en vigueur lors de la votation sur ce règlement 145, par les considérants suivants:

Considérant que le vote a eu lieu sur le rôle d'évaluation alors en vigueur, et que ce rôle n'a pas été attaqué, et qu'il ne l'est pas par la présente procédure;

Considérant que pour une corporation et ses contribuables, le rôle en vigueur sert de base pour la valeur foncière, l'imposition des taxes, et pour la qualité foncière des contribuables;

Considérant qu'au point de vue municipal, les propriétaires de biens-fonds sont ceux qui sont inscrits comme tels au rôle d'évaluation en vigueur, lequel lie la corporation et ses contribuables;

Considérant que si, au moment de la confection du rôle, la corporation entre comme propriétaires les personnes qui ne le sont pas, ceci peut constituer une irrégularité ou même une illégalité qui peut donner lieu à faire corriger le rôle en la manière voulue par la loi, mais ne peut pas constituer une nullité absolue des actes faits par ceux qui sont inscrits au rôle comme propriétaires, lesquels sont en possession des droits et obligations du vrai propriétaire, au point de vue municipal, et doivent en supporter les conséquences;

Considérant que cette cour, en annulant les votes, tel que demandé, se trouverait virtuellement à corriger le rôle d'évaluation, ou même à l'annuler partiellement, ce que cette cour ne peut faire ni directement ni indirectement;

Considérant que le rôle d'évaluation, lors du vote, était la seule base du vote et qu'il doit rester tel, et que cette cour ne serait pas justifiable d'annuler les votes tel que demandé, la corporation n'ayant commis aucune faute en laissant voter les électeurs qui avaient droit de le faire, n'ayant encouru aucune nullité, et qu'annuler ces votes serait mettre la corporation dans une impasse inextinguible;

(1) [1931] S.C.R. 437.

Cette doctrine ne semble pas avoir été adoptée par aucun des juges de la Cour du Banc du Roi.

Il est admis de part et d'autre que le règlement devait être soumis à l'approbation des électeurs, en vertu de l'article 771 du code municipal, qui exige que le règlement, sur lequel doivent voter au moins les deux cinquièmes en nombre des propriétaires de biens-fonds imposables de la municipalité, qui sont électeurs municipaux et qui résident dans la municipalité, soit approuvé par une majorité d'au moins les deux tiers, en nombre et en valeur immobilière, de tous les propriétaires, résidant ou non dans la municipalité, qui ont voté et qui ont droit de voter sur ce règlement, ainsi que par le lieutenant-gouverneur en conseil.

Le code municipal, à l'article 379, nous dit que le secrétaire-trésorier de la corporation locale est tenu d'assister à l'assemblée des électeurs convoquée pour approuver ou désapprouver un règlement "avec l'original ou une copie certifiée du rôle d'évaluation en vigueur"; il y agit comme greffier de l'assemblée.

L'article 275 s'applique; et, en conséquence, quiconque se présente pour voter doit, s'il en est requis par le président ou *par un électeur*, jurer ce qui suit:

> Je jure que je suis sujet britannique, que rien ne m'a été donné ou promis pour m'engager à voter à cette élection, que je suis *habile à voter* à cette élection, que je suis âgé d'au moins vingt et un ans, et que je n'ai pas déjà voté à cette élection.

Cette formule complète le rôle d'évaluation, en permettant d'avoir des renseignements quant à la nationalité du propriétaire, que le rôle ne doit mentionner que pour les fils du propriétaire—C.M. 654 §§ 10 et 11—et pour l'indentifier. Si l'électeur refuse de prêter ce serment, son vote doit être refusé.

En vertu de l'article 267:

> Quiconque vote à une élection sans avoir, au moment où il donne son vote, les qualités requises d'un électeur, encourt une amende de vingt piastres.

Remarquons que les articles 228 et 229 vont beaucoup plus loin quand il s'agit du maire et des conseillers, qui ne peuvent exercer ces fonctions à moins qu'ils ne possèdent *en tout temps* le cens d'éligibilité et les qualités requises par la loi.

Quoi qu'il en soit, les demandeurs étaient présents et ont voté et pouvaient, comme électeurs, demander l'assermen-

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tation de tout électeur qu'ils considéraient inhabile à voter. D'après le procès-verbal, ils ne sont pas intervenus pour se prévaloir de ce droit.

Il appert, à la résolution certifiant le résultat de la votation de ce règlement numéro 145, que, d'après le cahier de votation et le certificat du secrétaire-trésorier, deux cent vingt-neuf voteurs ont voté, que quatre voteurs ont refusé de prêter serment sur objection et n'ont pas été admis à voter, que plus des deux cinquièmes des voteurs ayant voté, la votation a été déclarée close, approuvant le règlement. De plus, ce règlement a été approuvé par le lieutenant-gouverneur en conseil qui, d'après l'article 388, ne doit approuver un règlement qu'après avoir eu la preuve de l'accomplissement des formalités requises pour la passation de tel règlement.

Qui était habile à voter sur ce règlement? quels propriétaires?

Doit être inscrite au rôle d'évaluation comme propriétaire, nous dit le paragraphe 20 de l'article 16 du code municipal:

toute personne ayant la propriété ou l'usufruit de biens imposables, ou les possédant ou occupant, à titre de propriétaire ou d'usufruitier. * * *

Mais le propriétaire doit aussi être électeur municipal, que l'article 243 du code municipal, tel qu'amendé par 19 Geo. V, ch. 89, définit comme suit:

Est électeur, et comme tel a droit de voter à l'élection du maire et des conseillers locaux et d'exercer tous les droits et privilèges conférés aux électeurs par les dispositions du présent code, sujet à l'application de l'article 758, tout individu qui possède, au moment d'exercer tels droits et privilèges, les conditions suivantes:

1. Etre sujet de Sa Majesté et majeur;

2. Etre du sexe masculin, ou être fille ou veuve;

3. Posséder dans la municipalité dans laquelle est exercé le droit d'électeur, en son nom ou au nom et pour le profit de sa femme, *tel qu'il appert au rôle d'évaluation en vigueur,* soit comme *propriétaire,* un terrain de la valeur réelle d'au moins cinquante piastres s'il est résidant dans la municipalité, et de la valeur réelle d'au moins deux cents piastres s'il est non-résidant, soit comme locataire résidant à ferme ou à loyer, ou comme occupant à un titre quelconque, un terrain d'une valeur annuelle d'au moins vingt piastres; et, dans les municipalités du comté de Saguenay situées à l'est de la rivière Betsiamites, posséder, à titre de propriétaire, de locataire ou d'occupant, un terrain d'une valeur quelconque;

4. Etre inscrit comme propriétaire, comme locataire ou occupant, *sur le rôle d'évaluation en vigueur.*

Quand, comme dans l'espèce, l'article 758, complété par 771, s'applique, ces droits et privilèges ne peuvent être exercés que par les électeurs municipaux, résidant ou non

dans la municipalité, qui sont en possession, d'après le rôle, comme propriétaires. Ce rôle, d'après l'article 670, pendant tout le temps depuis son entrée en vigueur jusqu'à l'entrée en vigueur d'un nouveau rôle, sauf les amendements prévus aux articles 671, 673 et 675, pour changements de valeur ou mutations de propriétaires,

sert de base aux taxes * * * ainsi qu'à *toute qualité foncière*, et au paiement de toute dette *municipale*.

D'après Larousse et Littré, *qualité foncière* signifie: " Le titre en rapport avec un fonds de terre, qui rend habile à exercer quelque droit ". La version anglaise traduit " qualité " par " qualification " et " foncière " par " immoveable property ". Que signifie le mot " qualification " en anglais? Vo. Blackstone, I, ch. 2, 171.

Broom's Law Dictionary. The circumstances or *group of circumstances* whereby an individual is rendered eligible for a post is called his qualification.

Wharton's Law Lexicon. Qualification—that which makes any person fit to do a certain act.

Murray. New English Dictionary. Qualification: (6) A necessary condition, imposed by law or custom, which must be fulfilled or complied with before a certain right can be acquired or exercised, an office held, or the like.

Funk & Wagnall's Practical Standard Dictionary (1930), Vo. Qualification—State of being qualified. Ce dernier mot est défini comme l'équivalent de " competent ", et " to qualify " veut dire " to fit for a particular place or office ", " to make legally capable ".

Les deux mots employés à l'article 670: " qualité " et " qualification ", veulent donc dire, non pas " valeur ou évaluation foncière " mais le " titre " ou " le groupe de circonstances " rendant habile à exercer le droit d'électeur comme propriétaire foncier.

Il faut donc dire, avec l'article 670, que la qualité de propriétaire foncier en vertu du code municipal doit avoir pour base le rôle d'évaluation en vigueur et que ni le secrétaire-trésorier, ni le président de l'élection n'y peuvent rien changer.

Ce règlement imposait une taxe sur les biens-fonds imposables. A défaut de paiement, ces biens pouvaient être vendus pour taxes par le conseil de comté suivant une liste fournie suivant l'article 729 C.M. " indiquant la désignation

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des immeubles affectés au paiement des taxes avec les *noms des propriétaires tels qu'indiqués au rôle d'évaluation*".

Ce sont donc les propriétaires tels qu'*indiqués au rôle d'évaluation* qui sont éventuellement appelés à payer et à protéger l'immeuble; pourquoi ne seraient-ce pas les mêmes propriétaires, indiqués de la même manière, qui auraient, dès l'origine, qualité pour voter le règlement d'emprunt?

D'après l'article 1207 C.C., les documents et papiers des corporations municipales sont authentiques et (1212 C.C.) font preuve complète entre les parties

de tout ce qui y est exprimé en termes énonciatifs, pourvu que l'énumération ait un rapport direct * * * à l'objet qu'avaient en vue les parties.

Or, l'article 654 C.M. requiert d'inscrire au rôle

6° les noms et prénoms des propriétaires de tout immeuble ou de partie d'immeuble, s'ils sont connus.

Les parties en cette cause sont la municipalité et deux de ses contribuables, lesquels, avec les autres habitants contribuables de la municipalité, forment une corporation (art. 4 M.C.), et pour les fins de l'administration, tous sont liés par le rôle d'évaluation régulièrement adopté, et les demandeurs ne peuvent, dans une procédure collatérale, comme la présente action, remettre en contestation ce qui a été finalement décidé quant à ce rôle. Art. 356 C.C.

Je ne saurais mieux faire que de citer et adopter l'opinion de sir Elzéar Taschereau, plus tard juge-en-chef du Canada, *re Les listes électorales de Kamouraska* (1):

L'article 743 (maintenant 670) du code municipal dit spécialement que le rôle d'évaluation sert de base à toute qualification foncière. On a prétendu que le montant de la valeur de la propriété, mais non la qualité ou le nom du propriétaire ou possesseur, étaient couverts par cette clause. C'est essayer de faire dire à un statut ce qu'il ne dit pas. Si le législateur eût voulu rendre le rôle conclusif quant à la valeur seulement, il eût dit: "Le rôle sert de base à toute éventualité de biens-fonds," ou "le rôle fait preuve de la valeur des biens-fonds pour les fins de cet acte". Au contraire, ce rôle établit, pour toutes les fins de taxes, de listes de jurés, etc., etc., etc., etc., non seulement la valeur de chaque propriété, mais encore qui la possède ou l'occupe, et à quel titre. Et pour toutes ces fins il est conclusif. Une fois homologué, c'est *res judicata*. La sect. 291 (maintenant 243), C.M., ne laisse aucun doute là-dessus pour les élections municipales. * * *

Ce rôle d'évaluation est fait avec tout autant sinon plus de formalités que la liste électorale. Il est fait d'abord sous serment. (725, maintenant 659, C.M.) Ensuite, après avis public donné aux intéressés, il est soumis à l'examen du Conseil (734, 736, 746a, maintenant 661, 662, 663 C.M), qui peut l'amender, et devant qui quiconque s'y croit lésé peut porter plainte.

(1) [1877] 3 Q.L.R. 308, at 310, 311, 312, 314.

Puis l'article 430 donne droit d'appel à la Cour de Circuit ou de Magistrat de toute décision rendue par le conseil local.

Il me semble qu'il y a là assez de garanties pour les intéressés. Si quelqu'un se pense injustement omis du rôle, s'il croit que sa propriété n'y est pas équitablement évaluée, la loi lui donne d'amples moyens d'obtenir justice. S'il néglige ses propres intérêts, lors de la confection ou révision du rôle d'évaluation, il aurait mauvaise grâce à venir plus tard se plaindre que son nom n'est pas inscrit comme électeur, par suite d'erreur ou d'injustice dans ce rôle. La loi lui dira alors: "*Vigilantibus non dormientibus subvenit lex.* Il fallait veiller à vos intérêts lors de la révision du rôle."

* * *

Il y a une procédure, un tribunal pour décider sur le rôle d'évaluation. Et dans une procédure collatérale, comme une contestation des listes électorales, on ne peut remettre en contestation ce qui a été finalement décidé quant à ce rôle (*McDonald* v. *Quinn*) (1), pas plus que sur une contestation d'élection, il ne serait permis de prouver que le vote d'un électeur est nul parce qu'il n'avait pas la qualification foncière voulue pour lui donner le droit de vote. (*White* v. *McKenzie*) (2).

* * *

Il y a un tribunal pour décider du rôle d'évaluation et de toutes plaintes portées contre icelui; un autre tribunal pour décider de la liste électorale et des plaintes portées contre icelle; et enfin, un troisième tribunal pour décider des contestations d'élections. Chacun de ces tribunaux doit rester dans sa sphère, dans ses attributions. C'est là, je crois, l'économie de notre système sur la matière. Sur la contestation d'élection, il ne sera pas permis de prouver contre la liste électorale; et sur la contestation de la liste électorale, il ne sera pas permis de prouver contre le rôle d'évaluation.

* * *

La loi veut indubitablement baser le cens électoral sur la propriété foncière. * * * Or, en faisant la liste de ceux à qui la loi donne les droits d'électeurs, où le secrétaire-trésorier doit-il puiser ses informations? Sur quoi doit-il se baser? Entièrement sur le rôle d'évaluation * * * Pour paraître être électeur par le rôle d'évaluation, il faut paraître par le rôle être propriétaire ou occupant d'un bien-fonds; il ne suffirait pas d'avoir un immeuble dont la valeur apparaît par le rôle; mais il faut apparaître par le rôle être propriétaire. *Le rôle,* pour le secrétaire-trésorier, *dit conclusivement non seulement quelle est la valeur d'un bien-fonds, mais encore qui en est le propriétaire ou l'occupant.* * * * Il ne peut donc omettre un seul nom de ceux que la loi lui désigne ainsi, comme il ne peut mettre un seul nom qui, *par le rôle,* ne paraît pas avoir la qualité d'électeur. Il n'a aucun droit, aucun pouvoir, soit de se servir de ses informations personnelles, soit de constater le fait par enquête ou autrement, pour dire qu'une telle personne est portée sur le rôle comme propriétaire d'une telle propriété, mais que c'est une erreur, et que c'est le nom d'une telle personne qui doit y être porté. Aux évaluateurs, tous les contribuables sont tenus, sous peine d'amende, de donner tous les renseignements demandés pour la confection du rôle. (745, maintenant 672 C.M.) Au secrétaire-trésorier qui demanderait ces renseignements, les

(1) [1854] 4 L.C.R. 457. (2) [1875] 19 L.C.J. 117.

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contribuables seraient en droit de méconnaître son autorité et de refuser de lui répondre. Le secrétaire-trésorier n'a donc aucun droit de corriger le rôle d'évaluation: la loi lui dit au contraire de le suivre, et de ne suivre que ce rôle.

Si on lui reconnaissait le droit de dire que malgré que le rôle fasse apparaître qu'un tel est propriétaire d'une telle maison, cependant lui, le secrétaire-trésorier, decide lorsqu'il fait sa liste, qu'un tel autre est actuellement propriétaire de cette maison, il faudrait aussi lui concéder le droit de décider qu'un tel ou un tel n'est pas propriétaire de bonne foi et ainsi ne doit pas être mis sur la liste. Certes, la loi n'a pas voulu donner ces pouvoirs au secrétaire-trésorier. Pour lui, ceux qui sont actuellement propriétaires ou occupants de bonne foi sont ceux que le rôle lui indique comme tels, et le rôle est son seul guide.

* * *

Pourquoi celui qui viendrait dire que, depuis que le rôle a été fait ou revisé, il est devenu propriétaire d'un tel immeuble, et qu'il doit être mis sur la liste des électeurs, quoique non sur le rôle, serait-il écouté? Il est en faute lui: que n'a-t-il fait mettre son nom sur ce rôle? Que ne s'est-il fait substituer à l'ancien propriétaire? L'article 745 (maintenant 673) C.M. lui en donnait spécialement le droit. "Après chaque mutation de propriétaire ou d'occupant d'un terrain mentionné au rôle d'évaluation en force, le Conseil Local, sur requête par écrit à cet effet, et sur preuve suffisante, peut biffer le nom de l'ancien propriétaire ou occupant et y inscrire celui du nouveau," dit cet article.

S'il n'est pas sur la liste, c'est parce qu'il n'est pas sur le rôle, et s'il n'est pas sur le rôle, c'est par sa faute. Il n'est pas bien venu à se plaindre.

Sir Elzéar Taschereau cite la cause de *McDonald* v. *Quinn* (1), où, le 5 septembre 1854, le juge-en-chef Bowen et le juge Meredith (Duval, J. dissident) décidaient

Que dans l'examen de la légalité des votes donnés à une élection municipale pour la cité de Québec, les juges doivent tenir pour correctes les listes d'électeurs faites par le conseil de ville, et qu'ils n'ont pas droit d'en scruter l'exactitude.

et je cite, en les acceptant, les motifs du juge Meredith, aux pages 461, 462, 463:

In England, if the titles of electors can be tried directly, in a proceeding against themselves, such titles cannot be impugned indirectly, in the course of a proceeding against a person elected by them; *but if there be no direct mode of trying the titles of the electors,* then, as a matter of necessity, they may be tried in the course of the proceeding against the officer whom they have elected.

In the present case, according to the English doctrine, the qualification of the electors to vote ought not to be discussed collaterally here; because the law declares as I have already shewn, that that question is to be determined by the lists, and that the lists are to be made by the council; so that it is by direct proceedings before the council, and against the electors that their titles ought to be tried.

* * *

It would require stronger reasons than I have yet heard urged, to induce me to attempt to exercise a power which the legislature have said may be exercised by the city council, and which the city council have in

(1) [1854] 4 L.C.R. 457.

fact exercised; namely the power of determining the right of individuals to vote at municipal elections.

* * *

Moreover, we would be called upon to disfranchise electors, whose right to vote has been admitted in the manner provided by law, namely by the council; and this, without such electors having even an opportunity of being heard before us. It is plain that in this proceeding the electors could not be heard; * * *

Before the council, the persons claiming the right to vote, and the persons contesting that right, were upon an exact equality, both as to the right of being heard, and the right of adducing evidence; but if we, in this proceeding, investigate the rights of the electors, we must do so *in the absence of those most interested,* that is to say, *in the absence of the electors.*

Whether, therefore, we are guided by the letter of the law, or by what seems to be the justice of the case, I think we must come to the conclusion, that the lists of voters, prepared by the Council must be regarded as determining the individuals who have a right to vote.

Les articles 430 et 431 C.M. donnent à tout électeur ou à tout intéressé une action devant la Cour de Circuit en cassation d'un rôle d'évaluation dans les trois mois de la passation de la procédure attaquée pour cause d'illégalité. En conséquence, une action directe en Cour Supérieure pour attaquer le rôle d'évaluation, sauf le cas de fraude, ne serait pas accueillie, d'après la décision de cette cour *re La Ville de St-Michel* v. *Shannon Realties Limited* (1), confirmée par le Comité Judiciaire du Conseil Privé (2), où Lord Shaw of Dunfermline semble répéter, sous une autre forme, l'opinion de sir H. E. Taschereau, quand il dit, concernant les dispositions de la *Loi des Cités et Villes* qui sont, pour la réception des plaintes par le Conseil et l'appel à la Cour de Circuit, semblables aux articles du code municipal:

In this view it is of cardinal importance to consider what is the remedy provided for the situation in which a ratepayer or body of ratepayers has been put by a valuation roll which is said to be illegal and invalid by reason either of error in its particular items, or by reason of fundamental error in principle. Once such a roll appears, the statute steps in to provide a remedy to "every person who, personally or as representing another person, deems himself aggrieved by the roll as drawn up," and the appeal is to state "the ground of his complaint."

What the Act provides by way of the prescription to appeal is to give by that means a remedy for a grievance which is complained of. The Act demands—for otherwise municipal finance would fall into confusion —a statement and handling of the aggrieved person's case, and that within a period of thirty days, to the council, and, if the grievance complained of be still not remedied, within another period of thirty days to the Circuit Court. Here is promptitude, and the saving of the finance of the year, by making secure the basis of it all—namely the valuation roll.

(1) [1922] 64 S.C.R. 420.

(2) [1924] A.C. 185; Q.R. 47 K.B. 416.

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Les intimés nous ont fourni un mémoire de décisions où l'on semble avoir permis la preuve du défaut de qualité d'électeur dont les noms avaient été inscrits au rôle d'évaluation. Mais il est à remarquer que la plupart de ces arrêts ont été rendus dans des causes en contestation d'élection où il s'agissait de la qualité foncière des conseillers municipaux. Or, l'économie de notre code municipal exige plus sur ce point des conseillers et du maire que des électeurs. Il suffit, en effet, de comparer les articles 228 et 243 pour constater que la qualification du maire et du conseiller doit exister non seulement lors de son élection, mais *continuer aussi longtemps qu'il occupe cette charge.* Le rôle d'évaluation en vigueur, d'après une disposition expresse de la loi, ne lie le tribunal qui entend la cause de contestation, ou auquel on demande l'émission d'un bref de *Quo Warranto,* que quant à la valeur des biens-fonds. Si, lors de l'élection ou après, le conseiller cesse d'être électeur ou propriétaire en son propre nom de biens-fonds, ou, si déduction faite de toute charge imposée, même après l'élection, sur tels biens-fonds, la valeur tombe à moins de $400, on peut en faire la preuve.

C'est cette pratique qui a probablement amené dans certains esprits la confusion que nous pouvons constater dans certains arrêts de la Cour de Circuit, qui nous ont été cités, où l'on semble avoir appliqué à l'article concernant la qualification des électeurs la même règle, quant à la preuve admissible, que l'on avait adoptée pour la contestation de la qualification des conseillers. L'article 228 ne réfère au rôle d'évaluation que pour la valeur foncière, alors que l'article 243 y réfère quant à la possession, à titre de propriétaire ou autrement, et quant à l'inscription comme propriétaire au rôle d'évaluation.

A l'appui de ces conclusions, je citerai: *Brisebois* v. *Corporation du Village de Roxton Falls* (1), (Lynch, J.) *Westover* v. *Hibbard* (2), (Lynch, J.) *Hickson* v. *Abbott,* Bélanger, J. (3).

Je tiens à remarquer qu'une décision apparemment contraire du juge-en-chef actuel de la province de Québec, *re Boivin* v. *La Ville de St-Jean* (4), est basée sur une dispo-

(1) [1897] 4 R. de J. 26.
(2) [1907] 13 R. de J. 285.
(3) [1881] 25 L.C.J. 289.
(4) 14 R. de J. 292.

sition expresse de la charte de cette ville qui exigeait non seulement l'inscription au rôle comme propriétaire mais ajoutait

et qui, au moment d'exercer leurs droits comme électeurs, sont encore propriétaires en possession des mêmes biens.

C'est une décision d'espèce et qui ne saurait s'appliquer à l'article 243 C.M. du code actuel, où l'on ne trouve rien de semblable.

Dans ces conditions, il serait superflu pour moi de discuter la nature du droit que le vendeur à réméré conserve dans un immeuble, à l'encontre de l'acheteur à réméré, et jusqu'à quel point la définition du "propriétaire", au code municipal, diffère de celle du droit civil.

Je suis d'avis que l'appel devrait être accueilli favorablement et les demandeurs déboutés de leur action et de leur demande d'injonction, avec dépens devant cette cour, et devant la Cour du Banc du Roi contre les demandeurs-intimés, ainsi que les frais de motion devant cette cour. Le mis-en-cause Couturier, dans son factum, n'a aucune conclusion quant à ses frais.

Appeal dismissed with costs.

Solicitor for the appellant: *Antoine Cimon.*

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

MUNICIPAL DISTRICT OF BEAVER DAM (DEFENDANT) ..... APPELLANT;

AND

LILLIE BELLE STONE AND JOHN HENRY URE, ADMINISTRATORS OF THE ESTATE OF WALTER GEORGE STONE, DECEASED (PLAINTIFFS) ..... RESPONDENTS.

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

Appeal—Jurisdiction—Action for damages taken from jury at trial and dismissed—New trial ordered by appellate court—Appeal by defendant to Supreme Court of Canada—Whether any "amount in controversy in the appeal"—Supreme Court Act, s. 39.

At the trial of an action (in which plaintiffs claimed $20,000 damages) the judge, at close of plaintiffs' evidence, took the case from the jury

*PRESENT: Duff, Rinfret, Lamont, Smith and Cannon JJ.

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and dismissed the action. On appeal by plaintiffs, the Appellate Division, Alta., ordered a new trial. Defendant appealed to this Court. Plaintiffs contended that, there having been no finding of any amount, there was no "amount in controversy in the appeal" (*Supreme Court Act*, s. 39) and this Court was without jurisdiction.

Held, that the objection to the jurisdiction was not well taken.

On the merits, defendant's appeal was dismissed.

APPEAL by the defendant from a judgment of the Appellate Division of the Supreme Court of Alberta.

The action was brought by the administrators of the estate of one Stone, deceased, for the benefit of the deceased's wife and son, for damages (the amount claimed being $20,000) resulting from the deceased's death, which plaintiffs alleged was caused by defendant's negligence. Plaintiffs alleged that deceased died as the result of an accident which occurred when he was driving a team of horses attached to his wagon, and that the accident was due to the defective condition of a culvert within the defendant municipality.

The action was tried before Walsh J., with a jury. At the close of the evidence for the plaintiffs, the judge, on motion by defendant's counsel, took the case from the jury and gave judgment dismissing the action, on the ground that there was nothing to establish any connection whatever between the injury to deceased and the defective condition of the highway. On appeal by the plaintiffs, the Appellate Division, Alta., allowed the appeal and ordered a new trial. The defendant appealed to this Court.

Counsel for the respondents raised the question of the jurisdiction of this Court, under the circumstances, to hear the appeal, contending that, there having been no finding of any amount, there was no "amount in controversy in the appeal" (*Supreme Court Act*, s. 39). This question was reserved along with the determination of the appeal on the merits.

O. M. Biggar K.C. for the appellant.

Robert Ure for the respondents.

THE COURT.—The appeal should be dismissed with costs.

We have come to the conclusion that Mr. Ure's point as to jurisdiction is not well taken. The necessary result of accepting the view advanced by him would be that an

appeal from a judgment ordering a new trial (on the ground that the trial judge has improperly taken the case from the jury) is only permissible upon obtaining special leave under section 39. We think we should be misinterpreting the intention of the Legislature if we ascribed such effect to the amendments of 1920. Besides, the adoption of such a construction would involve a reversal of the practice which has obtained since those amendments came into force.

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Appeal dismissed with costs.

Solicitors for the appellant: *Ford, Miller & Harvie.*
Solicitor for the respondents: *Robert Ure.*

IN THE MATTER OF THE ESTATE OF FRANKLIN DAVID DAVIS, DECEASED

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*Feb. 24.

MARY JANE ROGERS (A DEFENDANT)....APPELLANT;

AND

HELEN ELIZABETH DAVIS (PLAINTIFF) AND OTHERS (DEFENDANTS).... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Will—Testamentary capacity—Concurrent findings of two courts below on questions of fact.

The appeal was from the judgment of the Court of Appeal for Ontario, affirming judgment of Rose, C.J.H.C., declaring that certain purported testamentary dispositions constituted deceased's will. Appellant contended that no part of the last of the documents in question should be held to form part of the will, as it was not shewn that deceased, at the time of the making and execution of it, was of sufficient mental capacity or of a disposing mind, or understood or appreciated the document, or that it was the expression of his desires.

Held, that, as there was nothing to indicate that the trial judge misdirected himself, or that either he or the Court of Appeal failed to appreciate the facts, and as, in the courts below, there was nothing that could be described as a miscarriage of justice or a violation of any principles of law or procedure, this court should refuse to examine the evidence in order to interfere with the concurrent findings of the two courts below on what was a pure question of fact. (*Robins* v. *National Trust Co.*, [1927] A.C. 515, at 517-518).

The principle laid down in *Perera* v. *Perera*, [1901] A.C. 354, at 361, as to extent of capacity required on executing a will prepared in accordance with instructions previously given, held applicable.

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

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APPEAL from the judgment of the Court of Appeal for Ontario, affirming the judgment of Rose, C.J.H.C., declaring that certain documents dated respectively November 16, 1926, January 20, 1930, and October 4, 1930, and purporting to be the last wills and testaments of Franklin David Davis, deceased, and a codicil to the first of such wills, except paragraphs 1 and 2 of the will dated October 4, 1930, constitute together the last will and testament of said deceased, and ordering that the proper court in that behalf do admit to probate the last will and testament of said deceased, so constituted.

The appellant contended that no part of the document dated October 4, 1930, should be held to form a part of deceased's last will and testament, on the ground that the evidence did not shew that deceased, at the time of the making and execution of said document, was of sufficient mental capacity or of a disposing mind or understood or appreciated the document, or that it was the expression of his own desires.

J. H. Rodd K.C. and *Roy Rodd* for the appellant.

Gideon Grant K.C. and *A. H. Foster* for the respondent Helen Elizabeth Davis.

Gideon Grant K.C. and *E. W. Haines* for the respondent Annie M. Davis.

J. B. Aylesworth for respondents Ada A. Guppy and others.

J. M. Baird for the Official Guardian, representing certain infant respondents.

On the conclusion of the argument of counsel for the appellant, the Court retired to consider the case, and, on returning to the Bench, without calling on counsel for respondents, delivered judgment dismissing the appeal, costs to be payable out of the Estate.

DUFF J.—We are satisfied, Mr. Grant, that it is unnecessary to call upon you.

The principle of procedure by which we are governed is laid down by Lord Dunedin in the case of *Robins* v. *National Trust Company* (1), and I quote a few sentences from his judgment:

(1) [1927] A.C. 515, at 517.

This raises in a quite distinct way the question of whether their Lordships will examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact. Whether a man at the time of making his will had testamentary capacity, whether a will was the result of his own wish and act or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact. The rule as to concurrent findings is not a rule based on any statutory provision.

Then he says it is a rule of conduct, and a rule of conduct for the Empire, and "will be applied to all the various judicatures whose final tribunal is this Board"; and proceeds (pp. 517-518):

Being, as has been said, a rule of conduct, and not a statutory provision, the rule is not cast iron; but it would avail little to try to give a definition which should at once be exhaustive and accurate, of the exceptions which may arise. It will be sufficient to quote what has been said on this subject in the past:—

In *Moung Tha Hnyeen* v. *Moung Pan Nyo* (1), Lord Hobhouse, delivering the judgment of a Board which included Lord Macnaghten and Lord Lindley, said: "There has been nothing to show that there has been a miscarriage of justice, or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognized here and commonly observed in second Courts of Appeal, that such a Court will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned."

In *Rani Srimati* v. *Khajendra Narayan Singh* (2), Lord Lindley repeated the view: "The appellants have failed to show any miscarriage of justice, or the violation of any principle of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact."

Now, we can see nothing to indicate that the trial judge misdirected himself; that either he or the Court of Appeal failed to appreciate the facts; still less, that there has been anything that could, by the widest stretching of the scope of the words, be described as a miscarriage of justice or a violation of "any principles of law or procedure."

To repeat Lord Hobhouse's words—no "definite and explicit grounds," within the meaning of these judgments, have been brought before us for interfering with the judgment of the Court of Appeal. I might also add that this is a case for the application of the principle laid down by the Privy Council in *Perera* v. *Perera* (3), where the Judicial Committee accepted this statement of the law by Sir James Hannen in *Parker* v. *Felgate* (4):

(1) (1900) L. R. 27 I.A. 166, at 167.
(2) (1904) L.R. 31 I.A. 127, at 131.
(3) [1901] A.C. 354, at 361.
(4) (1883) 8 P.D. 171, at 173.

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If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: "I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out."

The appeal will, therefore, be dismissed.

(The question of costs was then discussed between the Court and counsel.)

DUFF J.—We think that, considering all the circumstances of this case, the costs should be payable out of the estate.

Appeal dismissed.

Solicitors for the appellant and for the respondent Genevieve Rogers: *Rodd, Wigle, Whiteside & Jasperson.*

Solicitors for the respondent Helen Elizabeth Davis: *Fleming, Drake & Foster.*

Solicitors for respondents Ada A. Guppy and others: *Bartlet, Aylesworth & McGladdery.*

Official Guardian (on behalf of certain infant respondents): *McGregor Young.*

Solicitors for the respondent Annie M. Davis (and solicitors on the record for certain respondents not appearing in this appeal): *Haines & Haines.*

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*Feb. 22.
*Mar. 31.

HIS MAJESTY THE KING (DEFENDANT)..APPELLANT;

AND

ROBERT F. CUTTING (SUPPLIANT).....RESPONDENT.

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

Banks and banking—Petition of right—Succession duties—Bank shares—Owner domiciled in United States—Shares registered outside of Canada—Whether the words "elsewhere" in s. 42, ss. 5 of the Bank Act authorize share registry offices outside Canada—Bank Act, R.S.C., 1927, c. 12.

The words "or elsewhere," in subsection 5 of section 42 of the *Bank Act*, both under their ordinary meaning and in the light of prior legislation are adequate to provide for the establishment of places for registration and transfer of shares outside the Canadian territory, in respect of shares owned by persons not resident in Canada.

Judgment of the Court of King's Bench (Q.R. 51 K.B. 321) aff.

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*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the decision of the Superior Court, Gibsone J., and maintaining the respondent's petition of right for $13,513.01 which had been paid under protest to the treasury of the province of Quebec for succession duties on 275 shares of the Bank of Montreal, owned by one Brown, of the city of New York, deceased.

The respondent, acting in his quality of sole surviving executor of the late MacEvers Bayard Brown, in his lifetime of the city of New York, by petition of right seeks to recover from the appellant in right of the province of Quebec $12,573.72, which he paid to the appellant under protest on the 10th of May, 1927, and a further sum of $939.29 paid on the 13th of June following, as succession duty on 275 shares of the capital stock of the Bank of Montreal belonging to the estate of the late Mr. Brown. Mr. Brown was a citizen of the United States and during all the time relevant to this case he had his domicile in the city of New York, where he died on the 8th of April, 1926. The Bank of Montreal has its head office in the city of Montreal, Que. Formerly its shares were transferable on its books at its head office only. A transfer of shares is made on the register of the bank by the holder of them in person or by attorney authorized by special power of attorney and is accepted by the transferee in the same way. That was the procedure followed when Mr. Brown acquired the 275 shares of the stock of the bank, and on the 1st November, 1920, Mr. Brown appeared on the register at the head office of the bank as the owner of 275 shares of its capital stock.

The transfer of shares of the capital stock of Canadian banks is governed by the provisions of sections 42 *et seq.* of the *Bank Act,* of which paragraphs 4 and 5 have special application on this appeal. They read:

"4. The bank may open and maintain in any province in Canada in which it has resident shareholders and in which it has one or more branches or agencies, a share-registry office, to be designated by the directors, at which the shares of the shareholders, resident within the province,

(1) (1931) Q.R. 51 K.B. 321.

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shall be registered and at which, and not elsewhere, except as hereinafter provided, such shares may be validly transferred.

"5. Shares of persons who are not resident in Canada or in any province in which there is a branch or agency of the bank may be registered and shall be transferable at the chief office of the bank or elsewhere, as the directors may designate."

The directors of the bank, acting under what they conceived to be the power and authority conferred upon the bank by these paragraphs, by by-law passed on the 14th of April, 1927, opened share-registry offices in each of the provinces of Canada in which the bank had a branch and resident shareholders, and also at the office of the bank in the city of London, England, and at its agency in the city of New York. The part of the by-law now relevant is as follows:—

By-law no. 23

(*a*) Share-registry offices for the registration and transfer of the shares of the capital stock of the bank shall be opened and maintained at:

(1) The place where the head office of the bank is situate, namely, at the city of Montreal in the province of Quebec;

* * *

(3) The agency of the bank in the city of New York in the state of New York;

* * *

(*b*) Shares of persons who are not resident in Canada may be registered either on the register in the city of Montreal or on the register in the city of London, or on the register in the city of New York, and on the request in writing of the shareholder may be removed from one of these registers and placed on another, but such shares may be transferred only on the register on which they are then registered.

* * *

(*e*) Whenever there is a change of ownership of any shares, or a change of residence of any shareholders, and it is necessary in order to conform to the foregoing provisions of this by-law that a change should be made in the place

of registry of the shares concerned, such change shall be made forthwith.

(*f*) For the purposes of this by-law, a shareholder shall be deemed to be resident at the place in which he has according to the books of the bank his post office address.

(*g*) The board of directors shall from time to time appoint persons to act as local registrars of stock at the share-registry offices of the bank other than at the city of Montreal or designate other officers or employees of the bank to perform the duties of such office. The registrar of stock, the local registrars of stock, or the officer or officers of the bank designated by the board to perform the duties of these offices, shall, subject to the direction of the board keep at each of the share-registry offices of the bank an accurate register or registers of the shareholders of the bank whose shares are registered at such share-registry office, containing the post office address and description of each such shareholder * * *"

Following up this by-law, the bank opened a share-registry office at its agency in New York and appointed a local registrar to take charge of it. On the 8th of October following, 1925, the 275 shares belonging to Mr. Brown were removed from the head office register at Montreal to the New York register and were still there at the time of his death.

Aimé Geoffrion K.C. and *Ls. St. Laurent K.C.* for the appellant.

Arnold Wainwright K.C. and *D. C. Abbott* for the respondent.

W. N. Tilley K.C. for the Attorney-General for Canada.

The judgments of Duff and Smith JJ. were delivered by

DUFF J.—There is, I think, only one question of substance involved in this appeal. That question is whether the words " or elsewhere " in section 42, ss. 5 are adequate to provide for the establishment of places for registration and transfer of shares outside of Canada. I thought at first that the difficulty was important. Full consideration has led me to the conclusion that the ordinary force of the

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words of the subsection (they had better be quoted in full)—

> Shares of persons who are not resident in Canada or in any province in which there is a branch or agency of the bank may be registered and shall be transferable at the chief office of the bank or elsewhere, as the directors may designate.

are not affected by any context upon which the appellant relies. I can perceive nothing in subsection 4 which expressly or by implication qualifies subsection 5.

It cannot, on a fair construction of the statute, be held that shares must be registered at a " branch or agency of the bank " because the statute enacts that where the shareholder resides in a province where there is not a " branch " or " agency " shares

> may be registered and shall be transferable at the chief office of the bank or elsewhere as the directors may designate.

This is not the natural way of saying that shareholders must register their shares at the head office or at some " branch or agency," which is also a " share registry office."

The proper inference from the whole section appears to be that a " share registry office " need not be a " branch " or " agency " or the " head office."

Reference should perhaps be made to Mr. St. Laurent's contention that this view conflicts with the presumed policy of the Act: namely, that the registration and transfer of the shares of banks should be governed exclusively by the Canadian law. But there is nothing in the *Bank Act* to prevent a purchaser or creditor acquiring by contract a right legal and equitable to require the vendor or debtor to do whatever is necessary in order to effect a legal transfer of such share; and the question whether such is the effect of the contract will depend upon the law of the place where the contract is made—*Colonial Bank* v. *Cady* (1), nor I apprehend—is there any doubt that the conditions under which title to its shares may be acquired is exclusively matter for the law making authority of the jurisdiction where the Corporation has its proper domicile. For Canadian banks, in the absence at all events of special legislation, this domicile is a single one, Canada, by reason of the fact that the whole subject of banking, as well as the incorporation of banks, is exclusively a subject for Dominion legislation.

(1) (1890) 15 A.C. 267.

The appeal should be dismissed with costs. No costs to or against the Attorney-General for Canada.

RINFRET J.—I agree with my brothers Duff and Lamont. The word " elsewhere " (in subsection 5 of section 42 of the *Bank Act*), both under its ordinary meaning and in the light of the prior legislation, shews, in my view, the intention of Parliament to authorize the Canadian banks to open and maintain share registry offices outside of the Canadian territory. (Compare *Wright & Carson* v. *Brake Service Ltd.* (1), and comments of the Privy Council on that decision in *Canadian General Electric Company* v. *Fada Radio Limited* (2), and in *Rice* v. *Christiani* (3).

The appeal should be dismissed with costs.

The judgments of Lamont and Cannon JJ. were delivered by

LAMONT J.—The respondent in this appeal is the surviving executor of the last will and testament of McEvers Bayard Brown who, in his lifetime, was an American citizen domiciled in the state of New York, and died there on April 8, 1926. Among the assets comprising his estate at the time of his death were 275 shares of the capital stock of the Bank of Montreal, a corporation created under Canadian law with its head office in the city of Montreal in the province of Quebec. The respondent took out letters probate in the state of New York and, as the testator had considerable assets in the province of Quebec, he applied to have the assets there registered in his name as executor. In making his application he pointed out that in so far as the 275 shares in the Bank of Montreal stock were concerned they were not subject to succession duty in the province, inasmuch as they were registered on the share-register of the bank in the city of New York and transferable only on that register. The collector of succession duties for the province refused to permit registration of the assets of the testator's estate in the name of the respondent until payment had been made of the succession duty which, he claimed, was payable in respect of the 275 shares. The

(1) [1926] S.C.R. 434. (2) [1930] A.C. 97, at 106.
(3) [1931] A.C. 770, at 781.

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basis of this claim was that the shares were property within the province of Quebec. The respondent paid the amount of the duty ($13,513.01) under protest, and then commenced these proceedings by way of petition of right for an order that the Crown in right of the province be adjudged to refund him the said sum with interest thereon and costs.

In answer to the petition the Attorney-General for Quebec set up:

1. That the shares of the capital stock of the bank constituted an interest in the net assets of the bank, which were owned and controlled at its head office and not elsewhere, and that each shareholder's right or interest therein constituted an interest in property situated in the province in which the head office was located, and was, therefore, subject to such direct taxation as the provincial legislature saw fit to impose.

2. That the *Bank Act* (now R.S.C., 1927, c. 12), properly construed, did not authorize the bank to establish a share-register outside of Canada, but, if it did, to that extent it was *ultra vires,* and

3. In any event the by-law of the bank purporting to establish a register in the state of New York did not comply with the Act.

The Superior Court granted the prayer of the petition and directed a refund of the duty paid in respect of the shares. On appeal the Court of King's Bench unanimously affirmed the judgment, and the Crown now appeals to this court.

1. The first of these above contentions was rejected by the Privy Council in *Brassard* v. *Smith* (1), where it was held that shares of the capital stock of a bank, incorporated under the *Bank Act,* which had been transferred from the register at the bank's head office to the register of the bank in another province, were, for the purposes of succession duty, property in the province in which the shares were registered, and not in the province in which the head office was situated. This principle was reaffirmed in the case of *Erie Beach Company* v. *Attorney-General for Ontario* (2).

(1) [1925] A.C. 371. (2) [1930] A.C. 161.

2. The greater part of the argument before us was made in support of the contention that the Act did not authorize the establishment of share-registers outside of Canada. The material section of the Act is s. 42 (5):—

Shares of persons who are not resident in Canada or in any province in which there is a branch or agency of the bank may be registered and shall be transferable at the chief office of the bank or elsewhere, as the directors may designate.

Under the authority of this section the directors of the bank passed by-law no. 23, which, in part, reads as follows:

(*a*) Share-registry offices for the registration and transfer of the shares of the capital stock of the bank shall be opened and maintained at:

(1) The place where the head office of the bank is situate, namely, at the city of Montreal in the province of Quebec;

(2) The office of the bank in the city of London, England;

(3) The agency of the bank in the city of New York in the state of New York;

(4) The office of the bank in each of the other provinces of Canada in which the bank has resident shareholders. * * *

(*b*) Shares of persons who are not resident in Canada may be registered either on the register in the city of Montreal or on the register in the city of London, or on the register in the city of New York, and on the request in writing of the shareholder may be removed from one of these registers and placed on another, but such shares may be transferred only on the register on which they are then registered.

It was argued that the words " or elsewhere " in s. 42 (5) must be construed as meaning " or elsewhere in Canada," because the territorial jurisdiction of the Canadian Parliament was restricted to the Dominion, and that to construe " elsewhere " as including places beyond the Dominion would amount to an assertion of the competence of the Canadian Parliament to legislate as to the legal effect to be given to a transfer of shares made in another country.

The short answer to this argument, in my opinion, is that the word " elsewhere " in the subsection is either ambiguous or it is not. If it is not ambiguous it must be given its ordinary natural meaning, which is, " in some other place " or " any other place." This does not restrict the places at which transfers of shares may be made to places in Canada. If it is ambiguous we are at liberty to look at the prior legislation to ascertain the sense in which it was used. That legislation shews that from 1852 the Bank of Montreal had legislative authority to maintain a register of shares in Great Britain. Other banks had similar rights by pre-Confederation legislation. In 1871 a general *Bank Act* was passed (34 Vict., c. 5). That Act permitted a bank to

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open branches at any place or places in the Dominion. It also provided that the share of the capital stock of the bank might be transferable in the United Kingdom of Great Britain and Ireland. In 1890 the Act was revised and a bank was given the right to " open branches, agencies and offices " without the limitation as to the Dominion contained in the Act of 1871. In 1913 the Act was again revised and provision was made by which shares could be transferred as set out in s. 42 (5), above quoted.

When we consider that Canadian banks were opening branches in various parts of the world outside of Canada, and that it would be for the convenience of their shareholders in those parts to be able to transfer their shares in the country in which they were residing, it seems more reasonable to suppose that the intention of Parliament in enacting s. 42 (5) was to assist the banks by authorizing the keeping of registers where the directors thought it most convenient, than to infer an intention to take away the right, enjoyed prior to 1913, of having a register in Great Britain. In my opinion the word " elsewhere " in s. 42 (5) is not limited to Canada, nor does the subsection imply an assertion of legislative competence on the part of Parliament to determine the legal effect to be given to acts performed in other countries. The effect of a contract to transfer shares made in another country must depend upon the laws of that country. But, subject to that law, it is within the competence of the Parliament of Canada in legislating on the subject of banks and banking—a matter over which it is given exclusive jurisdiction by section 91 of the *British North America Act*, 1867—to compel a bank, its own creature, to recognize as valid a lawful transfer made outside of Canada, when made in the manner prescribed by the Act. *Secretary of State of Canada* v. *Alien Property Custodian* (U.S.) (1).

3. It was also contended that the by-law did not comply with the Act, inasmuch as the directors did not " designate " the place of transfer outside of Canada, as required by s. 42 (5), but left it to the shareholder to select the register upon which his shares would be placed. I am of opinion that a by-law which provides that shares may be registered

(1) [1931] Can. S.C.R. 170.

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at one of several specified places is a designation by the directors within the meaning of the Act.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Fleet, Phelan, Fleet, Robertson & Abbott.*

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

CONSOLIDATED DISTILLERIES LIMITED AND W. J. HUME (DEFENDANTS) } APPELLANTS;

AND

HIS MAJESTY THE KING (PLAINTIFF) . . . RESPONDENT.

(TWO APPEALS)

1931

*Oct. 28, 29.

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*Mar. 15.

CONSOLIDATED DISTILLERIES LIMITED AND F. L. SMITH (DEFENDANTS) } APPELLANTS;

AND

HIS MAJESTY THE KING (PLAINTIFF) . . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Excise and Customs Act—Bond—Interest—Jurisdiction—Exchequer Court Act, section 30—Ontario Judicature Act, section 34.

The actions are for the recovery of the amounts of bonds given by the appellants to the Crown in respect of liquors entered at a port for export, the form of bond being expressed to secure actual exportation to the place provided for in the entry and production of proof thereof, such as has been fully described and discussed in the case of *The Canadian Surety Co.* v. *The King* ([1930] S.C.R. 434). The appellants denied liability on the bonds and alleged that, in any event, the Crown could not recover interest, and that the Exchequer Court of Canada had no jurisdiction in the matter, the matter being one of contract and not one arising out of the administration of the laws of Canada and the provincial courts only having jurisdiction.

*Present at hearing: Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ. Newcombe J. took no part in the judgment, having died before the delivery thereof.

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Held that the Exchequer Court of Canada had jurisdiction to hear and determine the claims. It was competent for the Parliament of Canada, in virtue of the powers vested in it by section 101 of the *British North America Act*, to confer upon a court, created by it for "the better administration of the laws of Canada," authority to hear and determine such claims; and the Parliament has clearly intended to confer such jurisdiction on the Exchequer Court of Canada, the cases probably falling within clause (*a*), but clearly within clause (*d*), of section 30 of the *Exchequer Court Act*.

Held, also, that, under the circumstances of these cases, the full amount nominated in the bond is recoverable.

Held further, Anglin C.J.C. dissenting, that interest should only run from the date of the judgment of the trial court as, at no date prior to it, the penalty became payable as a "just debt" within the meaning of Lord MacNaghten's judgment in *Toronto Ry. Co.* v. *City of Toronto* ([1906] A.C. 117).

Section 34 of the Ontario *Judicature Act* should not be regarded as dealing merely with a matter of procedure; it deals also with important matters of substantive law.

Judgment of the Exchequer Court of Canada ([1931] Exc. C.R. 85) aff.

APPEALS by the appellants from the judgments of Maclean J., President of the Exchequer Court of Canada (1), holding that the respondent was entitled to recover from the appellants the amounts of certain bonds. One action was brought on seven bonds totalling $445,093, another action, on four bonds totalling $129,512, and a third one on one bond for $12,795. These bonds were given by the appellants to the Crown in respect of the export in bond of liquors on which the excise duties had not been paid and for interest at five per cent. per annum from the date of the bonds. The bonds were given pursuant to the provisions of section 68 of the *Inland Revenue Act* (1906) c. 51 (now known as *The Excise Act*) and the regulations of the Governor in Council made pursuant to sections 67 and 140. The goods covered by the bond had been deposited in an excise bonding warehouse under section 61 of the Act without payment of the duties imposed by the Act. The appellants denied any liability under the bonds and by an amendment made to their statement in defence pleaded that in any event the Exchequer Court of Canada had no jurisdiction to decide the matters at issue in the actions, and that the *Exchequer Court Act*, R.S.C. (1927) c. 34, in so far as it purports to give the Exchequer Court jurisdiction to decide the matter at issue between the parties to this

(1) [1931] Exc. C.R. 85.

action, is beyond the power of the Parliament of Canada to enact. The trial judge held that the Exchequer Court had jurisdiction to try these actions and that the respondent was entitled to recover on the bonds. The trial judge held also that the respondent was not entitled to interest on the bonds.

W. N. Tilley K.C. and *F. T. Collins* for the appellants.

N. W. Rowell K.C. and *Gordon Lindsay* for the respondent.

ANGLIN C.J.C. (dissenting as to cross-appeals).—I never entertained any doubt whatever as to the jurisdiction of the Exchequer Court in these cases to hear these appeals.

If authority to hear and determine such claims as these is not something which it is competent for the Dominion, under s. 101 of the *British North America Act,* to confer upon a court created by it for "the better administration of the law of Canada," I would find it very difficult to conceive what that clause in the B.N.A. Act was intended to convey.

That the Dominion Parliament intended to confer such jurisdiction on the Exchequer Court, in my opinion, is clear beyond argument, the case probably falling within clause (*a*); but, if not, it certainly is clearly within clause (*d*) of s. 30 of the *Exchequer Court Act.*

On the question of the construction of the bonds raised at bar, to my mind, a breach of the condition of each bond properly constituted has been equally clearly established. As to the amount recoverable, I agree with the contention of the Crown that the whole amount named in the bond must be paid by the defendants.

I was quite prepared to dismiss these appeals at the conclusion of the argument but, in deference to the wishes of some of my colleagues, judgment was reserved. That being so, I think it better to put in writing, as I have done very briefly above, my reasons for concurring in their dismissal.

I also agree in the view, which I understand to be that of the other members of the court, that the matter of interest is clearly a matter of substance and in no sense a matter of procedure. Interest should, in my opinion, be allowed the respondent from the date of default by the

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defendants in each case. From that date the claim of the Crown was for a liquidated amount and was a just debt, payment of which was improperly withheld (*Toronto Ry. Co.* v. *City of Toronto*) (1). As pointed out by my brother Duff, those who take the view that section 34 of the Ontario *Judicature Act* should be regarded as dealing merely with a matter of procedure are clearly wrong. Section 34 of that statute, like a number of other sections thereof, deals with important matters of substantive law.

I would dismiss the appeals and allow the cross-appeals, all with costs.

The judgments of Duff, Rinfret and Lamont JJ. were delivered by

DUFF J.—I find no difficulty in holding that the Parliament of Canada is capable, in virtue of the powers vested in it by section 101 of the *British North America Act,* of endowing the Exchequer Court with authority to entertain such actions as these. I do not doubt that " the better administration of the laws of Canada," embraces, upon a fair construction of the words, such a matter as the enforcement of an obligation contracted pursuant to the provisions of a statute of that Parliament or of a regulation having the force of statute. I do not think the point is susceptible of elaborate argument, and I leave it there.

As to the jurisdiction of the Exchequer Court, in so far as that depends upon the construction of the *Exchequer Court Act,* something might be said for the view that these cases are not within the class of cases contemplated by subsection A of section 30; but that is immaterial because they are plainly within subsection D.

The professed cancellation of the bonds was inoperative in point of law. The learned trial judge properly found that the documents, upon which the cancellation proceeded, were concocted documents, and that the conditions, under which alone cancellation is permitted by the regulations, never came into effect. Nor can I agree with Mr. Tilley's contention that the alternative condition has been performed. That condition is in these words:

(1) [1906] A.C. 117, at 120, 121.

Or if the above bounden Consolidated Distilleries, Limited, shall account for the said goods to the satisfaction of the said Collector of Inland Revenue, then this obligation is to be void.

There is not the slightest ground for finding that the appellants did account for the goods to the satisfaction of the Collector.

As to the amount recoverable, I think the reasoning of Garrow B., in *The King* v. *Dixon* (1), is conclusive. That experienced lawyer had no doubt that where the breach of the condition occurs in such circumstances as to expose the parties concerned to a serious temptation to violate in a substantial manner the revenue laws and to provide an opportunity for doing so, the breach must be regarded as substantial, and the full amount nominated in the bond is recoverable. Here the bond is required by the regulations. It is to be in the "prescribed form" which, since there is apparently no form prescribed either in the statute or the regulations, I take to mean that it is to follow the form authorized by the departmental instructions. The purpose of the bond is to prevent frauds on the revenue. Where such is the purpose of the bond, generally speaking, the sum named is recoverable in full. The application of this principle is illustrated in two American cases cited by the Crown, in addition to the judgment already mentioned in *The King* v. *Dixon* (1). These cases are: *United States* v. *Ottery* (2), and *Clark* v. *Barnard* (3). Such bonds are to be distinguished from those in which the purpose of the bond is merely or mainly to secure the full payment of duties on imported goods, in other words, to secure the payment of money.

I have, indeed, some difficulty in affirming that the penalties named in these bonds were not in each case "a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation." *Clydebank Engineering and Shipbuilding Co., Ltd.* v. *Yzquierdo Y. Castaneda* (4).

As to interest, I think we must be guided by the decision of the Judicial Committee in *Toronto Railway Co.* v. *City of Toronto* (5). I am unable to agree with the learned

(1) (1822) 11 Price 204.
(2) (1894) 67 Fed. Rep. 146, at 152.
(3) (1883) 108 U.S. 436.
(4) [1905] A.C. 6.
(5) [1906] A.C. 117, at 120, 121.

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Duff J.

President that the subject-matter of section 34 of the Ontario *Judicature Act* is matter of procedure. A number of titles of substantive law are dealt with in that Act, and I have no doubt that section 34 falls within that category. On the other hand, I cannot accept the view advanced on behalf of the Crown that the latest date for performance of the alternative condition of the bonds was that suggested, namely, three months subsequent to the date of the exportation of goods from out of Canada. I do not think the provisions of the regulation in regard to cancellation control the period within which the appellants were entitled to perform this condition of the obligation, and I am unable to conclude that at any date prior to judgment the penalty became payable as a "just debt," within the meaning of Lord MacNaghten's judgment in the *Toronto* case (1). Effect must, therefore, be given to the general rule.

The appeals and cross-appeals should be dismissed with costs.

Appeals and cross appeals dismissed with costs.

Solicitors for the appellants: *Meredith, Holden, Heward and Holden.*

Solicitor for the respondent: *W. Stuart Edwards.*

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*Feb. 23.
*Mar. 24.

LOUIS HÉBERT (PLAINTIFF) .....APPELLANT;

AND

LA CITÉ DE THETFORD-MINES (DEFENDANT) ..... } RESPONDENT.

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

Municipal corporation—Liability—Constable—Riot—Killing of rioter—Dismissal of suit against constable—Action by constable against corporation for loss sustained in defending action—Whether constable acted as municipal officer or minister of the law—Rights as mandatary—Art. 1725 C.C.

The appellant, a constable of the village of Asbestos, later on annexed to the city of Thetford Mines, but employed and paid by a circus exhibiting in the village, fired upon a body of rioters and killed one of them. An action was brought against the appellant and the munici-

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1906] A.C. 117.

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pality in the interest of the widow and the children. The action was finally dismissed by this court on the ground that the appellant was not legally responsible for the death of the victim. ([1931] S.C.R. 145). The appellant then sued the respondent municipality for indemnity against loss sustained by him as its mandatary in defending the action brought against him.

Held that a constable binds the municipal corporation which has appointed him when he acts as municipal officer for the purpose of enforcing the observance of the local ordinances; but he does not bind the corporation when he acts as guardian of the peace to enforce observance of the laws concerning public order. *La cité de Montréal* v. *Plante* (Q.R. 34 K.B. 137) approved.

Held, also, that the mandatary of several principals binds only the one for whom he acts at the time when the act causing injury is committed. It is not the regular and customary employment of the mandatary that must be taken into consideration, but the quality in virtue of which he really acts at the time of the event giving rise to the action brought against him.

Held, further, that the mandatary, who claims the right to be indemnified by his mandator for the costs awarded to him and taxed against a third party, must, in order to create a *lien de droit*, allege that he has tried, but has been unable, to collect these from that party, or, at least that that party is insolvent and not able to pay. Such an allegation is essential in order that these costs may be regarded as "losses caused to him by the execution of the mandate" within the meaning of Art. 1725 C.C.

Judgment of the Court of King's Bench (Q.R. 52 K.B. 1) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, d'Auteuil J., and dismissing the appellant's action upon inscription in law.

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

R. Beaudoin K.C. for the appellant.

A. Girouard K.C. for the respondent.

DUFF J.—I agree with my brother Rinfret and with his reasons.

The plaintiff, a constable of the village of Amiante, but employed and paid by a circus exhibiting in the village, fired upon a body of rioters and killed one of them. An action was brought against the plaintiff and the municipality in the interest of the widow and the children. The action was dismissed on the ground that neither defendant was legally responsible for the death of the victim. The

(1) (1931) Q.R. 52 K.B. 1.

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plaintiff now sues the municipality for indemnity against loss sustained by him as its mandatary in defending the action against him.

He must fail, I think, because he was not the mandatary of the village. 1st: He was acting under the pay of the circus. 2nd: In any case, as constable, he was the minister of the law. In repelling the riot his duty was not to obey the municipality, or the officers of the municipality, but to act as the law prescribes. The principle is settled by numerous authorities to which it is not necessary to refer.

The appeal should be dismissed with costs.

The judgments of Rinfret, Lamont, Smith and Cannon JJ. were delivered by

RINFRET J.—Au milieu d'une émeute qui se produisit, le 17 juillet 1927, sur un terrain occupé par un cirque, dans le village d'Amiante, l'appelant, qui était constable et gardien de la paix à cet endroit, dut se servir d'un revolver pour faire cesser le désordre; et, au cours d'une altercation avec l'un des dirigeants des émeutiers, il déchargea son revolver, et, par accident, tua son assaillant.

La veuve et les enfants de la victime poursuivirent alors l'appelant et la corporation du village d'Amiante et leur réclamèrent les dommages résultant du décès de l'émeutier, qu'ils attribuèrent à la faute de l'appelant et dont ils tentèrent de tenir responsable la corporation municipale dont ils alléguaient que l'appelant était le préposé en la circonstance.

Cette action fut renvoyée par la Cour Supérieure (Letellier, J.), puis maintenue par la Cour du Banc du Roi contre l'appelant seul (les demandeurs n'ayant pas poursuivi leurs procédures contre la corporation municipale); et définitivement rejetée par la Cour Suprême du Canada (1), qui infirma le jugement de la Cour du Banc du Roi et rétablit le jugement de la Cour Supérieure. L'appelant, par la suite, intenta contre l'intimée la présente action, qui a pour but de lui réclamer les frais et pertes occasionnés par sa défense à l'encontre de la première poursuite. Cette action est instituée contre la cité de Thetford Mines, à laquelle,

(1) [1931] S.C.R. 145.

dans l'intervalle, le village d'Amiante a été annexé, et qui est maintenant aux droits et obligations de ce village.

L'intimée a opposé à l'action de l'appelant une inscription en droit alléguant qu'il appert des circonstances invoquées, et qui font la base de son action, que ce dernier agissait alors en sa qualité de constable en vertu des pouvoirs qui lui sont conférés par la loi criminelle, et en aucune façon sous la responsabilité de la corporation du village d'Amiante.

L'inscription en droit a été maintenue par le motif que bien que nommé par la défenderesse, le demandeur tient son autorité et son pouvoir de la loi, et la défenderesse n'est pas responsable envers lui des risques de sa fonction, surtout lorsqu'il n'allègue pas qu'elle lui a commandé l'acte qui donne lieu à son recours.

Ce jugement a été confirmé par la majorité de la Cour du Banc du Roi (Guerin, J., dissident) (1) et nous est maintenant soumis.

La déclaration que l'appelant a annexée au bref de sommation allègue les faits sur lesquels il entend appuyer ses conclusions, et réfère aux plaidoiries écrites et aux jugements de la première cause, en disant qu'il les " produit comme s'ils étaient ici récités au long ". Il s'ensuit qu'il les a incorporés dans sa déclaration et qu'il faut lire cette dernière comme si elle contenait les plaidoiries écrites et les jugements en question.

En ce sens, il n'est même pas nécessaire d'invoquer le jugement de *Chechik* v. *Rabinovitch* (2) pour savoir si, afin de décider sur l'inscription en droit, la cour pouvait référer aux pièces invoquées par la déclaration. Dans le cas actuel, à cause de la rédaction que lui a donnée l'appelant, les pièces font partie de la déclaration elle-même. Or, si on lit—comme on doit le faire—la déclaration comprenant les pièces produites, on voit reproduit au long dans le jugement de monsieur le juge Letellier le plaidoyer écrit que l'appelant a produit dans la première instance. Dans ce plaidoyer, pour faire repousser la première action, l'appelant allègue:

1. Qu'il était à l'emploi, comme gardien de la paix sur les terrains, d'une compagnie locataire desdits terrains, laquelle compagnie donnait des attractions et des amusements pour le public;

2. Qu'il avait agi comme tel depuis plusieurs jours pour ladite compagnie, et qu'en plusieurs circonstances, les années précédentes, il n'avait jamais eu de trouble ni de difficulté à maintenir le bon ordre;

(1) (1931) Q.R. 52 K.B. 1. (2) [1919] S.C.R. 400.

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Le plaidoyer continue en relatant les circonstances de l'émeute; puis il reprend comme suit:

5. Que c'est à ce moment, qu'après avoir tiré plusieurs coups de revolver à terre et en l'air pour tâcher de remettre l'ordre et de défendre sa personne, qu'une balle atteint ledit Médéric Martin;

6. Que le coup fatal partit au moment où Martin lui-même avait réussi à attrapper le poignet du défendeur et essayait de lui enlever son arme, lui disant à peu près ceci: "Tu as voulu défendre le vieux, c'est toi qui va y passer." Le défendeur était justifiable de se défendre par les moyens qu'il a pris et de protéger sa vie et la vie du public;

7. Que ledit Médéric Martin, la victime, a été lui-même avec ses amis la cause de tout le trouble, et conséquemment la cause de sa propre mort;

8. Que le défendeur ne peut être tenu responsable en dommages envers les demandeurs, et c'est pourquoi il a refusé de payer lesdits dommages;

Et le défendeur conclut au renvoi de la présente action, quant à ce qui le concerne, avec dépens;

Dans ce plaidoyer, l'appelant a donc pris la position que, lors de l'émeute, il se trouvait sur le terrain, non pas comme l'employé de la corporation municipale, mais comme l'employé de la compagnie du cirque, et que, lorsqu'il a tiré le coup fatal, il a agi comme gardien de la paix, à la fois pour défendre sa personne et pour protéger sa vie et la vie du public. L'attitude de l'appelant est d'ailleurs conforme à celle que la corporation du village d'Amiante a prise elle-même dans le plaidoyer séparé qu'elle a alors produit; et les allégations de la corporation viennent confirmer celles de l'appelant. Il faut ajouter à cela que le jugement de monsieur le juge Letellier n'a pas modifié la situation invoquée par les parties elles-mêmes quant à la nature des relations qui existaient entre elles lors de l'émeute.

Il est inexact de dire que ce jugement constitue chose jugée sur ce point entre l'appelant et la cité de Thetford Mines. La première cause, où le jugement de monsieur le juge Letellier a été prononcé, n'était pas une cause entre les parties actuelles. C'était une cause entre la veuve et les enfants de l'émeutier d'une part, l'appelant et le village d'Amiante (que représente maintenant l'intimée) d'autre part. L'appelant et l'intimée étaient tous deux défendeurs dans la première cause, et le jugement n'a pas prononcé entre eux (Art. 1241 C.C.).

Mais, comme nous l'avons vu, nous devons prendre les plaidoiries écrites et le jugement dans la première cause comme faisant partie de la déclaration dans la cause

actuelle, et nous devons envisager les allégations qui s'y trouvent telles qu'elles ont été faites. C'est de cette façon qu'il faut nécessairement décider l'inscription en droit. Si donc l'on prend les faits tels qu'ils ressortent de l'ensemble des documents produits à titre de déclaration par l'appelant, il en résulte que l'appelant était sans doute, de façon générale, l'employé de la corporation du village d'Amiante, mais qu'il avait été nommé constable et gardien de la paix et que, lors de l'émeute,

il était à l'emploi, comme gardien de la paix sur les terrains, d'une compagnie locataire desdits terrains;

qu'il avait été, pour employer l'expression de monsieur le juge Letellier,

choisi par le conseil lui-même comme l'homme que la compagnie du cirque devait engager pour tenir l'ordre,

qu'il était

payé par la compagnie qui donnait ce cirque. Il était en autorité et avait le droit et le devoir de tenir l'ordre sur le terrain et de protéger les propriétaires et les personnes qui faisaient partie de ce cirque;

et que la violence de l'émeute "lui donnait raison de craindre pour sa vie" et qu'il "était en légitime défense lorsque l'accident fatal est survenu".

Il ne nous est pas permis, sur cette inscription en droit, de référer aux notes des juges de la Cour Suprême pour y constater les motifs qui les ont amenés à rétablir le jugement de la Cour Supérieure, car ces notes n'ont pas été produites avec la déclaration de l'appelant; et seule la minute du jugement de la Cour Suprême se trouve au dossier.

A ce qui précède il faut ajouter que l'appelant n'allègue pas, dans sa déclaration, que la corporation du village d'Amiante aurait autorisé, approuvé ou adopté l'acte à raison duquel il a été poursuivi et il a encouru les frais et pertes qu'il réclame maintenant. Il appert, au contraire, de la plaidoirie écrite de la corporation d'Amiante, dans la première cause, et qui fait partie de la déclaration dans la présente cause, que cette corporation avait alors répudié l'acte de l'appelant et affirmé qu'elle

n'avait absolument rien à faire avec le défendeur Hébert, qui n'était pas à son emploi, n'était pas payé par elle, et n'avait reçu, ni ne devait recevoir d'elle aucune instruction.

En plus, il ne faut pas oublier que la réclamation en dommages de l'appelant comprend des frais qui ont été distraits et taxés contre les demandeurs dans la première

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cause; et il n'allègue pas qu'il a tenté de les percevoir, ou que ces demandeurs sont insolvables et incapables de les payer.

Cette allégation était essentielle pour que ces frais pussent être considérés comme "des pertes * * * essuyées" par l'appelant (Art. 1725 C.C.).

Mais cette dernière remarque ne s'adresse qu'à une partie de la réclamation, et il n'est pas nécessaire d'y insister, vu que nous sommes d'avis que l'inscription en droit totale a été, à juste titre, maintenue par la Cour Supérieure et la Cour du Banc du Roi.

Résumons, en effet, la position de l'appelant, ainsi qu'elle ressort de l'action telle qu'il a jugé à propos de la rédiger: Il était généralement l'employé de la corporation du village d'Amiante; il était constable; et, sur les terrains du cirque, il était l'employé de la compagnie du cirque.

Ainsi que l'observe monsieur le juge Rivard dans son jugement:

> La question de la responsabilité des corporations municipales pour les actes des constables qu'elles ont nommés, selon qu'ils agissent comme sergents de ville pour faire respecter les ordonnances locales, ou comme gardiens de la paix pour faire observer les lois concernant l'ordre public, en d'autres termes selon qu'ils agissent comme agents de la corporation ou comme officiers de l'Etat, s'est plus d'une fois présentée devant nos tribunaux. La doctrine, en cette matière, telle qu'arrêtée par une jurisprudence constante, se trouve pleinement exposée dans la cause de *Cité de Montréal* vs *Plante* (1), avec mention des principaux arrêts qui l'ont consacrée et développée.

Nous dirons, en plus, qu'il serait inutile pour nous de tenter d'ajouter quoi que ce soit à ce qui a été dit par les juges de la Cour du Banc du Roi dans cette affaire de *Cité de Montréal* vs *Plante* (1), où les principes qui doivent nous guider sont exposés d'une façon précise et complète.

La décision dans *Doolan* v. *Corporation of Montreal* (2), qui a été citée par le procureur de l'appelant, est bien antérieure (1868) à celle de la Cour du Banc du Roi dans *Cité de Montréal* vs *Plante* (1922) (1). Si l'on y trouvait une contradiction avec ce dernier arrêt, elle ne saurait prévaloir contre lui.

Mais il n'existe aucune divergence entre les deux décisions.

(1) (1922) Q.R. 34 K.B. 137. (2) (1868) 13 L.C. 71.

Dans la cause de *Doolan* (1), la Court de Revision avait jugé:

That a city corporation may be sued in damages for assaults committed by its servants, such as policemen, when the assaults are approved and attempted to be justified by the corporation.

De même, dans la cause de *Plante* (2), on avait jugé (pp. 137 et 150):

Qu'une corporation municipale est aussi responsable de l'acte dommageable commis par ses officiers de police, même si ceux-ci agissent comme gardiens de la paix, lorsqu'elle a autorisé, approuvé ou adopté cet acte.

Comme nous l'avons vu, non seulement cette allégation manque dans l'action de l'appelant, mais il résulte du plaidoyer de la corporation d'Amiante, incorporé dans la déclaration, que la corporation municipale, au contraire, affirmait n'avoir eu " absolument rien à faire " avec l'acte de l'appelant.

Quant à l'arrêt dans la cause de *Talbot* v. *La Compagnie d'Assurance de Montmagny* (3), également invoqué par le savant procureur de l'appelant, sans tenir compte de la différence qu'il peut y avoir entre une corporation publique et une corporation privée, il suffit de lire le rapport du jugement pour constater que si la compagnie d'assurance a été condamnée à indemniser la demanderesse des frais de défense encourus par son défunt mari en faisant repousser une action en dommages dirigée contre lui par une personne qu'il avait dénoncée comme se donnant faussement pour sous-agent de ladite compagnie, ce fut parce que la cour décida, en fait, qu'il avait agi en sa qualité de secrétaire-trésorier gérant avec l'autorisation de la compagnie, et que le bureau de direction avait approuvé ses actes " et fait enregistrer une résolution dans le registre de ses délibérations ". Il est également juste d'ajouter que, dans cette espèce, la déclaration alléguait que les frais de défense, dans l'action originaire, n'avaient pas pu être payés au mari de la demanderesse, parce que celui contre qui ils avaient été adjugés était insolvable.

Il nous paraît donc que les jugements de la Cour Supérieure et de la Cour du Banc du Roi sont bien fondés. Lors de l'émeute, l'appelant agissait comme constable

dans l'accomplissement du devoir que la loi lui impose pour le maintien de la paix, le respect de l'ordre public et la prévention ou la punition des crimes.

(1) (1868) 13 L.C. 71. (2) (1922) Q.R. 34 K.B. 137.
(3) (1897) Q.R. 12 S.C. 64.

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C'est à cause de cela que la Cour Supérieure et la Cour Suprême ont trouvé son acte justifiable et l'ont reconnu indemne de toute responsabilité criminelle ou civile. C'est la raison pour laquelle l'action intentée contre lui par la veuve et les enfants de l'émeutier a été rejetée. Il ne peut, à la fois, avoir reçu et accepté le bénéfice de cette position, puis tenter d'en éluder les conséquences.

A tout événement, s'il ne devait pas être considéré comme ayant agi, dans les circonstances, en sa qualité d'officier de l'Etat, ce ne serait pas, quand même, la responsabilité de la corporation du village d'Amiante qu'il aurait engagée et avec laquelle se serait établi le lien de droit qu'il invoque; mais ce serait avec la compagnie du cirque, si l'on tient compte—et cela est inévitable—de l'allégation que nous avons reproduite au commencement de ce jugement à l'effet

qu'il était à l'emploi, comme gardien de la paix, sur les terrains, d'une compagnie locataire desdits terrains, laquelle compagnie donnait des attractions et des amusements pour le public.

Cette allégation comporte, en effet, que l'appelant, lors des événements qui ont donné lieu au litige, était l'employé temporaire de cette compagnie et que la compagnie était son patron momentané.

Cela découle (dit Tessier, Responsabilité de la puissance publique, p. 196)), du principe élémentaire que le préposé de divers commettants engage la responsabilité de celui dont il fait l'affaire au moment de l'acte dommageable;

et ce principe a été reconnu et appliqué par la Cour Suprême et le Conseil Privé dans la cause de *Bain* v. *Central Vermont Railway Co.* (1).

Ce qu'il importe de regarder dans la présente cause, ce n'est pas l'emploi ordinaire et régulier de l'appelant, mais c'est la qualité en laquelle il agissait vraiment lors des événements à raison desquels il prétend maintenant recouvrer les frais et dépenses qu'il a encourus. Or, d'après ses allégations, au moment de l'émeute, il agissait comme officier de l'Etat, ou, tout au plus, il était le préposé, le mandataire ou l'employé de la compagnie du cirque.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Rosaire Beaudoin.*
Solicitor for the respondent: *Arthur Girouard.*

(1) (1919) 58 Can. S.C.R. 433; [1921] 2 A.C. 412.

N. J. MARION (PLAINTIFF) ..... APPELLANT;

AND

G. A. CAMPBELL AND ANOTHER (DEFENDANTS)

AND

LE BARREAU DE LA PROVINCE DE QUEBEC AND ANOTHER (MIS-EN-CAUSE) ..... RESPONDENTS.

1931
*Oct. 30.
Nov. 2.
1932
*Mar. 15.

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

Bar of Quebec—Mandamus—Lawyer convicted of a criminal offence—Struck from the roll—Res judicata—Estoppel.

The appellant, a lawyer practising in the province of Quebec, was, on the 7th of March, 1922, convicted of having fraudulently converted to his own use a sum of money belonging to a client; the conviction was affirmed by the appellate court on the 20th of June, 1922; and, on the 24th of July, 1922, he was sentenced to two years in penitentiary. No complaint was lodged by the *syndic* of the local council for the district of Montreal; but on the 23rd of June, 1922, it was decided at a meeting of that council, at which the appellant was present, to notify the secretary of the General Council of the Bar of Quebec that the offence for which the appellant had been convicted was a felony prior to the passing of the Criminal Code in 1892 and instructing him to act according to the statute incorporating the Bar. On the 26th of August, 1924, the assistant secretary of the Bar of the district of Montreal sent a copy of the conviction to the secretary of the General Council, who, the 28th of August, 1924, struck the appellant's name from the roll of advocates for Quebec. On the 13th of April, 1926, the appellant presented a petition for the issue of a *mandamus* against the General Bar of Quebec, calling the local Bar of the district of Montreal as third party, asking that the former be ordered to reinstate him as a member of the Bar and that the secretary of the latter be ordered to accept payment of any dues owed by him. On the 11th of October, 1926, the petition was dismissed, and there was no appeal. On the 21st of June, 1929, the appellant presented another petition for *mandamus*, asking that the respondent Campbell, as treasurer of the Bar for the district of Montreal, be ordered to accept payment of any fees then due and that the secretary-treasurer for the General Bar be ordered to reinstate him on the roll of the Bar of Quebec.

Held that under the circumstances of this case, the appellant was not entitled to the issue of the writ of *mandamus* prayed for by his petition.

*Present at hearing: Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.; Newcombe J. took no part in the judgment, having died before the delivery thereof.

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The judgment of the Superior Court rendered upon the first petition for *mandamus* constitutes *res judicata* as to the legality of the striking of the appellant's name from the roll of practising lawyers. *Per* Duff J. —In the proceedings before the trial court on the appellant's first application for a mandamus, it was established as between the Bar of the district of Montreal and the appellant, that he was disfranchised from practising as a member of the Bar and that, for that reason, he was not entitled to call upon the treasurer of that Bar to accept his unpaid subscriptions; therefore, the conditions upon which alone the appellant could call upon the secretary-treasurer of the General Bar to act are, in point of law, non-existent, because of the estoppel as between him and the Bar of Montreal and the treasurer of that Bar.

Per Anglin C.J.C.—The question of the legal nature and effect of the appellant's conviction has been conclusively determined against him by the Council of the District Bar, and its view has been equally conclusively affirmed by the appellate court. The appellant's liability to disbarment is a consequence of this conviction; and the statute incorporating the Bar of Quebec has made the Council the final judges upon the sufficiency of the conviction, unappealed and duly reported to them, to warrant their action.

Per Rinfret J.—A writ of mandamus could not be granted against the respondent Campbell, as treasurer of the District Bar, as the latter, in refusing to accept dues from the appellant, while he was no more a member of the Bar, was not refusing "to perform any duty belonging to such office or any act which by law he (was) bound to perform." Art. 992 (3) C.C.P.

Judgment of the Court of King's Bench (Q.R. 49 K.B. 124) 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, Patterson J. (2), and dismissing the appellant's petition for a writ of *mandamus*.

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

L. J. de la Durantaye and *C. A. Séguin K.C.* for the appellant.

Ls. St. Laurent K.C. and *Camille Tessier* for the respondents, Campbell and The Bar of the district of Montreal.

C. A. Guertin K.C. and *N. A. Millette K.C.* for the respondent The General Bar of Quebec.

ANGLIN C.J.C.—Condemned originally by the Magistrate's Court for failure to account to the complainant for a sum of approximately $1,300, the receipt of which he acknowledges, and non-repayment by him whereof to the

(1) (1930) Q.R. 49 K.B. 124. (2) (1930) Q.R. 68 S.C. 48.

complainant pursuant to a demand therefor, duly made on him as a member of the Bar of the Province of Quebec, he admits, the appellant now seeks to escape one of the consequences of his established guilt on the ground that he did not receive the money as bailee, or that, if he did, the character of his tenure of it was later so changed that the magistrate's judgment convicting him should not be looked upon as having amounted to a conviction for an offence which would have been a felony under the old law. The appellant on this latter ground claims his discharge from disbarment to which the Bar Council has subjected him.

In my opinion, the question of the legal nature and effect of the appellant's conviction has been conclusively determined against him by the Council of the District Bar, and its view has been equally conclusively affirmed by the Court of King's Bench. One of the consequences of this conviction is his liability to disbarment, the statute having, I think, made the district Council the final judges upon the sufficiency of the conviction, unappealed and duly reported to them, to warrant their action.

Under these circumstances, I cannot see my way clear to interfere with the action taken by the Council of the Bar of the District of Montreal, on a mere technical ground, such as, that conversion by a fiduciary to his own use of money belonging to his *cestui que use* did not amount to a felony before 1892. Of that, however, the legislature, in my opinion, has left the final and conclusive determination to the Council of the Bar of the district to which the barrister owed allegiance.

The early part of the judgment of Rinfret J. shews the details of the action taken by the Bar and its officers in connection with this matter and it is unnecessary, therefore, to repeat them here. A similar observation may be made as to the argument in favour of *res judicata* by reason of the unappealed judgment of Duclos J. on the former application for mandamus.

The appellant had the money of the applicant. He wrongfully kept that money. The learned trial judge found him guilty of having stolen it. He is, accordingly, a person unfit to be entrusted with the funds of others. The Council of the Bar has expressly so found. Its finding is for me conclusive on that point. I should not wittingly

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be party to an order of this court, which would enable such a man to resume practice before our Canadian courts—a practice in which he would necessarily be entrusted with the money of others.

I would dismiss this appeal with costs.

DUFF J.—The controversy in this appeal, once the facts are appreciated, is seen to lie in a very narrow compass and to present little difficulty.

I concur with my brother Smith as to the character of the offence of which the appellant was convicted; it would not, I agree, have been a felony prior to the enactment of the Criminal Code;—but I also share the view of the other members of the court that the earlier proceedings in the Superior Court constitute a conclusive answer to this appeal.

At this point it is convenient to state my opinion—it is a matter upon which I can discover no room for the slightest doubt—that the secretary-treasurer of the General Council has duties to perform which are committed to him by statute; and that his responsibility in respect of those duties is one which cannot be affected by any direction given by the General Council itself. He could not, for example, justify the deletion of the name of an advocate from the roll, on the ground merely of a decision by the General Council, that the advocate had been guilty of an offence which, prior to the passing of the Criminal Code, would have been a felony, when, in truth, the offence was not of that character. The statutory disqualification under section 68 (1. *b*) occurs only when the conditions laid down by that enactment have come into operation. For the purpose of applying that provision, the courts, and the courts alone, have authority finally to determine the question whether or not the case comes within it. The procedure is laid down in section 69, and by that section the responsibility is put, not upon the General Council, but upon the General Secretary, to decide, in the first instance, whether the offence is one in which the enactment requires him to act. If it is, the direction of the statute is peremptory. If it is not, he is without authority.

It should be observed in passing, however, that courts administering the law of England have always possessed a

judicial discretion in respect of the prerogative writ of mandamus; and, had it not been for the considerations I am about to mention, it might have been necessary to examine the circumstances of this case with a view to ascertaining whether they presented grounds upon which such a discretion might properly be exercised.

Briefly, the judgment of Duclos J. seems to have established, as between the Bar of Montreal and the appellant, that the appellant was disqualified from practising as a member of the Bar of the province, and that, for that reason, he was not entitled to call upon the Treasurer of the Bar of Montreal to accept his subscriptions for the years during which they had not been paid.

This seems to me to be conclusive of the issue before us. Section 82 does not contemplate payment by a former advocate who, in virtue of a decision of the Superior Court in litigation between himself and the " proper officer," has no right to call upon that officer to receive the subscriptions alleged to be in arrear. The appellant is precluded from requiring the Treasurer to accept his tendered subscriptions, and that is the end of the matter.

I am not, of course, saying that the judgment of Duclos J. constitutes a case of *chose jugée,* as between the appellant and the secretary-treasurer of the Bar of the province. It does not. But the conditions upon which alone the appellant could call upon the secretary-treasurer to act are, in point of law, non-existent, because of the estoppel as between him and the Bar of Montreal and the Treasurer of that Bar.

The appeal should be dismissed with costs.

RINFRET J.— L'appelant a demandé l'émission d'un bref péremptoire de mandamus (en vertu de l'article 996 du code de procédure civile), enjoignant au trésorier du barreau de Montréal de recevoir le montant de certaines " cotisations " et de lui en délivrer un reçu, afin que, au vu de ce reçu et sur paiement de la somme nécessaire, le secrétaire-trésorier du conseil général du Barreau de la province de Québec soit tenu de lui délivrer un certificat, sous le sceau du Barreau de la province de Québec, lui tenant lieu d'inscription au tableau de l'Ordre.

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Le Barreau de Montréal et le Barreau de la province de Québec ont été mis en cause, mais aucune conclusion n'a été prise contre eux. Le secrétaire-trésorier du conseil général est également en cause, mais les conclusions contre lui ne sont que subsidiaires.

Les faits essentiels sont les suivants:

L'appelant a été trouvé coupable d'un acte criminel devant le magistrat de district à Hull, et ce jugement a été confirmé par la Cour du Banc du Roi siégeant en appel.

A une séance du conseil de section du barreau de Montréal, dont l'appelant relevait au moment où il fut trouvé coupable, le conseil prit connaissance du jugement; et voici comment le procès-verbal relate ce qui se passa:

> Après discussion, le Conseil décide de dénoncer à Mtre Victor Martineau, C.R., secrétaire du Conseil Général, le fait que Mtre N. J. Marion a été trouvé coupable d'un acte qualifié de félonie avant l'adoption du Code Criminel de 1892 et de prier Mtre Martineau d'agir suivant la loi.
>
> La proposition de Mtre H. N. Chauvin, C.R., d'envoyer un avis de cette décision aux protonotaires et aux greffiers des différentes Cours de la province, est mise de côté; vu que cette procédure relève plutôt du Conseil Général.
>
> Mtre N. J. Marion se présente devant le conseil et, déclarant qu'il a l'intention de porter de nouveau cette cause en appel, demande au Conseil de suspendre sa décision jusqu'au jugement final.
>
> Mtre R. G. de Lorimier, C.R., informe alors Mtre Marion de la décision que vient de prendre le Conseil et lui fait savoir que cette décision est finale.

Marion était présent à cette séance, à la suite d'un avis qui lui avait été envoyé par l'assistant-secrétaire du conseil de section, comme suit:

> Cher monsieur, Le mercredi, 25 courant, à 4 heures de l'après-midi, le conseil du Barreau prendra connaissance du jugement rendu le 29 juin dernier par la cour d'appel, division de trois juges, dans la cause du Roi *vs* vous-même.
>
> Je suis chargé de vous dire que si vous désirez vous présenter devant le conseil à ce sujet, vous serez entendu.
>
> Bien à vous,
>
> L'Assistant-Secrétaire.

Pour se conformer à la décision prise par le conseil de section, l'assistant-secrétaire fit parvenir une copie du jugement au secrétaire-trésorier du conseil général. Ce dernier raya du tableau le nom de l'appelant (art. 69 du c. 210, S.R.Q., 1925, qui était l'article 4543 des Statuts Refondus de Québec de 1909); puis il donna avis, sous le sceau du barreau de la province de Québec, à tous les secrétaires de sections, leur enjoignant de rayer le nom de

l'appelant. A la suite de quoi, sur transmission de cet avis par les secrétaires de sections, les protonotaires et greffiers des tribunaux de la province rayèrent également le nom de l'appelant du tableau des avocats en leur possession.

Cette procédure est prévue par l'article 85 de la loi du barreau (c. 210 S.R.Q., 1925); et, après qu'elle a été accomplie,

les protonotaires et greffiers de tous les tribunaux de (la) province doivent * * * refuser de reconnaître comme avocat celui dont le nom n'apparaît pas sur le tableau, ou en a été rayé. (Art. 87.)

Le 13 avril 1926, l'appelant demanda l'émission d'un premier bref de mandamus contre le Barreau de la province de Québec, intimé, et le Barreau de Montréal, mis-en-cause, concluant:

à ce qu'il soit enjoint à l'intimée de réintégrer le requérant dans l'exercice de sa profession d'avocat, après qu'il aura acquitté les redevances dont il est endetté tant envers l'intimée qu'envers la mise-en-cause; *à ce qu'il soit enjoint au secrétaire de la mise-en-cause d'accepter le paiement des redevances qui pourraient être dues à cette dernière par le requérant et de lui en donner reçu;* à ce qu'il soit enjoint tant à l'intimée qu'à la mise-en-cause d'avoir à considérer votre requérant, lorsqu'il se sera acquitté des redevances dont il peut être endetté envers elles, comme étant membre en règle du Barreau de la province de Québec, et habile à exercer sa profession d'avocat, jouissant de tous les privilèges attachés à cette qualité, le tout sous toutes peines que de droit et avec dépens contre l'intimée, mais sans frais contre la mise-en-cause, à moins de contestation de sa part, et, en ce cas, avec dépens contre elle.

Cette requête pour mandamus fut contestée par les deux corporations du Barreau qui, toutes deux, invoquèrent le fait que l'appelant avait été trouvé coupable d'un acte criminel, et alléguèrent spécialement ce qui suit:

(*c*) Le 25 juin 1924, après avis donné au requérant, le conseil du Barreau de Montréal a pris connaissance de ces faits et documents et a rendu jugement assimilant l'acte du requérant au cas punissable par la radiation de son nom du tableau des avocats et a communiqué cette décision au secrétaire général du Barreau de la province de Québec pour qu'action soit prise en conséquence, et c'est en exécution de cette décision que la radiation a été faite;

(*d*) Il n'y a pas eu d'appel de cette décision auprès de l'intimée qui était un tribunal d'appel compétent dans les limites déterminées par la loi;

Le bref de mandamus dans cette première instance fut refusé par jugement de M. le juge Duclos, rendu le 11 octobre 1926 (1).

(1) [1926] Q.R. 64 S.C. 502.

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Il convient de bien noter la portée de ce jugement. Le savant juge y décide deux questions principales:

1. L'offense commise par l'appelant était qualifiée de félonie avant l'adoption du Code criminel de 1892;

2. Dans une séance convoquée suivant la procédure prévue à l'article 69 (3) de la Loi du Barreau, après avis donné à l'appelant, et où il " a eu l'occasion de se défendre ", le conseil du barreau de Montréal a rendu une décision sur le cas de l'appelant. " Il n'y a pas eu d'appel de cette décision au conseil du barreau de la province de Québec, tel que prévu par la loi ", et la requête de l'appelant n'est " qu'une tentative d'appel aux tribunaux de la décision du barreau de Montréal, appel que la loi ne permet pas ".

Comme conséquence, sur la première requête pour mandamus, il a donc été jugé entre l'appelant, d'une part, et le Barreau de la province de Québec et le Barreau de Montréal, d'autre part, que l'acte criminel dont l'appelant a été trouvé coupable constituait une félonie avant 1892; et que, en plus, le conseil du barreau de Montréal avait régulièrement décidé que cet acte criminel était une félonie, et avait prié le secrétaire-trésorier du conseil général d'agir en conséquence.

L'appelant avait d'abord inscrit en appel du jugement de l'honorable juge Duclos; mais il a subséquemment abandonné son appel. Ce jugement est par là devenu final et a acquis le caractère de chose jugée entre les parties dans cette première cause.

C'est dans ces circonstances, près de trois ans après ce premier jugement, que l'appelant a présenté sa seconde requête pour mandamus, qui est celle qui est maintenant devant cette cour. Il allègue qu'il est porteur d'un diplôme d'admission au barreau; qu'il a prêté serment comme avocat; qu'il a payé ses contributions jusqu'au 26 avril 1924; qu'il a offert au trésorier du barreau de Montréal tous les arrérages à date de ses cotisations et les honoraires du certificat qui peut lui tenir lieu d'inscription au tableau de l'Ordre, suivant la loi organique et les règlements du barreau de la province, mais que le trésorier a refusé d'accepter ces sommes; qu'il est ainsi privé du reçu du trésorier et qu'il ne peut obtenir du secrétaire-trésorier du conseil général le certificat sous le sceau de la corpora-

tion pour lui permettre de pratiquer comme avocat; et voici maintenant ses conclusions textuelles:

Par ces motifs, plaise à la cour:

Enjoindre au défendeur ès-qualité de recevoir ledit montant de 135 dollars plus toutes échéances à survenir en cours d'instance et d'en délivrer un reçu au demandeur; et au mis-en-cause, secrétaire-trésorier du Conseil général, au vu de ce reçu, de délivrer au demandeur, sur paiement de 7 dollars, un certificat sous le sceau du Barreau de la province de Québec lui tenant lieu d'inscription au Tableau de l'Ordre; à quoi faire contraints même par corps, quoi faisant déchargés. Avec dépens contre toute partie contestante.

Les intimés ont de nouveau allégué la sentence de culpabilité prononcée contre l'appelant, la décision rendue le 25 juin 1924 par le conseil du barreau de Montréal "assimilant l'acte (de l'appelant) * * * au cas prévu par la loi et entraînant la radiation du nom du demandeur du tableau des avocats dans la province de Québec" * * *, l'avis donné "au Secrétaire-Trésorier du Barreau de la province de Québec d'observer la loi en conséquence," et ils ont ajouté:

c'est en exécution de cette décision que le nom du demandeur a été rayé de la liste des avocats de la province de Québec suivant la loi.

Ils ont invoqué la chose jugée résultant du jugement de l'honorable juge Duclos; et ils ont plaidé que, en conséquence, le trésorier du barreau de Montréal n'avait pas le droit ni le pouvoir d'accepter les offres que l'appelant allègue lui avoir faites et que,

en refusant ces offres, (il) n'a aucunement omis, négligé, ou refusé d'accomplir un devoir attaché à sa charge ou un acte auquel la loi l'oblige.

Le juge de première instance a maintenu le mandamus; mais la Cour du Banc du Roi a unanimement infirmé ce jugement, sur le principe que les conclusions de la première requête de mandamus comprenaient tout ce que l'appelant demandait dans sa seconde requête et que, dans ces conditions, l'exception de chose jugée opposée en défense à la nouvelle demande de l'appelant était bien fondée.

C'est ce jugement qui est porté devant cette cour.

Il y a lieu au mandamus pour enjoindre l'accomplissement d'un devoir ou d'un acte dans certains cas énumérés à l'article 992 C.P.C. Le cas invoqué en l'espèce par l'appelant est celui du paragraphe 3 de l'article 992, qui se lit comme suit:

3. Lorsqu'un fonctionnaire public, ou une personne occupant une charge dans une corporation, corps public ou tribunal de juridiction inférieure omet, néglige ou refuse d'accomplir un devoir attaché à sa charge, ou un acte auquel la loi l'oblige.

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Pour que l'appelant pût réussir, il lui fallait donc établir que le trésorier du barreau de Montréal, en refusant de recevoir $135, plus toute échéance à survenir, que l'appelant lui a offerts pour ses cotisations au barreau, et d'en délivrer un reçu à l'appelant, refusait " d'accomplir un devoir attaché à sa charge, ou un acte auquel la loi l'oblige."

Le nom de l'appelant n'est pas sur le tableau général des avocats de la province, d'où il a été rayé par le secrétaire-trésorier du conseil général, à la suite des événements qui viennent d'être rapportés. L'appelant s'adresse au trésorier du Barreau de Montréal. Il lui offre ses arrérages de contributions comme membre de la profession et lui demande de lui en délivrer un reçu. Pour démontrer que ces deux actes: accepter la contribution et en délivrer un reçu, constituent " un devoir attaché à (la) charge " du Trésorier et " un acte auquel la loi l'oblige ", l'appelant s'appuie sur l'article 82 de la loi du Barreau.

Il n'est pas nécessaire de reproduire cet article; il suffit de remarquer qu'il se rapporte au cas de l'avocat:

1. dont le nom a été omis du tableau, faute par lui d'avoir payé toutes les contributions; (ou)

2. dont le nom a été omis par suite d'une suspension de ses fonctions; (ou)

3. dont le nom a été omis sans sa faute.

i.e. par erreur.

C'est sur cet article que l'appelant se base pour offrir ses arrérages au trésorier du barreau de Montréal et prendre un mandamus contre lui pour le forcer à les accepter et à lui donner un reçu dont il se servira auprès du secrétaire-trésorier général pour obtenir le certificat lui donnant droit de pratiquer comme avocat.

Or, il est bien évident que l'appelant ne tombe dans aucune des trois catégories bien distinctes prévues par l'article 82.

L'appelant n'a pas été omis du tableau de l'Ordre pour l'une des raisons contenues dans cet article; il ne figure pas sur le tableau parce qu'il en a été rayé. En pareil cas, le trésorier du barreau de Montréal, non seulement n'a pas le devoir de recevoir ses contributions et de lui donner un reçu, mais il n'en a pas le pouvoir. Il n'est pas nécessaire d'insister, en effet, sur la différence entre un avocat qui a été simplement suspendu de ses fonctions et un avocat qui est privé pour toujours du droit d'exercer sa profession. Cette distinction est soulignée à chaque instant dans la loi

du barreau. Seuls les " avocats qui ont droit de pratiquer dans la province " doivent figurer sur le tableau de l'Ordre (art. 81). Seuls les avocats dont le nom est sur le tableau peuvent pratiquer devant les tribunaux de la province (art. 68); et il ne peut être remédié à cela que dans trois cas bien définis: lorsque le nom a été omis faute par l'avocat d'avoir payé ses contributions; ou lorsque le nom a été omis par suite d'une suspension, ou lorsque le nom a été omis par erreur.

Dans chacun de ces cas, l'avocat peut obtenir du secrétaire-trésorier du conseil général " un certificat sous le sceau de la corporation constatant qu'il s'est conformé à la loi; et ce certificat lui tient lieu d'inscription au tableau pour le reste de l'année courante ". Lorsque le nom a été omis par erreur, l'avocat obtient le certificat gratuitement sur première demande.

Lorsqu'il a été omis par suite d'une suspension, il peut obtenir le certificat " à l'expiration du temps pour lequel il a été suspendu ", en payant les contributions et les honoraires.

Lorsqu'il a été omis, faute par lui d'avoir payé toutes les contributions, il n'a qu'à les payer à qui de droit; et, sur production du reçu, il obtient le certificat du secrétaire-trésorier du conseil général.

Mais tel n'est pas le cas de l'appelant. Lorsque le trésorier du barreau de Montréal, en refusant d'accepter sa contribution et de lui en donner un reçu, répond à l'appelant qu'il ne peut recevoir cette contribution au barreau parce qu'il a été rayé du tableau et qu'il a cessé d'être membre de la profession, cette raison constitue une réponse complète au mandamus de l'appelant, ce dernier ne peut prétendre que le trésorier du barreau de Montréal, en agissant ainsi, " refuse d'accomplir un devoir " attaché à sa charge ou un acte auquel la loi l'oblige " (C.P.C. 992-3), et, par conséquent, il n'y a pas lieu à l'émission d'un bref de mandamus en pareil cas.

Naturellement, l'appelant prétend que son nom n'aurait pas dû être rayé. Mais c'est là une toute autre question, qui ne concerne pas le trésorier du Barreau de Montréal. Ce n'est pas lui qui a rayé le nom. Ce n'est pas à lui qu'il appartient de le réinstaller. C'est précisément là le débat qui s'est engagé dans la première instance entre l'appelant

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d'une part, le Barreau de Montréal et le Barreau de la province de Québec d'autre part; et il a été tranché contre l'appelant par le jugement de l'honorable juge Duclos. Sur ce point et sous ce rapport, il y a *chose jugée* contre l'appelant. Quand l'appelant s'est adressé au trésorier pour lui demander de recevoir ses contributions, il s'adressait à lui non pas comme à un officier de la loi qui a des devoirs statutaires, mais comme à un mandataire et un représentant du Barreau de Montréal. Le trésorier perçoit les contributions pour le compte du Barreau de Montréal. La question de savoir si le nom de l'appelant a été régulièrement et validement rayé du tableau est chose jugée pour le représentant du Barreau de Montréal tout autant qu'elle l'est pour le Barreau de Montréal lui-même. (Pothier—Bugnet, 3e éd. vol. 2, n° 900; Baudry-Lacantinerie, Traité de droit civil, 3e éd. Des Obligations, tome 4ème, n^{os} 2687 et suivants; Lacoste, De la chose jugée, 3e éd. n^{os} 475 et suivants; *Ellard* v. *Millar* (1).

Pour ces raisons, je rejetterais l'appel avec dépens.

SMITH J.—The appellant (plaintiff) was an advocate of the province of Quebec duly enrolled and was in practice in the district of Hull.

On the 23rd January, 1922, one Mrs. Daniel laid complaint against him before the district magistrate in Hull, as follows:

* * * that at the city of Hull, in the said district of Hull, on or about the 30th day of March, 1921, Napoléon J. Marion of Hull, aforesaid, in his capacity of attorney for dame Anna Daniel, widow of the late Antoine Asselin, in her quality of tutrix to Emma Pleau, did receive from Mr. T. P. Foran, K.C., thirteen hundred dollars ($1,300) by cheque, payable to the order of said tutrix, which cheque the said N. J. Marion induced the said tutrix to endorse in order to withdraw the said money to pay it over to said tutrix as settlement of her share in the case then pending in the Superior Court of the district of Hull, which sum of money, less two hundred and five dollars, he did fraudulently convert to his own use, and fraudulently omitted to account for, and thereby did steal the said sum of money, and this contrary to the form of the statute in such cases made and provided.

The indictment was proferred in the same terms on 15th February, 1922, and on 7th March following he was found guilty, but sentence was deferred, pending the hearing of a reserved case.

(1) [1930] S.C.R. 319, at 326, 327.

The appeal court ordered the magistrate to return a new stated case, which he did in the following terms:

1. Elle a considéré que Marion était agent de la demanderesse ès-qualité, il était son avocat.

2. Qu'en sa qualité d'agent, il a reçu valeur chèque de $1,300, remis par T. P. Foran.

3. Cette valeur, la demanderesse n'en a jamais connu portée, ni eu libre possession, elle ne l'a pas eue un instant entre ses mains. Marion a collecté le produit; il a reçu $1,300. Déposition du gérant de la Banque Provinciale.

4. Ces produits, il les a convertis à son usage à la banque N.-E. Il a tiré sur ce dépôt, jusqu'à épuisement. Déposition du gérant de la Banque Nouvelle-Ecosse.

5. Marion prétend avoir agi sur la force d'un certain endossement non prouvé et certains documents. Ces documents sont absolument nuls et illégaux, et à l'encontre des articles 297, 298 et 307 du code civil, comme aussi du code de procédure civile, aux articles 1347 et 1348, et n'ont pu être pris en considération par la cour, et ne peuvent être considérés ici que comme du surplusage aggravant l'offense plutôt que de l'atténuer.

6. Il n'a jamais rendu compte, tout au contraire, il s'est retranché derrière toutes sortes d'excuses pour faire croire à la demanderesse qu'il n'avait pas encore été payé. Déposition de la tutrice et de dame Anna Asselin.

7. Qu'il n'a jamais fait remise et n'a jamais prouvé sa bonne foi, vis-à-vis de la demanderesse, ni devant la cour.

Pour la cour, la quintessence du crime était prouvée, elle a cru de son devoir de rendre jugement en conséquence.

On the 20th June, 1924, the Court of King's Bench confirmed the judgment of the magistrate, the notes of one of the judges containing the following:—

Upon a re-statement of the case, the learned magistrate states in detail what was proved before him. He states that the conviction is based upon the fact that it was proved that appellant, in his quality of agent of Daniel, received a cheque for $1,300 which he cashed and converted to his own use.

Upon these facts I can only say that the question should be answered in the affirmative and an offence known to the law is disclosed and proven. I should maintain the conviction.

On the 24th July following, the magistrate sentenced Marion to two years in the penitentiary.

On the 23rd June, prior to the date of the sentence, the assistant secretary of the Bar of Montreal sent Marion a letter, as follows:

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Le Barreau de Montréal,
Palais de Justice, Montréal,
24 juin 1924.

M. N. J. Marion,
71A rue St-Jacques, Montréal.

Cher monsieur,

Le mercredi, 25 courant, à 4 heures de l'après-midi, le conseil du Barreau prendra connaissance du jugement rendu le 29 juin dernier par la cour d'appel, division de trois juges, dans la cause du Roi *vs* vous-même.

Je suis chargé de vous dire que si vous désirez vous présenter devant le conseil à ce sujet, vous serez entendu.

Bien à vous,
L'assistant secrétaire,
(Signé) J. M. Nantel.

There was no complaint lodged by the syndic or other officer of the section council, but at the date fixed by the notice there was a meeting of the council, at which Marion was present, and the following appears in the minutes:

Après discussion, le Conseil décide de dénoncer à Mtre Victor Martineau, C.R., secrétaire du Conseil Général, le fait que Mtre N. J. Marion a été trouvé coupable d'un crime qualifié de félonie avant l'adoption du Code Criminel de 1892 et de prier Mtre Martineau d'agir suivant la loi.

La proposition de Mtre H. N. Chauvin, C.R., d'envoyer un avis de cette décision aux protonotaires et aux greffiers des différentes Cours de la province, est mise de côté; vu que cette procédure relève plutôt du Conseil Général.

Mtre N. J. Marion se présente devant le conseil et, déclarant qu'il a l'intention de porter de nouveau cette cause en appel, demande au Conseil de suspendre sa décision jusqu'au jugement final.

Mtre R. G. de Lorimier, C.R., informe alors Mtre Marion de la décision que vient de prendre le Conseil et lui fait savoir que cette décision est finale.

On the 26th August, 1924, the assistant secretary of the Bar of Montreal sent a copy of the conviction to the secretary-treasurer of the Council of the Bar of the province of Quebec, who, on the 28th August, 1924, struck Marion's name out of the list of advocates for the province of Quebec, and sent the legal notice of same.

In the present action, Marion contends that the secretary-treasurer of the Bar of the province of Quebec had no jurisdiction to strike his name off the roll as he did, because he was under no disqualification; and that, having tendered the arrears of his contributions to the treasurer of the Bar of Montreal, it was the duty of that officer to accept same and give a receipt, pursuant to sec. 82 of the Bar Act, chap. 210, R.S.Q., 1925, on presentation of which it would have

become the duty of the secretary-treasurer of the Bar of the province of Quebec to give him a certificate in lieu of his inscription on the roll.

The validity of these contentions must be tested by the provisions of the Bar Act. The Act provides that the advocates of the province shall form a corporation called "The General Corporation of the Bar," which shall be divided into sections, each of which shall form a separate corporation, one of which is named "The Bar of Montreal."

The general corporation may make by-laws for maintaining the honour and dignity of the Bar and discipline among its members, and for preparation and publication of the general roll of advocates in the province, and for other purposes.

The general corporation and the corporation of sections may make by-laws for defining the duties and functions of their officers, and for certain other purposes.

The powers of the general corporation are to be exercised by a council called the "General Council of the Bar of the province of Quebec" which shall select a secretary-treasurer who shall be a member of the council.

The Council of each section is to be composed of a batonnier, a syndic, a treasurer, a secretary, and, for Montreal, nine elected members.

The syndic is specially charged with the supervision of the discipline of the Bar. He is bound immediately to inform the council of the section of any conduct of a member derogatory to the honour of the Bar, and to submit to it any accusation handed to him, saving the right of the council to receive the same directly or to take the initiative in the exercise of its disciplinary powers.

Every complaint against a member shall be made under oath before the syndic, batonnier or secretary of the Bar of the district where it is laid. Each council of a section may pronounce a censure or reprimand against a member guilty of a breach of discipline or any act derogatory to the honour and dignity of the Bar, and may also suspend him forever from the right of practising his profession.

In the exercise of these powers, the council is to proceed deliberately and allow the accused to defend himself. The decision is subject to appeal to the General Council

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to be instituted by letter to the secretary-treasurer of such council, but such appeal shall lie only when it appears on the face of the complaint, decision or sentence that the council had no jurisdiction; and no appeal shall lie to the courts from decisions rendered by the council of any section.

Every member shall pay to the treasurer of his section certain prescribed subscriptions and dues, and the treasurer shall forward annually, before the 5th of May, to the secretary-treasurer of the General Council a list of all the advocates in his section who have paid their subscriptions and dues for the previous year, and the current year.

Section 68 provides that no advocate shall practise in any of the courts of the province in the following cases:

(*b*) If he has been found guilty of any criminal offence ranked as a felony before the passing of the Criminal Code, 1892, of perjury, or subornation of perjury, of conspiracy to defraud, or of one of the criminal offences set forth in sections 405, 406, 407, 412 and 442 of the Criminal Code.

(*c*) If his name is not inscribed on the General Roll of the advocates of the Province;

(*d*) If he has been suspended from his functions by a court or by a council of his section or by the General Council.

The secretary-treasurer of the General Council is required every year during the month of May, as far as practicable, to prepare a general roll of all the advocates having a right to practise in the province, taking as a basis the information supplied him by the treasurers of sections, the secretary-treasurers of library associations and the registers in his possession, but only those who have paid their subscriptions and are not disqualified or suspended.

Section 82 provides that:

Any advocate, whose name has been omitted from the roll for neglecting to pay all his subscriptions, may, at any time, pay the same to the proper officer; and on producing the receipts or certificates of the said officer, the secretary-treasurer of the General Council shall give to such advocate a certificate, under the seal of the corporation, showing that he has complied with the law, and such certificate shall take the place of the entry on the roll for the rest of the current year; and provided such advocate be not under the effect of a sentence of disqualification or suspension from his functions, he may, on producing such certificate before the prothonotary or clerk of the court, practise as if his name were on the roll.

It will be observed that the only action taken at the meeting of the Council of the Bar of Montreal was the resolution to notify the secretary of the General Council of the fact that Marion had been found guilty of a crime

ranked as a felony before the passing of the Criminal Code, 1892.

Acting on this resolution the assistant secretary wrote to the secretary of the General Council, enclosing what he calls a copy of the judgment in the affair of *The King* v. *Marion,* in virtue of which Marion is condemned to two years in the penitentiary. The original of this letter was not produced, and the only proof of its loss was the statement of Mr. Nantel, the writer of the letter, that Mr. Martineau, to whom it was addressed, had died and Mr. Jodoin, Mr. Martineau's successor, told him he had not found the original. At all events, the only ground that this notification furnished to Mr. Martineau, the secretary of the General Council, for striking Marion's name off the list was the conviction, and he and the Council of the Bar of Montreal purported to act under sec. 68 of the Act on the view that the conviction was for an offence ranked as a felony before the passing of the Criminal Code, 1892.

The offence for which Marion was convicted was not a felony prior to 1892 unless it comes within sec. 4 of the *Larceny Act,* R.S.C., 1886, c. 164, which is as follows:

> 4. Every one who, being a bailee of any chattel, money or valuable security, fraudulently takes or converts the same to his own use or to the use of any person other than the owner thereof, although he does not break bulk or otherwise determine the bailment, is guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.

It has been held that the bailment intended by this section is a deposit of something to be specifically returned, and, therefore, one who receives money with no obligation to return the identical coins received is not a bailee within the section; *R.* v. *Hassall* (1); *R.* v. *Garrett* (2); *R.* v. *Hoare* (3); *R.* v. *de Banks* (4).

I think it is impossible to hold here that there was an obligation to return the identical coins, and that, therefore, the offence was not a felony prior to the passing of the Criminal Code in 1892. There was, therefore, no power to strike Marion off the roll under the provisions of s. 62.

The Council of the section of Montreal could have struck him off for life by proceedings under sect. 27 and 28 of the

(1) (1861) L. & C. 58.
(2) (1860) 2 F. & F. 14.
(3) (1859) 1 F. & F. 647.
(4) (1884) 15 Cox 450.

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Smith J.

Act, but can it be said that any such proceedings were taken, or that any pronouncement was made by that body, depriving him forever of the right of practising his profession?

No complaint was laid under oath, pursuant to s. 22, and the Council did not purport to hear any complaint or to render any decision on a complaint and award of punishment under s. 27. The view was that s. 68 applied, and that Marion at once ceased to have the right to practise, and that his name must be struck off by the General Secretary upon receipt of the certified copy of the sentence as provided by sec. 69.

In my opinion, therefore, Marion did not in fact become disqualified automatically by virtue of section 68 and was not disqualified by any decision of the council of the Montreal section on complaint under section 27.

We must, however, consider the effect of the judgment in the former litigation instituted by Marion against the Bar of the province of Quebec and the Bar of Montreal.

I have examined carefully the reasoning of my brother Rinfret on this point and agree with his conclusion with regard to it.

In those proceedings there was put directly in issue the question of whether or not Marion had ceased to be a member of the Bar of Quebec, and the decision of the court was that, by virtue of section 68 and also by virtue of a decision of the council of the Montreal section, he had ceased to be such member.

While this decision is contrary to the view I have expressed above, it is, nevertheless, a final judgment on the issue of fact and is, therefore, binding as between the parties quite regardless of whether, as a matter of law, it was correct or not.

The statutory duty of the respondent treasurer of the Bar of Montreal is to receive subscriptions and dues from those who are members of the Bar and Marion having, by the judgment referred to, which binds him, been declared not to be a member of the Bar, there was no obligation on the treasurer to receive the dues tendered and to give a receipt for same.

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The argument that the service of his sentence and fulfilment of the terms of the ticket of leave by Marion freed him of all the consequences of his crime including disqualification from practice is, in my opinion, wholly untenable.

I agree that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *De la Durantaye, Martineau & Reeves.*

Solicitor for the respondent Campbell and the Bar of the District of Montreal: *Camille Tessier.*

Solicitor for the respondent The Bar of Quebec: *C. A. Guertin.*

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*Feb. 22.
*Mar. 31.

THE CANADIAN ELECTRICAL ASSOCIATION AND THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO ..... } APPELLANTS;

AND

CANADIAN NATIONAL RAILWAYS, CANADIAN PACIFIC RY. CO., MICHIGAN CENTRAL RD. CO. AND THE RAILWAY ASSOCIATION OF CANADA ..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Dominion and provincial electrical companies—Electric lines along or across railways—Order of the Board making companies wholly liable for damages—Jurisdiction—Whether Order is altering laws in force in provinces—Section 372 of the Railway Act, 1927, R.S.C., c. 170.

The Board of Railway Commissioners, acting under the powers given to it by section 372 of the *Railway Act,* issued a General Order in respect of the conditions and specifications applicable to the erection, placing and maintaining of electric lines, wires or cables along or across all railways, subject to the jurisdiction of the Board; and section 2 of the Order stipulated that "The applicant shall, at all times, wholly indemnify the company owning, operating or using the railway, from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property, caused by any of the said applicant's wires or cables,

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

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or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere." The appellants' contentions were that, upon an application for leave to cross railways with power lines, the authority of the Board is limited to imposing terms and conditions as to the manner and means of construction of the works; and that the Board is without jurisdiction to alter the law in force in the various provinces relating to the respective liabilities in damages of the railway and power companies.

Held, Rinfret and Cannon JJ. dissenting, that the Order was within the jurisdiction of the Board and that section 2 had been validly promulgated.

APPEAL by The Canadian Electrical Association and The Hydro Electric Power Commission of Ontario, by leave of the Board of Railway Commissioners for Canada under the provisions of section 52, subsection 3, of *The Railway Act,* on a question which in the opinion of the Board is a question of law or a question of jurisdiction, namely:—

"As a matter of law had the Board the jurisdiction to make General Order 490 dated 20th February, 1931?"

General Order no. 490 is an amendment of "The Rules for Wires erected along or across Railways" adopted by General Order no. 231 of the Board dated May 6, 1918, as amended by General Order 291 dated April 7, 1920, which rule establishes certain terms and conditions under which the Board would grant leave for crossings of railways by power transmission lines. Paragraph 2 of Part One of these Rules, as it was before General Order no. 490, read as follows:—

"The applicant shall at all times wholly indemnify the Company owning, operating or using the said railway of, from and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables or any works or appliance herein provided for *not being erected in all respects in compliance with the terms and provisions* of this order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant."

General Order 490 re-enacted this clause as follows:—

"2. The applicant shall at all times wholly indemnify the Company owning, operating, or using the railway from and against all loss, damage, injury and expense to which the Railway Company may be put by reason of any damage or injury to persons or property caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this Order as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, *unless the cause of such loss, cost, damage, injury, or expense can be traced elsewhere.*"

In effect the changes made by General Order 490 are shown by the italic portions of the above quoted paragraphs, the words underlined in the previous Order being omitted in Order 490 and the words in italic in the latter being added as new. The intended effect of the change was to impose upon the appellant Commission or any other person applying for and obtaining leave from the Board to construct and maintain power lines along or across a railway, the burden of wholly indemnifying the railway companies against all damages to persons or property resulting from the applicant's wires or cables unless the cause of the damage can be traced elsewhere. This matter originated in an application made by the respondents to the Board as a result of which the appellant Commission and others who were deemed to be interested were notified that certain amendments to General Order no. 231 were proposed by the respondents and to appear before the Board on February 27, 1928, to present any objections thereto. The appellant Commission and others accordingly appeared by counsel before the Board on that date and presented their objections to the proposed amendments, following which the Board took the matter under advisement and in February, 1931, rendered its decision and made the Order no. 490 appealed from.

Aimé Geoffrion K.C., Geo. H. Montgomery K.C. and *H. Hansard* for the appellant The Canadian Electrical Association.

E. Bristol K.C. for the appellant The Hydro-Electric Power Commission of Ontario.

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W. N. Tilley K.C. for the respondent The Railway Association of Canada.

A. Fraser K.C. for the respondent The Canadian National Railways.

E. P. Flintoft K.C. for the respondent The Canadian Pacific Ry. Co.

Vincent W. Price for the Michigan Central Railroad Co.

The judgments of Duff, Lamont and Smith JJ. were delivered by

DUFF J.—Section 372 was not attacked as *ultra vires,* and reading the term "along" as stretching "longitudinally" upon the right of way, it is not seriously open to objection. Otherwise the phrase "for other purposes" in the principal clause might be obnoxious to the *British North America Act* and the section might then have to be read as if those words were eliminated.

The substantive question is whether section 2 of the order in its amended form, has been validly promulgated. That section is as follows:—

> The applicant shall, at all times, wholly indemnify the company, owning, operating or using the railway, from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property, caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.

The controversy is, I think, susceptible of a brief solution. The Dominion Parliament has power to prohibit all such works as those comprised in the order under discussion. The language of subsection 3 is comprehensive enough to embrace any "term or condition"; and unless there is something in the order in question which is in itself absurd, or something in the statute which is repugnant to the order, then the order is valid. Lord Macnaghten's judgment in *Vacher* v. *London Society of Compositors* (1). The statute does not elsewhere deal with the subject matter of the order and there is nothing to which our attention has been called that is inconsistent with it. I can perceive no absurdity in the sense in which the word is used in the

(1) [1913] A.C. 107.

canon of construction laid down by Lord Macnaghten. I find it impossible to affirm that the condition required by section 2 is one which it would be unreasonable for an administrative body such as the Board of Railway Commissioners to enact as the price of such privileges as those with which the order deals.

As to the contention that the matter of the condition is in its nature a matter exclusively for the provincial legislatures, I can only say that I do not understand the point.

The appeal should be dismissed with costs.

The judgments of Rinfret and Cannon JJ. (dissenting), were delivered by

RINFRET J.—In the generation and distribution of electrical energy, it is frequently necessary for the electric power companies to construct and maintain lines, wires and other conductors and structures or appliances for the conveyance of power or electricity along or across a railway; or across or near other such lines, wires, conductors, structures or appliances which are within the legislative authority of the Parliament of Canada.

When a power company is desirous of constructing or maintaining its lines or wires along or across the lines or wires, etc., of any other Dominion company, it must either obtain the consent of the other company, or obtain the permission of the Board of Railway Commissioners of Canada, under section 372 of the *Railway Act* (c. 170 of R.S.C., 1927) which reads as follows:—

372. Lines, wires, other conductors or other structures or appliances for telegraphic or telephonic purposes, or for conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in subsection five of this section, be constructed or maintained.

(*a*) along or across a railway, by any company other than the railway company owning or controlling the railway; or

(*b*) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

2. Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works.

3. The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

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4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

5. Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under section three hundred and sixty-seven of this Act, nor for the maintenance of works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes."

Pursuant to the provisions of that section, which was then section 246 of chapter 37 of the Revised Statutes of 1906, the Board issued General Order no. 231 adopting " rules for wires erected along or across railways," to which was annexed a schedule setting forth " standard conditions and specifications for wire crossings " and providing for two methods of crossing: Part I, Over-crossing; and Part II, Underground lines. General Order no. 231 was later amended by General Order no. 291.

In view of certain objections made or terms insisted upon by the railway companies, the General Order was again amended on the 20th February, 1931, and paragraph 2 of the Standard Conditions relating to Over-crossings was made to read as follows:—

2. The applicant shall, at all times, wholly indemnify the company owning, operating or using the railway, from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property, caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.

The question in controversy is whether the Board had jurisdiction to issue that Order (No. 490). It comes before this court, pursuant to leave granted under subsection 3 of section 52 of the *Railway Act,* upon the following question submitted by the Board:

As a matter of law, had the Board jurisdiction to make General Order No. 490 dated 20th February, 1931?

The appellants are The Canadian Electrical Association and The Hydro-Electric Power Commission of Ontario. They submit that, upon an application for leave to cross railways with power lines, the authority of the Board is " limited to imposing terms and conditions as to the manner and means of construction of the works;" and, that, in this connection, the Board is without jurisdiction to alter the

law in force in the various provinces relating to the respective liabilities in damages of the railway company and the power companies.

The respondents are The Canadian National Railways, The Canadian Pacific Railway Company, The Michigan Central Railroad Company, and The Railway Association of Canada. They uphold the Order, and they contend that it is well within the competence of the Board of Railway Commissioners.

The Hydro Electric Power Commission of Ontario is a provincial institution. The Canadian Electrical Association includes several companies provincially incorporated. This should be borne in mind when dealing with the matter now before the court.

The appellants were authorized, by Dominion or provincial statutes, to construct or maintain their respective transmission lines in a given territory. They were incorporated to render a public service; and the legislature which called them into existence may be assumed to have regarded the services of these electrical and power companies as being in the public interest in no lesser degree than the services of the railway. The Dominion companies—railway or power—derive their authority from the same legislature. In the absence of a specific provision, section 372 should not be so construed as to give the Board the right to prevent the electrical companies from crossing altogether, or to attach to the permission granted by it such conditions as would practically defeat their statutory rights, or as would give to the railway companies a preferential position in respect of liability in damages. The enactment should, we think, be interpreted to mean that the Board ought to grant leave subject to certain terms and conditions. See *Attorney General for Canada* v. *Attorney General for British Columbia* (1). When Parliament intended, in the *Railway Act,* to delegate to the Board the power to refuse leave, it said so in express words. An instance of this may be found in the very next section of the Act, subsection 4 of section 373:

The Board may refuse or may grant such application in whole or in part, etc.

(1) [1930] A.C. 111, at 123.

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The real question is what "terms and conditions" the Board may prescribe upon granting the application; and that question turns upon the interpretation of subsections 3 and 4 of section 372. So far as material, the language is:

> 3. The Board * * * may order * * * on what terms and conditions * * * the proposed works may be executed.
>
> 4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

The expressions are very wide; and, to borrow the language of Lord Macmillan, delivering the judgment of the Judicial Committee in *Canadian Pacific Railway Company* v. *Toronto Transportation Commission* (1),

> Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.

Liability in damages is fundamentally a matter of property and civil rights. While the competence of the Dominion Parliament to provide for matters which, though affecting civil rights, are necessarily incidental to effective legislation in respect of Dominion railways, may not be doubted (2), Parliament should not be assumed to have legislated so as to appropriate the provincial field, except if the intention so to do is clearly indicated. And if that be true of Parliament, *a fortiori* must it be so of a subordinate body, like the Board of Railway Commissioners, whose duties, when acting under section 372, are essentially administrative.

The power to create civil liability is not easily understood to have been delegated. In order to conclude that Parliament intended to delegate it in the premises, we should require more explicit language than that found in subsections 3 and 4 of section 372.

Full effect can be given to the language of those subsections without implying the grant of the power claimed by the Board when framing General Order no. 490. Having regard to the ordinary functions of the Board and to the general scheme of the *Railway Act*, the safe course is to interpret the expression "terms and conditions" as having reference to the engineering features and protective devices relating to the actual construction of the works and their maintenance, and to decide that they are limited to pre-

(1) [1930] A.C. 686, at 697.

(2) [1894] A.C. 189; [1896] A.C. 348; [1930] A.C. 111, at 118.

scribing the manner and the means of construction, that is: the material safeguards, with a view to protection and safety.

It was suggested that the Order might be supported on the ground of compensation, and that a provision for indemnifying the railway companies in all cases of accidents might be considered as a means—even if unusual—of ordering payment of compensation.

But the answer to that suggestion would be:

1. That, under the *Railway Act* (except in cases specially provided for), the Board has nothing to do with the proceedings whereby compensation is to be ascertained; and

2. That wherever it was intended to empower the Board to make directions as to compensation, a special authorization to that effect is contained in the section of the Act under which action is to be taken.

In that respect, reference may be made to sections 39, subs. 1; 215 to 243, dealing with expropriations; 252, subs. 3 (*e*); 255, 256, subs. 3; 257, subs. 2; etc., of the *Railway Act*. Under each of these sections, although the Board is given the power to grant applications upon such " terms and conditions " as it deems expedient, yet where it was intended that compensation may be made a term of the order, it was deemed necessary to insert in the enactment a special provision to that effect. On the contrary, when the expression " terms and conditions " is used alone, without reference to compensation, it is to be found in sections where, on account of the nature of the enactment, it does not appear to have been the intention of Parliament that compensation should be paid.

Let us illustrate the point by a reference to sections 272 and 273 of the Act, dealing with farm crossings. The Board may, upon the application of any landowner, order the company to provide and construct a suitable farm crossing across the railway wherever, in any case, the Board deems it necessary for the proper enjoyment of his land; and the Board may order and direct how, when, where, by whom and upon what " terms and conditions " such farm crossing shall be constructed and maintained. One would hardly suggest that, by these expressions, Parliament intended to empower the Board to impose conditions of

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civil liability upon the farmer as a result of using the farm crossing. In that respect, Parliament did impose civil responsibility upon its creature, the railway company; but it did so in specific terms, and not by way of delegation. (*Railway Act*, sects. 385 and following). Under section 372 the power is not given to the Board, either in express terms or by necessary implication therefrom.

That the Board itself up to the time the present orders were issued, understood its powers and the policy of the *Railway Act* to be in accordance with the views we are now expressing may be gathered from the judgments of Chief Commissioners Blair, Killam and Mabee respectively in the *York Street Bridge* case (1); *Duthie* v. *Grand Trunk Railway Co.* (2), and *Bell Telephone Co.* v. *Nipissing Power Co.* (3); also from comparatively recent pronouncements of the Board: *City of Windsor* v. *Bell Telephone Co.;* and *Bell Telephone Company* v. *City of Ottawa* (4).

We think our conclusion is also supported by the decision of the Judicial Committee in *Grand Trunk Pacific Railway Company* v. *The Landowners on streets in Fort William* (5).

In that case, the Board of Railway Commissioners ordered that the railway company might construct its line of railway along certain streets through the city of Fort William. The order was made subject to the express condition that the railway should

> make full compensation to all persons interested for all damage sustained by reason of the location of the said railway.

On behalf of the landowners (respondents), it was contended that section 47 of the *Railway Act,* on its true construction, authorized the Board to impose the condition contained in its order, or that otherwise it had implied authority to frame its order as it thought right. It was urged that the Board, in considering whether a proper location of the railway should or should not be approved, must, in the proper exercise of its discretion and taking into account all the circumstances, judicially determine whether it should impose any and what condition on which its approval should be granted. The language of section 47 of

(1) (1904) 4 Can. Ry. Cas. 62.
(2) (1905) 4 Can. Ry. Cas. 304.
(3) (1909) 9 Can. Ry. Cas. 473, at 477.
(4) (1917) 22 Can. Ry. Cas. 416 and 421.
(5) [1912] A.C. 224.

the *Railway Act*, as it then was, related to the conditions which the Board may impose, and stated, in part, as follows:—

> The Board may direct in any order that such order or any portion or provision thereof shall come into force * * * upon the performance, to the satisfaction of the Board or persons named by it, of any terms which the Board may impose upon any party interested.

Lord Shaw, delivering the judgment of the Judicial Committee, said:—

> This language is certainly general and comprehensive; but, in their Lordships' view, it cannot be interpreted as being designed to alter the other and specific provisions of the statute as to the compensation payable by the railway company. The particular application now being dealt with falls within the scope of s. 237, which applies to "any application for leave to construct the railway upon, along, or across an existing highway." By subs. 3 of that section it is provided that when the application is of that character "all the provisions of law at that time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land exclusive of the highway crossing required for the proper carrying out of any order made by the Board." It does not appear to their Lordships that it would be safe to infer from the generality and comprehensiveness of the powers of the Board, and apart from any specific reference to the compensation itself and the parties entitled thereto, that these provisions of s. 237 were liable to be altered, abrogated or enlarged by the exercise of the Board's administrative power under s. 47.
>
> The reasons above referred to, which might induce administrative action so as to make the compensation properly equate with the injury to all interests, are reasons which might or might not appear sufficient for direct legislative interposition, but, as already mentioned, their Lordships, apart from that, cannot interpose by the inference argued for. On the contrary it appears to them that the administrative action taken was beyond the powers of the Board of Railway Commissioners for Canada, under the law as it stood at the date of the order.

An additional argument in favour of the appellant's contention may be found in the wording of subsection 3 of section 372, which is to the effect that the Board

> may order * * * on what terms and conditions * * * the proposed work may be executed,

the more natural meaning of that language being that the terms and conditions which the Board is empowered to order have reference to the actual execution of the work. After the work has been executed in accordance with the terms and conditions of the order, by force of subsection 4, there exists a statutory obligation to maintain the works in accordance with the terms and conditions laid down for its execution.

General Order no. 490, as already stated, amended General Order no. 231 (as amended by General Order no. 291),

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by striking out paragraph 2 of part 1, Over-Crossings, and substituting in lieu thereof the new paragraph 2 quoted at the beginning of this judgment. It also added two additional paragraphs relating to notice of accidents, and preserving all rights as between power companies and railway companies for crossing privileges. These added paragraphs are not in question under this appeal.

For the reasons stated, so far as concerns the substituted paragraph 2, we would answer the question submitted in the negative.

The respondents should pay to the appellants the costs of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant, The Canadian Electrical Association: *Brown, Montgomery & McMichael.*

Solicitors for the appellant, The Hydro-Electric Power Commission of Ontario: *Bain, Bicknell, White & Bristol.*

Solicitor for the respondents, The Canadian National Railways and the Railway Association of Canada: *Alistair Fraser.*

Solicitor for the respondent, The Canadian Pacific Ry. Co.: *E. P. Flintoft.*

Solicitors for the respondent, Michigan Central Railroad Co.: *Saunders, Kingsmill, Mills & Price.*

1931

*Nov. 16.

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*Mar. 15.

LAURA LITTLEY AND STANLEY LITTLEY, AN INFANT, BY HIS NEXT FRIEND, LAURA LITTLEY (PLAINTIFFS).. } APPELLANTS;

AND

MANSFORD BROOKS AND CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Contributory negligence—Action under Fatal Accidents Act, R.S.O., 1927, c. 183 ("Lord Campbell's Act")—Application and effect of Contributory Negligence Act, R.S.O., 1927, c. 103—Excessive assessment of damages by jury—Insufficiency of findings—New trial.

In an action under the *Fatal Accidents Act*, R.S.O., 1927, c. 183 ("Lord Campbell's Act"), where the deceased has been guilty of contributory

*Present at hearing of the appeal: Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ. Newcombe J. took no part in the judgment, as he died before the delivery thereof.

negligence, and though his degree of fault has much exceeded that of defendant, the *Contributory Negligence Act,* R.S.O., 1927, c. 103, is applicable to enable the action to be maintained; and it is also applicable for the purpose of providing for apportionment of the liability for damages. (Lamont J., dissenting, *contra*).

Plaintiffs claimed damages for the deaths of the occupants of a motor car through its collision with defendant company's electric train. The jury found negligence both in defendants and in the driver of the motor car, assessed damages, and apportioned the fault, 25% to defendants, and 75% to the driver of the motor car. This Court *held* that, having regard to the evidence, the assessment of damages was unreasonably large and such as must have been occasioned by a misunderstanding of the basis upon which the amount ought to be determined; also that the jury should have been asked who was actually driving the motor car, and whether any of the other occupants stood in such a relation to the driver as to imply his responsibility for the driver's contributory fault or neglect; and that there should be a new trial, but limited to the following issues: (1) the entire amount of damages suffered by each plaintiff; (2) to whom and how should responsibility for the contributory negligence found by the jury be imputed. (Lamont J. dissented, holding, on his grounds next stated, that the action should be dismissed.)

Per Lamont J., dissenting: The requirement, to give a right of action under the *Fatal Accidents Act,* that deceased's death was *caused* by a wrongful act, neglect or default of defendant, has not been affected by the *Contributory Negligence Act.* To hold that the present action should succeed, with such damages only as would be proportioned to defendants' fault, would mean that the *Contributory Negligence Act,* by inference, has amended the *Fatal Accidents Act* in matters which are of its very essence, viz., (1) so as to give a right of action to dependants where the death, though not caused, has been contributed to, by defendant's negligence; and (2), so as to restrict dependants' measure of damages as given by the *Fatal Accidents Act,* which is based on a principle entirely different from that applicable were deceased living and suing; and implication of such amendments is not justified by the provisions of the *Contributory Negligence Act.* That Act applies only to cases where the damages sought to be recovered in the action resulted partly from the defendant's fault and partly from the plaintiff's fault.

APPEAL by the plaintiffs, and cross-appeal by the defendants, from the judgment of the Appellate Division of the Supreme Court of Ontario (1) ordering a new trial.

The action was brought under the Ontario *Fatal Accidents Act,* for the benefit of the plaintiff Laura Littley and her son, Stanley Littley, to recover damages for the deaths of the husband and three children of the said Laura Littley, who were occupants of a motor car, the deaths resulting from a collision between the motor car and an

(1) (1931) 40 Ont. W.N. 364.

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electric train of the defendant company, which collision the plaintiffs alleged was caused by the negligence of the defendant company, its servants or agents, and of the defendant Brooks, who was the motorman of the train.

On a previous appeal to this Court in the same case this Court ordered a new trial (1).

The second trial came on before Raney J., with a jury. The following were the questions submitted to the jury, with their answers:

1. Was there negligence on the part of the defendants causing or contributing to the collision?

A. Yes.

2. If so, in what respect did such negligence consist? Answer fully.

A. Speed of train was in excess of ten miles per hour.

3. Was there negligence on the part of the driver of the Littley car contributing to the collision?

A. Yes.

4. If so, in what did such negligence consist? Answer fully.

A. Excessive speed and lack of caution.

5. At what amount do you assess the damages suffered by the plaintiff, Laura Littley, arising from the death of her husband and three children?

A. $20,000.

6. At what amount do you assess the damages of the plaintiff, Stanley Littley, arising from the death of his father?

A. $2,000.

7. How do you apportion the fault as between the defendants on the one hand and the driver of the Littley car on the other?

A. Defendants, twenty-five per cent. Driver of car, seventy-five per cent.

On these findings, counsel for the plaintiffs moved for judgment for the full amount of the damages found to have been suffered by them; but the learned trial judge gave judgment to the plaintiff Laura Littley for $5,000 and to the plaintiff Stanley Littley for $500, these amounts being, in each case, 25 per cent. of the amounts at which the jury assessed the full damages of the plaintiffs.

Both defendants and plaintiffs appealed to the Appellate Division, the defendants asking that the action be dismissed or, in the alternative, that a new trial be had; and the plaintiffs asking that judgment be entered for the full amount of the damages found to have been suffered by them. The Appellate Division set aside the judgment and ordered a new trial (2). The plaintiffs appealed to the Supreme Court of Canada, asking that the judgment

(1) [1930] Can. S.C.R. 416. (2) (1931) 40 Ont. W.N. 364.

entered at the trial and the judgment of the Appellate Division be set aside and that judgment be entered for the plaintiff Laura Littley for $20,000 and for the plaintiff Stanley Littley for $2,000; or, in the alternative, that a new trial be ordered as to the question of damages only. The defendants cross-appealed, contending that the action should be dismissed.

J. R. Robinson and *J. L. Kemp* for the appellants.

W. N. Tilley, K.C., and *R. E. Laidlaw* for the respondents.

ANGLIN C.J.C.—I understand the majority of the court favours a new trial in this case on the two questions stated by Mr. Justice Rinfret. Personally, I very much regret the necessity for further litigation concerning the matters in question here.

At the first trial there was a non-suit. To get rid of that it was necessary for the plaintiffs to come to this court. The case went back and was tried before a jury, Mr. Justice Raney presiding. The Appellate Division ordered a new trial generally, although the Chief Justice of Ontario, in pronouncing the judgment of that court, dealt severally with all the findings of the jury, expressly approving all of them, excepting for the objection, taken as the fourteenth ground of appeal. He dealt with that ground of appeal as follows:

The fourteenth ground of appeal:

"14. The jury did not properly understand the basis upon which the amount of damages, if any, ought to be determined between the parties."

With respect to the damages suffered by Laura Littley, I think the learned trial judge erred in requiring the jury to find one amount instead of separate amounts in respect of the respective deaths of her husband and her three children, and therefore the finding as to the amount of damages must be set aside and a new assessment had.

The learned trial judge had said to the jury about the beginning of his charge,—after referring to the two claims—made, the one on behalf of Laura Littley, the widow and mother, and the other on behalf of her son Stanley, who was a minor, these two being the only survivors of the family,—

The widow of the late Walter Littley comes to Court representing herself and her son Stanley who was a boy of sixteen at the time of the accident. She claims damages for the loss of her husband and her children on her own account. The basis of her claim is the reasonable expectancy of pecuniary benefits which she had a right to anticipate if her

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husband and children had survived,—the reasonable expectation of pecuniary benefit. It is on a cash basis. She also comes and asks as representative of her son Stanley, who cannot sue in his own name, because he is in law an infant, she represents him, and she asks for damages on his behalf, which, if they are recovered will be paid into Court and will not be paid to her, subject to the Court's Order, and her claim on his behalf is based on his reasonable expectation of pecuniary benefits on the survival of his father; if his father had survived, he would have had benefits which it is suggested he has not got now. He and the mother are the sole survivors of the family.

In my opinion, this sufficed to put before the jury the essential fact that, in assessing damages, they must take into account all the claims as preferred by Laura Littley, i.e., her claim for the loss of her boy Leslie, then aged 19, and of her other two infant children, and also her claim for the loss of her husband. The order for a new trial against Laura Littley cannot, in my opinion, be supported on the sole ground for it assigned by the learned Chief Justice, viz., that the learned trial judge erred in requiring the jury to find one amount instead of separate amounts for damages in respect of the respective deaths of the husband and the three infant children. With the utmost respect for the Chief Justice, I find no difficulty in the case on this point. Its only possible materiality would arise from the fact that contributory negligence of the driver of the motor car found by the jury, and evidently, in their opinion, imputable to the mother, could not well be attributed to the two infant children (other than Leslie) on account of whose deaths, as well as that of her husband, she brought action.

In ordering a new trial as against Laura Littley on this ground even, as the learned Chief Justice appears to put it, limited to a new assessment of damages, the Appellate Division seems to me to have been clearly wrong, as it must be quite immaterial how much of the $20,000 pecuniary loss, found to have been occasioned to the widow by the accident, was attributable to the loss of her husband and how much of it to the loss of each of her three children.

There is more to be said in favour of the order for a new trial as against Stanley Littley, if likewise limited, since, in my opinion, the learned Chief Justice is quite right when he says:

> Having regard to all the circumstances, I think it highly improper (improbable?) that Stanley sustained a pecuniary loss of $2,000 by his father's death.

Considering the walk of life of the parties, Stanley had about reached the age when he would have been required by his father, to earn his own living. I therefore think that the amount awarded to him is excessive, and that that finding should be set aside.

Here, the amount of damages alone is affected, and the new trial should, with respect, have been limited to that point.

I agree that the assessment of damages at $20,000 in favour of the widow is considerably larger than I would have allowed and it is quite possible that the jury made some mistake in that respect, or took into account something which they should not have considered. With regard to contributory negligence, what the jury evidently meant was this: Taking the case in the by and large, they said to themselves: "We will allow $22,000 (apportioned, $20,000 to Laura Littley and $2,000 to Stanley Littley) as total damages, of which 75 per cent. should be borne by the plaintiffs and 25 per cent. by the company." While the sums allowed as total damages may seem unreasonable, bearing in mind that the question of the amount of damages is usually exclusively for the jury, and having regard to their treatment of the case as a whole, I would, personally, be satisfied to allow the award to stand. I defer, however, to the views of my learned brothers who think it so grossly excessive that they cannot but assume that there was some error in the minds of the jury as to the proper basis of assessment.

On this ground alone, therefore, I would agree to a new trial—not at large, however, since the Appellate Division has expressly approved of the findings of the jury, excepting those as to the amount of damages,—and that is the only matter which my colleagues find unsatisfactory in the verdict already given.

As indicated above, one reason why I am not entirely satisfied with its findings was the failure on the part of the jury to determine how and to whom the contributory negligence of the driver of the Littley car was to be imputed. I would, therefore, since there must be a partial new trial, agree to the submission to the new jury of a question to cover this point.

For these reasons, I agree in the result of the judgment which I understand is to be delivered by my brother Rinfret.

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The judgment of Rinfret and Smith JJ. was delivered by

RINFRET, J.—This action was brought under the provisions of the *Fatal Accidents Act* (c. 183 of R.S.O., 1927). The plaintiffs (appellants) are Laura Littley, widow of Walter Littley, and Stanley Littley, son of the said Walter Littley, an infant suing by his next friend, Laura Littley. They seek damages for the death of Walter Littley, their respective husband and father. Laura Littley personally also claims damages for the death of her two sons, Leslie and Edward, and her daughter, Ivy.

The present appeal brings this case before this court for the second time. In a former appeal, wherein the parties were identical, this court ordered a new trial and, in doing so, took occasion to state the facts (1).

The second trial came on before Raney J., with a jury, and the following were the questions submitted to the jury, with their answers:

1. Was there negligence on the part of the defendants causing or contributing to the collision?

A. Yes.

2. If so, in what respect did such negligence consist? Answer fully.

A. Speed of train was in excess of 10 miles per hour.

3. Was there negligence on the part of the driver of the Littley car contributing to the collision?

A. Yes.

4. If so, in what did such negligence consist? Answer fully.

A. Excessive speed and lack of caution.

5. At what amount do you assess the damages suffered by the plaintiff, Laura Littley, arising from the death of her husband and three children?

A. $20,000.

6. At what amount do you assess the damages of the plaintiff, Stanley Littley, arising from the death of his father?

A. $2,000.

7. How do you apportion the fault as between the defendants on the one hand and the driver of the Littley car on the other?

A. Defendants, 25%. Driver of car, 75%.

On these findings, counsel for the appellants moved for judgment for the full amount of the damages found to have been suffered by them; but the learned trial judge gave judgment to the appellant Laura Littley for $5,000, and to Stanley Littley for $500, these amounts being, in each case, 25 per cent. of the amounts at which the jury assessed the full damages of the appellants.

(1) [1930] Can. S.C.R. 416.

From this judgment, both parties appealed to the Appellate Division of the Supreme Court of Ontario; and, on the 15th day of June, 1931, a new trial was again directed (1). The appellants, thereupon, appealed to the Supreme Court of Canada, praying that the order for a new trial be set aside, and again asking for the full amount of damages found by the jury. The respondents cross-appealed and gave notice of their intention to contend, on the hearing of the appeal, that the judgment of the Appellate Division ought to be varied and that the action ought to be dismissed with costs.

The judgment appealed from was unanimous. It was delivered by the Right Honourable the Chief Justice of Ontario, who went into a discussion of all the grounds of appeal and considered each of them very carefully. He held that " there was ample evidence to support the findings of the jury," and expressed the " opinion that the charge of the learned (trial) judge was fair and sufficient." The new trial was ordered for the reason that the jury was required " to find one amount instead of separate amounts in respect of the respective deaths of (the) husband and (the) three children, and therefore the finding as to the amount of damages must be set aside and a new assessment had."

As regards the award made to the appellant Stanley Littley, he thought " the amount awarded to him is excessive, and that that finding should be set aside."

The learned Chief Justice, on behalf of the Appellate Division, further expressed the view that, at the new trial, " the jury should be directed to find who was actually driving the car or in control of it at the time of the accident."

We now have before us the appeal and the cross-appeal from that judgment.

On the cross-appeal, subject to discussing the measure of damages, we have only to say that the questions raised were properly dealt with by the Appellate Division, and we do not think it should be entertained by this court.

On the main appeal, there are two questions to be considered: Whether the new trial was properly ordered for the

(1) 40 Ont. W.N. 364.

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reasons given by the Appellate Division; and, if not, whether judgment should be entered in favour of the appellants for the full amount of the damages assessed by the jury.

Walter Littley, the husband and father of the respective appellants, was forty-two years old, and apparently in excellent health. He was operator of an electric shovel in a gravel pit. He was being paid sixty cents an hour for a ten-hour day and would average 5 days' work, or $30 a week throughout the year. The wife's evidence is that he gave her his wages.

Leslie Littley was nineteen years of age. He was a teamster, receiving $85 every two weeks for himself and his team. He was just commencing in business and was paying for his team; but, up to that time, he had been a market gardener and had given his money to his mother.

Edward was a boy of thirteen, still going to school, and Ivy was a girl of ten.

The appellant Laura Littley was thirty-eight in November, 1928, five months after the accident, and the appellant Stanley Littley was sixteen the following December. The evidence was that Laura Littley was in good health, but that Stanley had a more delicate health than the other children and had been kept away from school for some time before his father's death. They were left without resources and the mother has been going out to work by the day for a living.

In assessing damages under the *Fatal Accidents Act,* it is well settled law that the jury are confined to the pecuniary loss sustained by the family and cannot take into consideration the mental suffering of the survivors (*Blake* v. *Midland Ry. Co.* (1)). It is the reasonable expectation of pecuniary advantage by the relatives remaining alive that may be taken into consideration (Mayne, On Damages, 10th ed., page 516). The action exists solely "for the benefit of the wife, husband, parent and child of the person whose death was caused" (*Fatal Accidents Act,* section 3). Under the Act, there is no right of action for the benefit of the brother of the victim of the accident. It follows that the appellant Stanley Littley was entitled to damages only

(1) (1852) 18 Q.B. 93.

in respect of the death of his father. As for Laura Littley, the pecuniary benefit which she might expect from the continuation of the lives of Edward, aged thirteen, and Ivy, aged ten, are almost negligible, particularly in view of the fact that until they reached the age when they would be earning their own living, they would have to be supported by their father and mother. Any pecuniary advantage which Laura Littley might expect must come substantially from her husband, and to a limited extent, from her son, Leslie. At the time of the accident, Leslie was using his money " to pay for his team." If we admit that he would later be able to look after himself, it would mean that the earnings of the father would go to maintain himself, his wife and the remaining three children. Assuming no contingencies whatever, such as interruption in work, illness, etc., these earnings would represent about $120 per month wherewith to provide for the whole family. It will be seen at once that the share of that sum available each month for both the mother and Stanley would fall far below $100.

Notwithstanding these facts, the jury assessed the damages at an amount the interest of which would be sufficient to provide an income of $100 a month for the mother alone. In addition to that, on the assumption that the *Contributory Negligence Act* does not apply in mitigation of the damages, she would become the owner of the capital sum necessary to produce that income, and a further sum of $2,000 was assessed in favour of the son, Stanley. For, let it be observed that this is not a verdict for $20,000 only. The $2,000 going to Stanley must, of course, be taken into account. Although the possible loss, remote as it is from the monetary standpoint, arising out of the deaths of the three children, may not be disregarded, the fact remains that, in this case, the damages which stand to be assessed are, almost entirely in the case of the wife, and exclusively in the case of Stanley Littley, damages resulting from the death of their respective husband and father. So that the verdict of $22,000 must be held to represent practically the pecuniary benefits which both appellants might have reasonably expected from the continuation of the life of Walter Littley. The jury, as was explained by the foreman at the trial, " based that amount on what (they) felt the widow should get a month on the basis of six per cent.,

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which would give her one hundred dollars a month, which would be approximately $20,000." The explanation throws light on what was in the minds of the jury. Having regard to the material circumstances of all concerned, $100 a month to the widow alone would not, in any event, be warranted by the evidence; but the jury disregarded altogether the fact that, in addition to the income, they were giving the capital as well; and, besides that, they were awarding $2,000 to Stanley Littley.

We cannot escape the conclusion that the assessment of damages, both in favour of the wife and of the surviving child, was excessive and out of proportion to the total pecuniary loss occasioned by the deaths of the persons in respect of whom the damages were awarded.

Having regard to the evidence, we are clearly of the opinion that the assessment was unreasonably large and such as must have been occasioned by a misunderstanding of the basis upon which the amount ought to be determined. On that ground alone, therefore, there would have to be a new trial.

We may now deal with the question whether, in view of the finding that there was "negligence on the part of the driver of the Littley car contributing to the collision", judgment should nevertheless, as the appellants contend, be entered in their favour for the full amount of the damages assessed by the jury.

By the *Fatal Accidents Act* of Ontario, it is provided that:

2. Where the death of a person has been caused by such wrongful act, neglect or default, as, if death had not ensued, would have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances amounting in law to culpable homicide.

3. (1) Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and except as hereinafter provided shall be brought by and in the name of the executor or administrator of the deceased, and in every such action such damages may be awarded as are proportioned to the injury resulting from such death to the persons respectively for whom and for whose benefit such action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the beforementioned persons in such shares as may be determined at the trial.

The *Contributory Negligence Act* (c. 103 of R.S.O., 1927) provides as follows:

2. In any action or counterclaim for damages, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury, or the judge in an action tried without a jury, shall find:—

First: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

Secondly: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.

3. Where the judge or jury finds that it is not, upon the evidence, practicable to determine the respective degrees of fault the defendant shall be liable for one-half the damages sustained.

The appellants submit that by section 2 of the *Fatal Accidents Act* a right of action in the deceased, had he survived, is made a condition precedent to a right of action accruing to certain of his dependents under the provisions of the Act. They further submit that, if such condition precedent be fulfilled, the survivors of the class named in section 3 of the same Act have a statutory right of action untainted and unaffected by anything which the deceased may have done or agreed to, so long as he, by such conduct or agreement, had not completely barred his own right of action, had he survived. Therefore, while, before the *Contributory Negligence Act,* contributory negligence was a good defence to an action under the *Fatal Accidents Act,* this was the case because contributory negligence would have deprived the deceased of his right of action had he survived. By the *Contributory Negligence Act,* his right of action is no longer barred, but his right to recover is limited proportionately to the percentage of negligence attributed to the defendant. It is therefore submitted that the condition precedent to a successful action under the *Fatal Accidents Act* is satisfied and the persons entitled to sue under that Act are given a new statutory right of action, which is unaffected by the conduct of the deceased.

In a recent case, *Price* v. *B.C. Motor Transportation Ltd.* (1), the Chief Justice of this Court had occasion to examine a similar question under the British Columbia statutes. Those statutes, although not identical in terms, are substantially the same as the Ontario Acts. The Chief Justice said (2):

(1) *Ante,* p. 310. (2) *Ante,* at p. 338.

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The presence of the condition of the right of action, i.e., that it must be "such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof," has been held to require that the deceased would have had an enforceable cause or right of action for the injury had he survived. To this cause of action, contributory negligence on his part would, of course, have been a defence. That being so, he could not have successfully maintained an action where contributory negligence was established, had he survived, and his personal representative or widow, etc., could, accordingly, maintain no action for damages caused by his death.

The ground now taken by the plaintiff is that the defence of contributory negligence being done away with by the statute of 1925 leaves the right of action under *Lord Campbell's Act* absolute and unqualified. In other words, the other provisions of the *Contributory Negligence Act* would have no application to a case under *Lord Campbell's Act*.

I find nothing in the *Contributory Negligence Act* to exclude its application as a whole to cases under *Lord Campbell's Act*, which are so common. On the contrary, everything in the former statute indicates that such cases must have been present to the mind of the Legislature which enacted it.

Contributory negligence is a defence which the statute does away with, but only conditionally, the condition being 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." I cannot conceive that the Legislature intended that this Act should apply for the purpose of enabling the plaintiff to maintain an action under *Lord Campbell's Act*, notwithstanding the establishment of contributory negligence imputable to her, and yet should not also apply for the purpose of providing for the apportionment of her damages under section 2.

That this case comes within section 2 is perfectly clear, the term or condition of its application thereby provided being that, where contributory negligence is shown, there shall be an apportionment of damages in proportion to the degree in which each person was at fault. Any person taking advantage of the *Contributory Negligence Act* must do so on the terms and conditions laid down by the Legislature."

In the British Columbia case (1), the view taken by the other members of the court made it unnecessary for them to pass upon that point. In the present case, the point has to be decided and the opinion thus enunciated by the Chief Justice may now be stated as being the opinion of the court on the question raised by the appellants.

At the outset, it should be said that the whole case proceeded on the basis that the *Contributory Negligence Act* applied. Should we now come to the conclusion that it does not, the consequence would be that the verdict is the result of misdirection throughout and a new trial is inevitable, in any event. But, as there is to be a new trial any-

(1) *Ante*, p. 310.

how, we think we should, under the circumstances, give a direction to the judge who shall preside at the trial.

At common law, contributory negligence of the plaintiff is a complete defence to an action "founded upon fault or negligence". The result was that in any such case, "if a plea of contributory fault or negligence (was) found to have been established", the victim of the accident could not successfully maintain an action and recover damages in respect thereof. As a consequence, under the *Fatal Accidents Act,* and under similar circumstances, if the death of the victim ensued, neither could an action be successfully maintained "for the benefit of the wife, husband, parent and child of the person whose death was so caused". Contributory negligence of the deceased or imputable to him continued under the Act to be a complete defence against the action of the named relatives. The action could not be maintained, not on account of the contributory fault or negligence of the relatives who brought it, but on account of the contributory fault or negligence of the victim of the accident.

The *Contributory Negligence Act,* of Ontario, has not created a new right of action and it has not taken away the defence of contributory negligence. It has only modified the effect of that defence. Where contributory negligence used to be an absolute answer to the action, the Act says that henceforth it shall not be so and it shall only mitigate the liability of the negligent party owing to the contributory fault of the victim. (Compare *The Napierville Junction Railway Company* v. *Dubois* (1)). What the jury is to find is "the degree in which each party was in fault". "Party" here means "party to the accident". Under the Act, the primary concern is to establish the degree of liability of each party to the accident. The apportionment of the amount of damages follows only as a matter of consequence. When, therefore, we have a verdict such as we have here, and the jury finds that the fault of each party contributing to the accident should be apportioned in the ratio of twenty-five per cent. for the defendants and seventy-five per cent. for the other party, the meaning of the Act and the intention of the legislature is

(1) [1924] Can. S.C.R. 375.

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that, the defendants having been found guilty of fault or negligence contributing to the accident only in the proportion of twenty-five per cent., their liability for the consequences of that accident is limited to twenty-five per cent., and they are answerable only to that extent towards the person claiming damages resulting from the accident. In such a case, says the Act, " the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant ". The injurious participation by the defendants in the wrongful acts which caused the accident having been in the proportion found by the jury, they are to contribute towards the compensation for the damages in that proportion. They are to pay only that proportion of the damages which they have caused,—and they are not responsible for more. The Act applies to " any action or counterclaim " (section 2) and, by definition (section 1), the plaintiff in any such action or the defendant in any counter-claim " *shall have judgment* only for so much (of the entire amount of damages) as is proportionate to the degree of fault imputable to the defendant ".

The cases cited by the appellants are not in point. In *Mills* v. *Armstrong,* commonly known as the *Bernina* case (1), three claims were made by the representatives of three of the victims for whose death action was brought. The accident consisted in a collision between two ships. Two of the victims were held to have had nothing to do with the negligent navigation, while the other (Owen) was found to have been connected with the wrongful acts contributing to the collision. Before the Court of Appeal, the claim on behalf of the latter's representative was given up. The two other claims were maintained in full, on the ground that, in each case, the victims for whose deaths the actions were brought were not parties to the negligence and could in no way be connected therewith, and therefore the Admiralty rule as to half damages did not apply. In the House of Lords, the question upon that rule was mentioned, but not argued. Lord Herschell expressed thus the ground of the decision:

They (the defendants) do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the

(1) (1888) 13 App. Cas. 1.

accident; nor * * * that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts.

In the case of *British Electric Railway Company* v. *Gentile* (1), the question was one of prescription and turned upon the construction of the Special Act of the electric railway company. It was decided that the particular enactment (whereby certain actions against the company had to be brought within six months of the event giving rise thereto) did not cover an action under the *Families Compensation Act* in British Columbia.

In *Union Steamship Company of New Zealand* v. *Robin* (2), the particular statutes therein involved and which had to be construed were quite different. The *Workers' Compensation Act* (1908) of New Zealand, sec. 62, gave to a servant who was injured by the negligence of a fellow-servant a right of action against his employer, it being provided by subs. 3 that

no servant shall be entitled to recover from his employer *in an action brought under this Act* in respect of the negligence of a fellow-servant a larger sum by way of damages for any one cause of action than five hundred pounds.

As will have been noticed, the limitation as to damages expressly applied to "an action brought under this Act" by the servant himself and there was "nothing to restrict the right" (covered by sec. 5 of the *Deaths by Accident Compensation Act* (1908) of New Zealand) "enabling the jury to give damages as they think proportioned to the injury resulting from the death."

Under the Ontario *Contributory Negligence Act*, the limitation as to damages is only consequential. The true purport of the Act is a limitation as to responsibility. The limitation applies "in any action or counterclaim for damages which is founded upon fault or negligence" and not, as in the New Zealand case, to "an action brought under this Act."

Moreover, the right of the jury to award damages is expressly limited to an amount "proportionate to the degree of fault imputable to the defendant."

In fact, the New Zealand statute appeared to be clear enough, and the discussion in the case centred not on the

(1) [1914] A.C. 1034. (2) [1920] A.C. 654.

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construction to be put upon the statute, but upon the effect of an amendment made in 1911. The Act of 1908 contained the following provision:

> Nothing in this subsection shall affect the measure of damages in an action brought against an employer in respect of the death of a servant.

In the amending statute, that provision was not repeated. The argument was that the removal of the provision must be assumed to have had some definite purpose; and it must follow that the limitation it was designed to avoid no longer applied (1). The decision was that

> The mere omission in a later statute of a negative provision contained in an earlier one cannot by itself have the result of effecting a substantive affirmation. It is necessary to see how the law would have stood without the original proviso, and the terms in which the repealed sections are subsequently re-enacted.

The decision in that case cannot affect the present case.

We hold, therefore, that the provisions of the *Contributory Negligence Act* (c. 103 of R.S.O., 1927) are applicable to an action brought under the *Fatal Accidents Act* (c. 183 of R.S.O., 1927).

It may not be without interest to point out that such is also the solution invariably given to similar cases in the province of Quebec, where the rule has always formed part of the law of the province.

This, however, does not end the matter. In order to affect the amount of damages recoverable by the appellants, it must be shown, in the words of Lord Herschell,

> that those whom (they) represent were personally guilty of negligence which contributed to the accident, (or) that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased * * * as to cause the acts of that third person * * * to be regarded as their acts.

It follows that, in this case, the jury ought to have been asked who was actually driving the car and, further, whether any of the other occupants of the car stood in such a relation to the driver (the actual wrongdoer) as to imply his responsibility for the contributory fault or neglect of the driver. The appellants urge that the onus was upon the respondents, in order to establish their plea of contributory negligence. But there was evidence from which the facts might at least be inferred and the point is that the jury made no finding upon those facts. We know that the car belonged to the son, Leslie Littley. If he was not the

(1) [1920] A.C., at 659.

actual driver, he may be responsible as owner. We know that the trip was on the father's mission. We know also that the owner of the car, Leslie, was not of age, and even if the father was not driving, he might yet be found to have been in control or to have been in a position to give orders or to interfere with the conduct of the driver. At the new trial, further evidence may be called. Mrs. Littley saw the car start and presumably could say who was driving it at that time. Other evidence may be adduced of a similar character.

Another consequence of the application of the *Contributory Negligence Act* is that it is necessary to have a separate finding of the damages suffered through the death of each of the four victims of the accident, for it might well be that all may not be held responsible for the driver's contributory negligence.

For all these reasons, we agree with the Appellate Division that there must be a new trial, but we think the order ought to be varied so as to limit it to the issues wherein the present trial is found to have been defective. The case having already been tried twice, the issue of negligence on both sides and the degree of fault imputable to the defendant respondents ought now to be taken as concluded.

Leaving those findings to stand, the new trial should be ordered only as to the following questions and matters:

1. The entire amount of damages suffered by each plaintiff.

2. To whom and how should responsibility for the contributory negligence found by the jury be imputed?

The order as to costs in the Appellate Division should not be disturbed. In this Court, in view of the divided success, there should be no costs.

LAMONT J. (dissenting).—The first question we have to determine in this appeal is: Can the plaintiff, who is the widow of the deceased, maintain an action under the *Fatal Accidents Act* where the deceased has been found guilty of negligence contributing to his death? For the plaintiff it is contended that she can by reason of the provisions of the *Contributory Negligence Act,* R.S.O., 1927, ch. 103. That Act is as follows:—

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1. In this Act "plaintiff" shall include a defendant counter-claiming, and "defendant" shall include a plaintiff against whom a counter-claim is brought.

2. In any action or counterclaim for damages, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury, or the judge in an action tried without a jury, shall find:—

First: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

Secondly: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.

3. Where the judge or jury finds that it is not, upon the evidence, practicable to determine the respective degrees of fault the defendant shall be liable for one-half the damages sustained.

Section 2 shews that the application of this Act is limited to an action or counter-claim for damages which is founded upon fault or negligence. By that language, the Legislature, in my opinion, meant that the Act applies only where the claim is for damages for loss or injury occasioned by the fault or negligence of the other party to the action or counter-claim. It applies where the purpose of the action is to determine as between the parties thereto the amount of damage which should be attributed to their respective faults. The section directs the judge or jury to find the degree in which "each party was in fault". "Each party" here must mean each party to the action, for they are the only persons who could be before the court. The total damage suffered by the plaintiff is to be so apportioned that he will receive from the defendant only that portion of his loss which is proportionate to the degree of fault imputable to the defendant. If the defendant has also suffered loss and counter-claims for damages for the loss he has suffered, his claim is dealt with in exactly the same way and he is entitled to damage against the plaintiff in proportion to the degree of fault imputable to the plaintiff. The Act, therefore, applies only to cases where the damages sought to be recovered in the action resulted partly from the fault of the defendant and partly from the plaintiff's own fault.

Turning now to the *Fatal Accidents Act*, R.S.O., 1927, ch. 183, we find that sections 2 and 3 (1) thereof read as follows:

2. Where the death of a person has been caused by such wrongful act, neglect or default, as, if death had not ensued, would have entitled

the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances amounting in law to culpable homicide.

3. (1) Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and except as hereinafter provided shall be brought by and in the name of the executor or administrator of the deceased, and in every such action such damages may be awarded as are proportioned to the injury resulting from such death to the persons respectively for whom and for whose benefit such action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the beforementioned persons in such shares as may be determined at the trial.

This Act, with certain immaterial exceptions, is identical with the English Act, known as *Lord Campbell's Act.* Apart, therefore, from the *Contributory Negligence Act,* which does not exist in England, the English decisions as to the meaning and effect of *Lord Campbell's Act* are applicable to the case before us.

At common law no civil action could be maintained for an injury to a human being which resulted in death. It was not until a right of action was given by statute that a wrongful act causing death subjected the wrongdoer to liability for loss occasioned by the death, and then only to such persons and on such conditions as the statute prescribed. Section 2, above quoted, prescribes two conditions precedent which must be fulfilled before an action can be maintained:

(1) The death must be *caused* by a wrongful act, negligence or default, of the defendant, and

(2) The act, negligence or default must be of such a kind that if death had not ensued the person injured would have been entitled to maintain an action and recover damages in respect thereof. That both these conditions must be fulfilled before the right of action exists is established by the judgment of the Privy Council in *British Electric Ry. Co.* v. *Gentile* (1), where, at page 1041, their Lordships say:—

Although the action under Lord Campbell's Act or the Families Compensation Act (British Columbia) is not an action of indemnity for negligence, yet nevertheless it is an action which can only exist if certain conditions precedent are fulfilled. The first is that the death shall have been caused by wrongful act, neglect, or default of the defendants. That has in this case been affirmed by the verdict of the jury. The second is that the default is such "as would if death had not ensued have entitled the

(1) [1914] A.C. 1034.

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party injured to maintain an action and recover damages in respect thereof."

Unless, therefore, these two conditions precedent were found to exist in the present case, or their requirement annulled, the plaintiff has no right of action.

Was the death of the deceased occasioned by the wrongful act, negligence or default of the defendants? The jury have found that it was not. They have found that the death was occasioned by the joint negligence of the defendants and the deceased, of which only 25 per cent. could be imputed to the defendants. The first condition precedent, therefore, is not fulfilled.

It is, however, argued that the fulfilment of this condition is rendered unnecessary by the *Contributory Negligence Act,* and that, since the passing of that Act, it is no longer necessary to prove that the death of the deceased was occasioned by the wrongful act or negligence of the defendant, but that a cause of action is established if it is shewn that the wrongful act contributed, whether much or little, to the death of the deceased.

Let us consider this contention: Prior to the passing of the *Contributory Negligence Act,* contributory negligence on the part of a deceased person was a complete defence to an action under the *Fatal Accidents Act.* It was an answer to the first condition because, where the death was due to the fault of the deceased and the defendant jointly, it could not be said to have been caused by the defendant. It was also an answer to the second condition because, being guilty of negligence himself, the deceased, if he had remained alive, could not, at law, have maintained an action for damages against the defendant. Since the passing of the Act the person killed, had he survived, could have maintained an action against the defendant for injuries caused by the defendant's fault even although himself guilty of contributory negligence. The Act does give the right of action required by the second condition precedent of the *Fatal Accidents Act,* but I fail to see that it in any way affects the first. The language setting forth the first requirement of section 2 is clear and explicit, and I can find nothing in the *Contributory Negligence Act* which, by express language or necessary implication, indicates in any way an intention on the part of the Legislature to modify or alter the first condition required by the section.

Let us test the application of the Act in another way: Let us assume that the above conclusion is wrong and that the *Contributory Negligence Act* is an answer to both conditions required by section 2. What is the result? The right of action given to the statutory beneficiaries by the *Fatal Accidents Act* is an entirely different right from that which the deceased, if living, would have had. As early as 1852, Coleridge J., in giving the judgment of the court in *Blake* v. *Midland Ry. Co.* (1), said:—

> But it will be evident that this Act does not transfer this right of action (of the deceased) to his representative, but gives to the representative a totally new right of action, on different principles.

And in *Seward* v. *"Vera Cruz" (Owners of)* (2), Lord Blackburn said:—

> I think that when that Act (*Lord Campbell's Act*) is looked at it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym* v. *Great Northern Ry. Co.* (3), is new in its species, new in its quality, new in its principle, in every way new.

Not only does the Act give the deceased's dependants a new cause of action but the measure of their damages is based on a principle entirely different from that which would apply if the deceased were living and suing. The damages which may be recovered under the Act are such "as are proportioned to the injury resulting from such death to the persons respectively for whom and for whose benefit such action is brought". The basis of the claim is compensation for the loss of the actual pecuniary benefit which the beneficiaries might reasonably have expected to enjoy had the deceased not been killed. This loss would be exactly the same whether the defendants' wrongful act or negligence was the sole cause of the death or whether it contributed thereto only to a very small extent. It was, however, argued that the contributory negligence of the deceased must be imputed to the plaintiff and the measure of her damages determined by the degree of fault imputable to the defendants. In my opinion, it is impossible to give effect to this argument in view of the express provision of

(1) 18 Q.B. 93, at 110.

(2) (1884) 10 App. Cas. 59, at 70-71.

(3) (1862) 2 B. & S. 759; (1863) 4 B. & S. 396.

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the statute that the damages are to be such as are proportioned to the injury resulting to each dependant from such death. To do so would be to amend the statute, which is the function of the legislature and not of the court. That any limitation affecting the measure of damages which the deceased, if living, could recover does not apply to the plaintiff is, I think, established by the authorities.

In *Union Steamship Company of New Zealand* v. *Robin* (1), the death of the deceased was caused by the negligent act of a fellow servant and an action for damages was brought against the employer, the steamship company, under the *Deaths by Accident Compensation Act,* 1908, of New Zealand, which was, in all material particulars, identical with *Lord Campbell's Act.* The contention of the company was that prior to the enactment of the *Workers' Compensation Act,* 1908, a servant had no right of action for damages against his employer where his injuries were caused by the negligence of a fellow servant, as the doctrine of common employment was an absolute defence; that the *Workers' Compensation Act* took away from an employer this defence and gave a right of action to a servant injured by the negligence of a fellow servant, but it provided that the damages recoverable, in an action under the Act, should not exceed 500 pounds, and that, as the plaintiff must depend on the *Workers 'Compensation Act* for her right of action, the limitation imposed by that Act was binding on her. The Privy Council, however, held that the measure of damages was not limited to 500 pounds, as the cause of action and the measure of damages were different from those which the deceased person would have had if he had survived. In his judgment Lord Buckmaster, at page 660, said:

> The argument in support of the appellants' case is best put in the assertion that as, without an express statutory relief from the doctrine of common employment, no suit could be maintained, and such relief being conferred by a section which limits the remedy, the whole of these conditions must be imported into every action to which the doctrine of common employment would have afforded a defence. Their Lordships cannot accept this view. The only operation of the doctrine of common employment in a suit by the dependants of a dead man would be that the conditions precedent were not satisfied. The dead man could not have brought an action in respect of damage or injury. This he can now do. But although in the action that he might have brought there would

(1) [1920] A.C. 654.

have been a limitation as to damage, there is nothing to restrict the right expressly conferred by s. 5 of the Deaths by Accident Compensation Act enabling the jury to give damages as they think proportioned to the injury resulting from the death.

and at page 661, he said:

The damages which the dependants are entitled to recover are such damages as the jury think proportional to the injury, and on this right no statutory limitations have been imposed.

The same principle is enunciated in the later case of *Nunan* v. *Southern Ry. Co.* (1). There the deceased, a passenger by railway, had agreed with the railway company that its liability for personal injuries should not exceed 100 pounds. He was killed by the negligence of the company's servants. In an action under *Lord Campbell's Act*, by his dependants, it was held that the damages recoverable were not limited to such sum. In his judgment Scrutten L.J., at page 228, said:

Then it is argued that if that is so his dependants must equally be bound if he has made an agreement which, while leaving him a cause of action, limits the amount which he can recover. I agree that it looks odd that he should be able to bar his dependants entirely, and yet should not be able to bar them in part, but one must be guided by the words of the statute.

and further on he says:

Under these circumstances we must follow the language of the statute, and that language compels us to say that as the dead man could at the time of his death have brought an action for some damages his dependants can bring an action for their own and quite different damages.

and Atkin, L.J., at page 230, said:

The deceased person could, if he were alive, only bring an action to recover compensation for his personal injuries, which ex hypothesi fall short of the consequences of his death; and it may well be that the sum of 100 pounds might more than cover the damages to which he would be entitled. On the other hand, the dependants bring their action substantially for the loss of the breadwinner of the family; and that is a very different matter.

Another illuminative case is that of *McColl* v. *Canadian Pacific Ry. Co.* (2), where, at page 133, my brother Duff, in giving the judgment of the Privy Council, summed up what Lord Dunedin had said in the *Gentile* case (3), as follows:

In other words, an action under Lord Campbell's Act is not an action for "damage sustained by the plaintiff by reason of the wrongful act which caused the death in respect of which the claim is made."

If the plaintiff's claim is not for damages for loss sustained by the defendant's wrongful act, I fail to see how

(1) [1924] 1 K.B. 223. (2) [1923] A.C. 126.
(3) [1914] A.C. 1034.

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the degree of fault attributable to the defendant can be made the yardstick by which to measure her damages.

In view of the above authorities the result, in my opinion, is that, on the assumption that the *Contributory Negligence Act* enables the plaintiff to maintain the action, the measure of damages which she is entitled to recover for herself and her infant son is not in any way limited by the fact that the damages which her deceased husband if living could have recovered would be only such as were proportioned to the degree of negligence imputable to the defendants. The measure of her damage is that fixed by the statute and, in my opinion, that measure has not been in any way limited or altered by the *Contributory Negligence Act*. If the damages recoverable by the beneficiaries under the statute are the same both when the fault of the defendant is the sole cause of the death and when it merely contributes thereto in a small degree, we have to ask ourselves this question: Can the Legislature have intended to impose upon the defendant liability for the whole loss occasioned by the death, irrespective of the degree of fault imputable to him? I cannot conceive of the Legislature doing so, as the imposition of such a liability would be unfair and unjust. The fact, however, that the imposition would be unfair does not, in my opinion, justify the inference of a legislative intention to alter the measure of damages awarded to the dependants by the statute, but rather that the Legislature had no intention of making the provisions of the *Contributory Negligence Act* apply to the *Fatal Accidents Act,* beyond this, that the right of action given by the former Act to a plaintiff guilty of contributory negligence was sufficient in an action brought by his dependants, in a case where he was killed, to satisfy the second condition precedent required by the latter Act. In order that the plaintiff should succeed in this action with only such damages as would be proportioned to the defendants' fault we must, in my opinion, hold that the *Contributory Negligence Act,* by inference, has amended the *Fatal Accidents Act* in two very important particulars, namely, (1) so as to give a right of action to the dependants where the death is caused *or contributed to* by the wrongful act, neglect or default of the defendant, and (2) so as to restrict the dependants' measure of damages to an amount proportioned to the

degree of fault attributable to the defendant. The first would give a right of action where none existed before, and the second would deprive the dependants of full compensation for the loss they had sustained by the death. But the statutory provisions which would be thus amended are of the very essence of the *Fatal Accidents Act*. The amendments would alter not only the purpose of the Act but also the extent of its application, and that without the slightest reference thereto in the *Contributory Negligence Act*. Amendments so important and far reaching in their operation, cannot, in my opinion, be implied simply from a statutory provision giving a right of action to a person injured, where he himself has been guilty of contributory negligence. In *In re Cuno; Mansfield* v. *Mansfield* (1), Bowen L.J. said:—

> In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature.

and in Craies on Statute Law (3rd ed.), the same principle is enunciated. At page 105 the author says:—

> Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes:— * * * (2) Conferring or taking away legal rights, whether public or private; * * *

and at page 109 he uses this language:—

> Therefore rights, whether public or private, are not to be taken away, or even hampered, by mere implication from the language used in a statute, unless, as Fry J., said in *Mayor, etc., of Yarmouth* v. *Simmons* (2) "the Legislature clearly and distinctly authorize the doing of something which is physically inconsistent with the continuance of an existing right.

In enacting the *Contributory Negligence Act* the Legislature gave a right of action to a plaintiff guilty of contributory negligence, but gave it in express and unambiguous language. It does not expressly give any other right; nor does it take away any right except the right of a defendant to set up the contributory negligence of the plaintiff as a defence which results from the right given. I can see nothing in the exercise of the right given which is inconsistent with the continuance of the right of the dependants of a deceased person, killed by the fault of another, to recover the damages awarded to them by the *Fatal Accidents Act*. Nor can I see how the granting of that right can, by any implication, take away the immunity from liability which the defendant theretofore enjoyed unless his wrong-

(1) (1889) 43 Ch. D. 12, at 17. (2) (1878) 10 Ch. D. 518, 527.

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ful act or negligence caused (not simply contributed to) the death of the deceased. Full effect can be given to the language of the *Contributory Negligence Act* without interfering with the rights or immunities enjoyed under the *Fatal Accidents Act* beyond what is necessary to give effect to the cause of action expressly given by the former Act. Had the Legislature intended to amend the latter Act in these respects, it would, I feel sure, have done so in express language. For this court to amend it would, in my opinion, be legislation and not interpretation.

If the Legislature thinks the cause of action given to the dependants by the *Fatal Accidents Act* should be available to them but with reduced damages where the death has been caused by the joint negligence of the defendant and the deceased, it has only to say so. It not having said so, the plaintiff in this case, in my opinion, has been unable to establish the conditions upon which her right to sue depends. Her action should, therefore, be dismissed.

Order of the Appellate Division varied, and the new trial to be limited to certain questions and matters.

Solicitors for the appellants: *Robinson & Haines.*
Solicitor for the respondents: *R. E. Laidlaw.*

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*Oct. 14, 15.

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*Mar. 1.

THE ROYAL BANK OF CANADA (DEFENDANT) ..... } APPELLANT;

AND

WILLIAM MACK (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Banks and banking—Moneys handed by bank's customer to branch bank manager for investment at latter's discretion, and used by latter for his own purposes—Liability of bank—Authority of the branch manager—Scope of his employment—Scope of business of a bank—Bank Act, R.S.C., 1927, c. 12, s. 75 (1) (c) (d).

R., a branch manager of defendant bank, suggested to plaintiff that some part of plaintiff's moneys on deposit with the bank should be invested, stating that an investment could be found which would return interest at 8%. For the purpose of such an investment, plaintiff handed to R.

*Present at hearing of the appeal: Duff, Newcombe, Rinfret, Lamont and Smith JJ. Newcombe J. took no part in the judgment, as he died before the delivery thereof.

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two cheques, one payable to cash or bearer, and the other payable to self or bearer and endorsed by plaintiff. R. used the money for his own purposes. Plaintiff sought to recover the amount from the bank. This Court found on the evidence: that plaintiff believed, and R. intended him to believe, that R., in making the proposal, was acting as agent of the bank; that plaintiff believed he was placing his money at the disposal of the bank, and R. was fully aware of this; that unrestricted discretion was committed by plaintiff to R. as to the nature of the investment.

Held: The bank was not liable. In this transaction R. was not doing something of a kind that, as agent of the bank, he was authorized to do, in the sense that such a transaction would fall within the general scope of his employment. It could not be said that an undertaking of the duty to invest a customer's money for him at the bank's discretion falls within the scope of the business of a bank, according to the intendment of the *Bank Act*. There was no evidence justifying or even pointing to the conclusion that the business of an investment agent or trustee is one which "appertains to the business of banking" (s. 75 (1) (*d*)); nor did the transaction in question fall under any class of transactions comprehended within the dealings authorized by s. 75 (1) (*c*) of the Act.

Judgment of the Court of Appeal for British Columbia, 44 B.C.R. 81, reversed.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1), dismissing (Macdonald C.J.B.C., and McPhillips J.A., dissenting) its appeal from the judgment of W. A. Macdonald J. (2), holding that the plaintiff was entitled to recover from the defendant the sum of $2,500, as claimed.

The material facts of the case (as found by this Court) are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal was allowed and the plaintiff's action dismissed, with costs throughout.

A. J. Mann K.C. for the appellant.

T. G. Norris for the respondent.

The judgment of the court was delivered by

DUFF J.—The agent of the appellant bank at Kelowna, one H. F. Rees, obtained from the respondent, who was a customer of the bank, the sum of $2,500, which he used for his own purposes; and, in the action upon which this appeal arises, the respondent seeks to recover that sum

(1) 44 B.C.R. 81; [1931] 2 W.W.R. 417; [1931] 3 D.L.R. 237.

(2) 43 B.C.R. 371; [1931] 1 W.W.R. 198; [1931] 2 D.L.R. 538.

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from the bank. There is no real controversy as to the facts. Rees suggested to the respondent that some part of a sum of $3,000, which the respondent had on deposit with the bank, should be invested. The respondent was told that an investment could be found which would return interest at eight per cent. There is no dispute that the respondent believed, nor do I in the least doubt that Rees intended him to believe, that in making this proposal, he (Rees) was acting as the agent of the bank. It is equally clear that in handing over the sum of $2,500, for which he gave two cheques (one payable to cash or bearer, and the other payable to self or bearer and endorsed by him), the respondent believed he was placing his money at the disposal of the bank, and that Rees was fully aware of this. I should have had no difficulty in holding the bank liable if there were grounds upon which it could be affirmed that, in this transaction, Rees was doing something of a kind that, as agent of the bank, he was authorized to do, in the sense that such a transaction would fall within the general scope of his employment.

I am constrained to the conclusion that the agent had no such authority, and for this reason. As I understand the evidence of the respondent, he was entrusting his money to Rees to invest it for him, at Rees' discretion, in some security of some description which would yield interest at eight per cent. It is plain, I think, that unrestricted discretion was committed to Rees as to the nature of the investment. I find myself in disagreement with the view expressed by one of the judges in the court below, that there was an implied representation by Rees that the subject matter of the undertaking was something within the bank's powers under the *Bank Act*. I have no doubt whatever that the respondent never thought of the *Bank Act* or of the powers of the bank. Fairly interpreting the language and conduct of the parties, as disclosed in the evidence, the discretion committed to Rees cannot be held to be limited in such a way as to bring the transaction within the scope of the *Bank Act*, unless an undertaking of the duty to invest for a customer, the customer's money, at the discretion of the bank, is something which falls within the scope of the business of a bank, according to the intendment of the provisions of the Act. There is no

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evidence before us justifying, or, indeed, pointing to the conclusion that the business of an investment agent or trustee is one which "appertains to the business of banking"; nor, in my opinion, does the transaction with which we are concerned fall under any class of transactions that is comprehended within the dealings authorized by sec. 75 (1) (*c*).

The appeal must, in my opinion, be allowed and the action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Walsh, Bull, Housser, Tupper & Molson.*

Solicitor for the respondent: *T. G. Norris.*

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*Feb. 25.
*Mar. 24.

THE LAURENTIAN INSURANCE COMPANY (DEFENDANT) ..... } APPELLANT;

AND

J. DONALD DAVIDSON (PLAINTIFF) ....RESPONDENT.

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

Fire insurance—Insurance Act, R.S.O., 1927, c. 222—Property becoming vacant—Destroyed by fire within 30 days from commencement of vacancy—Liability on policy—Statutory condition 5 (d)—"Change material to the risk" (statutory condition 7)—Representation as to occupancy in application for insurance.

During the term of a fire insurance policy on farm buildings, the insured, with his family, moved from the farm and took up residence in a new home, intending to reside there permanently and to rent or sell the farm, which remained vacant. He gave no notice to the insurer of the vacancy. Within 30 days from the time the insured property became vacant, it was destroyed by fire.

Held: The insurer was liable on the policy. (Judgment of the Appellate Division, Ont., [1931] 4 D.L.R. 720, affirmed.)

In view of statutory condition 5 (*d*) (Ontario *Insurance Act*, R.S.O., 1927, c. 222) in the policy, vacancy for a period of 30 days was a risk contemplated by the policy and assumed by the insurer, and it was not open to the insurer to shew that the mere fact of vacancy or non-occupancy for less than 30 days was a "change material to the risk" within statutory condition 7.

The insured's answer "yes" to the question in his application for insurance, "Is the house occupied all the year round," was not a misrep-

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

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resentation, or a representation on which the insurer could deny liability; it was a representation as to an existing fact and was then true.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, on an equally divided court, dismissed the defendant's appeal from the judgment of Wright J. (2), holding that the plaintiff was entitled to recover from the defendant the loss which he had sustained by fire on property covered by a certain fire insurance policy issued by the defendant.

The material facts of the case and the questions in issue are sufficiently stated in the judgments now reported. The appeal was dismissed with costs.

Nathan Phillips K.C. and *H. Weinfield K.C.* for the appellant.

N. L. Matthews and *J. P. Ebbs* for the respondent.

DUFF J.—I agree with my brother Cannon.

I think the construction proposed by the insurance company would, if acted upon, operate as a fraud upon the insured. The provision of Condition 5 (*d*) is a very specific one. It relates to buildings, to property contained in buildings and to manufacturing establishments, and goes into effect on vacancy or lack of occupation or discontinuance of operation for the period named in the Condition. Where a particular matter such as vacancy or lack of occupation or cessation of industrial operation is dealt with in a contract and in a specific way in a particular clause, then the parties naturally look to that clause as containing the controlling provision in relation to the subject dealt with. I think Condition 5 (*d*) is a declaration indicating that the parties contemplate vacancy and lack of operation during the periods mentioned as normal conditions of the risk insured against, and any change which consists merely in such vacancy or lack of occupation or cessation of operation is not a change material to the risk within the contemplation of the contract and is, therefore, not within Condition 7.

(1) [1931] 4 D.L.R. 720.

(2) [1931] O.R. 281; [1931] 3 D.L.R. 407.

I think that is all I have to say upon the appeal. To my mind the point is very clear and the appeal should be dismissed with costs.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

CANNON J.—This appeal is asserted from a judgment of the Second Appellate Division of the Supreme Court of Ontario (1), which, by an equal division of opinion, dismissed an appeal of the defendant and confirmed the judgment of the Supreme Court of Ontario (Wright J. (2)), rendered on the 15th April, 1931, in favour of respondent for a fire loss covered by insurance and ordering a reference to the Master to determine the amount payable.

The policy of insurance issued by the appellant to the respondent insured, to the extent of $5,000, the respondent's farm dwelling, barns and contents, for three years from the 24th August, 1928.

On the 20th February, 1930, the respondent, with his family, moved away from the farm and took up residence in a new home that he had built in Newmarket, with the intention of permanently residing there and of renting or selling the farm, which remained vacant after his departure.

The property insured was destroyed by fire on the 21st day of March, 1930, being within thirty days from the time the property became vacant. No notice was given by the respondent to the defendant company that the property had become vacant.

The appellant disclaims liability, first upon the ground that there was misrepresentation of fact in the application signed by the respondent where he answered "Yes" to the question, "Is the house occupied all the year round?"

The answer referred to in the application was a representation as to an existing fact and was then true, and therefore the first ground fails.

The second question involved in this appeal is whether, in view of statutory clause 5 (*d*) of the Ontario *Insurance Act* (R.S.O., 1927, c. 222), introduced in 1924, it was still open to the defendant to show that a vacancy or non-

(1) [1931] 4 D.L.R. 720.

(2) [1931] O.R. 281; [1931] 3 D.L.R. 407.

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occupancy for less than thirty days is a change material to the risk within the meaning of statutory condition no. 7.

There was, prior to 1924, no specific statutory condition in Ontario, in relation to the non-liability of the insurer, in the case of a vacancy or non-occupation. This was covered by the general statutory condition no. 2, which, with some unimportant changes, is now statutory condition no. 7, and which reads as follows:

> Any change material to the risk and within the control and knowledge of the insured shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent; and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the policy, or may notify the insured in writing that, if he desires the policy to continue in force, he must within fifteen days of the receipt of the notice pay to the insurer an additional premium, and in default of such payment the policy shall no longer be in force and the insurer shall return the unearned portion, if any, of the premium paid.

In 1924, the Ontario Legislature by the Act, 14 Geo. V, chap. 50, adopted statutory condition 5 (*d*), which reads as follows:

> Unless permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring:—
>
> * * * * *
>
> (*d*) When the building insured or containing the property insured is, to the knowledge of the insured, vacant or unoccupied for more than thirty consecutive days, or being a manufacturing establishment, ceases to be operated and continues out of operation for more than thirty consecutive days.

Evidence was offered at the trial to show that the vacancy of the property was a change material to the risk, but there was no evidence of any change material to the risk in addition to the bare fact of vacancy.

We are of opinion that, by virtue of clause (*d*) of condition 5 in the policy, vacancy for a period of thirty days was one of the risks contemplated by the policy, and assumed by the appellant, and that, the vacancy in question having been for less than thirty consecutive days, statutory condition no. 7 does not apply, and the appellants are liable.

The appeal is therefore to be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Nathan Phillips & Company.*

Solicitor for the respondent: *Norman L. Matthews.*

1931
*Nov. 25.
1932
*Mar. 15.

IN THE MATTER OF AN APPLICATION BY ARROW RIVER & TRIBUTARIES SLIDE & BOOM COMPANY, LIMITED, PURSUANT TO SECTION 53 OF THE LAKES AND RIVERS IMPROVEMENT ACT, CHAPTER 43 OF REVISED STATUTES OF ONTARIO, 1927, TO APPROVE OF TOLLS PROPOSED TO BE CHARGED BY SAID COMPANY UPON ALL TIMBER PASSING OVER CERTAIN IMPROVEMENTS ALLEGED TO HAVE BEEN MADE BY IT ON PIGEON RIVER, FOR THE PURPOSE OF IMPROVING THE NAVIGABILITY OF SAID RIVER FOR RIVER DRIVING PURPOSES.

ARROW RIVER & TRIBUTARIES SLIDE & BOOM COMPANY, LTD.... } APPELLANT;

AND

PIGEON TIMBER COMPANY, LIMITED ..... } RESPONDENT.

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

Waters and watercourses—Timber—Lakes and Rivers Improvement Act, R.S.O., 1927, c. 43, ss. 32, 52—Authorization for construction of works in river and charging tolls on timber passing through—Application of Act to international boundary streams—Application to Pigeon River—Validity of legislation—Construction, application and effect of provision in clause 2 of Ashburton Treaty.

Secs. 32 and 52 of the *Lakes and Rivers Improvement Act,* R.S.O., 1927, c. 43, providing for incorporation of companies for "acquiring or constructing and maintaining and operating works upon any lake or river in Ontario," and for charging tolls upon timber passing through such works, apply with respect to the Ontario side or part of boundary streams between Ontario and the United States, including the Pigeon River. Appellant company, incorporated under the *Ontario Companies Act,* R.S.O., 1914, c. 178, for the purpose (*inter alia*) of constructing works on that part of said river which is within Ontario, was held entitled to charge tolls, under the provisions of the *Lakes and Rivers Improvement Act,* upon all timber passing through such works. The Ontario legislation aforesaid, authorizing such powers, is *intra vires.*

Judgment of the Appellate Division, Ont., 66 Ont. L.R. 577, reversed.

Per Anglin C.J.C., Rinfret and Smith JJ.: The legislation, so construed as applicable to said river, is not in conflict with the provision in Article 2 of the Ashburton Treaty (between Great Britain and the United States, August 9, 1842), that "all the water-communications, and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

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to the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries."

Per Anglin C.J.C.: By that provision in the Treaty it was intended merely to ensure to the citizens of both countries equality of rights in regard to the water communications, portages, etc., and not to prevent either party from imposing tolls on its citizens for the use of improvements lawfully to be made, or from imposing like tolls (but none greater) on citizens of the other country for the use of such improvements.

Per Rinfret and Smith JJ.: That provision in the Treaty does not apply to the non-navigable part of Pigeon River in which the works in question are situated, as that part of the river was not, at the time of the Treaty, "actually used" for water communication, Grand Portage being used to carry traffic round the high falls and rapids in that part of the river. The words "as now actually used" applied, not only to Grand Portage, but also to "all the water-communications," etc.

Per Lamont and Cannon JJ.: The words "as now actually used," in the provision in the Treaty, referred only to Grand Portage and not to all water communications and usual portages. Pigeon River from its mouth along both sides of the boundary line forms part of the "water-communications" which were to be "free and open." The words "free and open" are not consistent with the imposition of tolls for the use of improvements erected in the river; they mean that the citizens of both countries are to be at liberty, as a matter of right, to travel these waters on both sides of the fixed boundary line without let or hindrance from anyone or having to pay anything for so doing. Therefore, s. 52 of the *Lakes and Rivers Improvement Act*, in so far as it authorizes the imposition of tolls for the use of improvements erected in the Pigeon River, is at variance with the provisions of the Treaty. But this does not make it invalid as a legislative enactment. The existence of the Treaty of itself does not impose a limitation upon the provincial legislative power. The provision in the Treaty, in the absence of any legislation, Imperial or Canadian, implementing or sanctioning it, has only the force of a contract between Great Britain and the United States, which is ineffectual to impose any limitation upon the legislative power exclusively bestowed by the Imperial Parliament upon the legislature of a province; and, in the absence of affirming legislation, the provision in the Treaty cannot be enforced by our courts.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) allowing the present respondent's appeal from the judgment of Wright J. (2), dismissing its application for an order prohibiting His Honour Judge McKay, Junior Judge of the District of Thunder Bay, from approving any schedule of tolls proposed to be charged by the present appellant for alleged improvements made by it on the Pigeon River, and from hearing any further evidence on the application for approval of the proposed tolls.

(1) (1931) 66 Ont. L.R. 577; [1931] 2 D.L.R. 216.

(2) (1930) 65 Ont. L.R. 575; [1931] 1 D.L.R. 260.

The said application by respondent before Wright J. was made on the following grounds:

1. That the said Judge has no jurisdiction to approve of tolls proposed to be charged by said Company for the use of alleged improvements made on said River by it for river driving purposes, such river being an international stream, and under the terms of the treaty between Great Britain and the United States, commonly known as the Ashburton Treaty, being free and open to the use of the subjects and citizens of both Canada and the United States.

2. That Part V of the Lakes and Rivers Improvement Act in so far as it purports to authorize the said Company to charge and collect tolls for the use of any improvements for river driving made or to be made in the said Pigeon River is *ultra vires* the Ontario Legislature and null and void.

3. That the said Company has no legislative authority to exact tolls or other charges for the use of any improvements for river driving made or to be made by it in said Pigeon River.

The Appellate Division (1) directed that an order go prohibiting the Junior Judge of the District of Thunder Bay from approving any schedule of tolls proposed to be charged by the present appellant for alleged improvements made by it on the Pigeon River.

The present appellant was granted, by the Appellate Division, special leave to appeal to the Supreme Court of Canada.

The material facts of the case and the questions raised are sufficiently stated in the judgments now reported. The appeal to this Court was allowed, and the order of Wright J. restored.

Sir William Hearst K.C. and *W. I. Hearst* for the appellant.

H. F. Parkinson K.C. for the respondent.

E. Bayly K.C. for the Attorney-General for Ontario.

ANGLIN C.J.C.—I agree in the allowance of this appeal largely for the reasons stated by my brothers Rinfret and Smith. I should, however, have preferred it had the majority of the court seen its way clear to base its decision upon a holding that, upon the true construction of the clause of the Ashburton Treaty—

It being understood that all the water-communications, and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries,

(1) (1931) 66 Ont. L.R. 577; [1931] 2 D.L.R. 216.

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Anglin C.J.C.

it was merely meant to ensure to the citizens of both countries equality of rights in regard to the water communications, portages, etc., and that it never was intended thereby to provide that in no event should either party to the Treaty be at liberty, as regards citizens of its own nationality, to impose tolls for the use of improvements lawfully to be made thereon. In other words, where either party to the Treaty saw fit to impose tolls upon its own citizens, in regard to such improvements, it should be at liberty to impose like tolls (but none greater) on citizens of the other country for the use of the improvements so made. Otherwise, it would follow that neither country could impose any tolls whatsoever upon its own citizens, because that would interfere with the water communications, portages, etc., being "free and open" to the use of the subjects and citizens of both countries.

The judgment of Rinfret and Smith JJ. was delivered by

SMITH J.—The appellant is a company incorporated by letters patent dated 26th September, 1922, under the *Ontario Companies Act,* chapter 178, R.S.O., 1914, now chapter 218, R.S.O., 1927, for the purposes and objects following:

> Subject to the provisions of The Timber Slide Companies Act, to acquire or construct and maintain any dam, slide, pier, boom or other work necessary to facilitate the transmission of timber down the Arrow River and its tributaries and that part of the Pigeon River which is within the Province of Ontario and to blast rocks or dredge or remove shoals or other impediments or otherwise improve the navigation of the said Arrow River and its tributaries and the said Pigeon River within the Province of Ontario.

A company with the same shareholders and directors and with similar objects had been incorporated in 1899, the existence of which was limited to 21 years, and at the expiration of this period the works constructed by it in the Arrow and Pigeon rivers became the property of His Majesty pursuant to the provisions of the *Timber Slide Companies Act,* R.S.O., 1914, ch. 181.

Upon the incorporation of the appellant company, the Crown conveyed to it for $100 all the works that had been constructed by the former company and, thereupon, the appellant company proceeded, as authorized by the letters patent, to improve and extend these works for the purpose of improving the floatability of the Arrow River and part of the Pigeon River in Ontario.

The appellant made the application in question to the District Judge for approval of tolls to be charged for the use of these works, and the respondent applied for an injunction order, restraining the District Judge from acting on appellant's application, on the ground that, the Pigeon River being an international stream, its use, under the Ashburton Treaty, is free and open to the use of the citizens of both Canada and the United States, and that Part V of the *Lakes and Rivers Improvement Act,* in so far as it purports to authorize the appellant company to charge tolls for use of improvements on that river, is *ultra vires* of the Ontario Legislature.

This injunction was refused by Wright J., on the ground that, in British countries, treaties to which Great Britain is a party are not as such binding on the individual subject in the absence of legislation.

The Appellate Division agrees with this and, apparently, would have upheld the decision of Wright J., had there been, in their Lordships' view, legislation in Ontario that authorized the construction of the works in question.

The appellant claims that these works were authorized by section 32 of the *Lakes and Rivers Improvement Act,* which reads as follows:

> A company may be incorporated under *The Companies Act* for the purpose of acquiring or constructing and maintaining and operating works upon any lake or river in Ontario, and every such company shall thereupon become subject to all the provisions of this Part.

The Appellate Division holds that this section applies only to lakes and rivers that are wholly within the province of Ontario, and the Pigeon River, being a boundary stream, is only partly in Ontario and the section, therefore, did not authorize the acquisition, construction, maintenance and operation of these works in that river.

The reason given for thus construing section 32, put shortly, is that the court ought not to impute to the legislature an intent, by this section, to authorize a violation of the terms of the treaty, if the section is capable of a construction not having that effect.

This reasoning is, of course, based on the assumption (unwarranted, as I think) that the construction of these works under legislative authority would be a violation of the treaty.

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It seems to me, however, that, looking at the statute as a whole, section 32 has not the restricted application assigned to it by the Appellate Division. So interpreted, the section would also have no application to boundary streams between provinces, such as the Ottawa River, and all works in that and other boundary rivers and streams, unless otherwise authorized, would, in consequence, be without legal sanction.

Moreover, section 14 of the Act has special provisions in relation to works in international streams, and the works there referred to are, I think, unquestionably works authorized by the Act itself, that is by section 32.

I am, therefore, of opinion that section 32 has application to the Pigeon River and, as already intimated, am further of opinion that it is not in conflict with the terms of the treaty.

The precise provision of the treaty, with which it is argued that section 32, applied to the Pigeon River, is in conflict, is as follows:

> It being understood that all the water-communications, and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries.

The part of the Pigeon River, in which the works in question are situated, is not stated in the affidavit, filed by respondent, to have been in actual use at the time of the treaty for water communication and the map filed as an exhibit to the affidavit indicates, as the terms of the treaty also indicate, that what was in actual use at that time was the Grand Portage which carried traffic round and past the obstruction of the high falls and rapids that rendered the part of the Pigeon River in question non-navigable for traffic then carried on.

It appears that some of these falls are 120 feet in height, and that the total drop in this part of the river is 620 feet. All the waters of these streams that were navigable were in use for transportation at the time of the treaty, and at the parts of the river not navigable the portages were used. In my opinion, the right preserved by the passage of the treaty quoted was the right to continue to use the water communication and portages then in use. I am unable to agree with the view expressed by the Circuit Court of

Appeals, Eighth Circuit, in *Clark* v. *Pigeon River Improvement Slide & Boom Co.* (1), namely, that the words "as now actually used" apply only to Grand Portage. This decision would imply that the right given to use the other portages is unlimited.

There could, so far as I can see, have been no reason for preserving a right to use Grand Portage that would not apply to other portages, and the language as used appears to apply to all, and to the water communications, and I think should be so construed. What was being dealt with, and what was in the contemplation of the parties, was travel and transportation over the water communications and portages as then used, and there was, in my opinion, no thought or intention of dealing with the use of these non-navigable rapids and falls that were not in use and could not be used, the passing of which was provided for by the portages. Both navigable and non-navigable waters are covered by the subsequent treaty in relation to boundary waters.

Article 1 of that treaty provides that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants of both countries.

Other articles make provision for an International Joint Commission, and give to that Commission control over uses, obstructions or diversions of all boundary waters on either side of the line not theretofore or thereafter provided for by agreement between the parties.

In my opinion, the passage of the Ashburton Treaty quoted above does not apply to the non-navigable part of Pigeon River in which the works in question are situated.

The International Boundary Waters Treaty, however, does apply, but section 14 of the *Lakes and Rivers Improvement Act* already referred to makes provision that everything to be done under the Act must conform to any orders or recommendation which the International Joint Commission may make under the International Boundary Waters Treaty, so that there is no conflict with that treaty.

It may be noted that part of the works in question is the dam extending all the way across the river. The part in

(1) (1931) 52 Federal Reporter (2nd Series) 550.

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the United States apparently was authorized by the State of Minnesota, which also authorized collection of tolls.

So far as the rights of the Dominion in connection with navigation are concerned, the provincial jurisdiction to improve the flotability of the non-navigable part of an international stream within the province, except as modified by treaty, does not seem to be different from the jurisdiction to make such improvements in a non-navigable stream wholly within the province.

It is argued, on behalf of the respondent, that the works in question are of no advantage to them in the floating of their cordwood ties and pulpwood; but this is a matter to be submitted to the District Judge in connection with the fixing of tolls.

The appeal should be allowed, and the order of Wright J. restored, with costs here and in the Appellate Division.

The judgment of Lamont and Cannon JJ. was delivered by

LAMONT J.—The Arrow River and Tributaries Slide & Boom Co., Limited, was, on September 7, 1922, incorporated under the *Ontario Companies Act* pursuant to what is now section 32 of the *Lakes and Rivers Improvement Act*, being R.S.O., 1927, ch. 43, for the following purposes and objects as stated in its letters patent, namely:—

> Subject to the provisions of The Timber Slide Companies Act, to acquire or construct and maintain any dam, slide, pier, boom or other work necessary to facilitate the transmission of timber down the Arrow River and its tributaries and that part of the Pigeon River which is within the Province of Ontario.

Section 1 (*g*) of the *Lakes and Rivers Improvement Act* defines "timber" as including saw logs, posts, ties, cordwood and pulpwood.

Section 32 of the Act reads:—

> 32. A company may be incorporated under *The Companies Act* for the purpose of acquiring or constructing and maintaining and operating works upon any lake or river *in Ontario*, and every such company shall thereupon become subject to all the provisions of this Part.

"Works" includes a dam, slide, pier, boom or other work constructed in a lake or river to facilitate the floating of timber down such lake or river.

By section 51 the owner or occupier of the works is designated "operator."

Section 52 reads:—

The operator may demand and receive the lawful tolls upon all timber passing through or over such works, and shall have free access to such timber for the purpose of measuring or counting it.

Before tolls can be collected the amounts thereof must be approved by a judge of the County or District Court after notice published in a newspaper once a week for four successive weeks stating the proposed tolls and the day and the hour on which an application is to be made to the judge for his approval thereof (s. 53).

The appellants acquired certain works already erected on the Pigeon River and constructed others, and, on March 28, 1930, made an application to His Honour Judge McKay, the junior judge of the District of Thunder Bay, to approve of the tolls of which due notice had been given. His Honour took some evidence and adjourned the application. The respondents then made an application to Mr. Justice Wright in chambers for an order prohibiting His Honour Judge McKay from approving of any schedule of tolls proposed to be charged by the appellants for the alleged improvements made by them on Pigeon River. The grounds upon which prohibition was sought were stated as follows:

1. That the said Judge has no jurisdiction to approve of tolls proposed to be charged by said Company for the use of alleged improvements made on said river by it for river driving purposes, such river being an international stream, and under the terms of the treaty between Great Britain and the United States, commonly known as the Ashburton Treaty, being *free and open* to the use of the subjects and citizens of both Canada and the United States.

2. That Part V of the Lakes and Rivers Improvement Act in so far as it purports to authorize the said Company to charge and collect tolls for the use of any improvements for river driving made or to be made in the said Pigeon River is *ultra vires* the Ontario Legislature and null and void.

The learned chambers judge dismissed the application. On appeal, the Second Divisional Court set aside the order of the chambers judge and made an order granting the application for prohibition. It is from this latter order that this appeal is brought.

The first question requiring consideration is: Does the imposition of tolls by the appellants, under section 52 above quoted, for the use of improvements made by them on Pigeon River, conflict with the provisions of the treaty made between His Majesty and the United States of

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America signed at Washington, August 9, 1842, and commonly known as the Ashburton-Webster Treaty.

The treaty had for its object, *inter alia*, the settling and defining of the undetermined boundary line between Canada and the United States.

The material part of article 2, as applicable to the case before us, is as follows:—

> It is moreover agreed, that * * * the line shall run * * * to the mouth of Pigeon River, and up the said river to and through the north and south Fowl Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods; * * * It being understood that all the water-communications, and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior to the Pigeon River, as now actually used, shall be *free and open* to the use of the subjects and citizens of both countries.

The Pigeon River thus forms part of the boundary line between Canada and the United States as well as between the Province of Ontario and the State of Minnesota. The appellants have acquired or constructed a dam across that part of the river extending from the Canadian shore to the international boundary line, and have established slides to facilitate the passage of timber down the river. The shareholders of the appellant company, according to the affidavit of A. L. Johnston, have become incorporated in the State of Minnesota under the name of "The Pigeon River Improvement Slide and Boom Company," which company claims to own the improvements made on the American side of the river and is claiming the right to charge tolls for the use of its improvements there. No person, therefore, can use the river to float down timber without using the improvements on one side or the other. The respondents own pulpwood and cutting rights both in the State of Minnesota and the Province of Ontario on the upper reaches of the Pigeon River. Their wood from both sides must of necessity be floated down the river in order to reach its market. They contend that the improvements made in the river, while possibly useful in floating down saw logs or large timbers, are of no value whatever to them, as their cordwood, pulpwood and ties could, just as satisfactorily, be floated down the river in its natural state. This, however, is disputed by the appellants in their factum, but there is nothing in the material before us by which the question can be determined, if its determination be

material. Neither is there anything in the record, as the chambers judge points out, shewing whether or not the river is a navigable stream at the point where the appellants made their improvements, although the argument proceeded on the assumption that it was not navigable for boats and even canoes.

The contentions advanced by the appellant are:—

1. That Pigeon River from its mouth to Fort Charlotte is not a water communication within the meaning of the last clause of article 2, nor was it at the time of the making of the treaty "actually used" as such.

2. That the words "free and open" in the clause do not mean free from tolls or charges for the use of improvements to navigation, lawfully constructed, but mean "available," "accessible," "thrown open to the use and enjoyment of the citizens of both countries on equal terms," or, in other words: "without discrimination."

1. For the purposes of this judgment I shall assume the facts to be as the appellants state in their factum: that, between its mouth and Fort Charlotte, Pigeon River is, for the greater part of the way, a rapid and turbulent stream interrupted by numerous falls and rapids and that, to avoid these, traders and voyageurs, at the date of the treaty, were accustomed to sail up Lake Superior five miles west of the mouth of Pigeon River, debark at Grand Portage and transport their goods and belongings a distance of nine miles to Fort Charlotte on the Pigeon River above the last of the falls. Here they reloaded their boats and canoes and proceeded westward, while those coming from the west also went overland from Fort Charlotte to Grand Portage.

I shall also assume as true the statements in the historical works to which we were referred, that, although the communication westward to the Lake of the Woods was by water, it was necessary from time to time to make a portage to avoid the rapids existing in the river and that, notwithstanding these difficulties, a very considerable trade was carried on between the east and the west.

In Baker's Historical Collections there is the following entry:—

> Henry records that he met 40 canoes on the Pigeon River loaded with furs from Athabasca Lake and bound for Grand Portage.

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In view of these facts, what is the meaning to be given to "water-communications" in the last clause of article 2? These are to be kept "free and open" for the use of the subjects of both countries, as are also the usual portages "along the line," as well as Grand Portage, which is not along the line but is wholly in United States territory.

In construing the treaty we have to determine the intentions of the framers thereof as expressed in the words used. Did they intend that the whole river should come within the term "water-communications," or only those parts of it between portages over which boats could pass at the date of the treaty? In order to understand these words it is material to inquire what was the subject matter with respect to which they were used, and the object the framers of the treaty had in view? The subject matter to which they were applied was the waters of the Pigeon River, and other rivers, streams and lakes up which the boundary line from Lake Superior to the Lake of the Woods was being run. The object of the provision was to secure to the subjects of both countries the free and untrammelled right to use these water stretches irrespective of whether they were on one side of the boundary line or the other.

Although at the date of the treaty the chief purpose for which these water communications were being used was the transportation by boat or canoe of persons and goods, the clause in question places no limit on the purposes for which they might be used. They are to be "free and open" to the people of both countries for whatever purpose they may desire to use them as a water communication. If, therefore, they could be used for any purpose which did not necessitate the making of a portage to get past a point of danger, I see nothing in the clause, or in any other part of the treaty, which would compel the use of the portage in order to have a free passage. To hold that water communications should be limited to those portions of the river navigable by boats at the time the treaty was signed, would, in my opinion, be to give too narrow a construction to the language used, and to impute a want of vision to the framers of the treaty.

Furthermore, such a construction would lead to the result that certain portions of the river around which portages had to be made at the date of the treaty owing to low water,

would not constitute a water communication at another season when boats could pass over them with ease and safety.

In *Kewatin Power Company* v. *Town of Kenora* (1), my Lord the Chief Justice (then Anglin J.) held that, where a river is navigable in its general character, natural interruptions to navigation at some parts of it which can be readily overcome do not prevent it from being deemed a navigable river at such parts.

In *Economy Light & Power Co.* v. *United States* (2), the Supreme Court of the United States, in referring to the question of the navigability of a river, said:—

> Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.

If a river may properly be called navigable notwithstanding that it is necessary to make use of portages at certain points, it would seem equally appropriate to designate it as a "water-communication."

It was contended by the appellant that the term "water-communications" referred to in the last paragraph of article 2, was limited by the words "as now actually used" in the last line but one thereof. This same argument was presented to the Circuit Court of Appeals of Minnesota in the case of *Clark v. Pigeon River Improvement Slide & Boom Co.* (3), where, at page 556, the court dealt with it as follows:—

> As a matter of grammatical construction, an argument might be made that the term "as now actually used" applies to all the water connections and usual portages and not merely to Grand Portage, but it appears from the record that Grand Portage alone of all the portages is not "along the line," and we think therefore the words, "as now actually used," refer only to Grand Portage. Any other theory would give the treaty a narrow and apparently distorted construction.

In addition there was another and a practical reason why a route which was to be "free and open" between Grand Portage and Fort Charlotte should be limited to that actually in use at the time of the treaty, which did not apply to the portages along the river. These portages were taken to get around some parts of the river over which it was impossible or dangerous to take boats. Practical

(1) (1906) 13 Ont. L.R. 237. (2) (1921) 256 U.S.R. 113, at 122.
(3) (1931) 52 Federal Reporter (2nd Series) 550.

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traders had, long before the treaty, found the most advantageous portage around these obstacles and such would always be taken owing to its practical advantage; while between Grand Portage and Fort Charlotte there was a land trip of nine miles over which possibly several routes, one as good as another, might have been established. Unless, therefore, the United States were to have more than one route across Minnesota territory kept free and open for traffic, it was desirable that the route agreed upon should be specifically defined. This was done by limiting such route to the one then "actually used." I am, therefore, of opinion that Pigeon River from its mouth along both sides of the boundary line, forms part of the "water-communications" which were to be free and open.

2. I cannot agree with the appellants' contention that the words "free and open" in the last clause of article 2 are consistent with the imposition of tolls for the use of improvements erected in the river. In my opinion, the meaning of these words in the clause is that the citizens of both countries are to be at liberty, as a matter of right, to travel these waters on both sides of the fixed boundary line without let or hindrance from anyone, or having to pay anything for so doing. This seems to me to be the natural and ordinary meaning of the words and the meaning which, at the time of the treaty, the subjects of both countries would place upon them. That this is the meaning the words were intended to bear seems to me to be indicated also by article 7 of the treaty, which reads:

> VII. It is further agreed, that the channels in the River St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channels in the River Detroit, on both sides of the Island Bois Blanc, and between that island and both the Canadian and American shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair with the lake of that name, shall be equally free and open to the ships, vessels, and boats of both parties.

If we give effect to the appellants' interpretation of the words "free and open" it would entitle either of the contracting parties who improved the navigation of any of the channels on its own side of these waters to levy a toll on every vessel making use of such channel. I cannot believe such to have been the intention of the parties. As Riddell, J.A., pointed out in his judgment below, the appellants here by building upon the bed of the river have interfered

with the enjoyment of the free and open use of it by the citizens of the United States. This, as I read it, is contrary to the treaty. The result, therefore is, that in my opinion, section 52 of the *Lakes and Rivers Improvement Act*, in so far as it authorizes the imposition of tolls for the use of improvements erected in the Pigeon River, is at variance with the provisions of the treaty.

The next question is: Does the fact that section 52 is repugnant to the provisions of the treaty make the section invalid as a legislative enactment?

The Second Divisional Court thought that because a former Sovereign had been a party to the treaty and His Majesty was in honour bound to uphold it, and, as the Act in question was passed in His Majesty's name, it should not be given a construction inconsistent with the terms of the treaty if it could fairly be otherwise interpreted. The Court referred to section 32 of the Act for the purpose of shewing that the company was incorporated only for the "acquiring or constructing and maintaining and operating works upon any lake or river *in Ontario*," and held that as Pigeon River was only partly in Ontario the Act was not intended to apply to that river.

That Pigeon River is only in part in the Province of Ontario does not, in my opinion, render the Act inapplicable to that part, for provincial legislative enactments, unless restricted as to the area to which they shall apply, effectively operate throughout the whole province.

Had the Legislature intended to exclude international boundary rivers from the operation of the Act, I think it would have said so in express terms and not have left the matter to inference, particularly when the inference can only be drawn by giving an unusual construction to the language used. The view that the Act was intended to apply to international boundary waters in so far as they were in Ontario is, I think, supported by the reference to such waters in section 14. The Act being applicable to boundary waters, was it, in other respects within the competence of the Legislature to enact?

It has long been well settled by the Privy Council that within the provincial area and the ambit of the classes of subjects enumerated in section 92 of the *British North America Act, 1867*, the legislative competence of a pro-

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vincial legislature is as plenary and as ample as the Imperial Parliament in the plentitude of its power possessed, and could bestow. That the subject matter of the Act in question falls within the enumerated heads of section 92 is not disputed nor indeed could it well be. *Caldwell* v. *McLaren* (1). The Act must, therefore, be held to be valid unless the existence of the treaty of itself imposes a limitation upon the provincial legislative power. In my opinion, the treaty alone cannot be considered as having that effect. The treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power. For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject. Upon this point I agree with the view expressed by both courts below:

> that, in British countries, treaties to which Great Britain is a party are not as such binding upon the individual subjects, but are only contracts binding in honour upon the contracting States.

In this respect our law would seem to differ from that prevailing in the United States where, by an express provision of the constitution, treaties duly made are "the supreme law of the land" equally with Acts of Congress duly passed. They are thus cognizable in both the federal and state courts. In the case before us it is not suggested that any legislation, Imperial or Canadian, was ever passed implementing or sanctioning the provision of the treaty that the water communications above referred to should be free and open to the subjects of both countries. That provision, therefore, has only the force of a contract between Great Britain and the United States which is ineffectual to impose any limitation upon the legislative power exclusively bestowed by the Imperial Parliament upon the legislature of a province. In the absence of affirming legislation this provision of the treaty cannot be enforced by any of our

(1) (1884) 9 App. Cas. 392.

courts whose authority is derived from municipal law. *Walker* v. *Baird* (1); *In re The Carter Medicine Co's Trade Mark* (2); *United States* v. *Schooner "Peggy"* (3); *The Chinese Exclusion Case* (4); *Oppenheim's International Law*, 4th ed., 733-4.

I am, therefore, of opinion that section 52, in question in this appeal, must be considered to be a valid enactment until the treaty is implemented by Imperial or Dominion legislation.

The appeal should be allowed with costs and the order of Wright J. restored.

Appeal allowed with costs.

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Solicitor for the appellant: *W. F. Langworthy.*

Solicitors for the respondent: *McComber & McComber.*

HIS MAJESTY THE KING.....APPELLANT;

AND

DOMINION BUILDING CORPORATION LIMITED (CLAIMANT) AND JAMES L. FORGIE (ADDED AS A PARTY CLAIMANT BY ORDER MADE BY THE PRESIDENT OF THE EXCHEQUER COURT OF CANADA ON THE 4TH MARCH, 1931.. } RESPONDENTS.

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*Nov. 11, 12.

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*Mar. 15.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Sale of land—Crown—Offer to the Crown represented by the Minister of Railways and Canals for Canada—Whether acceptance made, binding the Crown—Order in Council—Communications to offeror—Department of Railways and Canals Act, R.S.C., 1906, c. 35, s. 15—Alleged part performance by offeror—Whether time made of essence.

F. (the claimant's assignor, and added as party claimant in the proceedings), on July 27, 1925, sent to His Majesty the King, represented by the Minister of Railways and Canals for Canada, an offer to purchase certain land in the city of Toronto for $1,250,000 cash, depositing $25,000, and agreeing, upon acceptance of the offer, to pay the

*Present at hearing of the appeal: Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ. Newcombe J. took no part in the judgment, as he died before the delivery thereof.

(1) [1892] A.C. 491.
(2) (1892) 61 L.J. Ch. 716.
(3) (1801) 1 Cranch, 103.
(4) *Chae Chan Ping* v. *United States*, (1889) 130 U.S.R. 581.

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balance of the purchase price at such time as possession "be given to (F.) not later than" September 25, 1925. In the offer F. agreed that upon his obtaining possession, on or before September 25, 1925, he would proceed with the erection of a 26 storey building upon said land and certain adjoining land. The offer provided that His Majesty, represented as aforesaid, should execute a lease of certain floors for 30 years upon terms set out. The offer stated: "This offer of purchase, if accepted by Order * * * in Council, shall constitute a binding contract of purchase and sale," subject to its terms. On July 29, 1925, an Order in Council was passed, which recited that the Committee had before them a report from the Minister of Railways and Canals representing F.'s offer, stating that "the Minister accepted said offer of purchase subject to the approval and authority of Your Excellency in Council," setting out in the main the terms of "the said offer of purchase, accepted as aforesaid," and recommending that authority be given for its acceptance. The Order in Council stated: "The Committee concur in the foregoing recommendation and submit the same for approval." There was evidence that F. received a certified copy of the Order in Council, but no evidence that any copy of it or the fact of its having been passed was transmitted to F. by the Minister or by anyone authorized to do so. Extensions of time were given to F., signed by the Deputy Minister, and the last one by letter of the Minister, of November 17, 1925, stating: "I have your letter * * * applying for a further extension of time within which to receive possession * * * and to make payment * * * and to perform * * * other details of the contract of purchase under your offer of purchase, dated July 27, 1925, and the acceptance thereof," and granting a further extension, but without waiver of rights, etc., "under and as provided for by the said contract should you fail to perform and carry out, within the hereby extended period, all the covenants and conditions which on your part, under and as provided by the said contract, were to be performed and carried out within the original period thereunder provided." In the present proceedings damages were claimed against the Crown for not carrying out the contract alleged by the claimant to have been made.

Held: No acceptance on behalf of the Crown communicated to F. by anyone having authority to do so, had been shewn; and, therefore, no contract binding on the Crown had been established. The Order in Council did not in itself constitute an acceptance. The acceptance referred to in the Minister's report set out in the Order in Council, if there was any such acceptance, was not in writing signed in compliance with s. 15 of the *Department of Railways and Canals Act*, R.S.C., 1906, c. 35, and therefore was not binding on the Crown. The Minister's letter of November 17, 1925, could not be taken as an acceptance by him of the offer, so as to constitute a contract; he was evidently under the impression that a contract existed, but had no intention by that letter of constituting a contract.

Held, further: The claimants could not succeed on the ground of part performance. Even if the doctrine of part performance could otherwise be invoked in this case, the acts of part performance alleged (the contracting by F. for the purchase of adjoining land to form part of the site of the proposed building, and payments on account thereof; the preparation of plans, etc., for the building, and contracting for its construction) were merely steps taken in order to be in a position to

make the offer and to carry it out if accepted, and would not amount to part performance of the alleged contract.

Held further that, when F. made his applications for extension and was given extension in the terms of the letters, time was made, by these extensions, of the essence of the contract, and, the purchase not having been completed within the extended period, the claim could not be sustained even if there were a contract.

The judgment of the Exchequer Court in favour of claimants was reversed, and the claim dismissed. There being no contract, claimants were held entitled to return of the deposit (but not as damages).

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada, rendered the 4th March, 1931, holding that the claimants were entitled to recover damages from the Crown for breach of an alleged contract.

The claim for damages was made by the respondent Dominion Building Corporation Ltd., and was referred by the Acting Minister of Railways and Canals for Canada to the Exchequer Court. In his judgment the trial judge allowed a motion made by the claimant at the beginning of the trial for an order permitting the respondent Forgie, the claimant company's assignor, to be added as a party claimant, so that, if necessary, the claim for damages might be made in the name of the assignor as well as in the name of the claimant company.

The material facts of the case are sufficiently stated in the judgment now reported. The Crown's appeal was allowed with costs, and the claim dismissed with costs, subject to a direction for return of the deposit.

W. N. Tilley K.C. and *C. P. Plaxton K.C.* for the appellant.

I. F. Hellmuth K.C. and *R. V. Sinclair K.C.* for the respondents.

The judgment of the court was delivered by

SMITH J.—In 1923, the Crown purchased from the Imperial Bank of Canada property at the northwest corner of King and Yonge streets in the city of Toronto, for the use of the Canadian National Railways. Early in the year 1925, the respondent Forgie suggested to the President of the Canadian National Railways a scheme for the purchase of the Home Bank property on King street adjoining on the west the property of the Crown referred to, and the

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erection on the combined site of an office building of twenty-six storeys, the ground floor and the three floors immediately above to be leased for a term at certain rentals to the Canadian National Railways.

On 13th May, 1925, he submitted an offer to purchase the Crown property referred to for $1,250,000, provided that the Canadian National Railways should agree to sign a lease for the ground floor and next three floors of the twenty-six storey building he intended to cause to be erected on these lands and the lands of the Home Bank referred to, and received a reply from the President on the same date stating that he was agreeable, subject to the approval of the Board of Directors of the company, to recommending to the Government of Canada the acceptance of the proposal.

On the 14th May, a copy of this offer from Forgie, addressed to His Majesty the King, represented by the Minister of Railways and Canals for Canada, was forwarded to the Minister of Railways and Canals, but no action was taken in reference to it.

The Board of Directors of the railway company approved of the acceptance of the offer made to the President. On the 27th day of July, 1925, Forgie sent to His Majesty the King, represented by the Minister of Railways and Canals for Canada, an offer to purchase the Crown lands referred to for $1,250,000 cash, in which he undertook, upon acceptance of the offer, to pay the balance of the purchase price at such time as possession of the premises " be given to the undersigned not later than the 15th day of September, 1925." The offer further provides that it is understood that Forgie agrees, upon obtaining possession of the lands, on or before the 15th day of September, 1925, to proceed with the erection " of a twenty-six storey modern fireproof office building " on these Crown lands " and on the lands formerly known as the Home Bank of Canada Head Office site *now owned* by the undersigned," and to have the same ready for occupancy " not later than the 25th day of October, 1926, subject to the usual delays," etc. The offer further provided that His Majesty, represented by the Minister of Railways and Canals for Canada, should execute a lease of the ground floor and the next three typical floors

for thirty years upon terms set out. The final clause of the offer is as follows:

This offer of purchase, if accepted by Order of His Excellency the Governor General in Council, shall constitute a binding contract of purchase and sale, subject to all the terms and provisions thereof and which contract shall enure to the benefit of the undersigned, his heirs, executors, administrators and assigns and to the benefit of His Majesty, His successors and assigns.

With the offer a deposit of $25,000 was made.

On the 29th day of July, 1925, an Order in Council was passed, which recites that the Committee had before them a report dated the 27th day of July, 1925, from the Minister of Railways and Canals representing that His Majesty had title to the Crown lands referred to, that James Forgie had, by offer of 27th July, 1925, to His Majesty represented by the Minister of Railways and Canals, a copy of which was annexed, offered to purchase the premises, subject to the terms and conditions of the offer, and

the Minister accepted said offer of purchase subject to the approval and authority of Your Excellency in Council given on or before the 29th day of July, A.D. 1925.

The Order in Council proceeds to set out in the main the terms of " the said offer of purchase, accepted as aforesaid," and then proceeds as follows:

The Minister submits the above and, upon the advice of the Deputy Minister of Railways and Canals, recommends that authority be given for the acceptance of the said offer of purchase hereto attached marked " A," and that authority be given for the sale and transfer of the premises by His Majesty to the Purchaser, the transfer by its own terms only to vest title of the premises in the Purchaser upon the execution and delivery of the lease hereinbefore referred to, and such transfer to be in form to be approved by the Department of Justice.

The Committee concur in the foregoing recommendation and submit the same for approval.

There is no evidence that this Order in Council or a copy of it, or of the fact of its having been passed, was transmitted by the Minister or by anyone authorized to do so, to Forgie. At page 27 of the Case, his evidence is as follows:

Q. When did you receive that Order in Council?

A. I do not know, as a matter of fact, whether it was that day or a day or so afterwards, but I did receive a certified copy of the Order in Council.

Then, at page 50, on cross-examination there is the following:

Q. Now, you did not receive any letter from the Government with the certified copy of the Order in Council of 29th July; will you please file it if you did. It is not in your affidavit on production?

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A. I do not remember having received one or otherwise.

* * * * *

His LORDSHIP: From whom did you get it? Is it important?

Mr. GEOFFRION: A good deal turns on the terms of the Order in Council.

His LORDSHIP: The Order in Council was undoubtedly passed and it does not matter much how it reached him.

At page 100, the evidence of the Minister of Railways is as follows:

His LORDSHIP: When the offer was made to you by Forgie in writing, did you accept the offer subject to approval by the Governor in Council orally or in writing?.

Mr. GEOFFRION: Not in writing, but as to orally I do not know.

Mr. HELLMUTH: I do not want it to be taken that there was not a legal acceptance. I will have something to say on that.

His LORDSHIP: The Order in Council of July 29th states that the offer had been accepted by the Minister subject to the approval of the Governor in Council?

WITNESS: The method is this: I took the ground, which I think was a proper one, that this being a Canadian National affair we would want a recommendation from the Canadian National Railways and then as Minister I would approve or not approve of it; first recommended by the Canadian National Railways and then the Order in Council.

I find it difficult to understand why His Lordship thought it of no consequence how the Order in Council reached Forgie, nor why the counsel, instead of the witness, made the answer as to whether or not the witness accepted the offer orally or in writing. The witness, as would seem from his answer, makes no explicit statement as to whether or not there was in fact the acceptance referred to in his report to Council. What does appear clear is that there was no written acceptance communicated to Forgie by anyone having authority to communicate such acceptance. He obtained a certified copy of the Order in Council, but by what means or from whom, he does not state. The claimant's contention is that the offer of the 27th July, 1925, coupled with an acceptance, constituted a contract, and the main question at issue is whether or not there was an acceptance of the offer. An acceptance would, to amount to a binding contract, require to be an acceptance on behalf of His Majesty communicated to Forgie by someone having authority so to do. The Order in Council, on its face, does not purport to be an acceptance. The Minister recommends that authority be given for the acceptance of the said offer and for the sale and transfer of the premises by His Majesty to the purchaser, and the Committee

concur in that recommendation, and submit the same for approval. In terms this Order in Council authorizes the Minister, to whom the offer was made, to accept it. It is, however, contended that because of the statement in the offer that if accepted by Order of His Excellency the Governor General in Council, it shall constitute a binding contract, the terms of the offer are satisfied by this Order in Council, and that therefore the Order in Council itself amounted to an acceptance creating a completed contract.

I am quite unable to accept this view. An offer is not transformed into a completed contract until there is an acceptance of that offer by or on behalf of the party to whom the offer is made. If the Order in Council had expressly stated that His Majesty accepted the offer, I am of opinion that there would still have been no completed contract until that acceptance was communicated by or on behalf of His Majesty to Mr. Forgie in response to his offer. The situation, to my mind, is not different from what occurred at a later date in connection with the proposed lease of five floors of the proposed building for the Customs and Excise Department. An offer was made by the Dominion Building Corporation Limited, Forgie's assignee, to the Minister of Public Works for such a lease. The Minister of Public Works recommended the acceptance of the offer to His Excellency the Governor in Council, and an Order in Council was made, advising that the necessary authority be given accordingly. Forgie says that he received a copy of this Order in Council on or about the 3rd of February. He was then, of course, acting for his assignee, the Dominion Building Corporation Limited, which made the offer. Again, he does not state how or from whom he received the certified copy of the Order in Council, but admits that there was no letter or writing. It is not contended by anyone that in this later case the Order in Council constituted an acceptance, even though Forgie in some way got a certified copy of it.

I am therefore of opinion that the Order in Council of the 29th July, 1925, did not in itself constitute an acceptance of Forgie's offer of the 27th of that month, because, in the first place, the offer was not made to His Excellency the Governor General in Council and the Order does not purport to accept the offer, and secondly, because there is

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no evidence that the making of such an Order in Council was communicated to Forgie on behalf of His Majesty by the Minister of Railways and Canals, or anybody else duly authorized. Section 15 of the *Department of Railways and Canals Act*, ch. 35, R.S.C., 1906, reads in part as follows:

> No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon His Majesty, unless it is signed by the Minister, or unless it is signed by the Deputy Minister, and countersigned by the Secretary of the Department, or unless it is signed by some person specially authorized by the Minister, in writing, for that purpose.

As shown by the evidence already quoted, the acceptance referred to in the report of the Minister set out in the Order in Council, if there was any, was not in writing, signed in compliance with this section, and therefore was not binding upon His Majesty. The statement in the Minister's report to Council, to the effect that the offer had been accepted, was not a statement communicated to Forgie.

It is argued, however, that because there were numerous extensions of time given to Forgie for the carrying out of his contract, signed by the Deputy Minister of Railways and Canals, and a final extension to the 30th day of December, 1925, signed by the Minister himself, there was an acceptance complying with the terms of the section just quoted. The letter extending the time, that was signed by the Minister, is exhibit 30, replying to Forgie's request for an extension, and is dated November 17, 1925, and is as follows:

OTTAWA, 17th November, 1925.

DEAR SIR:

Re: Purchase of Crown Property (Imperial Bank Property, so called), Corner of Yonge and King Streets, Toronto, Ont.

I have your letter of the 16th instant, addressed to the Deputy Minister, applying for a further extension of time within which to receive possession of the property in question and to make payment of the balance of purchase price therefor and to perform and carry out on your part other details of the contract of purchase under your offer of purchase, dated July 27, 1925, and the acceptance thereof.

In reply, I am to advise you that a further extension of time, namely, from November 17, 1925, to December 30, 1925, is hereby given, but without prejudice on the part of His Majesty as to, and without waiver on the part of His Majesty of, any of His rights, reservations or remedies under and as provided for by the said contract should you fail to perform and carry out, within the hereby extended period, all the covenants and

conditions which on your part, under and as provided by the said contract, were to be performed and carried out within the original period thereunder provided.

Yours faithfully,

(Sgd.) GEO. P. GRAHAM.

JAMES FORGIE, Esq.,
Barrister, etc.,
Toronto, Ont.

This letter, signed by the Minister, is, of course, not in terms an acceptance of Forgie's offer, but implies that there is already in existence a contract. If I am correct in my view that up to this time there was in fact no contract, then this letter was written under a misapprehension of the real state of fact, and, I think, cannot be taken as an acceptance by the Minister of the offer so as to constitute a contract. The Minister was under the impression that a contract already existed, and he had no intention by this letter of constituting a contract; and without such intention I do not see how he can be held to have done so. There seems to be no doubt that the Minister was under the impression that a binding contract was in existence from about the time that the Order in Council was passed. Whether he thought that the contract was completed by the Order in Council itself, or by some acceptance by him or by his authority before or after the making of the Order, or by the fact that the Manager and Board of Directors of the Canadian National Railways had approved of the acceptance of the offer, is not apparent. Here we are not, however, dealing with what might be inferred in connection with negotiations between private parties. Parliament has seen fit, for the protection of His Majesty, to enact sec. 15 referred to, and we are not entitled to disregard that enactment. The question, therefore, is whether or not there was in fact an acceptance that complies with the terms of this sec. 15, and it seems to me impossible to say that there was.

It is further argued on behalf of the respondent that if there was no contract by virtue of the offer, the Minister's report and Order in Council, and the correspondence, then there was such part performance of the proposed contract by the respondents as to constitute a contract binding upon His Majesty represented by the Minister of Railways and Canals. It seems to me very doubtful if the express terms of the statute can be disregarded, especially, where, as here,

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the acts of part performance alleged took place entirely without the knowledge or assent of the Minister. There was no intimation by the claimants from the time of the passing of the Order in Council until the February following, when the Minister definitely refused to proceed further, that the claimants were proceeding in any way to carry out the contract, and no knowledge on the part of the Minister that the alleged acts were being performed. The claimants' successive applications for an extension of time to commence were an intimation to the Minister that nothing was being done towards carrying out the contract. The doctrine of part performance implies that one party to an intended contract stands by and knowingly allows the other party to perform acts by way of carrying out the proposed contract that places the party so performing in a changed position with regard to the subject matter. I am of opinion that none of the acts of part performance alleged here would amount to part performance. The part performance alleged is the entering into a contract by Forgie for the purchase of the Home Bank property and the payment of money on account, the preparation of plans and specifications for the building, and the entering into a contract for its construction. All these things, except some of the payments, were done prior to the making of the offer of the 27th July, 1925, and were steps taken by Forgie to put himself in a position to make the offer, and to carry it out if accepted. The option for purchase of the Home Bank property was obtained on the 7th May, 1925, and $10,000 was then paid. The offer itself has the statement that the Home Bank property is " now owned " by Forgie, and refers to plans, details and specifications prepared and to be prepared. The evidence shows that these plans were prepared before the date of the offer of 27th July, 1925. The entry into the contract for the construction of the building was all arranged with Mr. Anglin, of Anglin-Norcross Limited, as a preliminary to the making of an offer, as shown in exhibit 5, dated 2nd May, 1925. By that document, it was agreed that in consideration of the advance of the $25,000 deposited with the offer, Anglin-Norcross Limited were to have the contract to construct the building. Anglin-Nor-

cross Limited supplied the $25,000 pursuant to this letter, and Forgie was bound to give them the contract from that time.

All the payments subsequent to the first $10,000 in connection with the option on the Home Bank property were made by the claimants to keep that option good and to keep themselves in a position to carry out the contract if accepted, and are in no sense part performance of anything that Forgie had agreed to do in his offer. The negotiations with the President of the Canadian National Railway Company were all preparatory to the making of the offer to the Minister, as Forgie knew perfectly well that approval of his scheme by the President and Board of Directors of the railway company was a necessary preliminary to any consideration of his scheme by the Minister of Railways and Canals. I am of opinion, therefore, that there was no part performance of the proposed contract which would have the effect of an acceptance of the offer and thus constitute a binding contract.

It seems clear from the evidence of Forgie that the reason for all the applications for postponement was the expectation of otbaining from the Minister of Public Works the agreement for the lease of five storeys of the proposed building for the use of the Department of Customs and Excise.

At page 38 there is the following:

HIS LORDSHIP: You were waiting on the Order in Council in respect of the Customs lease?

THE WITNESS: Yes, and it was impossible during an election to secure the passing of that Order in Council and these extensions were given to me in order to hold over; this was definitely stated to me. The extensions were granted in order to enable me to maintain my position until Parliament was assembled and the Order in Council put through for the Customs and Excise lease of the five floors.

And at page 58:

It was always our hope that something might occur to give us the Order in Council for the Customs Department.

And in his letter, dated 15th February, 1926:

As you are aware, the Government decided last summer to lease five floors in this building, for different departments of the Government, and this was one of the factors in financing the construction of the building. Through circumstances with which you are familiar, and with which we had nothing to do, the Order in Council dealing with this matter, which was promised last October, was not passed until the 1st day of February, A.D. 1926. It was not our fault that the Order was not passed before the

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expiry of the extension of time, and if there has been any default it is not on the part of those I represent.

There is also the telegram of Mr. Spence, exhibit 9, on Forgie's behalf, asking for an extension and explaining that delay was caused by change in financing arrangements.

Forgie, on the 29th December, 1925, by letter, asked for an extension of time till January 31, which was not granted, yet he made no move towards going on with the contract till after the Order in Council of February 1, 1926, giving authority to the Minister of Public Works to accept the offer of the lease of the five floors for the Customs and Excise Department. On getting the copy of this Order, he writes at once, on 3rd February, that he is in a position to complete the purchase and make payment about 10th February.

The proposition from the first involved raising the money for payment of the site and building by a flotation of bonds, secured by mortgage of the property, to be bought by the public. The proposed leases of four floors to the Canadian National Railway Company and of the five floors to the Customs and Excise Department at the rentals stated and for the long terms proposed would have made sure a very considerable revenue which would have been an important factor in securing purchasers for the bonds. The witness Anglin thinks the bonds would have sold readily without the proposed lease to the Customs and Excise Department, but, though he and his firm were largely interested in having the scheme carried through, they made no move towards a flotation on that basis instead of waiting for the Order in Council in reference to the Customs and Excise lease, as Forgie says they did.

I entertain no doubt on the evidence that the claimants never intended to go on with the contract unless the lease to the Customs and Excise Department should be secured, and that without that lease they never were in a position to go on with the contract.

Mr. Forgie thought the Order in Council authorizing that lease made it a certainty, and at once proceeded to write that he was in a position to go on. The Order in Council, however, was never acted on, but was repealed shortly afterwards, so that the claimants did not in fact get themselves into the position to go on as stated in Mr. Forgie's letter, of February 3.

I am of opinion that there never was a completed contract binding upon His Majesty represented by the Minister of Railways and Canals, or otherwise.

I am also of opinion that, when Forgie made his various applications for an extension of time and received them in the terms of the various letters of extension, time was made by these extensions of the essence of the contract and that the claim could not be sustained even if there were a contract.

Counsel for respondent further contends that section 15 of the *Department of Railways and Canals Act,* quoted above, does not apply here because the transaction was a sale of public lands governed by the provisions of the *Public Lands Grants Act,* ch. 57, R.S.C., (1906), whereby the Governor in Council is authorized to sell or lease any public lands which are not required for public purposes.

This point seems to be disposed of by the judgment of the Privy Council in *Dominion Building Corporation Ltd.* v. *The King* (1), where it is stated that, even if the matter were originally not a departmental but a government one, their Lordships would be of opinion that it was appropriated to the Department of Railways and Canals by the Order in Council, and was thereby made part of the Minister's administration for the purposes of s. 38.

Moreover, the acceptance of the offer involved not only a sale of public lands but a contract by His Majesty for the payment of a large sum of money annually for a period of thirty years.

In any event, there was no contract to purchase. There was an offer to purchase which the Order in Council did not purport to accept, but which merely authorized the Minister to accept, and which, even if construed as an acceptance, was never communicated to the party making the offer by anyone authorized to do so on behalf of His Majesty.

There being no contract, the respondent is entitled to the $25,000 as a return of the deposit, but not as an item of damages as claimed.

Otherwise the appeal is allowed and the claim dismissed with costs throughout. *Appeal allowed with costs.*

Solicitor for the appellant: *W. Stuart Edwards.*
Solicitor for the respondents: *R. V. Sinclair.*

(1) [1930] A.C. 90.

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*Oct. 16.
1932
*Mar. 1.

THE ROYAL BANK OF CANADA (DEFENDANT) ..... } APPELLANT;

AND

MURDO MACKENZIE (PLAINTIFF) .....RESPONDENT.

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

Chattel mortgage—Sufficiency of description of chattels—Bills of Sale Act, Alta., 1929, c. 12, s. 5—Sufficiency of affidavit of bona fides—Mode of adaptation of unsuitable form—Banks and banking—Security under s. 88 of the Bank Act (R.S.C., 1927, c. 12) on rancher's live stock—Form C used instead of form E—Validity.

M. mortgaged to defendant bank chattels thus described: "60 Rams; 700 Ewe Lambs (etc., giving the number of sheep in each of different classes); All sheep of whatever age and description belonging to the mortgagor being not less than 3,880 head, branded , but not excluding those not so branded. 1 Belgian Stallion; 30 head of Horses." The chattels were stated to be now in the possession of the mortgagor and to be situate on certain described land.

Held: The description of the sheep satisfied s. 5 of the *Bills of Sale Act*, Alta., 1929, c. 12. The clause following the enumeration meant all the sheep belonging to the mortgagor, and its meaning was not changed by the preceding particulars. A description is sufficient when it is apparent that the mortgage covers all the chattels of the specified kind owned by the mortgagor (*McCall* v. *Wolff*, 13 Can. S.C.R. 130; *Hovey* v. *Whiting*, 14 Can. S.C.R. 515; *Thomson* v. *Quirk*, 18 Can. S.C.R. 695). The mere fact that the mortgage stated a larger number of sheep than the mortgagor owned could not make the mortgage void as to the sheep he did own. The description of the horses was insufficient.

In the affidavit of *bona fides*, the printed form on the mortgage, which was apparently one in use under a former wording of the Act, was adapted by, after the preliminary part, pasting over the unsuitable part a sheet on which were typewritten the allegations required, the typewritten sheet extending below the part of the printed form so covered over, the jurat of the printed form being used, and the commissioner initialling in the margin the typewritten sheet.

Held: The affidavit (though the adaptation was a slovenly method) complied with the statutory requirement. The pasting over was a mode of erasure and substitution, which was authenticated by the commissioner's initialling. The fact that by holding the document to the light the printed words covered over or part of them might be read, made no difference, the intent to erase or blot out being manifest.

The bank took what purported to be security under s. 88 of the *Bank Act* (R.S.C., 1927, c. 12) on livestock of a rancher, but used form C instead of form E.

*Present at hearing of the appeal: Duff, Newcombe, Lamont, Smith and Cannon JJ. Newcombe J. took no part in the judgment, as he died before the delivery thereof.

Held: The document was in form to the like effect as form E, and constituted a valid security. It sufficiently stated that the advance was made on the security of the live stock mentioned therein; and the statement that the security was given under the provisions of s. 88, instead of that it was given "under the provisions of subs. 12 of s. 88" (as in form E), was sufficient.

Judgment of the Appellate Division, Alta., 25 Alta. L.R. 281, reversed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1).

The plaintiff, who sued on behalf of himself and the other creditors of the estate of William McLennan, deceased, attacked the validity of a chattel mortgage made by the said McLennan to the defendant bank; and also attacked the validity of a security purporting to be given by said McLennan to the bank under the provisions of s. 88 of the *Bank Act.*

The trial judge, Walsh J. (2), held that the chattel mortgage was a valid security (except as to the stallion and horses mentioned therein); but held against the validity of the security taken under the provisions of s. 88 of the *Bank Act.*

The Appellate Division (1) held (Clarke J.A. dissenting, who agreed with Walsh J. in this respect) that the chattel mortgage was invalid, by reason of defective description of the chattels, and also by reason that it was not accompanied by a proper affidavit of *bona fides;* and held also (Clarke J.A. dissenting) against the validity of the security taken under the provisions of s. 88 of the *Bank Act.*

The defendant bank appealed to the Supreme Court of Canada.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal to this Court was allowed with costs.

H. G. Nolan for the appellant.

W. A. Begg K.C. for the respondent.

(1) 25 Alta. L.R. 281; [1931] 2 W.W.R. 129; [1931] 2 D.L.R. 884.

(2) 25 Alta. L.R. 281; [1931] 2 W.W.R. 129; [1931] 1 D.L.R. 981.

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The judgment of the court was delivered by

SMITH J.—One William McLennan, now deceased, had a sheep ranch in the vicinity of Suffield in the province of Alberta, and made a chattel mortgage dated 20th December, 1929, to the appellant, to secure $9,500 and interest on chattels described as follows:

> 60 Rams; 700 Ewe Lambs; 700 Yearling Lambs; 1,920 Two, Three and Four Year Old Ewes; 450 Five Year Old Ewes; 50 Six Year Old Ewes; All sheep of whatever age and description belonging to the mortgagor being not less than 3,880 head, branded , but not excluding those not so branded.
> 1 Belgian Stallion; 30 head of Horses.

These chattels are stated to be now in the possession of the mortgagor and to be situate on "all of the South Half and North-west Quarter of Township Fifteen (15), Range Eight (8), West of the Fourth Meridian, in the Province of Alberta." The mortgagor died on the 28th day of May, 1930, insolvent, and the (plaintiff) respondent is one of the unsecured creditors suing on behalf of himself and other creditors of the deceased mortgagor, to have it declared that the chattel mortgage referred to is void as against the creditors of the mortgagor.

The first ground of attack is that the description quoted above does not satisfy the provisions of the *Bills of Sale Act* of Alberta (1929, c. 12, s. 5), which provides as follows:

> Every bill of sale shall contain such sufficient and full description of the chattels comprised therein that the same may be thereby readily and easily known and distinguished.

I agree with the learned trial judge that the clause following the enumeration of the sheep means all the sheep belonging to the mortgagor, and that it is not necessary to introduce any words not there. If that clause stood alone as a description of the sheep, there would be no doubt as to its meaning, and I do not see that the meaning is changed by the preceding particulars as to the numbers of sheep in each of the different classes.

As the learned trial judge points out, the cases establish that the description is sufficient when it is apparent that the mortgage covers all the chattels of the specified kind owned by the mortgagor. *McCall* v. *Wolff* (1); *Hovey* v. *Whiting* (2); *Thomson* v. *Quirk* (3). The mere fact that

(1) (1885) 13 Can. S.C.R. 130. (2) (1887) 14 Can. S.C.R. 515.
(3) (1889) 18 Can. S.C.R. 695 (appendix).

the mortgagor has stated in the mortgage a larger number of sheep than he actually owned cannot make the mortgage void as to the sheep he did own. The description of the horses is, as the learned trial judge finds, insufficient.

The second objection to the validity of the mortgage is that the affidavit of *bona fides* does not comply with the statutory requirement.

There is on the printed form of mortgage used a printed blank form of affidavit in use apparently before the enactment of the statute as it now stands, which provides for a different form of affidavit. The conveyancer undertook to adapt the printed form of affidavit on the document by striking out the unsuitable part and substituting, in typewriting, what was necessary. He made use of the preliminary part of the printed form down to the words "make oath and say", and covered over all the printed words following these down to the jurat by pasting over them a sheet containing, in typewriting, all the allegations required by the statute. As this typewriting took up more space than that occupied by the printed words covered up, the bottom part of the typewritten sheet extends beyond the part of the printed form so covered over.

The jurat of the printed form is used and the commissioner initials in the margin this typewritten sheet. Much as one is inclined to censure the slovenliness of this kind of conveyancing, I am of opinion that in fact the affidavit complies with the statutory requirement. We have the preliminary part of the affidavit followed in typewriting by all the allegations required, and then the jurat. Pasting the substituted sheet over the printed words not intended to form part of the affidavit was a mode of erasure of these words and substitution of the typewritten words, and, being initialed by the commissioner, this erasure and substitution is authenticated and leaves no ground for doubt as to what the affidavit sworn to by the deponent really was. The fact that by holding the document up to the light the printed words covered over or part of them may be read, seems to me to make no difference, the intent to erase or blot out being manifest. When words in a document are erased as is usually done by

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drawing a pen through them, they remain legible, but it does not follow that they are not erased.

I agree with the learned trial judge that the statements in the affidavit are in compliance with the statute.

The chattel mortgage, therefore, is a security on all the mortgagor's sheep, valid as against the creditors of the mortgagor, but invalid as a security on the horses mentioned.

As to the security under section 88 of the *Bank Act,* I am in accord with the view of Mr. Justice Clarke of the Appellate Division.

Section 88, subsection 12, of the *Bank Act,* R.S.C., 1927, Chap. 12, authorizes a bank to lend money to any person engaged in stock raising upon the security of his live stock, and by subsection 14 it is provided that:

> The security taken under subsection twelve of this section may be taken in the form set forth in schedule E to this Act or in a form to the like effect.

In this case, form C was used instead of form E, and as subsection 14 is only directory the whole question is as to whether what is contained in the form C used is to the like effect of what is required by form E.

The learned trial judge found that, in two respects, what is stated in the form used fails to comply with what is required by form E, namely, that the advance was made on the security of the live stock mentioned in it, and that the security was given under subsection 12 of section 88, the particular subsection 12 not being mentioned. As to the first of these objections, the document states that in consideration of an advance of $2,000 made by the Bank to the undersigned, for which the Bank holds bills or notes, the live stock or dead stock or the products thereof, mentioned below, is hereby assigned to the Bank as security for the payment of said bills or notes.

I am unable to understand how it can be said that this fails to be a statement that the advance was made on the security of the live stock mentioned. I think it is a clear statement to that effect.

The other objection, that the document states that the security is given under the provisions of section 88 of the *Bank Act* instead of "under the provisions of subsection twelve of section eighty-eight," seems to me to be of little

force. How could the omission to state the particular subsection mislead anyone? The only provision of the Act authorizing a loan on the security of live stock is subsection 12 of section 88. The document sets out that the loan is on the security of the live stock mentioned, and anyone looking at section 88 must know at once that, if the loan is under the provisions of section 88, it must be under subsection 12 of that section.

For these reasons and those stated by Mr. Justice Clarke, I am of opinion that the document as completed is in form to the like effect of form E and constitutes a valid security.

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

Appeal allowed with costs.

Solicitors for the appellant: *Bennett, Hannah & Sanford.*

Solicitor for the respondent: *Wm. A. Begg.*

THE CENTURY INDEMNITY COMPANY (DEFENDANT GARNISHEE)..... APPELLANT;

AND

W. G. ROGERS (PLAINTIFF)..... RESPONDENT;

AND

ANNA FITZGERALD (DEFENDANT).

1931
*Nov. 20.
1932
*Mar. 15.

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

Garnishment—Insurance—Motor vehicles—Automobile liability insurance policy indemnifying against loss from legal liability to pay damages to others—Recovery of judgment against insured by person damaged by collision with insured's automobile—Garnishment proceedings against insurance company—R. 590 of Ontario Rules of Court—Whether the insurance company was a "person within Ontario" and "indebted to the judgment debtor"—Terms of policy—Whether alleged debt attachable in Ontario.

Appellant, in May, 1928, issued in the United States an insurance policy to F., an American subject, by which it agreed to indemnify F. against loss by reason of her legal liability to pay damages to others arising out of the ownership, operation or use of her automobile within the

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

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United States or Canada. In October, 1928, near Kingston, Ontario, F.'s automobile collided with that of respondent, who sued F. in the Ontario courts and, on November 26, 1929, recovered judgment against her for damages and costs. A writ of execution was returned *nulla bona*, and respondent, on December 31, 1929, obtained an order attaching all debts owing or accruing due from appellant to F. under the policy, which was still in force. Subsequently a trial of an issue was directed to settle what amount, if any, appellant must pay to respondent on account of the judgment against F. At the trial, respondent put in evidence the policy, his judgment against F., F.'s deposition admitting the collision, the action against her, her presence at the trial, that judgment had been given against her for $8,000 and costs, that no part of the judgment had been paid, and that, at the time of the accident, she carried liability insurance on the automobile with appellant. Respondent testified that the judgment was in respect of $829 damage to his car, and the balance in respect of his personal injuries, as the result of the collision. Respondent also adduced evidence that on March 23, 1929, appellant was licensed to carry on the business of automobile and other insurance in Ontario, and shewing its head office for the province, and its assets in Ontario (moneys in bank) and its assets deposited with the Receiver General of Canada for the protection of Canadian policy holders, as shewn by its annual statement filed as required by law. A clause (F) in the policy read: "No recovery against the Company by the Assured shall be had hereunder until the amount of loss or expense shall have been finally determined either by judgment against the Assured after actual trial or by written agreement * * *."

Held: (1) Appellant was a "person within Ontario" and was "indebted to the judgment debtor," within the meaning of R. 590 of the Ontario Rules of Court. By above quoted clause (F), appellant impliedly agreed that the insured would be entitled to recover on the policy when the legal liability against which she had been insured was determined as to amount by a judgment against her after trial. The amount of her loss in this case having been determined by judgment, the right of the insured to recover that amount under the policy could no longer be disputed by appellant. Appellant was, therefore, under obligation to pay a fixed and definite sum to the insured at the time the attaching order was made.

(2) The fact that the policy was not issued in Ontario or received by the insured in Ontario was immaterial, in view of the fact that the agreement to indemnify was expressly made to cover loss incurred by the insured when operating her automobile in Canada.

(3) The debt was attachable in Ontario.

(4) Appellant's contention that the evidence put in did not, as against it, amount to proof of legal liability on F.'s part for the damage caused by the accident, in that the judgment recovered was not evidence that the damage was caused by her negligence (*Continental Casualty Co.* v. *Yorke*, [1930] Can. S.C.R. 180), was not open on this appeal, as it had not been raised in the courts below.

Judgment of the Appellate Division, Ont., [1931] O.R. 342, holding respondent entitled to recover against appellant, affirmed, subject to a slight variation as to amount.

APPEAL by the defendant garnishee from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which (reversing the judgment of Jeffrey J.) held that the present respondent (plaintiff) was entitled to recover against the present appellant (garnishee), in an issue which had been directed in certain garnishment proceedings.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal was dismissed with costs, with a slight variation (in reduction) of the amount.

R. S. Robertson K.C. and *T. J. Rigney K.C.* for the appellant.

A. B. Cunningham K.C. for the respondent.

ANGLIN C.J.C.—I concur in the judgment of my brother Lamont dismissing this appeal. In fact, the only difficulty I have had in connection with this case arises from the decision of this Court in *Continental Casualty Co.* v. *Yorke* (2), where a somewhat similar appeal was dismissed on the ground that

> the defendant, to escape liability under the condition, must shew that the boy was driving with the knowledge, consent or connivance of S., and this it had failed to do. Such consent could not be presumed as against the plaintiff by reason of the judgment obtained by plaintiff against S.; it did not necessarily follow that because judgment was given against S., the latter had any knowledge that her son was driving her automobile, or that she consented thereto.

This case, however, I am inclined to regard as *sui generis—un arrêt d'espèce,* and it should not be allowed to govern in the case now before us. Indeed, in my opinion, it is too clear to admit of argument to the contrary that the appellant was bound by the judgment against Anna Fitzgerald, both as to the fact of her liability and the amount thereof.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. (Anglin C.J.C. also concurring therein) was delivered by

LAMONT J.—Two questions arise in this appeal:

1. Are the appellants "a person within Ontario indebted

(1) [1931] O.R. 342; [1931] 3 D.L.R. 225.

(2) [1930] Can. S.C.R. 180.

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to the judgment debtor" Anna Fitzgerald, within the meaning of Rule 590 of the Ontario Rules of Court? and

2. If so, is that indebtedness attachable by the respondent to satisfy in whole or in part his judgment?

On or about May 23, 1928, the appellants, in consideration of the premiums therein stated, issued in the United States a policy of automobile liability insurance to Anna Fitzgerald, an American subject, by which they agreed to indemnify her against loss by reason of her legal liability to pay damages to others,

(*a*) For bodily injuries to the extent of $5,000, and

(*b*) damages to property to the extent of $1,000,

arising out of the ownership, operation or use of her automobile within the United States of America or the Dominion of Canada.

On October 5, 1928, Miss Fitzgerald, in operating her automobile near Kingston in the province of Ontario (a friend of hers at her request being at the wheel), collided with another automobile belonging to the respondent with the result that the respondent was seriously injured and his car badly damaged. He brought an action for damages against Miss Fitzgerald in the Ontario courts for the injuries received by him and the damage done to his car, and, on November 26, 1929, recovered judgment against her for $8,000 and costs. The $8,000 was made up as follows: $829 damages to his car, and the balance for personal injuries suffered by himself. The costs were, on December 2, 1929, taxed at $495.60, and were, by the judgment, made payable forthwith after taxation. The respondent immediately issued execution on his judgment, but the sheriff made a return of *nulla bona* to the writ. The respondent, on December 31, 1929, obtained from the local judge at Kingston, Ontario, an order attaching all debts owing or accruing due from the appellants to the judgment debtor, Anna Fitzgerald, under the above mentioned policy, which was still in force. On February 24, 1930, a further order was made:—

> that the Judgment Creditor and the Garnishee do proceed to trial of an issue to settle what amount if any the Garnishee must pay to the Judgment Creditor on account of the aforesaid judgment dated the 26th day of November, 1929.

Pleadings on both sides were delivered. The appellants rested their defence upon their refusal to admit the allega-

tions contained in the statement of claim, and the following two paragraphs:—

3. This Defendant pleads that if there was a contract of insurance issued by this Defendant to the Defendant Anna Fitzgerald, which this Defendant does not admit, such contract of insurance was not issued in the Province of Ontario by this Defendant nor was it received in the Province of Ontario by the Defendant Anna Fitzgerald.

4. This Defendant further pleads that if there is a debt owing by this Defendant to the Defendant Anna Fitzgerald, which this Defendant does not admit, such debt is not subject to attachment in the Province of Ontario.

At the trial of the issue the respondent put in evidence the policy of insurance of the appellant to Anna Fitzgerald; his judgment for $8,000, and costs, and the certificate of taxation. He then put in the deposition of Anna Fitzgerald in which she admitted the collision on October 5, 1928; that action had been brought against her by the respondent; that she was present at the trial and that judgment had been given against her as a result thereof for $8,000 and costs; that no part of the judgment had been paid and that, at the time of the accident, she carried liability insurance on her automobile with the appellants. She was not asked in so many words if the judgment obtained against her was on account of personal injuries received by the respondent and damage to his car caused by her automobile through the negligence of her driver or herself, but that, in our opinion, was the basis upon which her examination proceeded, and all parties so understood it, and the appellants, in their defence, did not allege otherwise. Apart from that, however, the respondent testified that the judgment recovered was in respect of $829 damage to his car, and the balance in respect of personal injuries to himself, as the result of the collision.

The respondent also called R. W. Warwick, Senior Actuarial Examiner of the Department of Insurance, Ottawa, who testified that, on March 23, 1929, the appellants were licensed to carry on the business of Accident, Burglary, Automobile and other insurance in the province of Ontario, and that the head office of the company for the province was at 15 Toronto street, Toronto. He also testified that, according to the annual statement filed by the appellants with the Department of Insurance at Ottawa, as required by law, the appellants, on December 31, 1929, had assets in Ontario amounting to $26,367.74, in the form of money

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deposited in the Dominion Bank at Toronto; they had also $388,000 of assets deposited with the Receiver General of Canada for the protection of Canadian policy holders. The appellants tendered no evidence.

The trial judge found the issue in favour of the appellants, holding that the insurance moneys could not be attached, as the defendant's claim against the appellants under the policy was merely a claim for unliquidated damages and not a debt due or accruing due. On appeal, the first Appellate Division (1) reversed the trial judge and entered judgment for the respondent for $6,000, the amount of the policy, with interest thereon at 5% from November 26, 1929; and for $495 for taxed costs, together with the costs of the issue and appeal. The appellants now appeal to this court.

With the exception of a slight variation to which reference will later be made, the judgment of the first Appellate Division, in our opinion, is well founded.

Rule of Court 590 reads in part as follows:—

(1) The Court, upon the *ex parte* application of the judgment creditor, upon affidavit stating that the judgment is unsatisfied and

(*a*) that some person within Ontario is indebted to the judgment debtor, or

(*b*) * * * *

may order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt.

That the appellants constituted "a person within Ontario" when the attaching order was served upon them seems to admit of no doubt. As pointed out by the court below, section 31 of the *Interpretation Act*, R.S.O., 1927, ch. 1, declares that a "person" includes a body corporate or politic, which the appellants are. They were then doing business in Ontario with a provincial head office there and with considerable sums of money on deposit in a bank in the province. We, therefore, see no reason why they cannot properly be designated "a person within Ontario" within the meaning of the rule.

Then were they indebted to the judgment debtor, Anna Fitzgerald? Under the contract of insurance the appellants agreed to indemnify Anna Fitzgerald against loss by reason of her legal liability to pay damages for injuries

(1) [1931] O.R. 342; [1931] 3 D.L.R. 225.

caused to a person or his property arising out of the use of her automobile in the Dominion of Canada, and to pay the costs taxed against her in any legal proceedings to enforce a claim therefor. They did more, they fixed the time when recovery under the policy might be had, by inserting in the policy the following clause:—

F. Right of Recovery. No recovery against the Company by the Assured shall be had hereunder until the amount of loss or expense shall have been finally determined either by judgment against the Assured after actual trial or by written agreement of the Assured, the Claimant, and the Company, nor in any event unless suit is instituted within two years thereafter.

Whether apart from this clause the claim of the insured under the policy would have been a claim for unliquidated damages, it is unnecessary to inquire. By this clause the appellants impliedly agreed that the insured would be entitled to recover on the policy when the legal liability against which she had been insured was determined as to amount by a judgment against her after trial. This, in our opinion, is the meaning which the parties intended the clause to bear. The amount of her loss in this case having been determined by judgment, the right of the insured to recover that amount under the policy could no longer be disputed by the appellants. They were, therefore, under obligation to pay a fixed and definite sum to the insured at the time the attaching order was made.

This view is not, in our opinion, in conflict with what was held in *Luckie* v. *Bushby* (1). In that case the policy did not contain an express or implied undertaking to pay whatever amount the parties might agree upon as the extent of the loss. Their agreement, therefore, as to the amount at which the loss should be adjusted was only evidence by which to fix the amount for which judgment should be given.

A somewhat similar case came before this court in *Melukhova* v. *The Employers' Liability Assurance Corporation* (2), where the court held that, under garnishee proceedings taken under the Rules of Practice of the province of Quebec, the obligation of the garnishee to pay the insurance money under a policy of indemnity, constituted an indebtedness, although, under the facts of that case, it was only a conditional one.

(1) (1853) 13 C.B. 864.

(2) (1922) 63 Can. S.C.R. 511.

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Lamont J.

That the contract of insurance was not issued in Ontario, or received by the insured in that province, is, in our opinion, immaterial in view of the fact that the agreement to indemnify was, by express provision, made to cover loss incurred by the insured when operating her automobile in the Dominion of Canada.

The only other defence set up was that, if the appellants were indebted to Anna Fitzgerald, such debt was not attachable in the province of Ontario. Since the appellants are a " person within Ontario " and the claim of Anna Fitzgerald to the insurance moneys constitutes a present indebtedness, the attachment, it seems to us, comes squarely within the rule.

On the argument before us Mr. Robertson for the appellants took the point that the evidence put in on behalf of the respondent did not, as against the appellants, amount to proof of legal liability on the part of Anna Fitzgerald for the damage caused by the accident, in that, the judgment recovered was not evidence that the damage was caused by her negligence, and he cited *Continental Casualty Company* v. *Yorke* (1). Mr. Cunningham for the respondent, however, stated that this point was not raised either before the trial judge or the Appellate Division, but that before these courts the whole issue between the parties was whether the claim for indemnity under the policy constituted a claim for debt or one for liquidated damages, and, if for a debt, was it attachable in Ontario? That this was so would appear from the judgment of the Appellate Division, written by Mr. Justice Hodgins, in which we find the following:—

> The only question therefore to be determined is whether at the date of the attaching order there was a debt, and if there was whether that debt is attachable here in Ontario.

The parties having fought out the issue before both courts below on these grounds and having taken it for granted that the respondent's judgment against Anna Fitzgerald determined the measure of the appellants' liability to her under the policy, the appellants are bound by the manner in which they have conducted their case.

The first Appellate Division gave judgment for $6,000 and interest, and costs of $495.60, together with the costs

(1) [1930] Can. S.C.R. 180.

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of the issue and of the appeal. We think there was a slight oversight in these figures: the judgment recovered by the respondent for damage to his car was only $829, and the liability of the appellants under the policy for personal injuries is limited to $5,000. The appellants' total liability under these two items is, therefore, $5,829, instead of $6,000. With this slight variation we would dismiss the appeal with costs.

Appeal dismissed with costs, with a slight variation in amount of the judgment.

Solicitors for the appellant: *Rigney & Hickey.*

Solicitors for the respondent: *Cunningham & Smith.*

THE CITY OF SAINT JOHN v. THE KING

1932

*Feb. 8.
*Mar. 1.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Interpretation—Covenant to repair street—Extent of liability—Nature of Structure—Structure designed to serve dual purpose of wharf and road—Liability as to repair of wharf.

APPEAL by the suppliant, the City of Saint John, from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing its Petition of Right to recover from the Crown the cost of repairing a street on which a spur track of the International Railway had been laid, under an agreement dated January 29, 1914, between the City and His Majesty the King, represented therein by the Minister of Railways and Canals for the Dominion of Canada.

On the appeal to this Court, after hearing the arguments of counsel for the parties, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs. Written reasons were delivered by Smith J., with whom the other members of the Court concurred.

This Court disagreed with the ground taken by Maclean J. that, on the interpretation of the said agreement, the only part of the street that the Crown's covenant to

*PRESENT: Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1931] Ex. C.R. 188.

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repair related to was the strip occupied by the ties and rails of the railway; but agreed with his opinion that the repair or reconstruction that the City was calling upon the Crown to make did not fall within the terms of the covenant. What the City had constructed (originally about 1857, with subsequent repairs) was not simply a roadway but a structure that was to be combined so as to form a wharf and a roadway, the latter superimposed upon the wharf; the specifications for the original construction indicated that the construction of the wharf was at least a main part of the undertaking. The wording of the agreement now in question referred, in this Court's opinion, only to repair of the road. The part of the structure that was out of repair and which the Crown was being called on to repair, was the timber of the perpendicular face of the wharf, the decay and destruction of which, it was said, would in time result in destruction and consequent non-repair of part of the street. The agreement, however, imposes liability to repair the street and says nothing about the wharf, and, in the Court's opinion, does not impose any liability to maintain the street in the sense contended for. The cases of *Sandgate Urban District Council* v. *County Council of Kent* (1) and *Reigate Corporation* v. *Surrey County Council* (2), relied on by appellant, were discussed, and it was held that what was decided in those cases did not amount to authority for appellant's contention here. The judgment of the Lord Chancellor in the *Sandgate* case (1), at p. 427, was quoted from, and it was pointed out that, in the view there taken, it was the duty to "maintain" that imposed the liability; that in the present case there was no contract to "maintain," the agreement being merely to keep the portion of the street in proper repair. In the said two cases referred to, the words "maintenance and repair" of the road were given a meaning wider than their express meaning so as to make them include "maintenance and repair" of a structure, found as a fact not to be part of the road. This was evidently arrived at as a proper inference to be drawn from the circumstances and conditions, and was outside of the express language. In the present case the court was asked to construe the express

(1) (1898) 79 L.T. 425 (H.L.) (2) (1928) 97 L.J. Ch. 168.

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language used so as to impose by inference a liability not expressly imposed by the language of the agreement. There was nothing in the conditions existing at the time or in the surrounding circumstances calling for extending the language of the agreement beyond its express and literal meaning. On the contrary, those conditions and circumstances indicated that the parties never contemplated, at the time, that the Crown was to be made liable for the repairs in question. The term in the agreement giving the City the right to cancel the licence to use the street and compel the removal of the railway tracks at any time on 60 days' notice, strengthened this view; also the specific provision, in another agreement between the same parties made two years later (by which the City granted to the Government Railway the right to lay a spur along the same street on Ballast Wharf), as to repairs of the wharf structure in addition to the provision for repairs of the street, was another circumstance indicating that the parties did not regard repairs to the street as including repairs to the wharf.

Appeal dismissed with costs.

A. N. Carter for the appellant.

I. C. Rand K.C. for the respondent.

QUEBEC SKATING CLUB *v.* THE KING

1932

* Feb. 22
* Mar. 1

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Market value—Title—Value to the owner—Servitudes

APPEAL by the defendant appellant and cross-appeal by the plaintiff respondent from the judgment of the Exchequer Court of Canada (1).

The appellant was the owner of a property in the city of Quebec, upon which there had been a skating rink building which was destroyed by fire. The building was not rebuilt because it was known that the property was to be expropriated by the National Battlefields Commission for the purposes of the National Battlefields park.

* PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1931] Ex. C.R. 103.

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QUEBEC SKATING CLUB v. THE KING.

Expropriation proceedings were taken and Mr. Justice Audette in the Exchequer Court awarded the club $31,500, as the value of the property.

The Skating Club appealed from this award, complaining that the amount was too small, and the respondent cross-appealed, complaining that the amount was too large.

After hearing the arguments of counsel, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal and the cross-appeal with costs.

Appeal and cross-appeal dismissed with costs.

Louis St. Laurent, K.C., for the appellant.

Noël Belleau, K.C., and *L. E. L. Galipeault* for the respondent.

1931

*Nov. 9

1932

*Mar. 15

OBALSKI CHIBOUGAMAU MINING COMPANY

v.

AERO INSURANCE COMPANY

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

Insurance company—Aerial navigation—Seaplane—Accident—Warranty—Licence—Aeronautics Act, R.S.C., 1927, c. 3—Air Regulations, 1920, Art. 3.

APPEAL by the plaintiff appellant from the decision of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of the Superior Court, Duclos J. (2), and dismissing the appellant's action.

The action was brought by the appellant upon a contract of insurance to recover the total loss of a seaplane. On the 29th of May, 1929, the appellant company took out a policy of insurance with the respondent company insuring a seaplane for $19,650, ten per cent deducted, against certain specified perils. On July 13, 1929, the managing

*PRESENT at hearing of the appeal: Duff, Newcombe, Rinfret, Lamont and Cannon JJ., Newcombe J. took no part in the judgment, as he died before the delivery thereof.

(1) (1931) Q.R. 51 K.B. 145.

(2) (1931) Q.R. 51 K.B. 140, at 146.

director of the appellant company, a pilot and a mechanic flew the machine to Lac Ouimet, some 65 miles from Montreal, and there decided to land. In attempting to land, the machine was wrecked and totally destroyed. The appellant company made a claim for the full amount of the insurance, less ten per cent deductible and the cost of salvage. The respondent company denied any liability under its policy on the ground that the flight which resulted in the loss of the plane had been made contrary to government regulations, which fact constituted a direct violation of the warranties contained in the policy, and on the further ground that the aircraft was not airworthy.

The trial judge held that the appellant company had established its claim to the extent of $14,185; but that judgment was unanimously reversed by the appellate court and the action was dismissed.

After hearing the arguments of counsel, the Court reserved judgment, and on a subsequent day delivered judgment, dismissing the appeal with costs.

Appeal dismissed with costs.

H. N. Chauvin, K.C., and *J. C. Lamothe, K.C.,* for the appellant.

Gregor Barclay K.C. and *Miller Hyde* for the respondent.

HARRIS *v.* HARRIS

HARRIS *v.* HARRIS

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal to Supreme Court of Canada—Jurisdiction—Appeal from judgment affirming dismissal of action for alimony—Appeal from judgment affirming the granting of decree nisi in action for divorce—"Final judgment" (Supreme Court Act, R.S.C., 1927, c. 35, s. 2(b)).

The appellant appealed from two judgments of the Court of Appeal for Ontario affirming, in each case, the judgment at trial, granting a decree *nisi* against her in her husband's action for divorce, and dismissing her action for alimony.

Held: There was jurisdiction in this Court to entertain the appeal in the alimony action; but not the appeal in the divorce action, as the decree *nisi* was not a "final judgment" within s. 2 (*b*) of the *Supreme Court Act.*

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*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

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HARRIS v. HARRIS.

MOTIONS by way of appeal, in each case, from an order of the Registrar affirming the jurisdiction of this Court to hear an appeal from the judgment of the Court of Appeal for Ontario, in the one case affirming the granting, at trial, of a decree *nisi* in an action against the appellant for divorce, and in the other case affirming the dismissal of the appellant's action for alimony. In each case the Court of Appeal for Ontario granted leave to appeal to this Court.

R. H. Wilson for the motions.

O. M. Biggar, K.C., contra.

The judgment of the court was delivered by

ANGLIN C.J.C.—These are two motions made by the (defendant) appellant in the first action, and (plaintiff) appellant in the second action, by way of appeal from an order of the Registrar affirming the jurisdiction of this Court to hear appeals from the judgments, in two matrimonial causes, of the Court of Appeal for Ontario. In the first action the husband sued the wife and two co-respondents for divorce and was successful in maintaining his action. This judgment was upheld by the Court of Appeal. In the second case, the wife sued for alimony and her action was dismissed by the trial judge, whose judgment was also affirmed by the Court of Appeal. In both cases the wife is the appellant here.

We are of the opinion that there is jurisdiction in this Court to entertain the appeal in the alimony action from the judgment of the appellate court; but, in regard to the divorce action, it is quite different. The only judgment pronounced so far in that action is that pronounced by the trial judge, affirmed on appeal, whereby it is provided that

> This Court doth order and adjudge that the marriage had and solemnized on the 24th day of February, A.D. 1915, at the city of Toronto, in the county of York and province of Ontario, between George Wesley Harris, the above-named plaintiff, and Marian J. Harris, one of the above-named defendants, then Marian J. Cheyne, be dissolved by reason that since the celebration thereof the said Marian J. Harris, one of the defendants, has been guilty of adultery, unless sufficient cause be shown to the Court why this judgment should not be made absolute within six months from the making thereof.

It is obvious that this is not a final judgment and cannot become such until the order is made absolute by the court. Many things may intervene before that takes place which

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HARRIS v. HARRIS.

Anglin C.J.C.

would prevent the court from making the decree absolute, viz., collusion may later be established, or the defendant may have further evidence to offer when the application to make the order absolute is presented to the court.

At all events, until the decree *nisi* is made "absolute" there can be no appeal to this court from it. Nor can there be a right of appeal from its affirmation by the Court of Appeal to this Court, inasmuch as only final judgments of that court are appealable here; and, in our opinion, an order *nisi*, such as that now before us, cannot be regarded as a "final judgment" within s. 2(*b*) of the *Supreme Court Act*. It does not

> determine(s) in whole or in part any substantive right of any of the parties in controversy in (this) judicial proceeding.

Thus, the wife cannot re-marry, nor can the husband, under the present order. They are still husband and wife, unless and until the order shall be made absolute. The dissolution of marriage under the terms of the order itself becomes effective only when the order or judgment is made absolute; and this is so for all purposes.

The motion by way of appeal from the Registrar will, therefore, be granted as to the divorce action, and refused as to the alimony action. Under the circumstances, there will be no order as to costs.

Motion granted as to the divorce action, and refused as to the alimony action.

Solicitors for the appellant: *McLarty & Fraser.*

Solicitors for the respondent: *Wilson & Thomson.*

SALE AND SALE v. McMILLAN

1932

*Feb. 24.
*Mar. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Solicitors—Action for payment of bill of costs—Alleged absence of retainer—Instructions given to solicitors by litigant's husband—Authority of husband—Ratification by litigant's conduct—Estoppel.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1), which, reversing the judgment of McEvoy J., dismissed the action.

*PRESENT: Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1931] O.R. 418; [1931] 4 D.L.R. 203.

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SALE v. McMILLAN.

The action was brought by a firm of solicitors against the defendant as executor of the will of Mrs. McMillan, deceased, for payment of a bill of costs for alleged services in conducting certain litigation for the said deceased. The defendant denied that the deceased retained the plaintiffs to act for her in the said litigation. The trial judge, McEvoy J., gave judgment for the plaintiffs, which was reversed by the Court of Appeal (1).

On the appeal to the Supreme Court of Canada, after hearing the arguments of counsel, the Court reserved judgment, and on a subsequent day delivered judgment allowing the appeal with costs and restoring the judgment of the trial judge. Written reasons were delivered by Duff J., with whom Rinfret, Lamont and Smith JJ. concurred, and by Cannon J.

Duff J. held that it was clear that Mrs. McMillan's husband had made himself responsible at each stage of the litigation, and had fully committed himself in respect of the appellants' bills; the one point was whether or not Mrs. McMillan herself, who was the real litigant, was bound. There was no formal retainer by her nor anything personally communicated by her to the appellants which, in itself, could have amounted to a retainer of the appellants by her. But her husband was the general manager of her property in Windsor, and there was evidence also to shew that she was aware that the litigation was proceeding on her account and necessarily, therefore, aware that her husband was interesting himself in it. She gave a bond for security for costs, paid one of the accounts with her own cheque, and there was abundant evidence that accounts sent to her were received, because they were brought in later by her husband. The appellants were for a long period collecting rents and crediting the amounts to the expense of litigation; and in the defence a counterclaim was set up alleging that appellants had received as solicitors for Mrs. McMillan certain

(1) [1931] O.R. 418; [1931] 4 D.L.R. 203.

monies and did not pay them, or account for them, to her, and asking for an account. There was the series of actual occasions on which the appellants acted in the most open way, and to her specific knowledge, as her solicitors; in other words, there was a ratification of the acts of her husband in retaining the appellants, as he undoubtedly did, on her behalf. The application for leave to appeal to the Privy Council, opposed by appellants on her behalf, was in the litigation in respect of which most of the bills were rendered; the party to the litigation was Mrs. McMillan who was the owner of the property concerned; her husband very properly applied for assistance from the Essex Border Utilities Commission in the cost of carrying on the litigation; the sum proposed to be advanced by the Commission was not regarded as anything like the whole of the costs. It was very clearly proved that Mrs. McMillan permitted her husband, in the course of managing her affairs on the Canadian side of the line, to act for her in legal matters. She had, by her conduct, put it entirely beyond her power to dispute her husband's authority to act as her agent in giving instructions in reference to legal matters to the appellants.

CANNON J. held that there was no doubt that Mr. McMillan requested appellants to oppose the petition for leave to appeal before the Privy Council. Mrs. McMillan, before and after, certainly held out her husband as her agent for everything connected with the property in question. If, in fact, no agency existed, her husband, now her executor, should have sworn to that effect, but had not done so. The trial judge was right in maintaining the action.

Appeal allowed with costs.

G. F. Henderson K.C. for the appellants.

J. B. Aylesworth for the respondent.

1932

*May 2
*May 7

IN THE MATTER OF THE ESTATE OF FRANKLIN DAVID DAVIS, DECEASED.

MARY JANE ROGERS (A DEFENDANT).. APPELLANT;

AND

HELEN ELIZABETH DAVIS (PLAINTIFF) AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Costs—Allowance of separate bills of costs to respondents—Appellant contending for allowance of only one set of costs.

The appellant's appeal to this court, attacking the validity of a document as forming part of a deceased's will, had been dismissed, "the costs of all parties in this court" to be paid out of the estate. The Registrar had allowed a separate bill of costs to each of three groups of respondents. Each group had been represented by a separate firm of solicitors. Appellant objected to such allowance on the grounds: (1) The interest of all said respondents on the appeal was the same; (2) Only one joint factum was filed by them (only one fee on factum was taxed and only one allowance made on printing of factum, which costs were divided equally among the groups); (3) All said respondents were represented by one Ottawa agent, which agent had presented the three separate bills for taxation.

Held (Rinfret J. in chambers), that there was no ground for interfering with the Registrar's taxation.

APPLICATION by way of appeal from the allowance by the Registrar of a separate bill of costs to each of three groups of respondents, in the appeal before this Court (1).

Cuthbert Scott for the appellant.

Stanley M. Clark and *E. H. Charleson* for the respondents.

RINFRET J. (in chambers)—This is an application by way of appeal from the decision of the Registrar of this Court, upon the taxation of the bills of costs of the respondents, in respect of the allowance by the Registrar of separate sets of costs to each of three groups of respondents.

Before the Registrar, the appellant objected to the allowance of a separate bill of costs to each of the three groups of respondents for the following reasons:

*Rinfret J. in chambers.

(1) The judgment in the main appeal to this Court is reported *ante*, p. 407.

1. The interest of all these respondents on this appeal was identical, all that was at stake before the court being the validity of the will dated October 4, 1930, in which question the interest of each of the groups of respondents was the same;

2. Only one joint factum was filed by the respondents (other than the Official Guardian). The appellant submits that it follows accordingly that the respondents were as one party before the court, at the hearing, and that only one bill of costs can properly be presented for taxation;

3. All the respondents were represented by one Ottawa agent, which agent has presented three separate bills for taxation on behalf of the allegedly separate respondents.

There were other objections mentioned in the notice filed before the Registrar, but they were not pressed on the appeal before me.

I know of no law or rule—and none was cited to me—which compels persons who have different shares in an estate to appear by the same solicitor because their interest, as regards their opposition to the claim of the plaintiff, may be identical. (See *Remnant* v. *Hood* (1).)

In this case there were three separate firms of solicitors representing the three separate groups of respondents, and the rights of these groups to retain the services of the respective firms of solicitors may not be disputed.

It is a fact that only one factum was filed by the three groups of respondents. As a result, only one fee on factum was taxed and only one allowance was made by the Registrar on the printing of factum; and the fee and the cost of printing were equally divided between the three groups of respondents. This had the effect of reducing the total costs; but I fail to agree that, just because, for the sake of convenience, several respondents elect to join in their factum, it should follow that they are to be deprived of their right to a separate bill of costs. Still less, do I think that the sole fact that the respondents were represented by one Ottawa agent may affect their right in that respect.

The judgment of this Court, when dismissing the appeal, was "that the costs of all parties in this Court will be paid out of the said Estate"; and, in my view, the result

(1860) 27 Beavan, 613, at 614.

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Rinfret J.

is that each party separately and properly represented before this Court is entitled to the taxation of his bill of costs. Whether, under the circumstances, there should have been given only one set of costs was a question for the court, when pronouncing its judgment, and is not a question for the taxing officer, who has only to give effect to the order upon costs, as adjudicated by the court. The point now raised by the appellant should have been taken, if at all, by speaking to the minutes of judgment.

I find no ground for interfering with the taxation made by the Registrar, and I therefore dismiss the application by way of appeal, with costs. However, on the present application, as all the respondents were represented by one counsel, there will be only one set of costs to them.

Application by way of appeal dismissed with costs.

1932
*Feb. 24.
*Mar. 24.

LOUISE R. KRAUSE (PLAINTIFF)..... APPELLANT;

AND

FRANK J. YORK (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Res judicata—Claims in present action all before court in former action though not claimed directly as specific relief—Agreement for sale of land—Action by vendor for cancellation and possession; counterclaim by purchaser for return of payments—Subsequent action by vendor for damages for loss on re-sale and sums paid for repairs and taxes.

A vendor of land sued for cancellation of the agreement for sale, and for possession, alleging the purchaser's default in payment of interest and taxes; and recovered judgment for possession and a declaration that the agreement had become null and void. The purchaser counterclaimed for repayment of all amounts paid by him and, by the judgment, recovered all amounts in excess of the first payment. The vendor subsequently brought the present action, claiming damages for loss on a re-sale of the land, and sums expended by him in repairs and for taxes.

Held: While, in the first action, the claims now made were not all claimed directly as specific relief to which the vendor would be entitled upon cancellation of the agreement, yet they were all urged as separate reasons why the amount recovered by the purchaser should not be returned to him. The claims now made were thus all before the court in the first action; and therefore could not be made the subject of another action.

PRESENT: Duff, Rinfret, Lamont, Smith and Cannon JJ.

Judgment of the Appellate Division, Ont. ([1932] O.R. 29), sustaining judgment of Garrow J. (*ibid*), dismissing the action, affirmed.

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KRAUSE v. YORK.

APPEAL by the plaintiff from the judgment of the Appellate Division, Ontario (1), dismissing her appeal from the judgment of Garrow J. (1), dismissing her action.

The plaintiff and defendant entered into a written agreement, dated June 26, 1925, for the sale by the plaintiff to the defendant of certain land in Kingsville, Ontario. The purchase price was $13,500, payable "$2,700 in cash on the date hereof and the balance as follows: in four equal annual consecutive payments on the 26th days of June in each year hereafter of $2,700 each together with interest thereon at 7% per annum payable on the amounts of principal from time to time due on the same dates as the said instalments."

The defendant had previously paid a deposit of $200, and at the time of execution and delivery of the agreement he paid the sum of $2,500, making up the cash payment of $2,700 under the agreement. In July, 1926, he paid another sum of $2,700.

The agreement contained a provision that unless the payments were punctually made "these presents shall be null and void and of no effect and vendor shall be at liberty to re-sell the said lands and all payments heretofore made are to be forfeited to the vendor as liquidated damages."

In May, 1927, the plaintiff sued, alleging default by defendant in payment of interest and taxes, and claimed recovery of possession of the land and cancellation of the agreement. In August, 1927, the plaintiff entered into an agreement to sell the land to other parties.

The defendant delivered his defence in October, 1927, and counterclaimed for repayment to him of all amounts paid on account of the alleged contract together with interest thereon.

That action came on for trial before McEvoy J. McEvoy J. (2), in his judgment, said that he was satisfied that the property was one of highly speculative value, and that the peculiar wording of the forfeiture clause was made for the purpose of providing what the parties considered would be a fair amount to be forfeited if the defendant should fail to carry out the agreement; and refused to relieve the

(1) [1932] O.R. 29. (2) (1928) 38 Ont. W.N. 146.

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KRAUSE v. YORK.

defendant from the forfeiture of the cash payment of $2,700, in the circumstances revealed in the evidence. He gave judgment for the plaintiff for possession of the land and for a declaration that under the terms of the agreement the same had become null and void and of no effect. He held that the defendant was entitled to recover all amounts paid by him in excess of the sum of $2,700 together with interest thereon at 5% per annum from the date of the sale by the plaintiff to the other parties above referred to. He refused to make any allowance to the defendant for alleged improvements to the property, but did not charge him with any occupation rent.

The plaintiff appealed to the Appellate Division against the judgment of McEvoy J., in so far as he held defendant entitled to recover any sum from the plaintiff. The defendant cross-appealed, asking that the amount awarded him by the judgment be increased to the whole amount paid by him with interest.

The Appellate Division, without written reasons, allowed the plaintiff's appeal, and dismissed the defendant's cross-appeal.

The defendant appealed to the Supreme Court of Canada, which (1) allowed his appeal to the extent of restoring the judgment of the trial judge.

On March 22, 1930, the plaintiff brought the present action, claiming damages in the sum of $2,500 for loss on re-sale of the property, the sum of $500 spent in repairing the premises and for interest thereon, and the sum of $114 paid by plaintiff for overdue taxes and for interest thereon.

The action was dismissed by Garrow J. (2), whose judgment was sustained by the Appellate Division (2). The plaintiff appealed to this Court.

By the judgment now reported the appeal to this Court was dismissed with costs.

J. H. Rodd K.C. and *Roy Rodd* for the appellant.

S. L. Springsteen for the respondent.

The judgment of the court was delivered by

LAMONT, J.—We are of opinion that the action in the present case has resulted from a misunderstanding of what had been held by the trial judge, Mr. Justice McEvoy, in

(1) [1930] Can. S.C.R. 376. (2) [1932] O.R. 29.

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a former action between the parties. That action was for cancellation of an agreement for the sale of land and possession, by reason of the defendant's default in the payment of interest and taxes. The defendant counterclaimed for the return of the instalments of purchase money paid. The agreement contained the following clause:

And it is expressly understood that time is to be considered the essence of this agreement and unless the payments are punctually made at the time and in the manner above mentioned these presents shall be null and void and of no effect and vendor shall be at liberty to re-sell the said lands and all payments heretofore made are to be forfeited to the vendor as liquidated damages.

There had been a previous agreement for the sale of the property for $12,500, with a cash payment of $2,500; but the purchaser, on surveying the property, found that an additional ten feet was necessary to include all the house. This ten feet was purchased for $1,000, $200 cash, and the balance in four payments. The parties agreed that the present agreement should be substituted for the former one.

In his judgment Mr. Justice McEvoy said:—

Under the terms of the agreement the defendant covenanted with the plaintiff, and the plaintiff covenanted with the defendant, that if the defendant should not make his payments promptly, that he should forfeit the cash payment of $2,700. Or in the words of the agreement dated the 26th of June, 1925, it was agreed that the plaintiff should be at liberty to sell the said lands, and all payments "heretofore" made are to be forfeited to the vendor as liquidated damages.

I am not overlooking the law that this might be considered as a penalty, and that the damages ought to be assessed independently of the amount named in the forfeiture clause; but I am satisfied that the property was a property of highly speculative value, and that the peculiar wording of the clause was made for the purpose of providing what the parties considered would be a fair amount to be forfeited if the defendant should fail to carry out the agreement.

That judgment was affirmed by this court (1).

In the present action the plaintiff claims:

(*a*) damages in the sum of $2,500 for loss on the resale of the property;

(*b*) $500 spent in repairing the premises;

(*c*) interest and taxes which, in the agreement, the defendant covenanted to pay.

In opening the present case at the trial counsel for the plaintiff said:—

We are assisting your Lordship to this extent that we are putting in the appeal case in the action between the same parties as containing the

(1) [1930] Can. S.C.R. 376.

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evidence of the respective parties and the exhibits referred to in the appeal case, subject to either one calling such further witnesses as they may be advised.

and he closed the plaintiff's case without putting in any new evidence.

The claims now made by the plaintiff were all before the court in the former case. They were not all claimed directly as specific relief to which the plaintiff would be entitled upon the cancellation of the contract, but, it is admitted, they were all urged as separate reasons why the second payment of $2,700 should not be returned to the defendant. This court decided against the plaintiff's contention. These claims, therefore, cannot now be made the subject of another action.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *McTague, Clark, Springsteen, Racine & Spencer.*

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*Feb. 3, 4, 5.
*April 26.

ERNEST F. BRADLEY, AND HECTOR LANG AND REV. EDWARD T. SCRAGG, EXECUTORS OF THE WILL OF GEORGE MOULTON GODDARD, DECEASED.....(PLAINTIFFS) } APPELLANTS;

AND

JENNIE CRITTENDEN.....(DEFENDANT)

RESPONDENT.

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

Gift—Alleged undue influence—Action to set aside gift of bank shares made by person since deceased—Nature of relationship between donor and donee—Presumption—Onus.

The residuary legatee and testamentary executors of G., deceased, sued to set aside a transfer of bank shares made by G., by way of gift, to defendant, about 8 months before G.'s death. At the time of the gift, G. was a man of 85, and defendant a woman of about 50, years of age. For some years they had been very friendly and intimate, and G. had several times proposed marriage to her. They had undertaken together the purchase of some property. About a month after the gift in ques-

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

tion, G. gave her a general power of attorney and signed blank cheques, but these were never used. About 9 days before his death G. made his last will, the defendant not being present, which made no mention of the shares. There was no finding of any fraudulent or wrongful act or any deliberate exercise of undue influence on defendant's part; and the questions for determination were: whether there existed between them a relation of such a nature as would raise the presumption that defendant had influence over G. of such a kind that the court, acting on such presumption, would set aside the gift unless defendant established that in fact the gift was G.'s spontaneous act, in circumstances which enabled him to exercise an independent will, and which justified the court in holding that the gift was the result of a free exercise of his will; and, if there was such a relation as would raise the presumption, whether the presumption had been rebutted. The trial judge, Ewing J. (25 Alta. L.R. 562), set aside the gift. His judgment was reversed (two judges dissenting) by the Appellate Division, Alta. (*ibid*). On appeal to this Court:

Held (Duff and Lamont JJ. dissenting), that the judgment of the Appellate Division in defendant's favour should be affirmed.

The nature of the relationships giving rise to the presumption against a donee; the discharging of the onus of rebutting the presumption; the governing considerations; the materiality, weight and effect of certain circumstances; acquiescence or ratification by subsequent conduct of the donor; laches, etc., discussed.

Per Rinfret and Smith JJ.: It is not the law that any relation of confidence between a donor and a donee is sufficient to raise the presumption. The presumption does not extend to cases of relationship resulting from pure friendship, even though the friendship were of such a character that the donor reposed confidence and trust in the donee. In the present case, the only relationship established was one of deep affection and of the high regard in which G. held defendant. This affection in itself afforded a satisfactory explanation of the motive which prompted the gift. But, assuming that the relationship was such as to raise the presumption, it was rebutted by the facts and circumstances in evidence.

Per Cannon J.: While the relationship, which was one implying special confidence, was such as to raise the presumption, it had been rebutted. Moreover, the lapse of time during which G., when free from any influence of defendant, allowed the transaction to stand, and the other circumstances in the case, proved his determination to abide by what he had done.

Per Duff J. (dissenting): The relationship was such that, by reason thereof, it must be inferred from the facts in evidence that, in transactions with defendant, G. was not under the control of his own judgment; and the onus rested on defendant to shew that, in the matter of the gift in question, G. was entirely free from this influence; and that onus was not discharged. There was not adequate evidence to warrant a finding that G., after he became free (if he was ever wholly free) from defendant's influence, deliberately and spontaneously confirmed the gift.

Per Lamont J. (dissenting): The facts in evidence shewed the existence of such a relationship as raised the presumption. The onus was on defendant to establish that the transfer was made to her for her own benefit and was the spontaneous act of G.'s independent will; and this onus was not discharged. Without entirely disregarding defendant's

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testimony, effect should not be given to it unless it was corroborated by independent evidence. The evidence was not sufficient to establish, by G.'s subsequent conduct, any deliberate and intentional affirmance of the transfer.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1).

The action was brought by the residuary legatee, and by the executors, named in the will of one Goddard, deceased, to set aside a transfer, made by the deceased by way of gift, to the defendant of 44 shares of bank stock, it being alleged that at the time of the transfer the defendant stood in a confidential relationship to the deceased, that the deceased did not receive any independent advice and that he was induced to make the gift by the undue influence of defendant.

The trial judge, Ewing J. (2), gave judgment setting aside the transfer. His judgment was reversed by the Appellate Division (1) (Clarke and Lunney, J.J.A., dissenting).

The material facts of the case are sufficiently stated in the judgments now reported. The appeal to this Court was dismissed with costs, Duff and Lamont JJ. dissenting.

A. Macleod Sinclair K.C. and *A. B. Clow* for the appellants.

C. S. Blanchard K.C. for the respondent.

The judgment of Rinfret and Smith JJ. was delivered by

RINFRET, J.—The action is brought by the testamentary executors of the late G. M. Goddard, of Medicine Hat, in the province of Alberta, to have declared null and void and set aside a transfer by way of gift to the respondent of certain shares of stock in the Bank of Nova Scotia. It was admitted that there was no consideration passing from the respondent to Goddard.

The trial judge found that the transfer "was in fact a gift"; and the correctness of that finding cannot be seriously disputed. There is no evidence to support the contention that the shares were given to the respondent as trustee for the estate, or that an actual trust was created under either an express or an implied contract.

(1) 25 Alta., L.R. 562; [1931] 2 W.W.R. 669; [1931] 4 D.L.R. 384.

(2) 25 Alta., L.R. 562; [1931] 2 W.W.R. 699; [1931] 2 D.L.R. 961.

The attack made upon the gift was based on two grounds; mental incapacity of the donor, and undue influence of the donee.

The ground of mental incapacity of the donor may be excluded at once. It was not entertained by the trial judge nor by the Appellate Division of the Supreme Court of Alberta, and it was not pressed by the appellants before this court.

It remains to consider the ground of undue influence.

The evidence does not bring this case within the group of cases mentioned by Lindley L.J., in *Allcard* v. *Skinner* (1), "in which there has been some unfair and improper conduct, some coercion from outside." We have here no finding of fraudulent or deliberate exercise of undue influence. As a matter of fact, the trial judge negatived any suggestion "that the defendant was guilty of any wrongful act." There was no evidence whatever of undue influence leading to the gift; or, to borrow the expression of Cotton L.J., in *Allcard* v. *Skinner* (2), "that the gift was the result of influence expressly used by the donee for the purpose."

Then, there is another class of cases "in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him." Instances of these would be the position of solicitor to client, trustee to *cestui que trust,* guardian to ward; that of husband and wife, or of parent and child. In those instances, where the donor relies on the donee for guidance and advice, the doctrine of equity, as expounded in *Huguenin* v. *Baseley* (3) and such other cases, intervenes on the principle of presumed undue influence and introduces the rule that, while fiduciary relations of that character exist between donor and donee, it is, generally speaking, impossible to rebut the presumption, unless the donor had competent and independent advice.

But that is not the present case. It was not found here that the deceased relied on the respondent for advice of any kind or in relation to his business.

Other relations from the existence of which the courts have presumed the exercise of undue influence are those of

(1) (1887) 36 Ch. D. 145, at 181. (2) (1887) 36 Ch. D. 145, at 171.
(3) (1807) 14 Ves. 273.

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spiritual adviser and devotee, medical attendant and patient, principal and agent; and also, in special cases, that of a man to a woman to whom he is engaged to be married. (See: Halsbury, Laws of England, vol. 15, p. 107, no. 215).

In the present case, however, the learned trial judge appears to have considered that any relation of confidence between a donor and a donee is sufficient to raise a presumption of undue influence; to put it in his own words: "that the relations between the deceased and the defendant (respondent) * * * raised a presumption that the donee had influence over the donor"; and, for that reason, he reached the conclusion that the action should be maintained. We do not agree with that view of the law.

The doctrines of equity do not require that the principle and the rule should be extended to relationship resulting from pure friendship, even were the friendship of such a character that the donor reposed confidence and trust in the donee. As said by Fletcher Moulton, L.J., in *Coomber* v. *Coomber* (1): "The nature of the fiduciary relation must be such that it justifies the interference."

In the case at bar, there was no proof of any fiduciary relation so called, nor, in our view, proof of any confidential relationship such as is necessary to raise the presumption of undue influence. The only relationship established was one of deep affection and of the high regard in which the deceased held the respondent. We agree with the majority of the Court of Appeal that such affection, in itself, "provides a good reason" for the gift and affords a satisfactory explanation of the motive which prompted the donor to make it.

But, even if we should assume that the relationship in the premises was such as to raise any presumption, we think the facts and circumstances established in the case were sufficient completely to rebut the presumption. As found by the trial judge, the respondent "placed before the court frankly and, as far as (he) could judge, fully all the relevant facts in her possession." The learned judge accepted her story, but thought apparently that he was precluded from "taking her evidence into account" and that "the gift must be established by separate and inde-

(1) [1911] 1 Ch. 723, at 729.

pendent evidence," and so he "felt bound" to set aside the transfer of the shares.

We do not think the proposition put thus absolutely may be stated as a rule of law (See: *Koop* v. *Smith* (1); *Fowkes* v. *Pascoe* (2)); nor does that result flow from the provision in the statute of Alberta (s. 12 of c. 87, R.S.A., 1922), invoked by the appellants' counsel, which reads as follows:

> In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

In *Thompson* v. *Coulter* (3), this court had to apply the Ontario statute, which is substantially similar, and Killam J., delivering the judgment of the court, remarked (p. 263):

> The direct testimony of a second witness is unnecessary; the corroboration may be afforded by circumstances. *McDonald* v. *McDonald* (4).

Throughout the record in the present case may be found abundant corroboration of the evidence of the respondent. That corroboration "confirms the credit not only of the statements which are expressly supported but of all the statements made by her" (*Minister of Stamps* v. *Townend* (5)). Even were the relationship existing between her and the deceased as contemplated by the decided cases and of a character to raise the presumption of undue influence, we would consider that, at all events, the evidence overbalances the presumption and shows that the gift made to the respondent by the deceased was a spontaneous and voluntary act on his part and "the result of the free exercise of independent will."

The judgment of the Appellate Division should be affirmed and the appeal should be dismissed with costs.

Under those circumstances, the application of the respondent for leave to reopen the case and adduce further evidence becomes unnecessary; and the costs of that application should be costs in the appeal.

(1) (1915) 51 Can. S.C.R., 554, at 558.
(2) (1875) L.R. 10 Ch. App. 343.
(3) (1903) 34 Can. S.C.R. 261.
(4) (1902) 33 Can. S.C.R. 145.
(5) [1909] A.C. 633 at 638.

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CANNON J.—In my opinion, undue influence might be presumed in this case because the deceased and the respondent stood towards one another in a relationship implying special confidence. The respondent therefore had to prove the fairness of the transaction and she has done so to my satisfaction.

Moreover, the gift was made in May, 1930, by a man of good business ability, not illiterate nor ignorant, who was not at a disadvantage in relation to it. The donor had already done much for his nephew Bradley; and he was entitled to do what he wished for the future welfare of the respondent, for whom he had a deep regard.

Before he made his will in January, 1931, he could have revoked, within a reasonable time, the intention which he had formed and declared in his letter to the bank requesting the transfer of the shares to the respondent. He confirmed his intention first by signing the necessary papers giving effect to the transfer. The appellants admit that the deceased had the testamentary capacity to make a will on the 14th of January, 1931, when he was entirely free to act as he pleased and gave his instructions to the Reverend Mr. Scragg. He then remarked that he had made "a great and grave mistake about Mrs. Crittenden"—from whose "influence" he had been, and was then, removed during the last few weeks of his life. In my view, the deceased was then content to let the gift stand; he did not even mention the exact nature of the transaction to Reverend Mr. Scragg, who was advising him, nor to the Bradleys with whom he was living. An impeachable transaction may become unimpeachable by reason of ratification after the influence of the "donee" has been removed. The lapse of time during which the donor has allowed the transaction to stand, and the other circumstances of the case prove a fixed, deliberate and unbiased determination that the gift should not be impeached—and the persistent will to take these shares out of the estate to avoid complications. Paraphrasing Lord Selborne's words in *Mitchell* v. *Homfray* (1), it must be held that whether he knew or not that he had power to retract the gift, he was determined to abide by his acts; this is not a case of mere acquiescence; he determined that he would not undo what he had done. This

(1) (1881) 8 Q.B.D. 587, at 591.

being the state of facts, I do not think that any authority goes the length of saying that his representatives after his death, can do that, which if he had lived he himself would not have done.

The appeal must be dismissed with costs.

DUFF J. (dissenting).—It is most important, I think, that some aspects of the law should be emphasized. The first branch of the legal rule can be put in this way: If A obtains property by contract or gift, by exercising influence upon B which, in the opinion of the court, prevents B from exercising an independent judgment, then the transaction is bad. With that particular class of case we are not concerned here. The present case belongs rather to those in which the court acts, not upon the proof of actual exercise of undue influence in a particular case, but upon a presumption of law and a rule of public policy. The rule and the presumption may be thus stated: If it be proved that there exists a relation between two persons, A and B, of such a nature as to give rise to a presumption that A possesses over B an influence which may, in operation, deprive him of his independence of judgment, then if, in any transaction B acquires from A property by gift or contract, the court will presume that the transaction has been the result of that influence and will set it aside, unless the donee (because in this case we are concerned with the case of gift) establishes, to the satisfaction of the court

"that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. * * * In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

The words in quotation marks are taken from the judgment of Cotton, L.J., in *Allcard v. Skinner* (1), and were explicitly approved by the House of Lords in *Inche Noriah* v. *Shaik Allie Bin Omar* (2).

Two other things it is important also to note: first, that where the case falls within the second of the classes mentioned, it is immaterial that the donor makes the gift without pressure or solicitation upon the donee, or that the

(1) (1887) 36 Ch. D. 145, at 171. (2) [1929] A.C. 127.

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donor perfectly understands the nature of what he is doing, that is, that he is conferring a bounty. *Wright* v. *Vanderplank* (1); *Rhodes* v. *Bate* (2). Effect was given to this in *Allcard* v. *Skinner,* where it was conceded that no pressure was exerted (3), except the inevitable pressure of the vows and rules.

Then, as to the duty of giving advice, that is very far from being the core of the matter. The substance is in the answer to the question, was the gift the result of the act of a person having power to act independently—who, in fact, is independent. The court sets aside the gift unless the court sees that the gift was the result of the independent judgment of the donor.

I have been quite unable to resist the conclusion, after an examination of all the facts, that the state of influence contemplated by the law in this branch of it did exist. We need not concern ourselves with the greater or less degree of analogy to other cases. I need only mention the case of *Rhodes* v. *Bate* (4), in which that great master of equity, Lord Justice Turner, stated that such cases as child and parent, solicitor and client, medical man and patient, were merely instances of the application of the general principle. The primary question that the court ought to ask itself is: should influence of the kind contemplated be presumed? The mere fact that the motive on one side is that of pure affection is immaterial. The principle has been applied to cases of engaged young persons, and of mother and son, brother and sister, sister and sister. As I have already said, it is immaterial that nothing in the nature of solicitation or activity on the part of the beneficiary has been disclosed or exists. It is not material that the whole transaction from beginning to end is free from moral blemish on either side. *Rhodes* v. *Bate* (4).

As already observed, it cannot properly be laid down that independent legal advice is the only way in which the presumption can be rebutted; "nor are they prepared to affirm," said the Lords of the Judicial Committee in *Inche Noriah* v. *Shaik Allie Bin Omar* (5),

that independent legal advice, when given, does not rebut the presumption, unless it be shewn that the advice was taken. It is necessary for

(1) (1856) 8 D.M. & G. 133, at 136.
(2) (1865) L.R., 1 Ch. App. 252.
(3) (1887) 36 Ch. D. 145, at 178.
(4) (1865) L.R. 1 Ch. App. 252.
(5) [1929] A.C. 127, at 135.

the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton L.J., and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.

It should, I think, in the present case, be emphasized that, as their Lordships state, if independent advice is to be given, it must be given with a knowledge of all relevant circumstances, and must be such as a competent and honest adviser would have given if acting solely in the interests of the donor.

My conclusion is that, in consequence of the relation between Goddard and the respondent, it must be inferred from the facts in evidence that, in transactions with Mrs. Crittenden, Goddard was not under the control of his own judgment, and that the onus rests upon the respondent to shew that in the matter of the gift in question he was entirely free from this influence. I think she has failed to do that.

It seems necessary to say a word as to acquiescence and laches. I am unable to agree that the few words uttered by Goddard during his last illness, coupled with what he did concerning his testamentary dispositions, can be accepted as adequate evidence that after he became free from the influence (if he was ever wholly free from it) of the respondent, he deliberately and spontaneously confirmed the gift. The term "acquiescence" is one which is sometimes rather loosely employed. I shall not stop to go through the authorities which illustrate the scope and proper application of the doctrine; because the law, as it affects such cases as this, is stated with perfect accuracy in the following passage from White & Tudor's Leading Cases in Equity (1):

Delay in asserting rights cannot be in equity a defence unless the plaintiff knows his rights. In *Allcard* v. *Skinner* (2), more than six years

(1) 8th ed., at pp. 299-300. (2) (1887) 36 Ch. D. 145.

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had elapsed since the influence had ceased, and the action was commenced, and following the analogy of the Statute of Limitations in actions for money had and received, such delay would be a very material element for consideration. And although delay is not a bar in itself, it is a fact to be considered in determining whether there has been an election on the part of the donor to confirm the gift.

In cases of this kind there can be no acquiescence until the donor knows his rights and is free from the influence, but ignorance of his rights which is the result of deliberate choice is no answer to a defence of laches and acquiescence. It is enough for the donee to show that the donor knew he might have rights, and being a free agent at the time, deliberately determined not to inquire what they were or to act upon them.

I can find no evidence in this case upon which an inference can be founded that Goddard either knew his right to recall the gift, or that he had any suspicion of the existence of such a right, and deliberately chose to remain in ignorance of it. I find nothing to indicate, on his part, a deliberate abstention from enquiry. I should be disposed to ascribe his inaction to the combined effect of lack of knowledge and growing weakness of body and mind.

The appeal, in my opinion, should be allowed and the judgment of the trial judge restored.

LAMONT J. (dissenting).—The appellants, who are the residuary legatee and the executors of the last will of George Moulton Goddard of Medicine Hat, brought this action to set aside a transfer of 44 shares of the capital stock of the Bank of Nova Scotia made by the deceased Goddard to the respondent on or about May 30, 1930. Goddard died on January 23, 1931.

The grounds upon which it is sought to set aside the transfer are: that there was no consideration therefor; that the parties stood in a confidential relation one to the other, and that the transfer was induced by undue influence.

The principle upon which courts act in cases in this kind was laid down by the Court of Appeal in *Allcard* v. *Skinner* (1); and by the Privy Council in *Inche Noriah* v. *Shaik Allie Bin Omar* (2), and, as set out in the head-note of the latter case, is as follows:—

Where the relations between a donor and donee raise a presumption that the donee had influence over the donor, the court will set aside the gift unless the donee establishes that it was the spontaneous act of the donor acting in circumstances which enabled him to exercise an independent will, and which justified the court in holding that it was the result of a free exercise of the donor's will.

(1) (1887) 36 Ch. D. 145, at 171. (2) [1929] A.C. 127.

In such a case the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy and to prevent the relation which exists between the parties and the influence arising therefrom being abused. In fact, courts have gone so far as to set aside gifts made to persons in a position to exercise undue influence over the donors, although there was no proof of the actual exercise of such influence.

In the present case the first and most important question is: Was the relationship existing between the deceased Goddard and the respondent sufficient to raise a presumption that the transfer of the shares was the result of undue influence on the part of the respondent? On this question the facts are all important.

The deceased with his wife came to Alberta from Newfoundland in the fall of 1918. He had been a successful merchant and business man there and, some forty years before he came west, he had adopted as a son his nephew who grew up with him and married, but still continued to live with him. The nephew (the plaintiff Bradley) also came to Medicine Hat in 1918, where the deceased had bought a farm for him. He also bought him a house and later the Shamrock Bottling Works. In fact, he made his nephew independent. The deceased, his wife and the Bradleys all lived together. The deceased and the respondent became acquainted as they were both active workers in the same church.

Mrs. Goddard died in 1923. In 1924 the deceased commenced to visit the respondent at her home. She was a married woman living separate from her husband and earning her living by dressmaking. Her husband had, in 1923, commenced divorce proceedings against her, in the United States, but whether or not he took out the final order the respondent did not know. The deceased visited her two or three times each week; they kissed when they met and when they parted. In 1925 he proposed marriage to her, but she said she did not know if she was free to marry. On cross-examination she said she refused him. He, however, continued his visits as before and, between 1925 and the early part of 1928, he had proposed marriage to her on six different occasions. She admits he was very much in love with her and had offered to change his will and leave her

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everything he had if she would marry him. She also admits that she had learned about his affairs and the property he had, and said he was in the habit of bringing to her his papers as he knew she was interested in him. In 1926 he brought to her his will in which the bank shares in question in this action were bequeathed to the plaintiff Bradley. She ascertained from a lawyer the meaning of a holograph will and what, under the Alberta law, was necessary to its validity. This information she conveyed to the deceased. In the fall of 1929 she says the deceased shewed her a holograph will in which the 44 shares in the Bank of Nova Scotia were bequeathed to her and she was made sole executrix of the will. This will was not produced nor was there any evidence, except her own, that it had ever existed. In April, 1930, she says the deceased told her he was going to take the shares in question out of the will and give them to her. On May 9, 1930, the deceased had a fall and it is common ground that he was badly shaken up as a result thereof. Mrs. Bradley says that after his accident "his speech was much changed; that it was quite thick and he could not say his words plain." It was for that reason she thought he had had a stroke. After the accident he brought to the respondent another holograph will, supposed to be a copy of the 1929 will except as to the shares. This will bears date May 20, 1929, but she says she called the deceased's attention to the year and he admitted that it should be 1930, and said he would rectify that. This will was produced. In it there is no mention of the 44 Bank of Nova Scotia shares. After specifying a number of bequests the will contains this clause:—

> I appoint my friend Jennie Crittenden to be my Sole Executrix of this my last will for the purpose of settling all my affairs stated herein and leave the sum of $300 for her services in connection with same, all my personal and private effects together with the contents of my office, I leave in her charge to be used at her discretion and with power to collect any monies due to me all necessary documents are to be found in my safe My Life Insurance Policies (Mutual Life No. 313777) and Confederation Life 19732 shall be used to provide for bequests above mentioned and to these shall be added any other monies standing to my credit, after satisfying these claims, together with all my just debts and funeral expenses, the residue shall constitute a fund from which certain Church and Charitable contributions shall be made annually in my name. My wishes in this respect I have conveyed to my executrix.

The day before he wrote this will the deceased had sent his certificates for the 44 shares in the Bank of Nova Scotia

to the bank at Calgary, with instructions to have the shares transferred to the respondent. The bank manager sent back the necessary forms for signature, and, after they had been duly executed by both, the respondent returned them to the bank on May 30, 1930, and certificates in her name were issued; but she says it was understood that he was to have the dividends while he lived and after his death the shares were to be hers. At this time the deceased was still visiting her two or three times a week and he had no independent advice as to the transfer. He was then eighty-five years old, and she was around fifty.

At this point it is convenient to refer to their business transactions: In July, 1928, they both went for a trip to Vancouver along with his brother. While there the deceased purchased some property, and so did the respondent. They also bought one piece of property jointly for $3,375, with a cash payment of $844. The deceased made the entire cash payment but the agreement was taken in her name alone, and she says she subsequently paid him the moneys he had paid for her. From that time she took charge of these real estate transactions, his as well as her own, paying the taxes, interest, etc.

On June 30, 1930, the deceased gave the respondent a general power of attorney authorizing her (*inter alia*) to collect all moneys due to him, to sell and dispose of all mortgages, stocks, bonds, and all other personal property, and all lands of which he was possessed, at such prices as to her might seem best. He also gave her seven cheques, signed by him, but left blank as to date, payee and amount, on various banks in which he had accounts, not only in Medicine Hat and Edmonton, Alberta, but also in St. Johns, Newfoundland. After receiving these she was in complete control of all his money and property. She, however, made no use of either the power of attorney or the cheques.

In the early part of January, 1931, the deceased took sick and, on January 14, made his last will in which the appellants, Lang and Scragg, were made his executors, and Bradley the residuary legatee. No mention is made of the shares, and the respondent is given a legacy of $100. The entire estate of the deceased at that time, including the

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shares in question, amounted to $25,400, and the shares were worth $14,080.

Do the above facts shew the existence of a relationship which raises a presumption that the transfer of the shares to the respondent was due to the influence she had over the deceased? In my opinion they do. One of the fundamental principles of our law is that a person standing in a fiduciary relation shall not be allowed to use the influence he derives from his position for his own material advantage and to the prejudice of those whom he should protect. No general rule can be laid down as to what shall constitute undue influence. Each case must depend upon its own particular circumstances. In determining the question it must not be forgotten that a man *sui juris* has a right to do as he likes with his own property, and the fact that the transaction may be improvident, extravagant or foolish on the part of the donor will not alone justify interference with it. It is for the court in each case to say if the influence exercised has been so pressing as to be undue influence within the rules of equity.

Undue influence has been presumed where the relationship existing between donor and donee was that of solicitor and client, doctor and patient, confessor and penitent, guardian and ward, etc. The rule, however, is not confined in its application to cases in which a fiduciary relationship exists. As was said by Lord Cottenham in *Dent* v. *Bennett* (1), and quoted with approval in *Cavendish* v. *Strutt* (2):—

> The relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another.

The rule has also been applied where the relationship existing is that of a man and woman engaged to be married. *In re Lloyds Bank, Bomze* v. *Bomze* (3). In that case Mr. Justice Maugham said:—

> A young woman engaged to be married, however, is in a different position. In general she reposes the greatest confidence in her future husband.

See also: *Page* v. *Horne* (4); *Cobbett* v. *Brock* (5); *Howes* v. *Bishop* (6).

(1) (1839) 4 My. & Cr. 269, at 277; 41 E.R. 105, at 108.
(2) (1903) 19 T.L.R. 483, at 489.
(3) (1930) 47 T.L.R. 38.
(4) (1848) 11 Beav. 227, at 235.
(5) (1855) 20 Beav. 524.
(6) [1909] 2 K.B. 390.

Does the rule apply where the donor and donee are not formally engaged but the donor is greatly in love with the donee and desires to make her his wife?

Under the circumstances of this case I am of opinion that it does. I am unable to conceive of the deceased having any greater confidence in the respondent had there been a formal engagement between them than that which the evidence shews actually existed. She says she refused his offer of marriage when first made. If so it must have been a refusal which did not repel, for his visits continued and, for over two years, his proposal was at intervals renewed. She occupied a fiduciary relation towards him in respect of the Vancouver property, and she admits that hers was the stronger mind and the stronger personality.

The giving to the respondent of a general power of attorney and the cheques one month after he made the transfer of the shares, shews the special confidence he had in her, as does also his making her residuary legatee under the holograph will, with a direction to distribute the fund in accordance with his verbal instructions, and his giving to her the combination of his safe which he gave to no other person. Further, although he was living with Mrs. Bradley, his relations with the respondent were so intimate that, on his last visit to her (January 6, 1931), he took her his coat to mend, and she admits that she often pressed his clothes. All this indicates how intimate and confidential was the relationship existing between them. In addition to these confidential relations there is the admitted fact that she informed the deceased as to what constituted a holograph will and the requirements necessary for its validity. In doing so there may have been nothing whatever of calculation in her action, but a holograph will appears in which she is designated the residuary legatee. Both the will and the transfer of the shares were kept secret. It is, as I read the authorities, just in cases of this kind that the courts have insisted upon the application of the rule.

Then has that presumption been rebutted? That the deceased knew what he was doing cannot, I think, be disputed. He gave the bank instructions to make the transfer. That, however, in a case of this kind, proves nothing more than that he was transferring the shares to her. It furnishes no evidence of the terms upon which she was to hold

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the legal title thereto. And, even if it did, it might only tend to shew more clearly the deep rooted influence which the respondent had over him. The statement of claim alleges the transfer was made by way of gift, but, at the trial, counsel for the appellants sought to amend the prayer for relief by claiming in the alternative that the respondent held the shares as trustee for the deceased. The amendment was refused. I think it might well have been allowed. The facts were all before the court. The only living person who knew the conditions upon which she received the shares, so far as we know, was the respondent herself. If any one else had been present when the conditions were decided upon she would be aware of it and would have had that person at the trial if he could have corroborated her story. The onus was on her to establish the gift as well as that it was the spontaneous act of the donor's independent will. In *Walker* v. *Smith* (1), Sir John Romilly, M.R., said:—

> He (the donee) must prove every point of the case, not only the transfer, but that the transfer was meant to be made to him beneficially.

And at page 396 he said:—

> I am of opinion that, in all these cases, you must not take into account the evidence of the recipient himself; the gift must be established by separate and independent evidence.

Without entirely disregarding the donee's testimony I would say that effect should not be given to it unless it is corroborated by independent evidence. Upon the vital point that it was the intention of the deceased to give to the respondent the beneficial interest in the shares conditioned upon her paying the dividends to him during his lifetime, there is absolutely no evidence but her own. It is consistent with all the evidence but that of the respondent that the deceased may have transferred the shares to her to pay the dividends to him during his lifetime, and then to apply the shares to a particular purpose expressed verbally to her by him, and not put in writing, but which no person knew but themselves.

As to the transfer of the shares being the spontaneous act of the deceased in the exercise of an independent will, I am of opinion that the onus resting on the respondent has not been discharged. That confidential relations existed between them during the years he was seeking to

(1) (1861) 29 Beav. 394, at 399.

make her his wife is not denied by the respondent. Where a confidential relation is established the court will presume its continuance unless there is distinct evidence of its determination. *Rhodes* v. *Bate* (1). That there was no termination of this relation prior to the transfer of the shares and that he was more than ever dominated by his confidence in the respondent is, I think, demonstrated by the fact that a month later he gave her the power of attorney and the cheques, thus putting himself completely in her power.

It was argued that as, on January 14, 1931, he made a new will, when he was surrounded by influences other than hers, and made no disposition of the shares, it might reasonably be inferred that he had determined to leave them where they were. If it had been established that he then knew he could revoke the gift (if it was a gift) and set aside the transfer, the argument would have been much stronger, but, in the absence of evidence to establish such knowledge on his part, his failure to mention the shares in his last will does not, in my opinion, justify the inference that he deliberately and intentionally affirmed the transfer. Until the commencement of his sickness eight days before he made his last will, he was under the influence of the respondent. Because he did not during these eight days seek to ascertain his rights in respect to the revocation of the shares, he cannot be charged either with laches or deliberately choosing to remain in ignorance thereof, as at the time he was ill and very old. After carefully perusing the evidence I am unable to find the slightest evidence of acquiescence or ratification of the transfer by the deceased.

The rule of equity which places on the donee the burden of proving both the gift and the independence of the donor's will in making it, may be a harsh one and, in individual cases, may lead to hardship. The courts, however, have found it necessary to maintain it in order to prevent those in a position to exercise undue influence from taking advantage of their position under circumstances in which proof thereof would be impossible.

In the *Inche Noriah* case (2) their Lordships of the Privy Council said:—

> We regard it as most important from the point of view of public policy to maintain the rule of law which has been laid down and to insist

(1) (1865) L.R. 1 Ch. App. 252. (2) [1929] A.C. 127, at 136.

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that a gift made under circumstances which give rise to the presumption must be set aside unless the donee is able to satisfy the court of facts sufficient to rebut it.

I would allow the appeal and restore the judgment of the trial judge.

Appeal dismissed with costs.

Solicitor for the appellants: *A. B. Clow.*

Solicitors for the respondent: *Laidlaw, Blanchard, Niblock & Stone.*

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*May 4, 9.
*May 13.

THE ATTORNEY-GENERAL FOR ALBERTA (INTERVENER) ..... APPELLANT;

AND

NICK ROSKIWICH (DEFENDANT).....RESPONDENT;

AND

KATHLEEN ROSKIWICH (INFORMANT).

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

Appeal—Jurisdiction—Appeal (by special leave from Appellate Division) from judgment of Appellate Division, Alta., rendered on stated case from magistrate re *his order made under s. 26 of Domestic Relations Act, Alta., 1927, c. 5, as amended 1928, c. 25—Jurisdiction of Supreme Court of Canada to hear appeal—Jurisdiction of magistrate to make, and of Appellate Division to hear, the stated case—Domestic Relations Act (supra), ss. 26, 30—Magistrates and Justices Act, R.S.A., 1922, c. 78, s. 9—Cr. Code, R.S.C., 1927, c. 36, ss. 761, 765, 749—Supreme Court Act, R.S.C., 1927, c. 35, s. 41.*

A police magistrate made an order against defendant, under s. 26 of the *Domestic Relations Act,* Alta., 1927, c. 5, that his wife be no longer bound to cohabit with him and that the legal custody of their children, while under 16 years of age, be committed to her. Defendant had taken objections to the magistrate's jurisdiction, and the magistrate, at defendant's request, granted a stated case (purporting to be made under s. 761, *Cr. Code,* and the Alberta Rules of Court) to the Appellate Division, Alta. That court declared that s. 26 of the *Domestic Relations Act* was *ultra vires,* and set aside the magistrate's order. It granted to the Attorney-General for Alberta (intervener) special leave to appeal to this Court. On the appeal coming on for hearing, this Court raised the question of its jurisdiction, and this was the only question argued.

Held: This Court had no jurisdiction to hear the appeal.

Per Anglin C.J.C.: Assuming that (notwithstanding the provincial statutory provisions making applicable Part XV of the *Cr. Code*) this is

*PRESENT: Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

a civil case (if a criminal case, there would be no appeal to this Court), to which s. 761, *Cr. Code,* applies, and assuming that the Appellate Division had original jurisdiction to entertain the stated case (if it had not that jurisdiction, it had no jurisdiction to grant leave to appeal to this Court under s. 41 of the *Supreme Court Act*), any appeal from its decision is precluded by s. 765, *Cr. Code,* which declares an order made on a stated case to "be final and conclusive upon all parties." As a special provision dealing with a particular subject matter, s. 765, *Cr. Code,* entirely excludes the jurisdiction which might otherwise have been vested by the general terms of s. 41 of the *Supreme Court Act* in the Appellate Division to entertain an application for special leave to appeal to this Court *(Generalia specialibus non derogant).* Some doubt was expressed of the jurisdiction of the Appellate Division to entertain the stated case addressed to it; in this connection, the *Magistrates and Justices Act,* R.S.A., 1922, c. 78, s. 9, and the *Domestic Relations Act,* s. 30, and the effect of the amendments to ss. 30 and 26 of the latter Act by c. 25 of 1928, were discussed.

Per Rinfret, Lamont and Smith JJ.: The magistrate had no jurisdiction to state a case for the Appellate Division, nor had that court jurisdiction to pronounce upon it. Proceedings by way of stated case under s. 761, *Cr. Code,* constitute an appeal; and, being a form of appeal given by Part XV, *Cr. Code,* stand in exactly the same position as the appeal to the District Court given by s. 749, *Cr. Code.* S. 30 of the *Domestic Relations Act* (as amended in 1928, c. 25) makes applicable the provisions of Part XV, *Cr. Code,* "save as is otherwise specially provided by this or any other Act"; and s. 26 (3) (as enacted in 1928, c. 25) of the *Domestic Relations Act* makes special provision for an appeal. The effect is, that any right of appeal which a party might otherwise have, under the provisions of Part XV, *Cr. Code,* is excluded, and the only right of appeal from the magistrate's order is that to the District Court provided by s. 26 (3) of the Act. There being no jurisdiction in the magistrate or the Appellate Division as above stated, this Court is likewise without jurisdiction to entertain the appeal. The result is that the magistrate's order, not having been appealed against, stands.

Per Cannon J.: S. 765, *Cr. Code,* applied to the proceedings adopted, and the court to which the case was transmitted was to give an order "final and conclusive upon all parties." This would exclude an appeal, even by special leave, to this Court.

APPEAL by the Attorney-General for Alberta (intervener) from the judgment of the Appellate Division of the Supreme Court of Alberta (1).

A police magistrate had made an order against the defendant (the present respondent), under s. 26 of the *Domestic Relations Act, 1927,* Alta. (statutes of Alberta, 1927, c. 5), that defendant's wife (the informant) be no longer bound to cohabit with him and that the legal custody of their children, while under the age of 16 years, be

(1) [1931] 3 W.W.R. 614; [1932] 1 D.L.R. 135.

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committed to her. The defendant had taken objections to the magistrate's jurisdiction, and the magistrate, at defendant's request, granted a stated case, purporting to be made "under the Provisions of the Criminal Code of Canada, Section 761, and the rules of Court of the Province of Alberta," to the Appellate Division of the Supreme Court of Alberta. The defendant's appeal, upon the stated case, having come on for hearing before the Appellate Division, that court allowed the appeal, declared that said s. 26 of the *Domestic Relations Act* was beyond the legislative competence of the Province, and set aside and vacated the magistrate's order. The Appellate Division granted to the Attorney-General of Alberta, who had intervened in the said appeal before it, special leave to appeal to the Supreme Court of Canada, and the Attorney-General brought the present appeal. On this appeal coming on for hearing, this Court raised the question of its jurisdiction to hear it, and this was the only question argued.

G. B. Henwood K.C. for the appellant.

Percy G. Davies for the respondent.

ANGLIN C.J.C.—After giving to this case careful consideration, I have come to the conclusion that the appeal must be quashed or dismissed without costs on the ground that there is no jurisdiction here to entertain it.

If there be not jurisdiction in the Appellate Division of Alberta to deal with the stated case submitted to it, we cannot do otherwise than treat the judgment from which it is sought to appeal as a nullity.

Section 9 of the *Magistrates and Justices Act* (R.S.A., 1922, c. 78) reads as follows:

> Except as otherwise specially provided, the Provisions of *The Criminal Code* of Canada respecting summary convictions, as amended from time to time and proceedings relating thereto shall apply in respect of all convictions or orders made or to be made by justices of the peace and police magistrates.

It has been held in Alberta that the effect of the above section was to introduce into Alberta, in a case such as this, the provisions of the *Criminal Code* respecting appeals from summary convictions (Part XV) (*Prudius* v. *Johnson*) (1). By s. 749 *Cr. C.*, an appeal is given to the District Court of Alberta; and, by another provincial statute

(1) [1924] 2 W.W.R. 105.

(R.S.A., 1922, c. 73, ss. 47-48), provision is made for an appeal from the District Court to the Appellate Division. But, where a case is stated under s. 761 *Cr. C.* (and the present appellant has elected to resort to that procedure), no appeal lies under s. 749 *Cr. C.*

S. 761 *Cr. C.*, providing for a stated case, impliedly, if not expressly, contains a provision enabling the court to make rules or orders dealing with such "stated case" (s. 576 *Cr. C.*), and expressly confines the subject matter of the stated case thereby authorized to

> question(ing) a conviction, order, determination or other proceeding of a justice under this Part, on the ground that it is erroneous in point of law, or is in excess of jurisdiction.

Notwithstanding the provision of the Alberta Rules of Court, made by Rule 816, that a stated case may be addressed to the Appellate Division or to a judge (apparently at the option of the applicant), and that, by s. 705 (*e*) *Cr. C.*, "the court" is defined as follows:

> "The court" in the sections of this Part relating to justices stating or signing cases means and includes any *superior* court of criminal jurisdiction for the province in which the proceedings in respect of which the case is sought to be stated are carried on,

assuming that s. 761 applies to convictions such as that before us, s. 765, as part of Part XV, is also expressly made applicable. That section reads, in part, as follows:

> The court to which a case is transmitted shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination *in respect of which the case has been stated,* or remit the matter to the justice with the opinion of the court thereon, and may make *such other order* in relation to the matter, and *such orders as to costs,* as to the court seems fit; and *all such orders shall be final and conclusive upon all parties.*

This section in terms precludes any further appeal from the court or judge to whom the stated case has been directed, the decision of the court or judge thereon being thereby declared to "be final and conclusive upon all parties." Part XV of the *Criminal Code,* although it may, in one aspect thereof, be regarded as provincial, and, as such, *ultra vires,* (because the Legislature of Alberta adopted the same instead of itself enacting a Summary Convictions Act), is an enactment of the Dominion Parliament and retains its character as legislation duly enacted by that Parliament and, as such, is a statutory provision binding on this court, the validity of which cannot be questioned here.

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Provision for appeal to this court in criminal cases is made by sections 1023 and 1025 of the *Criminal Code*. There is no other provision for any such appeal. Both counsel agreed at bar and in memoranda subsequently filed by them dealing with the point of jurisdiction (and we are inclined to the same view), that this case is not a "criminal cause," within the meaning of s. 36 of the *Supreme Court Act*, merely because the Alberta Legislature has seen fit to adopt, and make applicable to it, Part XV of the *Criminal Code*. This is merely a matter of substituting the procedure of Part XV for a provincial Summary Convictions Act, such as Ontario has.

The appellant and respondent, however, insist that this is a civil case and that, consequently, the appellant has the right to appeal to this court under s. 41 of the *Supreme Court Act*, by virtue of an order for special leave to appeal made by the Appellate Division of Alberta. Assuming that the Appellate Division of Alberta had original jurisdiction to entertain the "stated case," any appeal from its decision is precluded by s. 765, *Cr. C.*, which prevents an application for special leave to appeal under s. 41 of the *Supreme Court Act* being entertained by any Canadian court, because s. 765, *Cr. C.*, has declared the order made on a stated case to "be final and conclusive upon all parties." As a special provision dealing with a particular subject matter, s. 765 of the *Criminal Code* (enacted in 1892 by 55-56 Vic., c. 29, s. 900 (7), and to be found in the Revised Statutes of 1906, c. 146, as s. 765), entirely excludes the jurisdiction, which might otherwise have been vested by the general terms of s. 41 of the *Supreme Court Act* (enacted in 1920) in the Appellate Division for Alberta, to entertain an application for special leave to appeal to this court from its decision "in any case within s. 36" of the *Supreme Court Act*. *Generalia specialibus non derogant.* If, therefore, the case at bar should, because of its nature, be regarded as a civil case, notwithstanding the provisions of the provincial statute which makes Part XV of the *Criminal Code* applicable to it (a provision which was acted upon and which clearly includes s. 765), as a special provision dealing with a particular subject matter, the latter section must override the provision of s. 41 of the

Supreme Court Act. (*Garnett* v. *Bradley* (1); *Barker* v. *Edger* (2); see also Maxwell on Interpretation of Statutes, 7th ed., 152).

What I have written above proceeds on the assumption that there was power in the Appellate Division of Alberta to entertain and dispose of "the stated case" directed to it by the magistrate. I entertain some slight doubt, however, of the jurisdiction of that court to entertain, as it did, as a court of first instance, the stated case so addressed to it.

It should be noted that s. 9 of the *Magistrates and Justices Act* opens with the phrase, "Except as otherwise specially provided,"—evidently contemplating that there may be "convictions or orders made or to be made by police magistrates" to which the Legislature may intend especially to express its intention that the provisions "of *The Criminal Code* of Canada respecting summary convictions, as amended from time to time and proceedings relating thereto shall (not) apply."

The immediate question before us is whether the section of the *Domestic Relations Act* (Stats. of Alta., 1927, c. 5, s. 30) excluded the stated case under Part XV of the Code (s. 761 et seq.) by enacting that,

> (1) Save as is otherwise specially provided by this or any other Act, the provisions of Part XV and Part XXII of *The Criminal Code,* shall apply to all proceedings under this Part, *save and except that no appeal shall lie from any order made under this Part,*

and, if it did, whether, by the amendment of 1928 (Stats. of Alta., c. 25, s. 5) which reads as follows:

> Section 30 of the said Act is amended as to subsection (1) thereof by striking out the words "save and except that no appeal shall lie from any order made under this Part" where the same occur therein,

that right was not restored? On the one hand, it is said that s. 30 of the Act of 1927 cuts out every right of appeal and makes the magistrate's decision final. On the other hand, it is said that it merely cuts out the provisions of s. 749 et seq. of the *Criminal Code,* which deal with the right of appeal strictly so-called, and leave intact the provisions of s. 761 et seq., pertaining to the stated case, and also the indirect appeal by way of certiorari, etc. If the view be correct that s. 30 included in its provision the right of

(1) (1878) 3 App. Cas. 944, *per* Lord Hatherley, at 950 et seq.

(2) [1898] A.C. 748, *per* Lord Hobhouse, at 754.

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appeal by way of a stated case, it would seem logical that the striking out of the final words would have left the parties precisely where they would have been had the concluding words of s. 30, so repealed, never been enacted. In any event, however, whether the right of appeal does or does not include the "stated case," it would seem doubtful that the Legislature thus intended to restore a right so taken away.

It should not escape notice that s. 30 of the Act of 1927 opens with the words,

> Save as is otherwise specially provided by this or any other Act,

thus raising the question whether the amendment to s. 26, also made in 1928 (Stats. of Alta., c. 25), is a special provision dealing with the "stated case." It does not in terms at all apply to a stated case, and its application thereto would seem to depend upon whether or not the stated case is included in s. 30 of the Stats. of Alta., 1927, from which the words,

> save and except that no appeal shall lie from any order made under this Part

are deleted by the amendment of 1928. If, as above pointed out, the stated case is included in s. 30, it is likewise included in s. 5 of the amending Act of 1928. Therefore, it seems to me to be made clear that the portion of Part XV of the *Criminal Code* dealing with the stated case should have application to the case before us. But, either on the ground that Part XV applies and that s. 765 as part thereof also applies, or, on the ground that the application of ss. 761 et seq. is entirely excluded, and the Appellate Division was, accordingly, without original jurisdiction, there can be no jurisdiction to entertain the present appeal here. I am, moreo er, of opinion that, if that court had no jurisdiction to entertain the stated case, it had no jurisdiction to make the subsequent order granting leave to appeal to this court under s. 41 of the *Supreme Court Act* from its decision. This appeal, therefore, must be quashed.

As this objection was not taken by counsel or at bar, there will be no costs.

The judgment of Rinfret, Lamont and Smith JJ. was delivered by

LAMONT J.—The only question argued before us in this case was whether or not there was jurisdiction in this court to hear the appeal.

Members of the court called attention to certain grounds on which it was thought our jurisdiction might be questioned and the court requested counsel to submit arguments thereon. Two of the grounds were:—

(1) that it was a criminal cause and therefore excluded from our consideration by the language of section 36 of the *Supreme Court Act,* and

(2) that a police magistrate who makes an order under Part IV of the *Domestic Relations Act, 1927* (Alberta), as amended by chapter 25 of the Act of 1928, has no power to state a case for the opinion of the Supreme Court of Alberta, and consequently the Appellate Division of that court was without jurisdiction to give the judgment now sought to be appealed against.

In view of the conclusion at which I have arrived on the second of these grounds, it is unnecessary to deal with the first.

Part IV of the *Domestic Relations Act* is headed "Protection Orders," and section 26 of that Part authorizes a police magistrate, on the application of a married woman who has been deserted by her husband, where the magistrate is satisfied that the husband is able wholly or in part to maintain his wife or his wife and family, but who has wilfully neglected to do so and has deserted his wife, to summon the husband before him and, after hearing, to make an order, or orders, containing all or any of the following provisions:

(*a*) that the wife be no longer bound to cohabit with her husband;

(*b*) that the legal custody of their children under sixteen years of age be committed to the wife;

(*c*) that the husband shall pay to his wife such weekly sum, not exceeding $20, as the magistrate, having regard to the moneys both of the husband and wife, shall consider reasonable.

Subsection (3) (*a*) of section 26 reads as follows:

(3) (*a*) Any party to proceedings under this section being dissatisfied with any order or refusal to make an order pursuant to this section may appeal from such order or refusal to the District Court of the district within which such order or refusal was made, provided such party does within twenty days of the date of the order or refusal appealed from serve upon the police magistrate, who dealt with the matter, and upon the opposite

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party a notice in writing which shall contain the name and address of the appellant and of the opposite party, the substance of the order or refusal appealed from and the date and place of such order or refusal.

This is followed by provisions regulating the procedure in relation to the appeal and the hearing thereof by the District Court judge who is given jurisdiction to "set aside, confirm or vary any order made by the magistrate, or make any other order mentioned in the section warranted by the evidence." Then s. 30, as amended by s. 5 of c. 25 of the Statutes of 1928, is as follows:—

30. (1) Save as is otherwise specially provided by this or any other Act, the provisions of Part XV and Part XXII of *The Criminal Code*, shall apply to all proceedings under this Part.

In the present case the magistrate's order was limited to the provisions (*a*) and (*b*) of sec. 26, above referred to. The order did not include any decree against the husband for the payment of money, not even for costs. No appeal was taken to the District Court, but an application on behalf of the husband was made to the magistrate to state a case, under s. 761 of the *Criminal Code*, for the opinion of the Appellate Division as to the constitutionality of Part IV of the Act. A case was stated and we have now to determine if the magistrate, in view of the provisions made in the Act for an appeal to the District Court, had any jurisdiction to state it.

The provisions of Part XV and Part XXII of the *Criminal Code* are to apply to proceedings under Part IV of the *Domestic Relations Act*, unless it is "otherwise specially provided" either in that Act or in any other provincial Act. The *Domestic Relations Act* makes special provision for the appeal which may be taken from the order of a police magistrate under that Act. By the very language, therefore, of section 30 any right of appeal which a party might otherwise have, under the provisions of Part XV of the *Criminal Code*, is excluded. That is not questioned, but it is contended that the exclusion of the right of appeal given by Part XV does not affect the right to have a case stated under section 761.

In my opinion, we do not require to go beyond the language of sections 761 to 765 to establish that proceedings by way of stated case constitute an appeal from the magistrate's order.

The very object of having a case stated is to question the conviction or order on the ground that it is erroneous in point of law, or is in excess of jurisdiction. In subsection (3) (*c*) of section 761 the proceedings are referred to as an "appeal." In section 762 (1) the applicant is to enter into a recognizance "conditioned to prosecute his appeal without delay." In subsection (2) the order of the magistrate is referred to as "the judgment appealed against," and by section 765 the court to which the stated case is transmitted has jurisdiction to affirm, reverse or modify the conviction or order of the magistrate who is not to be liable for costs "by reason of *such appeal* against his determination."

In addition to the internal evidence supplied by the language of these sections, there is a considerable body of judicial opinion to the same effect: In *Regina* v. *Robert Simpson Co.* (1), Boyd C., at page 235, said:

> The Code, therefore, treats this method of stated case to be but a form of appeal equivalent to the ordinary appeal upon the facts and law to the General Sessions.

This view was approved by the Appellate Division of the Supreme Court of Alberta in *Rex* v. *Weinfield* (2); and by the Court *en banc* of Saskatchewan in *Zeats* v. *Johnston* (3). See also *Rex* v. *Macdonald* (4), and *Rex* v. *Driscoll* (5).

In view of the above statutory provisions, I have no hesitation in holding that proceedings by way of stated case under s. 761 of the Code constitute an appeal although limited to a point of law or a question of jurisdiction.

Being a form of appeal given by Part XV, a stated case, in my opinion, stands in exactly the same position as the appeal to the District Court given by s. 749 of the Code. Both are appeals allowed by Part XV and, where applicable, the party aggrieved has an option as to which appeal he will pursue. Where, however, as in s. 30 of the *Domestic Relations Act,* Part XV of the Code is made applicable only in so far as it is not "otherwise specially provided," and the Act itself makes special provision for an appeal to the District Court from the magistrate's order, I think the intention of the legislature must be held to have been that

(1) (1896) 28 O.R. 231.
(2) (1919) 14 Alta. L.R. 572.
(3) (1910) 3 Sask. L.R. 364.
(4) (1922) 69 D.L.R. 251.
(5) (1924) 55 Ont. L.R. 306.

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the only appeal open to a party dissatisfied with the magistrate's order, or his refusal to make one, is the appeal to the District Court provided by subs. 3 of s. 26. If it had been intended to allow an appeal by way of stated case there was no necessity for any provision in the Act for an appeal to the District Court. If no such provision had been made, Part XV of the Code would have applied and, under s. 749, there would have been an appeal, both on the facts and the law, from the magistrate's order to the District Court, and there would have been an appeal by way of stated case on a question of law or jurisdiction to any superior court of criminal jurisdiction of the province. (S. 705 and s. 761.)

When the Act was passed in 1927, s. 30 thereof contained, in addition to the language above quoted, these words: "save and except that no appeal shall lie from any order made under this Part." While these words were in the Act a party to any order had no right to a stated case (s. 769 (2) *Cr. C.*). By the amendment of 1928, which made provision for an appeal to the District Court, these words were struck out. Had it been the intention of the legislature to permit an appeal by way of stated case it would, I think, have inserted in the Act an express provision to that effect, as was done with respect to the appeal, and not have left such intention to be inferred from the fact that Part XV was made to apply.

The object of Part IV of the *Domestic Relations Act* was, no doubt, to provide a speedy and inexpensive proceeding before a magistrate which married women, deserted by their husbands, might take to obtain redress. That its provisions are found in an Act which otherwise deals with matters coming within the jurisdiction of a superior court is, in my opinion, of no moment. They are still the expression of the legislative will.

For these reasons I am of opinion that the only appeal that may be taken from a magistrate's order, under Part IV of the Act, is that provided by the Act itself and that the magistrate had no jurisdiction to state a case for the Appellate Division, nor had that court jurisdiction to pronounce upon it. There being no jurisdiction either in the magistrate or the Appellate Division, this court is likewise without jurisdiction to entertain the appeal. *The Grand*

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Council of the Can. Ord. Chosen Friends v. *The Local Government Board and the Town of Humboldt* (1). The result is that the magistrate's order, not having been appealed against, stands.

I would allow no costs either here or below.

CANNON J.—I have reached the conclusion that this appeal should be quashed for lack of jurisdiction. Section 765 of the *Criminal Code* applies to the proceedings adopted by the litigants, and the court to which the case was transmitted was to give an order " final and conclusive upon all parties." This would exclude an appeal, even by special leave, to this court. No costs.

Appeal dismissed.

Solicitor for the appellant: *W. S. Gray.*

Solicitor for the respondent: *Percy G. Davies.*

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*May 2, 3.
*June 15.

CALEDONIAN INSURANCE COMPANY AND ALLIANCE ASSURANCE COMPANY (DEFENDANTS) ... APPELLANTS;

AND

THE MONTREAL TRUST COMPANY, LIQUIDATOR OF THE EDMONTON TERMINAL GRAIN COMPANY LIMITED (PLAINTIFF) ..... RESPONDENT.

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

Fire insurance—Insurance obtained by liquidator on company's property —Sale of the property by liquidator—Payment to liquidator of purchase price and of unexpired portions of insurance premiums—No conveyance of property nor assignment of insurance policies—Destruction of property by fire—Right of liquidator to recover on policies on behalf of purchasers—Alberta Insurance Act, 1926, c. 31, statutory conditions (schedule B) 4 (a), 5 (c).

Respondent company was liquidator of E. Co. and obtained from the appellant insurance companies policies of fire insurance on E. Co.'s grain elevator, the loss, if any, being made payable to a bank to which E. Co. was indebted. In the course of the liquidation respondent sold the elevator to directors of E. Co. (who were guarantors on

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) [1924] Can. S.C.R. 654.

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E. Co.'s indebtedness to the bank). It was part of the arrangement that the purchasers should pay the unexpired portions of insurance premiums from date of sale. The purchasers paid the purchase price and the unexpired portions of insurance premiums. The bank was paid off and it handed to respondent E. Co.'s certificate of title and the insurance policies (which the bank had held as security). It was arranged between respondent and the purchasers that the conveyance to the latter should remain in abeyance, and no conveyance of the property, nor any assignment of the insurance policies, was made. Subsequently the elevator was burned, and respondent, at the request and for the benefit of the purchasers, sued appellants on the policies.

Held: Respondent was entitled to recover.

Per Rinfret, Lamont, Smith and Cannon JJ.: The stipulation in the contract of sale that the purchasers were to pay the unearned portions of the insurance premiums constituted an implied undertaking on respondent's part to hold the policies for the benefit of the purchasers until such times as they were validly assigned to them. Such an undertaking was enforceable in a court of equity by respondent as trustee of the purchasers. Respondent as liquidator had an insurable interest in E. Co.'s assets when it obtained the policies. Also it had an insurable interest at the time of the fire, by virtue (1) of its legal ownership, and (2) of its implied undertaking. Statutory conditions 4 and 5, schedule B, of the *Alberta Insurance Act,* (1926, c. 31) did not afford a defence to the claim. Appellants insured respondent as liquidator of E. Co.; by so doing they must be held to have insured all the interest in the elevator which, in the liquidation, would pass to or be under the control of respondent; the insured's interest was, therefore, stated in the policy within the meaning of statutory condition 4 (*a*). The insured's interest in the subject matter of the insurance had not been assigned within the meaning of statutory condition 5 (*e*).

The law in such cases discussed and authorities reviewed.

Judgment of the Appellate Division, Alta. (26 Alta. L.R. 21), affirmed.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1), which (Mitchell and McGillivray, J.J.A., dissenting) dismissed their appeal from the judgment of Ives J. (2) holding the plaintiff entitled to recover against the defendants on certain policies of fire insurance.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

G. F. Henderson K.C. and *S. Bruce Smith* for the appellants.

O. M. Biggar K.C. and *M. B. Gordon* for the respondent.

(1) 26 Alta. L.R. 21; [1931] 3 W.W.R. 432; [1932] 1 D.L.R. 116.

(2) [1931] 2 W.W.R. 571; [1931] 3 D.L.R. 809.

ANGLIN C.J.C.—I agree in the result of the judgment in this case, but, for want of opportunity to consider and analyze it in detail, cannot commit myself on the various propositions of law which it incidentally enounces.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

LAMONT J.—In this case the respondent brought action on two policies of insurance, one issued by each of the appellants who respectively agreed to indemnify the respondent for loss sustained by fire in respect of an elevator the property of the Edmonton Terminal Grain Company, Limited, in liquidation (hereinafter called the Grain Company). The relevant facts are as follows:—

On October 15, 1928, a winding up order was made against the Grain Company, and the respondent, the Montreal Trust Company, was appointed liquidator. On October 16 the respondent applied for and obtained a policy of insurance on the Grain Company's elevator from the appellant, the Caledonian Insurance Company, for $2,500, and, on November 5, 1928, a similar policy was obtained from the appellant, the Alliance Assurance Company. In both policies the loss, if any, was made payable to the Royal Bank of Canada.

At that time the Grain Company was indebted to the said bank in the sum of $26,400, and the bank held as security therefor an equitable mortgage on the elevator property, the fire insurance policies on the elevator, and the personal guarantees of the following directors of the Grain Company: Messrs. Morris, Chamberlain, Scramstad, Topper and Krause.

In the winding up proceedings the elevator in question was offered for sale by order of the Master in Chambers but no bids were received therefor. When no bids were obtained at the sale the above named directors got together and, through their solicitors, Messrs. Abbott & McLaughlin, submitted to the respondent an offer of $25,000 for the elevator property. This offer was accepted, as testified to by Mr. Banner, the manager of the respondent's Edmonton branch, on condition that as part of the arrangement the purchasers were to pay the unexpired portions of the insurance premiums from the date of the sale.

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This arrangement was approved by the Master in Chambers, as appears from a letter to Abbott & McLaughlin by the respondent's solicitors, on February 19, 1929, which reads as follows:—

> As advised we attended before the Master this afternoon and explained the situation to him asking for his further directions. He directed that the purchasers, for whom you act, be required to pay, not later than 3 p.m. on Thursday the 21st inst., the amount equal to 10 per cent. of the purchase price of $25,000 and that the balance of the purchase price be paid not later than Thursday the 28th inst., together with the amount of the unearned premiums on the existing Fire Insurance Policies from the date when the sale was made. In default a further Application is to be made when directions will be given for the enforcement of the Agreement.

The purchasers complied with the terms set out in the letter. On February 22 they paid the $25,000 and, on February 28, the sum of $1,125, which represented the premiums on the policies (some 13 in all) from the date of the sale until the expiration of the policies. As the purchasers had not made up their minds just what they were going to do with the property, they arranged with the respondent that the conveyance to them should, in the meantime, remain in abeyance. The respondent paid the purchase money over to the Royal Bank and the guarantors furnished the additional amounts necessary to pay the bank in full. The bank then handed over to the respondent the Grain Company's certificate of title and the insurance policies. No conveyance of the property nor any assignment of the insurance policies was made. On April 28, 1929, the elevator was burned to the ground, constituting a total loss. The appellants repudiated any liability under the policies as a result of the burning of the elevator, and the respondent brought this action at the request and on behalf of the purchasers.

As a defence to the respondent's claim the appellants set up:—

(1) That after the making of the policies of insurance, but prior to the fire, the respondent had sold and assigned the insured property and had received the full purchase price and consideration therefor, and that, at the time of the fire, the respondent had no interest whatever in the property so insured and, therefore, did not suffer any loss or damage.

(2) That the statutory conditions set forth in Schedule B of the *Alberta Insurance Act*, 1926, were, by the Act,

embodied in and made part of the policies in question, and the said conditions, in part, provided:—

4. Unless otherwise specifically stated in the policy the insurer is not liable for the losses following, that is to say:

(*a*) For loss of or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the policy;

5. Unless permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring:

(*c*) After the interest of the insured in the subject matter of the insurance is assigned.

In its reply the respondent set up, as an answer to the appellants' defence, that if, prior to the fire, the insured property had been sold, it was sold under a contract which contained a provision that the respondent must keep alive the existing policies of insurance for the benefit of the purchasers and retain title to and possession of the insured property, and otherwise care for the building, until the purchasers saw fit to have the same transferred to themselves, and that a sale of the property under these circumstances did not deprive the respondent of its interest therein or disentitle it to recover on the policies.

It is established law that a contract of fire insurance is a contract of indemnity. To establish a right to indemnity the insured must shew that he has in fact sustained loss by reason of the destruction (wholly or partly) by fire of his interest in the subject matter of insurance. The extent of his indemnity must, subject to the terms of the contract, be measured by the loss which he has actually sustained. A contract of insurance is a mere personal contract between the insurers and the insured for the payment of money and, as such, cannot, in the case of a building insured against fire, run with the land so as to pass the benefit of it to an assignee of the original owner. The mere transfer of the property insured is not of itself sufficient to pass the benefit of the insurance to the transferee.

On the other hand, it is equally well established law that a vendor owning a building upon which he holds a policy of insurance may validly transfer the building and, at the same time, validly assign to the transferee the policy of insurance. Welford and Otter-Barry on Fire Insurance, 3rd ed., at pp. 215 et seq.

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In *Powles* v. *Innes* (1), the head-note is:

A person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy; except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit.

In his judgment Parke B. said:

Unless, therefore, there was some understanding that the policy should be kept alive for her benefit, the plaintiffs, suing on behalf of Page, have lost nothing. If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser: but we cannot infer that, no facts being stated in the case to warrant such an inference.

And in *Rayner* v. *Preston* (2), Brett, L.J., stated the law as follows:—

It is true that under certain circumstances a policy of insurance may, in Equity, be assigned, so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the Defendants to the Plaintiffs. It would have been assigned by the Defendants to the Plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the Plaintiffs to the Defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the Plaintiffs.

See also *North of England Pure Oil-Cake Co.* v. *Archangel Maritime Insurance Co.* (3); *Keefer* v. *Phoenix Insurance Co.* (4); *Castellain* v. *Preston* (5); *Collingridge* v. *Royal Exchange Ass. Corporation* (6), and *Phoenix Assurance Co.* v. *Spooner* (7).

The law as laid down by these authorities and others has been summarized in Welford and Otter-Barry's work above referred to, and, as applied to this case, may briefly be said to be:—

Where the insured property has been sold under an agreement of sale and the sale completed by the receipt of the purchase money and an absolute conveyance of the property, before its destruction by fire, the insured, having divested himself of all his interest in the property, could not suffer loss by its destruction and, therefore, has no right of recovery on the policy.

(1) (1843) 11 M. & W. 10; 152 E.R. 695.
(2) (1881) 18 Ch. D. 1, at 10.
(3) (1875) L.R. 10 Q.B. 249.
(4) (1901) 31 Can. S.C.R. 144.
(5) (1883) 11 Q.B.D. 380.
(6) (1877) 3 Q.B.D. 173.
(7) [1905] 2 K.B. 753, at 756.

In the event of a fire taking place before the sale is completed by the conveyance of the property and the receipt of the price, the insured is entitled to recover to the full extent of his loss within the limits of the policy.

Referring to a state of facts similar to those existing in the case before us, the learned authors, at pages 217 and 218, say:—

> If the price has been paid, but the conveyance of the subject-matter has not been completed, the assured retains an insurable interest by virtue of his legal ownership. The policy therefore remains in force, notwithstanding such payment; but in the event of a loss before completion, the assured, not being damnified by the loss, will not be entitled to enforce it against the insurers for his own benefit * * * Where, however, the assured has contracted with the purchaser to be responsible for the safety of the subject-matter, the position will be different; and, unless the language of the policy is prohibitive, the value of the subject-matter will be recoverable by the assured.
>
> The contract under which the assignment of the subject-matter takes place may contain a provision that the assured is to keep alive an existing policy for the benefit of the purchaser. Where, as is usually the case, the consent of the insurers is obtained to what is to all intents and purposes an assignment of the policy no difficulty can arise. The effect of the provision, in the absence of such consent, does not appear to have been discussed, but the following considerations seem to apply, namely:—
>
> (i) There must be no condition in the policy precluding the assured from contracting with a purchaser in the terms of the provision.
>
> (ii) So long as the assured retains some interest in the subject-matter, such a provision may be valid, not only as between the assured and the purchaser, but also against the insurers. Although the contract may effect a change in the nature of his interest, it does not put an end to it. Nor is its value necessarily diminished, since the contract may amount to an undertaking by the assured to be responsible in the event of any loss.

An attempt was made by the purchasers to establish that, as a result of certain conversations between Mr. Banner, the respondent's then manager at Edmonton, and themselves, an agreement had been arrived at by which the respondent was to be responsible for the safety of the elevator. This attempt, in my opinion, wholly failed. No agreement of that nature can be spelled out of the conversations.

The respondent, however, is entitled to rely on the terms of the contract of sale made with the purchasers and approved by the Master. By that contract the purchasers were to pay the unearned portion of the insurance premiums. These had been paid by the respondent to the

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insurance companies. What object could there have been in embodying this stipulation in the contract if it was not to give the purchasers the benefit of the insurance policies? The respondent could have surrendered the policies to the companies and have obtained from them a return of the unearned premiums if all that was desired was to reimburse the respondent for money paid out in the liquidation on behalf of the Grain Company. The $1,125 was paid in respect of the policies of insurance and, in my opinion, the stipulation constituted an implied undertaking on the part of the respondent to hold the policies for the benefit of the purchasers until such times as they were validly assigned to them. Such an undertaking is enforceable in a court of equity by the respondent as trustee of the purchasers. *Burton* v. *Gore District Mutual Ins. Co.* (1).

That the respondent as liquidator had an insurable interest in the assets of the Grain Company when it obtained the policy is not disputed. That it had an insurable interest at the date of the fire is, in my opinion, established. It had that interest by virtue (1) of its legal ownership, and (2) of its implied undertaking.

The statutory conditions do not afford any defence to the respondent's claim. The appellants insured the respondent as liquidator of the Grain Company. By so doing they must be held to have insured all the interest in the elevator building which, in the liquidation, would pass to or be under the control of the respondent. The insured's interest was, therefore, stated in the policy within the meaning of statutory condition 4 (*a*). And, for the reasons above given, the insured's interest in the subject-matter of the insurance had not been assigned within the meaning of statutory condition 5 (*c*).

As the respondent had an insurable interest in the elevator not only when it obtained the policies in question but also at the date of the fire, and, as it was a term of the contract of sale that the insurance policies should be held for the benefit of the purchasers, the respondent, in my

(1) (1857) 14 U.C.R. 342, at 351.

opinion, is entitled to recover on the policies. I, therefore, agree with the majority of the court below and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Parlee, Freeman, Smith & Massie.*

Solicitors for the respondent: *Abbott & McLaughlin.*

CITY OF CHARLOTTETOWN (PLAINTIFF) APPELLANT;

AND

FOUNDATION MARITIME LIMITED (DEFENDANT) ..... } RESPONDENT.

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*May 11, 12.
*June 15.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND

Taxation—Direct or Indirect tax—B.N.A. Act, s. 92, head 2—Municipal tax, on contractors non residents of the province, computed on basis of percentage of contract price—Ultra vires.

The appellant City was by statute empowered "to pass by-laws imposing a tax on contractors resident outside this province doing business within" the City. It passed a by-law enacting that all contractors non residents of the province who should engage in the business of a contractor for the performance of any work within the City, under a contract or agreement, should pay to the City "on every such contract or agreement a direct tax," the tax to be a percentage of the contract price, graduated on a sliding scale according to the amount of the contract. The City claimed from respondent payment of a tax, in accordance with the by-law, of a percentage on the amount of respondent's contract for the building of an hotel.

Held: The tax was "indirect taxation," and the said by-law imposing it was *ultra vires*. (Judgment of the Supreme Court of Prince Edward Island *en banc*, 3 M.P.R. 196, affirmed, on this ground.)

"Direct taxation," as defining the sphere of provincial legislation (*B.N.A. Act*, s. 92, head 2), discussed, and authorities referred to.

Having regard to the form of the tax as imposed, it is nothing else but "the exaction of a percentage duty on services" and would ordinarily be regarded and should be classified as "indirect taxation" (*City of Halifax* v. *Fairbanks' Estate*, [1928] A.C. 117, at 125). Such a tax would invariably be an element in the fixing of the price of the contract and, in its normal and general tendency, must be reasonably assumed to pass to the owner, in the ordinary course of the transaction, as enhancement of the cost.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Maclean (*ad hoc*) JJ.

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CITY OF CHARLOTTETOWN v. FOUNDATION MARITIME LTD.

APPEAL by the City of Charlottetown from the judgment of the Supreme Court of Prince Edward Island *en banc* (1).

The City claimed $7,812.50 for taxes against the respondent. The respondent disputed the City's right to impose the tax upon it. A special case was stated for the opinion of the Supreme Court of the Province, and, pursuant to order made on consent of the parties, the case was heard by the Court *en banc,* which gave judgment in favour of the respondent.

The special case is set out in full in the judgment now reported. The appeal to this Court was dismissed with costs.

W. N. Tilley K.C. and *R. M. Martin K.C.* for the appellant.

Gregor Barclay K.C. and *J. O. C. Campbell* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The City of Charlottetown claimed $7,812.50 for taxes alleged to be due by the respondent as contractors resident outside the province of Prince Edward Island in respect of the respondent's building under contract the Canadian National hotel in Charlottetown. The tax is computed on a percentage of the amount of the contract for the building (except the foundation and steel work), as estimated and fixed by the mayor of the city as provided for in a city by-law.

The respondent resisted payment of the tax on several grounds.

The parties concurred in stating the questions of law arising herein in the form of a special case for the opinion of the Supreme Court of the province; and, on consent of all concerned, the case was heard by the court *en banc,* which, having considered the points submitted, ordered that judgment be entered for the respondent, without costs.

The most convenient way to expose the facts and the respective contentions of the parties is to transcribe the stated case:

(1) (1931) 3 M.P.R. 196; [1932] 1 D.L.R. 453.

"This action was commenced on the ninth day of December, A.D. 1930, by a writ of summons, whereby the plaintiff claimed $7,812.50 for debt, and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court:—

"1. The plaintiff is a body corporate under an enactment of the Legislature of Prince Edward Island known as the City of Charlottetown Incorporation Act.

"2. The defendant is a body corporate incorporated by Letters Patent issued under authority of an enactment of the Parliament of Canada and having as one of its objects and powers the construction of buildings, generally throughout Canada.

"3. On or about the 28th day of April, A.D. 1930, at Montreal in the Province of Quebec the defendant entered into a contract with Canadian National Realties, a body corporate with head office without Prince Edward Island, for the construction of a hotel (except the foundation and steel frame) for said Canadian National Realties, in the City of Charlottetown; and the defendant built and constructed such hotel under the said contract. The materials used in such construction were largely imported into Prince Edward Island.

"4. Section 112 (19) of the City of Charlottetown Incorporation Act, being 3 Edward VII, Cap. 17, is as follows:

It is hereby enacted that the City Council of Charlottetown shall have power to pass by-laws imposing a tax on contractors resident outside this province doing business within the City of Charlottetown.

"5. In pursuance of said Statute the plaintiff's City Council on May 21, 1908, duly and regularly passed the following by-law:

A BY-LAW TO IMPOSE A TAX ON NON-RESIDENT CONTRACTORS.

BE IT ENACTED by the City Council of the City of Charlottetown as follows:

1. All persons commonly known as Contractors non residents of the Province of Prince Edward Island who shall engage in the business of a Contractor for the performance of any work of a public or private nature within the City of Charlottetown, under a contract or agreement, shall pay to the City of Charlottetown on every such contract or agreement a direct tax to be computed in the manner following, that is to say:

(a) On all contracts where the contract price does not exceed $10,000.00 the tax shall be three per cent. of such contract price.

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(*b*) Where the contract price exceeds $10,000.00 but does not exceed $25,000.00 the tax shall be two and one-half per cent. of such contract price.

(*c*) Where the contract price exceeds $25,000.00 but does not exceed $50,000.00 the tax shall be two per cent. of such contract price.

(*d*) Where the contract price exceeds $50,000.00 the tax shall be one and one-quarter per cent. of such contract price.

2. In cases where the exact amount of the contract price cannot be ascertained and in all cases where the same is disputed, the Mayor of the said City shall have power to fix the precise amount of said tax and when so fixed by the Mayor as aforesaid such tax may be sued for and recovered in the manner hereinafter provided.

3. The tax aforesaid shall be paid on or before the expiration of ten days after it has been applied for by the Collector of the said City or other persons duly authorized, and in default of payment may be sued for and recovered in any Court of competent jurisdiction.

(Sgd.) W. W. CLARKE, City Clerk. (Sgd.) B. C. PROWSE, Mayor.

"6. Under the foregoing enactment and by-law the plaintiff City has sought to impose upon the defendant a tax of $7,812.50, being the rate of one and one-quarter per cent. on $625,000, said $625,000 being the amount of the defendant's contract for the building of said hotel (except the foundation and steel frame) as estimated and fixed by the Mayor of the Plaintiff City.

"7. The due and proper assessment and demand as based on the said by-law and statute (whose provisions are not admitted to be *intra vires*) is accepted subject to later determination of the actual contract price if admissible.

"8. The Head Office of the defendant company is at Halifax in the Province of Nova Scotia; it has no place of business in the Province of Prince Edward Island; there is no allegation of any other or further work done in the City by the defendant, and it is not assessed by the plaintiff City in respect to any property or in any way, except the said tax in respect to the said contract.

"9. The question for the Court is whether or not the defendant is liable to pay the tax claimed and more particularly:

(1) Is the tax "indirect taxation," and so *ultra vires?*

(2) Is the tax an interference with the status and powers of Dominion Companies, and so *ultra vires?* If not *ultra vires* for this reason, is it enforceable against the defendant, a Dominion Company?

(3) Is the tax an interference with "Trade and Commerce," and so *ultra vires?*

(4) Is it taxation "within the Province" within the meaning of the British North America Act, 1867?

(5) Is the by-law *ultra vires* the statute in professing to tax an isolated transaction?"

The judges in the Supreme Court of Prince Edward Island were unanimous in holding that the tax in dispute was "indirect taxation," and we agree with their conclusion on this point.

The by-law declares that the tax is to be a "direct" one, but it is needless to say that the point does not turn on the language used in the enactment. As was observed in *Caledonian Collieries Limited* v. *The King* (1), to label the tax as a direct tax does not affect the substance of the matter.

The question of "direct taxation" as defining the sphere of provincial legislation has often been the subject of pronouncements by this Court and by the Judicial Committee of the Privy Council. The effect of the decisions, when analyzed, is substantially as follows:

In every case, the first requisite is to ascertain the inherent character of the tax, whether it is in its nature a direct tax within the meaning of section 92, head 2, of the *British North America Act,* 1867 (*Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co. Ltd.* (2); *City of Halifax* v. *Fairbanks' Estate* (3)). The problem is primarily one of law; and the Act is to be construed according to the ordinary canons of construction: the court must ascertain the intention of Parliament when it made the broad distinction between direct and indirect taxation. At the time of the passing of the Act,—and before,—the classification of the then existing species of taxes into these two separate and distinct categories was familiar to statesmen. Certain taxes were then universally recognized as falling within one or the other category. The framers of the Act should not be taken to have intended to disturb "the established classification of the old and well known

(1) [1927] Can. S.C.R. 257, per Duff J. at 258.
(2) [1930] A.C. 357, at 363 & 364.
(3) [1928] A.C. 117, at 124.

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species of taxation." (*City of Halifax* v. *Fairbanks' Estate* (1).)

Customs or excise duties were the classical type of indirect taxes. Taxes on property or income were commonly regarded as direct taxes (*Fairbanks* case (1)).

These taxes had come to be placed respectively in the category of direct or indirect taxes according to some tangible dividing line referable to and ascertainable by their general tendencies. (*Bank of Toronto* v. *Lambe* (2).)

As applied, however, to taxes outside these well recognized classifications, the meaning of the words " direct taxation," as used in the Act, is to be gathered from the common understanding of these words which prevailed among the economists who had treated such subjects before the Act was passed (*Attorney-General for Quebec* v. *Reed* (3)); and it is no longer open to discussion, on account of the successive decisions of the Privy Council, that the formula of John Stuart Mill (Political Economy, ed. 1886, vol. II, p. 415) has been judicially adopted as affording a guide to the application of section 92, head 2 (*Fairbanks* case (4).) Mill's definition was held to embody " the most obvious indicia of direct and indirect taxation " and was accepted as providing a logical basis for the distinction to be made between the two. (*Bank of Toronto* v. *Lambe* (5).) The expression " indirect taxation " connotes the idea of a tax imposed on a person who is not supposed to bear it himself but who will seek to recover it in the price charged to another. And Mill's canon is founded on the theory of the ultimate incidence of the tax, not the ultimate incidence depending upon the special circumstances of individual cases, but the incidence of the tax in its ordinary and normal operation. It may be possible in particular cases to shift the burden of a direct tax, or it may happen, in particular circumstances, that it might be economically undesirable or practically impossible to pass it on. (*The King* v. *Caledonian Collieries, Limited* (6).) It is the normal or general tendency of the tax that

(1) [1928] A.C. 117, at 125.
(2) (1887) 12 App. Cas. 575, at 582.
(3) (1884) 10 App. Cas. 141, at 143.
(4) [1926] Can. S.C.R. 349, at 368; [1928] A.C. 117, at 125.
(5) (1887) 12 App. Cas. 575 at 583.
(6) [1928] A.C. 358.

will determine, and the expectation or the intention that the person from whom the tax is demanded shall indemnify himself at the expense of another might be inferred from the form in which the tax is imposed or from the results which in the ordinary course of business transactions must be held to have been contemplated. (*Fairbanks* case (1).)

Let us now examine the tax in discussion in the light of the principles so laid down.

It is a tax on non-resident contractors (and it seemed to be common ground, at the argument, that, by the word "contractors," was meant those who undertake building contracts). It is therefore a tax upon a person working for someone else in respect of the work he does for someone else, (*Grain* case (2)), and the amount will be paid by someone else than the person primarily taxed (*Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (3)). The tax is not a direct lump sum imposed yearly as a result of the non-resident engaging in the business of contractor within the city of Charlottetown, it is a tax on every contract or agreement, on each single transaction, graduated on a sliding scale according to the amount of the contract.

Having regard to the form of the tax as imposed this case is different in almost every respect from those of *Bank of Toronto* v. *Lambe* (4), and of *Brewsters and Malsters' Association of Ontario* v. *Attorney-General for Ontario* (5). In truth, the tax is nothing else but "the exaction * * * of a percentage duty on services," of which Lord Cave said that it "would ordinarily be regarded" and should be classified "as indirect taxation" (6). Such a tax would invariably be an element in the fixing of the price of the contract and, in its normal and general tendency, must be reasonably assumed to pass to the owner, in the ordinary course of the transaction, as enhancement of the cost. That would seem to be, in the end, the natural consequence —in fact, the inevitable result—of the taxation now in question. In the case of *Attorney-General for Quebec* v.

(1) [1928] A.C. 117, at 122.
(2) *Attorney-General for Manitoba* v. *Attorney-General for Canada,* [1925] A.C. 561.
(3) [1927] A.C. 934.
(4) (1887) 12 App. Cas. 575.
(5) [1897] A.C. 231.
(6) *City of Halifax* v. *Fairbanks' Estate,* [1928] A.C. 117, at 125.

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Queen Insurance Co. (1), the disputed tax was imposed under cover of a licence to be taken out by insurers. The price of the licence was to be a percentage on the premiums received for insurances. Speaking of that case in *Bank of Toronto* v. *Lambe* (2), Lord Hobhouse said: "such a tax would fall within any definition of indirect taxation."

It was pointed out by the appellant that, in the *Fairbanks* case (3), Lord Cave excluded, as a rule, from the operation of Mill's principle the imposition of municipal and local rates. This, we have no doubt, meant municipal and local rates properly so called. It is idle to mention that a rate is not a municipal rate in the proper sense, merely because it was imposed by a municipality. It must be a municipal rate according to the common understanding of the word. We find it impossible to classify the disputed tax as a municipal tax in that sense.

It was further argued that the non-resident contractors would, in the ordinary course, be limited in their contract price by the competition of resident contractors and would be forced to absorb the tax. A similar argument was advanced in *The King* v. *Caledonian Collieries, Limited* (4) and again put forward in *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co. Ltd.* (5), and it was rejected on the ground that the general tendency of the tax remains and it is "really irrelevant in determining the inherent character of the tax."

The case was stated for the purpose of determining whether, as a matter of law, the respondent was "liable to pay the tax claimed." The tax was imposed in the by-law. There was no dispute about the statute. Counsel for the respondent stated at bar that he found nothing objectionable in the particular section of the city charter. The object of the stated case was to test the validity of the by-law. For the reasons we have stated, our view is that the tax is "indirect taxation" and the by-law is *ultra vires*. That being so, the assessment must be set aside and the action must be dismissed. We need therefore go no further, and it is unnecessary to consider the other questions submitted.

(1) (1878) 3 App. Cas. 1090.
(2) (1887) 12 App. Cas. 575, at 584.
(3) [1928] A.C. 117.
(4) [1928] A.C. 358 at 362.
(5) [1930] A.C. 357 at 364-5.

The judgment appealed from should be confirmed, with costs to the respondent in this court.

Appeal dismissed with costs.

Solicitor for the appellant: *K. M. Martin.*

Solicitor for the respondent: *J. O. C. Campbell.*

CLIFFORD B. REILLY (PETITIONER).....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1932
*May 27.
*June 15.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Appointment to public office—Abolition of office—Claim by appointee against Crown for damages for breach of contract—Federal Appeal Board—Dominion Acts, 1923, c. 62, s. 10; 1925, c. 49; 1926-1927, c. 65; 1930, c. 35 (Acts to amend the Pension Act).

Appellant was appointed, by Order in Council and by Commission, as a member of the Federal Appeal Board, under s. 10 of *An Act to amend the Pension Act,* 1923 (Dom.), c. 62. His appointment was extended (under statutory amendments in 1925, c. 49, and 1927, c. 65), the last extension being for a period of five years from August 17, 1928. By c. 35 of the statutes of 1930, Parliament in effect abolished the Board and provided for the establishment of new tribunals, and appellant thereby lost his said office. He claimed damages from the Crown for breach of contract.

Held (affirming judgment of Maclean J., President of the Exchequer Court of Canada, [1932] Ex. C.R. 14), that appellant could not succeed.

Appellant's appointment to his office, even for a definite period, did not deprive the Crown of the right to terminate the appointment at any time; and *a fortiori* did not deprive Parliament of the power, by abolishing the office, of automatically terminating the appointment.

In an appointment to public office, while there is a contractual element in that the Crown, in effect, promises to pay the salary or other emolument fixed by law for services performed, yet this in no respect affects the Crown's prerogative right, unless restricted by statute, to dismiss the servant at any time without incurring liability for damages or further compensation. Even if there be a contract of service, the Crown's absolute power of dismissal is deemed to be imported into it, and nothing short of a statute can restrict that power.

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*PRESENT: Anglin C.J.C. and Rinfret, Lamont, Cannon and Orde (*ad hoc*) JJ.

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APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the present appellant (petitioner) was not entitled to the relief sought by his Petition of Right.

The appellant claimed from the Crown a sum for damages for alleged breach of contract.

Section 10 of *An Act to Amend the Pension Act*, chapter 62 of the Statutes of Canada, 1923, provided for the creation of a Board, to be known as "The Federal Appeal Board," the members to be appointed by the Governor in Council on the recommendation of the Minister of Justice, to hear certain appeals with respect to pensions, etc. It was provided that the chairman should hold office during pleasure; that of the members first appointed, other than the chairman, one-half should be appointed for a term of two years and the others for a term of three years; that the chairman should be paid a salary of $7,000 per annum and each of the other members $6,000 per annum.

By amendment to the said statute, contained in chapter 49 of the Statutes of 1925, it was provided that the members first appointed (other than the chairman) should be eligible for re-appointment for a further term of two years, should the Governor in Council deem it advisable. By a further amendment to the statute, contained in chapter 65 of the Statutes of 1926-1927, it was provided that the members first appointed (other than the chairman) should be eligible for re-appointment for such further terms, not to exceed five years, as the Governor in Council might deem advisable.

By Order in Council of August 17, 1923 (P.C. 1620), and by letters patent under the great seal of Canada, dated August 17, 1923, the appellant was appointed as a member of the Board for a term of three years. By Order in Council of June 4, 1926 (P.C. 882) his term of appointment was extended to a term of five years from August 17, 1923. By Order in Council of August 16, 1928 (P.C. 1506) his term of appointment was extended for a period of five years from August 17, 1928, (with a proviso "that the appointment of any of the said members may be terminated at any time in the event of reduction in the Board's

(1) [1932] Ex. C.R. 14.

Work to an extent sufficient to permit of its performance by fewer Commissioners").

By chapter 35 of the Statutes of Canada, 1930, entitled *An Act to Amend the Pension Act,* the enactments relating to the constitution of the Federal Appeal Board were repealed, and provision was made for the establishment of new tribunals. Said c. 35 of the Statutes of 1930 received the royal assent on May 30, 1930, and the provisions thereof came into force, as provided by s. 17 thereof, on October 1, 1930.

In his Petition of Right, the appellant alleged (*inter alia*) that he accepted the appointment and extensions and took up residence in Ottawa in August, 1923, and continuously carried out, until some time in October, 1930, the duties prescribed for him; that he had duly declared himself to be, and was, still willing and able to carry out any duties, obligations or requirements arising out of the said employment; that on October 10, 1930, he was requested to vacate the premises which were allotted to him in August, 1923, for the performance of his duties as a member of the Board, and received a communication that the Federal Appeal Board was abolished and that all legal right of any member of the Board to any salary or emoluments would cease as of October 1, 1930.

The appellant's claim was against the Crown for damages for alleged breach of contract. Maclean J. (1) held that he could not succeed; and he appealed to this Court.

R. Quain K.C. and *J. T. Wilson* for the appellant.

A. E. Fripp K.C. for the respondent.

The judgment of Anglin C.J.C. and Rinfret, Lamont and Orde (*ad hoc*) JJ. was delivered by

ORDE J. (*ad hoc*).—The sole question here is whether or not, by virtue of the legislation creating the office and the nature of his appointment thereto, the appellant acquired a contractual or other vested right to the office and its emoluments.

It is argued that there was a contract between the appellant and the Crown for the performance by the appellant

(1) [1932] Ex. C.R. 14.

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of the duties of the office during the period of time covered by his commission and for the payment by the Crown of the statutory salary therefor, and that the Crown cannot escape its liability in respect therefor merely because Parliament abolished the office.

Whether the Crown might not so bind itself by contract to pay for specific services over a certain period as to incur liability for a breach thereof is not the question here. Assuming the possibility of such a contract, was there any such contract in the present case?

I find it difficult to see in what way the appointment of the appellant to be a member of the Federal Appeal Board under the *Pension Act* as it then stood differed from many other appointments to offices under the Crown. It was urged during the argument that the earlier negotiations or communications between the Minister and the appellant, which culminated in the Order in Council authorizing the appointment, constituted, by way of offer and acceptance, a contract binding upon the Crown. But the circumstances leading up to the appointment did not differ materially from those which must accompany most appointments to public offices, and I cannot see how they distinguished this appointment from any other.

There is, of course, in every appointment to public office a contractual element in that the Crown, in effect, promises to pay the salary or other emolument fixed by law for services performed. But this in no respect affects the Crown's prerogative right, unless restricted by statute, to dismiss the servant at any time without liability for damages or further compensation.

The principles governing appointments to civil offices under the Crown are summarized in Robertson's Civil Proceedings By and Against the Crown, at p. 359. Even if there be a contract of service, the Crown's absolute power of dismissal is deemed to be imported into it, and nothing short of a statute can restrict that power.

Here there was no dismissal from office by the Crown in the ordinary sense. Parliament abolished the office. The power of the Crown to abolish a civil office and thereby to deprive the holder thereof of any right to further compensation is recognized in *Young* v. *Waller* (1). If in cases

(1) [1898] A.C. 661.

where its power is not restricted by statute the Crown may abolish an office, *a fortiori* Parliament which created it must surely possess the power.

It was argued that, notwithstanding the abolition of the offices, it must be assumed that Parliament did not intend to deprive those appointed thereto of their vested rights. In other words, that, in the absence of some express statutory provision to the contrary, the rights of the holders of the abolished offices to damages or compensation as upon a breach of contract were implicitly reserved. No authority for this as a general principle was cited, but reliance was placed upon the provisions of sec. 19 of the *Interpretation Act, R.S.C.* (1927), ch. 1, which preserves rights, privileges, obligations and liabilities acquired, accrued, accruing or incurred under a repealed Act. But this argument begs the question. If there is no right there is nothing to preserve. If the appellant's appointment to his office even for a definite period did not deprive the Crown of the right to terminate the appointment at any time, and *a fortiori* did not deprive Parliament of the power, by abolishing the office, of automatically terminating the appointment, what right was there to preserve?

The judgment of the learned President of the Exchequer Court is right, and the appeal should be dismissed with costs.

CANNON J.—The fundamental rule of our constitution requires that the legislative, executive and judicial branches of our body politic must be kept distinct and respect the independence of one another. No tribunal can interfere with the free agency of one or, as in this case, two of the constituent parts of the sovereign power. We cannot interfere with the dismissal by the Executive, following the abolition by Parliament of plaintiff's office, although the plaintiff's commission may be read as indicating that the right of the Crown to terminate his engagement at any time has seemingly not been imported in the order in council which extended his term of office for a definite period of five years from August 17, 1928.

Blackstone, No. 243, says that the subjects of England are not totally destitute of remedy, in case the Crown should invade their rights by private injuries:

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If any person has, in point of property, a just demand upon the King, he must petition him in his court of chancery, where his councellor will administer right as a matter of grace, though not upon compulsion. And this is entirely consonant to what is laid down by the writers on natural law. "A subject, says Puffendorf (Law of N. and N.b. viii, c. 10), so long as he continues a subject, has no way to *oblige* his prince to give him his due, when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity than upon the municipal laws." For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him.

We cannot do more. Let Parliament remedy appellant's wrong if they see fit, but the Exchequer Court and this Court cannot enforce the demand of the Petition of Right; and the appeal must be dismissed with costs, if respondent will exact them.

Appeal dismissed with costs.

Solicitors for the appellant: *Quain & Wilson.*

Solicitor for the respondent: *W. Stuart Edwards.*

1932

*May 26.
*June 15.

THE CORPORATION OF THE CITY OF TORONTO ..... APPELLANT;

AND

THE VILLAGE OF FOREST HILL, THE TOWNSHIP OF YORK AND CANADIAN NATIONAL RYS. ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Board of Railway Commissioners for Canada—Jurisdiction—Board's order directing municipality to contribute to cost of highway bridge crossing over a railway in another municipality—Whether municipality "interested or affected" by order for construction of bridge—Railway Act, R.S.C., 1927, c. 170, ss. 256, 39, 259, 33 (5).

A street ran east and west through (and continuing beyond) the northern part of the city of Toronto and of the adjoining village of Forest Hill. At a point in Forest Hill it was carried over a ravine by a bridge under which a railway (under Dominion jurisdiction) crossed the street. The bridge was 500 feet beyond the nearest point of the Toronto city limits. The Board of Railway Commissioners for Canada, on application of the Village of Forest Hill, authorized reconstruction of the bridge, and directed that the City of Toronto contribute to the cost. The City appealed.

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

Held: The Board had not jurisdiction under the *Railway Act* to direct that the City contribute to the cost of the work. There were no circumstances to warrant a holding that the City was "interested or affected" by the Board's order, within the meaning of the Act.

The Railway Act, R.S.C., 1927, c. 170, ss. 256, 39, 259, 33 (5), considered. *Toronto Ry. Co.* v. *Toronto,* [1920] A.C. 426, at 437, and *Canadian Pacific Ry. Co.* v. *Toronto Transportation Commission,* [1930] A.C. 686, cited; and other cases referred to and discussed. *Toronto* v. *Canadian Pacific Ry. Co.,* [1908] A.C. 54, distinguished.

Quaere whether, in any case, under the circumstances in question, the reconstruction of the bridge was not a matter merely of "street improvement" (*British Columbia Electric Ry. Co.* v. *Vancouver, etc., Ry. & Nav. Co. et al.,* [1914] A.C. 1067); whether the order did not deal with matters which, in their essence, fell under the category of "municipal" rather than that of "railway"?

APPEAL by the City of Toronto from an order (No. 47439, dated 25th September, 1931) of the Board of Railway Commissioners for Canada (1) which authorized the Village of Forest Hill (the applicant) to construct a certain bridge, replacing an existing bridge, whereby the roadway of Eglington Avenue was carried over a railway of the Canadian National Railways, and directed (*inter alia*) that the City of Toronto contribute to the cost of the construction.

Leave to appeal was granted by the Board, and was also granted by a judge of the Supreme Court of Canada. The appeal was upon the following question:

"Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the *Railway Act* (Canada) to provide in Order No. 47439, dated 25th day of September, A.D. 1931, that the City of Toronto should contribute to the cost of the work referred to in said order?"

The material facts of the case are sufficiently stated in the judgment of Smith J. now reported. The question submitted was answered by this Court in the negative and the appeal was allowed with costs to the appellant against the village of Forest Hill.

G. R. Geary K.C. and *J. N. Herapath* for the appellant.

Melville Grant for the respondent, Village of Forest Hill.

Alistair Fraser K.C. for the respondent, Canadian National Railways.

(1) See reasons given by the Board, (1932) 39 Can. Ry. Cas. 176, dismissing an application by the city of Toronto for a rehearing on the question of jurisdiction.

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Duff J.

DUFF J.—I concur with my brother Smith.

I am unable to agree that the decision under appeal can be supported by the judgment of the Privy Council in *Toronto Corporation* v. *Canadian Pacific Ry. Co.* (1).

The question which is the governing question in this case, whether, namely, the municipality was "a person interested or affected by the order," within the meaning of the statute, was disposed of by the Lords of the Judicial Committee, by reference to the reasons of Meredith J.A., in the Court of Appeal (2), in which they agreed. Those reasons are as follows:

> This case is governed by that of *In re Canadian Pacific Railway Company and York*, in this Court (3), and that of *Toronto* v. *Grand Trunk, etc.*, in the Supreme Court of Canada (4). They are all quite the same in principle. The fact that the territorial limits of the City of Toronto did not extend beyond the southerly limit of the land of the railway company, and that their power over the highway in question ends there, cannot deprive them of interest in a source of great danger to persons travelling upon the highway but a few yards beyond that part of it which is vested in them, and with the keeping of which in repair they are charged. If, instead of the railway, there were a pit or a precipice there, could it be said that they had no duty to protect those lawfully using the highway against its danger? That, because it happened to be in the next parish, they were not concerned, in any way, with that danger? The road, over which they have control, is a paved invitation to the public to use it up to almost the very point of greatest danger; and up to lesser, but still considerable, danger before passing beyond their limits. We are not concerned in the extent of their interest, but that they have a substantial interest in the safety of that level crossing seems to me indisputable, unless indeed they can, and until they do, stop up the highway at their limits. It is a case of doing that, or adopting some other means of protecting traffic upon the highway either going out of or coming into the City, the highway being an invitation to use it each way. Whether the railway company, or the railway company and the other corporation, should pay the whole of the cost of necessary protection, or the bulk of it, is not a question for consideration here. The appellants are interested, and that is all that need be determined.

It requires no argument to shew that these reasons have no application to this case.

It was admitted by Mr. Grant, in the course of his most able argument, that the principle for which he contended was that all municipalities in which traffic passing over the bridge in question would normally originate, in substantial magnitude, would be subject to the jurisdiction of the Board as being "persons interested or affected by the

(1) [1908] A.C. 54.
(2) (1907) 7 Can. Ry. Cas. 274, at 280-281.
(3) (1898) 25 Ont. A.R. 65.
(4) (1906) 37 Can. S.C.R. 232.

order." That is a principle, in my opinion, not laid down or contemplated by the statute.

I express no opinion whatever as to whether, if the Corporations of the City of Toronto and the County of York were, respectively, "persons interested or affected by the order," within the meaning of the statute, the order of which that before us is a type is one of the kind authorized by the provisions in question. There is something at least to be said for the view that it deals with matters which, in their essence, fall under the category of "municipal" rather than that of "railway."

The appeal should be allowed and the order set aside with costs throughout.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

SMITH J.—This is an appeal from the order of the Board of Railway Commissioners of Canada authorizing the applicant, the Village of Forest Hill, to construct an overhead bridge on Eglington Avenue and Spadina Road.

The order directed that the Canadian National Railway Company pay $20,000 toward the construction of this bridge, and that the remainder of the cost be paid by the applicant, the City of Toronto and the Township of York, the consideration of their respective contributions being reserved until after completion of the bridge.

The appellant appeals on the ground that there was no jurisdiction in the Board to direct the City to contribute to the cost of the proposed bridge.

Eglington Avenue is an original road allowance running easterly and westerly through the northern part of the city of Toronto and of the village of Forest Hill, and, to the east of Toronto, through the town of Leaside and on through the township of North York. To the west of Forest Hill it runs through the township of York to the towns of Mount Forest and Weston.

At a point in Forest Hill this avenue is carried over a ravine by a bridge, under which the Toronto Belt Line Railway, now owned by the Canadian National Railway Company, crosses the avenue. Spadina Road to the north joins the avenue at the bridge, but continues south from the avenue at a short distance west of the bridge.

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Smith J.

This bridge was built by the Belt Line Railway Company in 1890, the location being then in the township of York, but now in the village of Forest Hill. North of the avenue it is about 500 feet west of the westerly limit of the part of the city of Toronto that was formerly North Toronto; and south of the avenue it is about 2,000 feet west of the westerly limit of the city of Toronto; and it is about one mile north of the northerly limit of Toronto.

The avenue has been widened to 86 feet and paved to a width of 54 feet through Toronto and Forest Hill, except a short piece in Forest Hill which, with the part forming a boundary between Forest Hill and the Township of York, it is intended to complete during the present summer.

The question is:

"Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the *Railway Act* (Canada) to provide in Order No. 47439, dated 25th day of September, A.D. 1931, that the City of Toronto should contribute to the cost of the work referred to in said order?"

The order of the Board is made under the powers granted by sec. 256 of the *Railway Act,* R.S.C., 1927, ch. 170, subsections 1 and 2 of which are as follows:

256. Upon any application for leave to construct a railway upon, along or across any highway, or to construct a highway along or across any railway, the applicant shall submit to the Board a plan and profile showing the portion of the railway and highway affected.

(2) The Board may, by order, grant such application in whole or in part and upon such terms and conditions as to protection, safety and convenience of the public as the Board deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, or that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, in the opinion of the Board, arising or likely to arise in respect of the granting of the application in whole or in part in connection with the crossing applied for, or arising or likely to arise in respect thereof in connection with any existing crossing.

The power to apportion the cost of the work among corporations, municipalities and persons is derived from sections 39 and 259 of the Act, which are as follows:

39. When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed,

altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

(2) The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid.

259. Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of the next following section of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person in respect of any order made by the Board, under any of the last three preceding sections, and such order shall be binding on and enforcible against any railway company, municipal or other corporation or person named in such order.

In delivering judgment in *Toronto Railway Co.* v. *Toronto City* (1), Viscount Finlay, discussing sections 59 (now 39) and 238 (3) (now sec. 259), says, at page 437:

Whatever be the construction of this subsection (238 (3), now 259), there is nothing in it to put an end to the application of s. 59 (now 39) to orders under ss. 237 and 238 (now 256 and 257). The power given by s. 59 applies in the case of any order made by the Board in the exercise of any power vested in it by the Railway Act. As ss. 237 and 238 (now 256 and 257) are part of the Railway Act, it follows that s. 59 (now 39) applies to orders made under them.

The judgment delivered by Lord Macmillan in *Canadian Pacific Ry. Co.* v. *Toronto Transportation Commission* (2), quotes from these remarks of Viscount Finlay, and holds (p. 696) that they apply to the present sections 39 and 259; and that an order may be made only on a company, municipality or person interested or affected by the order directing the works.

Section 33 (5) of the Act is as follows:

5. The decision of the Board as to whether any company, municipality or person is or is not a party interested within the meaning of this section shall be binding and conclusive upon all companies, municipalities and persons.

Dealing with the provisions of this section, his Lordship, at the same page (696) says:

The finality provisions quoted above from the Railway Act have not in the past been held to preclude the Courts in Canada or their Lordships' Board in other cases from determining on appeal as a question of law whether a company, municipality or person was interested or affected

(1) [1920] A.C. 426. (2) [1930] A.C. 686.

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within the meaning of the statute so as to confer jurisdiction on the Railway Board.

This disposes of the contrary view expressed in *The County of Carleton* v. *The City of Ottawa* (1).

The sole question to be determined as a question of law in this appeal is whether or not the City of Toronto, under the circumstances, is a municipality interested or affected by the order in question.

The Board apparently came to the conclusion that the City was interested or affected mainly on the report of its engineer. After reciting the facts already set out as to the location, width and paving of the street, he says that it is bound to carry a heavy traffic from municipality to municipality, and the 2,600 feet within Forest Hill is much like a bridge between two larger municipalities. He goes on to say that the present bridge is an unsightly structure, but, if the street were not being widened, it would be adequate to take care of the traffic for some time to come, but the municipalities want to improve conditions and want a wider and better looking bridge, and that the improvements will bring more traffic over the crossing.

These are the grounds on which he recommends that the Eglington Avenue section of the bridge be paid for in part by the City of Toronto. The Village of Forest Hill is widening and paving this avenue running through the town, and it is said that the "protection, safety and convenience of the public" require that this bridge, which is part of the street, should also be widened and paved.

The public belongs to no particular municipality, but may come from all municipalities. Each municipality ordinarily is bound to keep in a condition of safety its own streets, but the Board under the *Railway Act* in some special circumstances may order one municipality to contribute to the cost of works in another, but only where the outside municipality is interested or affected. How is the City of Toronto interested or affected by the construction of this bridge in Forest Hill in any way fundamentally different from the way in which any other outside municipality is interested or affected?

It is said that Toronto adjoins Forest Hill and the street is continued from one municipality to the other. It is also

(1) (1909) 41 Can. S.C.R. 552.

continued across East View and the Township of North York to the east. Are these municipalities also interested or affected, and had the Board jurisdiction in its discretion to assess part of the cost on them also?

Counsel for Forest Hill complained that because of what was said by Mr. Geary, as quoted by the Chairman of the Board, he was precluded from offering evidence as to the origin and volume of traffic likely to use the bridge. He thought he could have established that much traffic over the bridge would originate largely with people of the northern and western part of the city, making use of this avenue and Spadina Road as a main connecting link between these parts of the city. In my opinion this, if a fact, would not affect the question in the slightest degree, as the matter of where traffic over the structure originates and the volume of it from various districts is not a factor in deciding whether or not a particular municipality is interested or affected by the works within the meaning of the Act.

Toronto Corporation v. *Canadian Pacific Railway Co.* (1) establishes that a duty which a municipality owes to people for their protection, safety and convenience may furnish a ground for holding that municipality to be one interested or affected by works ordered to be constructed.

There the southerly limit of the lands of the Railway Company outside the City of Toronto adjoined the northerly limit of a city street. It was held that the fact that the power of the city did not extend beyond its limits did not deprive it of interest in a source of great danger to persons travelling on the city highway, but a few yards beyond it.

The principle on which the decision rests is stated in the following passage (2):

> If, instead of the railway, there were a pit or a precipice there, could it be said that they (the city) had no duty to protect those lawfully using the highway against its danger? That, because it happened to be in the next parish, they were not concerned, in any way, with that danger? The road over which they have control is a paved invitation to the public to use it up to almost the very point of greatest danger; and up to lesser, but still considerable, danger before passing beyond their limits.

(1) [1908] A.C. 54.

(2) See judgment of Meredith J.A. in the Court of Appeal, 7 Can. Ry. Cas., at 281.

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Surely the Corporation of the City of Toronto is under no duty to provide for the protection, safety and convenience of people using this bridge 500 feet beyond the nearest point of the city limits, the City having no special interest in that part of the Forest Hill street different from its interest in other parts of the street there.

Mr. Geary argued that the work of reconstructing the bridge was a matter merely of street improvement, and was not necessitated by any consideration of "protection, safety and convenience of the public," citing *British Columbia Electric Railway Co.* v. *Vancouver, Victoria & Eastern Ry. & Nav. Co. et al.* (1).

The learned Chairman of the Board describes this as a unique decision, and one which this Court and the Judicial Committee has ever since been attempting to distinguish or explain. He analyzes a number of cases in which he considers this has been done, and relies upon them as supporting the Board's decision that in this case Toronto is a municipality interested or affected by the order.

In two of these cases, viz., *The Toronto Railway Co.* v. *The Corporation of the City of Toronto et al.* (2) (Avenue Road), and *Toronto Railway Company* v. *The City of Toronto* (3) (Queen Street) already referred to, the tracks of the Toronto Railway Company on city streets crossed on the level the tracks of Dominion railways. The Board, in the first of these cases, ordered that the street be carried under the C.P.R. tracks, and in the other ordered that the street be carried over three Dominion railway tracks by a bridge. The sole question was whether or not the Toronto Railway Company was a company interested or affected by the orders, and it was held that it was such a company.

I am unable to see that these decisions have any bearing on the present issue. There seems to me to be no similarity or analogy, as the Toronto Railway tracks were on the spot, contributing to the danger intended to be removed by the orders.

Finally, *Toronto Transportation Commission* v. *Canadian National Railways* (4), dealing with the part known as Main Street Bridge, is cited, and the learned Chairman

(1) [1914] A.C. 1067.
(2) (1916) 53 Can. S.C.R. 222.
(3) [1920] A.C. 426.
(4) [1930] A.C. 686, 704.

of the Board states that it appears to him to be indistinguishable in its facts from the present case. There, in July, 1920, the Railway Board ordered the construction of a new bridge carrying Main Street in Toronto over the railway tracks. The Transportation Commission was not then in existence, and there were no tracks over the old bridge. In 1922, the Commission commenced to extend their tracks over the new bridge and, on protest to the Board by the Railway Company, the Commission applied to the Board for permission to cross, and, on October 10, 1922, obtained temporary permission under which they laid their tracks and continued to operate cars over the bridge. In 1926 the Board granted the Railway Company's application for a rehearing, and at this hearing ordered the Commission to pay ten per cent. of the cost. The judgment states that if the Commission had been running cars over the bridge at the time of the original order for construction of the new bridge, it would undoubtedly have been a company interested. The difficulty was whether or not the Transportation Commission, not being interested at the time of the original order, could be brought in at the rehearing and compelled to pay a part of the cost because in the meantime it had become a user of the new bridge. It was held that part of the cost could be allocated to the Commission because it was interested at the date of the rehearing and new allocation. This again seems to me to have no bearing on the present issue.

Mr. Geary's argument that the construction of the new bridge is a matter merely of street improvement does not seem to be disposed of by the three cases just referred to, as there is no similarity of facts.

The report of the Board's engineer shows that there was no condition of danger at the time of making the order, as the bridge was adequate to take care of the traffic for some time to come. The ground on which the order for a new bridge was sought, as he puts it, was that the municipalities want to improve conditions and want a wider and better looking bridge, which means that a great deal more traffic will use the overhead crossing. Toronto, of course, is not one of the municipalities that is seeking this improvement. Forest Hill wished to widen its street, of which the bridge was a part, and expected more traffic over it in con-

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sequence. It is difficult to discover any difference of object in widening the bridge and widening the rest of the street.

In any case, I am of opinion that no circumstance has been shown that warrants a holding that the City of Toronto is a municipality interested or affected by the works mentioned in the order within the meaning of the Act.

I would therefore answer the question submitted in the negative, and would allow the appeal with costs to the appellant against the respondent the Village of Forest Hill.

Question submitted answered in the negative, and appeal allowed with costs.

Solicitor for the appellant: *C. M. Colquhoun.*

Solicitors for the respondent, Village of Forest Hill: *Grant & Grant.*

Solicitor for the respondent, Canadian National Railways: *Alistair Fraser.*

Solicitors for the respondent, Township of York: *Starr, Spence & Hall.*

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*Apr. 26.
*Jun. 15.

HIS MAJESTY THE KING.....APPELLANT;

AND

RONALD C. C. STEWART.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Disqualification of a petit juror—Juror convicted of criminal offence—No objection taken at the trial—Insufficient ground of appeal—Applicability of s. 1011 Cr. C.—Leave to appeal to this court granted by a judge under s. 1025 Cr. C.—Jurisdiction of this court—Existence of conflict must also be found by the court at the hearing of the appeal—Sections 1025, 1011, 1011 Cr. C.—The Jury Act R.S.B.C., 1924, c. 123, ss. 6, 10, 15.

The conviction of the respondent was set aside by the appellate court on the ground that one of the jurors at the trial was disqualified to act as such for the reason that he had been convicted of an indictable offence within the meaning of section 6c of the *Jury Act* (R.S.B.C., 1924, c. 123).

Held that the fact of a defect of that kind in the constitution of the petit jury constituted no ground for an appeal to the appellate court in view of the provisions of section 1011 Cr. C., the more so as no objection to it had been taken at the trial.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

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Held, also, that the order of a judge of this court granting leave to appeal under the provisions of section 1025 Cr. C. is not conclusive as to the existence of conflict between the judgment to be appealed from and that of some "other court of appeal in a like case"; and, upon the hearing of the appeal, the Court must itself be independently satisfied that there is, in fact, such a conflict. Duff J. expressed no opinion.

Judgment of the Court of Appeal ([1932] 1 W.W.R. 912) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1) setting aside the conviction of the respondent.

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

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

Michael Garber for the respondent.

The judgments of Anglin C.J.C. and Rinfret, Lamont and Smith JJ. were rendered by

ANGLIN C.J.C.—The Crown appeals by leave of Smith J. given under section 1025 of the Criminal Code. That section reads:

1025. Either the Attorney-General of the province or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction of an indictable offence, if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case, and if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced, or within such extended time thereafter as the judge to whom the application is made may for special reasons allow.

Although at first disposed to think that the order of Smith J. might be conclusive as to the existence of conflict between the judgment *a quo* and that of some "other court of appeal in a like cause," on consideration of the above quoted section of the Code, I find that there really are two conditions precedent to the right of appeal here, viz., (*a*) that there is, in fact, conflict between the judgment *a quo* and the judgment of a court of appeal in a like case, and, (*b*) that leave to appeal be granted by a judge of this court. The latter condition was, undoubtedly, complied with; but the Court must be independently satisfied of the existence of the former.

(1) [1932] 1 W.W.R. 912.

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The case cited by Smith J., (*Rex* v. *Boak* (1)), is probably distinguishable from that at bar, in so far as it relates to disqualification of a petit juror, inasmuch as in that case, as was pointed out in the judgment of this Court, the fact of such disqualification was known to the prisoner and his counsel during the trial. Indeed, it would seem from the judgment delivered that the juror's deafness had been canvassed before the trial judge; yet no objection on that ground was taken to the trial proceeding. But there does seem to be a clear conflict between the decision *a quo* and the decision of the Court of King's Bench for Quebec in *Rex* v. *Battista* (2). Other cases could, no doubt, be found in which there were decisions along similar lines to that given in *Rex* v. *Battista* (2). For instance, see *Brisebois* v. *Reginam* (3); whereas *Rex* v. *McCrae* (4) may be cited in support of the view taken by the Court of Appeal of British Columbia, although, in that case, differing from the *Boak* case (1), the presence of a disqualified juror had been complained of before verdict was rendered. See too *R.* v. *Feore* (5).

In the result, it would seem that the conflict between the decisions in the *Battista* case (2) and in that at bar justified the granting of leave to appeal, and that, consequently, there is jurisdiction here to entertain this appeal.

The present appeal is from an order of the Court of Appeal for British Columbia setting aside the conviction of the respondent Stewart on the ground that one of the jurors at the trial was disqualified by reason of clause (*c*) of section 6 of *The Jury Act* (R.S.B.C., c. 123), which provides that,

> 6. Every person coming within any of the classes following shall be absolutely disqualified for service as a juror, that is to say:—
>
> (*c*) Persons convicted of indictable offences, unless they have obtained a free pardon.

It is common ground that the case falls within this clause. The only question would seem to be whether or not the fact of a defect of this kind in the constitution of the petit jury, afforded ground for an appeal to the Court of Appeal in view of the provisions of section 1011 Cr. C., no objection to it having been taken at the trial.

(1) [1925] Can. S.C.R. 525.
(2) (1912) 21 C.C.C. 1.
(3) (1888) 15 Can. S.C.R. 421.
(4) (1906) Q.R. 16 K.B. 193.
(5) (1877) 3 Q.L.R. 219.

There is nothing before us to shew that both counsel for the prisoner and the prisoner himself, were ignorant of this disqualification in question during the trial (*Rex* v. *Boak* (1)); but that this was the case may be assumed since the Crown does not rely on this objection to the appeal, counsel representing the Crown conceding indeed, as he did at bar, that both the prisoner and his counsel at the trial were unaware of the fact of this disqualification.

I see no reason why the provisions of section 1011 of the Criminal Code should not apply to this case. That section reads as follows:

1011. No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists or the striking of special juries shall be ground for impeaching any verdict, or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case.

There can be no doubt that this section is intended to apply to the case of a petit juror since it deals with a " ground for impeaching any verdict " and " error upon any appeal to be brought upon a judgment rendered in any criminal case." The effect of s. 1011 is, after verdict, to preclude an appeal on the ground, *inter alia,* of disqualification of a petit juror, no complaint thereof having been made at the trial. That section, in our opinion, is applicable and was conclusive against the right of appeal to the Court of Appeal in the case at bar.

Moreover, section 1010 Cr. C. provides that,

1010. Judgment, after verdict upon an indictment for any offence against this Act, shall not be stayed or reversed,

(*d*) because any person has served upon the jury who was not returned as a juror by the sheriff or other officer.

If the fact, that a person who sat to try a case had no right to be in the jury box because not returned as a juror, cannot be taken advantage of, after verdict, as a ground of appeal, *a fortiori,* we think that a disqualification of a person on the list who serves as a petit juror, taken for the first time only after verdict, must likewise be insufficient to warrant an appeal. We entirely agree with the decision in *Rex* v. *Battista* (2).

The case of *Bureau* v. *Regem* (the latest authority to which we are referred) (3) is entirely distinguishable from

(1) [1925] Can. S.C.R. 525. (2) [1912] 21 C.C.C. 1.
(3) (1931) Q.R. 51 K.B. 207.

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that at bar on two grounds, viz., (*a*) that case had to do with a grand jury and not a petit jury, and (*b*) the appellant there would appear to have made every effort possible during the trial to have effect given to his objection.

Apart altogether from any ground of appeal based on s. 1010 (*d*), as above stated, s. 1011 of the Criminal Code is conclusive against the appeal to the Court of Appeal in this case. The appeal to this Court will, accordingly, be allowed and the judgment of the trial court restored.

DUFF J.—This appeal involves the construction and application of section 1011 of the Criminal Code, which reads as follows:

> No omission to observe the directions contained in any Act as respects the disqualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case.

The relevant B.C. enactments (R.S.B.C., 1924, c. 123, secs. 10, 15 and 6) are, in substance, these:

Section 10 of the Act directs the selector to select, from the last revised voters' list for the county, the requisite number of persons resident in the county, to serve as grand and petit jurors for the next succeeding year.

Section 15 directs the selectors to meet and hold meetings annually commencing on the first Monday in July for the purpose of selecting a preliminary list of persons *liable* to serve as jurors.

Section 6 enumerates certain classes of persons, who, although their names appear on the last revised list of voters, are disqualified from service as a juror, *inter alia*, (*c*)

> * * * persons convicted of indictable offences, unless they have obtained a free pardon * * *.

One of the jurymen who tried the respondent was afterwards discovered to be a person who had been convicted of an indictable offence, within the meaning of section 6. On this ground, that is to say, on the ground that this juryman was disqualified to act as such, the Court of Appeal for British Columbia quashed the conviction.

The question before us is whether or not this decision can be sustained, in view of the terms of section 1011, above quoted. In my opinion the gist of the complaint upon

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Duff J.

which the respondent's objection is founded is of such a character as to bring the objection within the language of section 1011. The complaint is founded on the failure of the selectors to observe the directions of the *Jury Act*, who are authorized and required to select, for the jury lists, persons liable to be called upon to serve as jurors. The Act plainly excludes from the classes of persons which it was competent to the selectors to select, persons who have been guilty of an indictable offence, and who have not received free pardon therefor. It is to this default that must be ascribed the fact that the disqualified juryman was called to serve and did serve as one of the jury on the trial of the accused. No wrong against the respondent is alleged in respect of the trial, except the fact that the juryman, being disqualified for the reasons mentioned, was present on the jury. I should have thought, especially having regard to the observations of Channel, J. in *Montreal Street Ry. Co.* v. *Normandin* (1), delivering the judgment of the Judicial Committee of the Privy Council, that in the absence of some such provision as section 1011, the presence of this disqualified juryman would have been sufficient ground for quashing the conviction. But in my opinion, that particular illegality is one of the class contemplated by that section, and, therefore, the objection is not open to the respondent.

Appeal allowed.

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

Solicitor for the respondent: *Gordon M. Grant.*

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*Apr. 28.
*Jun. 15.

HIS MAJESTY THE KING (RESPONDENT) APPELLANT;

AND

S. D. McCLELLAN (SUPPLIANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Soldier's Settlement Act—Agreement to purchase—Default in payments—Property not kept in good condition—Notice by Crown to rescind agreement—Action to recover land and chattels—Tenancy at will—Reciprocal rights of parties to agreement—Soldier's Settlement Act, R.S.C., 1927, c. 188, ss. 22 and 31.

The Soldier's Settlement Board entered into an agreement with the respondent for the sale of land to him as authorized by the *Soldier's Settlement Act*. Between going into occupation under the agreement

*PRESENT: Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

(1) [1917] A.C. 170.

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in August, 1919, and determination on the part of the Board to rescind the agreement in April, 1929, the respondent defaulted in payments and neglected proper husbandry of the property. The agreement was rescinded by resolution of the Board on the 8th of August, 1929. The respondent brought an action, by petition of right, to recover the land and chattels of which he had been dispossessed and for damages for depreciation of the same. The Exchequer Court of Canada held that the respondent was not entitled to have the land or chattels returned to him; but that the notice of intention to rescind the agreement had not been given by the Crown sufficiently early to deprive the respondent of damages to be ascertained by the Registrar of that court upon a reference.

Held that, under the circumstances of this case, the respondent has established no actionable claim as against the Crown and that the *Soldier's Settlement Act* fully authorized the proceedings taken by it.

Held also, *per* Duff, Lamont, Smith and Cannon JJ. that, by the effect of section 31 of the *Soldier's Settlement Act,* the purchaser who is let into possession becomes tenant at will, and, in respect of possession of the land, has no greater interest than such a purchaser would have had at common law before the Judicature Acts.

Semble, per Duff, Lamont, Smith and Cannon JJ., that the reciprocal rights of the parties are by no means to be ascertained (in their entirety) by reference to the equitable principles governing the rights of vendor and purchaser, but chiefly by reference to the provisions of the statute, and especially to section 22.

Judgment of the Exchequer Court of Canada, ([1932] Ex. C. 18) rev.

APPEAL from the decision of the Exchequer Court of Canada (1), dismissing an action by the respondent to recover from the Crown certain lands and chattels of which he had been dispossessed but declaring that he was entitled to damages which were to be ascertained by the Registrar on a reference.

The material facts of the case are fully stated in the reasons for judgment given by the President of the Exchequer Court (1).

W. N. Tilley K.C. and *E. Miall* for the appellant.

E. F. Newcombe K.C. for the respondent.

ANGLIN C.J.C.—I concur in the result of the judgment in this case. I am entirely satisfied that the Crown was right in its contention that, under the circumstances, the statute fully authorized the proceedings taken by it herein.

The judgments of Duff, Lamont, Smith and Cannon JJ. were delivered by

(1) [1932] Ex. C. 18.

DUFF J.—The argument on behalf of the Crown has convinced me—contrary to the view I had formed on reading the case—that the respondent has established no actionable claim as against the Crown.

The appeal turns upon several sections of the *Soldier's Settlement Act,* the principal of which are sections 22 and 31. My view is that by the effect of section 31, the purchaser who is let into possession becomes tenant at will, and, in respect of possession of the land, has no greater interest than such a purchaser would have had at common law before the Judicature Acts. As to the respective interests of the parties in the land, that does not really come into question here, but I strongly incline to the view that the reciprocal rights of the parties are by no means to be ascertained (in their entirety), by reference to the equitable principles governing the rights of vendor and purchaser, but chiefly by reference to the provisions of the statute, and especially to section 22.

The Act requires that the terms of the sale shall be set forth in writing, and the agreement before us declares that the provisions of the statute are part of its terms. I regret that this sort of referential declaration should be resorted to. It seems to me that a more satisfactory method would be to state in as simple language as possible what the terms are, and to declare plainly and unequivocally that the contract is such as there set forth. In so far as it is intended to supersede equitable doctrines and to substitute therefor explicit statutory declarations, and especially when it is intended to revive common law doctrines and rules now in practice obsolete, that also should be made manifest.

But I cannot perceive that the form of the contract is characterized by any inconsistency with the statute of such a nature as to strike at its validity or effectiveness.

The terms of the statute in this view may, at first sight, appear needlessly oppressive. But when one considers the scheme of the Act, as a whole, one sees that the primary purpose of it is to assist and encourage agricultural settlement by former soldiers. The advancement of this purpose is entrusted to the Board, the appellant on this appeal. The main preoccupation of the Board, within the limits laid down in the statute, is to carry out this object and policy. The provisions of section 22 might appear in a first reading

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and without reference to this policy, to be somewhat arbitrary. But I have no doubt that the framing of these provisions was inspired by the view that the welfare of the deserving settler would be safer in the hands of the Board than if placed exclusively under the protection of a body of legal rules.

The appeal is allowed and the petition dismissed. The Crown's motion for leave is granted, and as terms, the Crown will pay all costs, including the costs of the motions.

Appeal allowed.

Solicitor for the appellant: *W. Stuart Edwards.*
Solicitor for the respondent: *H. Mason Drost.*

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*Apr. 28.
*Jan. 15.

CITY OF VANCOUVER (DEFENDANT).....APPELLANT;

AND

OLIVE MAY BURCHILL (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Highways—Obstruction on—Municipal corporation—Injury to unlicensed driver—Liability of municipality—Motor-vehicle Act, R.S.B.C., 1924, c. 177, s. 7, ss. 7, as amended by B.C. [1930], c. 47, s. 2, ss. 2.

The fact that a taxi driver has not obtained the chauffeur's permit from the Chief of Police provided for by s. 2 (2) of the *Motor-vehicle Act Amendment Act,* 1930, c. 47 and has not procured the driver's licence required by the appellant city's by-law, does not affect the liability of the city for injuries caused to him by its negligence.

At common law and as a member of the public, any individual has the right to the use of the highway under the protection of the law; and the liability of the municipality exists towards every member of the public so using the highway. This principle should not be taken to have been altered in the *Motor-vehicle Act,* except by express words or by necessary intendment. The whole scope of the Act is to prescribe certain requirements for those using the highway with motor vehicles, and to impose certain penalties upon the offenders; it does not provide that they will not be entitled to recover damages, if the damages are suffered while they are infringing the Act.

Goodison Thresher Co. v. *Township of McNab* (44 Can. S.C.R. 187) dist.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of Morrison C.J.S.C. on the verdict of a jury and maintaining the respondent's action for damages.

*PRESENT: Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1932] 1 W.W.R. 641.

The respondent recovered from a jury $20,000 damages against the city of Vancouver for the death of her husband, a taxi driver, who was killed consequent upon the motor car crashing through the cement railing upon the viaduct situate on Georgia street, in that city.

At the close of the argument, the Supreme Court of Canada announced that it would not interfere with the finding of negligence made by the jury, but reserved judgment on the question whether the deceased's failure to take out a driver's licence under the city by-law, and to obtain a permit from the Chief of Police, as prescribed by the *Motor-vehicle Act,* disentitled the respondent from recovering.

G. E. McCrossan K.C. for the appellant.

J. W. de B. Farris K.C. for the respondent.

DUFF J.—I concur with my brother Rinfret.

My view of the pertinent provision of the *Motor-vehicle Act,* (R.S.B.C., 1924, c. 177, s. 7, ss. 7, as amended by c. 47, s. 2, 1930), is that its object is to require persons operating motor vehicles for hire to obtain a municipal permit as prescribed, and to make this obligation enforceable through the penal provisions of the Act. We should, in my opinion, pass beyond the scope and intendment of the statute if we were to enlarge these sanctions, by introducing an additional one having the effect of depriving such a person (in case of non-observance of this obligation) of his *prima facie* right to sue the municipality for negligence in respect of the non-repair of a highway.

The appeal should be dismissed with costs.

The judgments of Rinfret, Lamont, Smith and Cannon JJ. were delivered by

RINFRET J.—At the close of the argument, the Court announced that it would not interfere with the finding of negligence made by the jury and that the appeal should be dismissed unless the deceased's failure to take out a driver's licence under the city by-law, and to obtain a permit from the Chief of Police, as prescribed by the *Motor-vehicle Act,* disentitled the respondent from recovering.

The *Motor-vehicle Act,* of the province of British Columbia (R.S.B.C., 1924, c. 177), is an act respecting the

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operation of motor-vehicles in that province. It provides for the registration and licensing of these vehicles and for the issuance of chauffeurs' licences. It contains traffic regulations, certain requirements with regard to the age of the driver and to such other things as the equipment of the vehicles or the sale and transfer thereof. Provisions are made for the collection of the registration and licence fees. The statute further specifies in what cases any person " shall be guilty of an offence against (the) Act," the penalties he shall thereby incur and to which he shall be liable, on summary conviction.

The particular section of the Act relied on by the appellant reads in part as follows (*Motor-vehicle Act Amendment Act, 1930*, c. 47 of S.B.C., 1930, s. 2, ss. 2):

> No chauffeur shall within any municipality drive, operate or be in charge of a motor-vehicle carrying passengers for hire unless he is the holder of a permit therefor issued to him by the Chief of Police of the municipality; and every chauffeur to whom a permit is so issued shall comply with all such regulations as may be made by the municipality and are not repugnant to the provisions of this Act or the regulations made thereunder.

The by-law referred to by the appellant is known as the " Vehicle Licence By-Law " (no. 1510 as amended by no. 1537) of the city of Vancouver. It provides for the licensing of certain trades and businesses: auto liveries, expressmen, automobiles used for purposes of business, vehicles used for hire for the carriage of passengers, etc. It describes specifically the classes of motor-vehicles coming under it. It fixes the tariff of fares that may be charged by the owners or drivers of these vehicles and subjects them to a long list of what may be truly termed police regulations.

Under s. 3 of the by-law,

> No person shall carry on, maintain, own, operate, or use any of the several trades, professions, occupations, callings, businesses, vehicles or things set forth in * * * this by-law, and more particularly described therein unless and until he has procured a licence to do so (for each such place or business, vehicle or thing operated by him), and shall have paid therefor such sums as are specified in said schedule " A," which sum shall in all cases be paid in advance.
>
> 4. Every person so licensed shall be subject to the provisions of this by-law, and non-compliance with any of the provisions of this by-law shall be deemed to be an infraction of the same, and shall render any person violating any of the said provisions liable to the penalties contained in section 18 hereof.

And the section of the by-law on which the appellant mostly relies reads as follows:

(3) No person shall, after the passing of this by-law, drive or operate, or permit to be driven or operated, on any of the streets of the city any motor vehicle coming within the classes "C," "D," "E," "F," or "G" as hereinbefore defined in subsection (1) hereof without being licensed so to do under the provisions of this by-law.

The several classes of motor vehicles covered by this subsection come under the general description of vehicles operated for hire.

It was not disputed that, at the time of the accident, the deceased's car was being operated for hire. The further undisputed facts are these: Burchill, the deceased, owner and driver of the car, had no licence to operate for hire under the by-law and no permit had been issued to him by the Chief of Police of Vancouver. It is not that he had been denied a licence and was operating his car despite the refusal. He held a licence the previous year, "but simply had not paid the renewal fee" and had neglected to take out the licence and to get the permit for "the current year."

The question is as to the effect upon this case of Burchill's failure, in the manner just mentioned, to comply with the requirements of the statute and by-law.

The point has already been raised and discussed in several cases in the provincial courts (amongst others: *Etter* v. *City of Saskatoon* (1); *Sercombe* v. *Township of Vaughan* (2); *Godfrey* v. *Cooper* (3); *Boyer* v. *Moillet* (4); *Halpin* v. *Smith* (5); *Walker* v. *British Columbia Electric Ry.* (6); *Waldron* v. *Rural Municipality of Elfros* (7); *James* v. *City of Toronto* (8)); but it comes for the first time before this court, at least in its present aspect.

It should be said at once that the matter depends primarily upon the language of the peculiar statute. No one would doubt the competency of provincial legislatures, in properly framed legislation, to deny entirely the right of recovery in the circumstances we have described and which happen to exist in this case. Generally speaking, however, legislation of that character does not operate to modify

(1) (1918) 39 D.L.R. 1.
(2) (1919) 45 O.L.R. 142.
(3) (1920) 46 O.L.R. 565.
(4) (1921) 30 B.C.R. 216.
(5) [1920] 2 W.W.R. 753.
(6) (1926) 36 B.C.R. 338.
(7) (1923) 16 Sask. L.R. 141.
(8) (1925) 57 O.L.R. 322.

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the civil rights of the parties or to relieve them from the consequences of their negligence. It is not intended for that purpose. It is framed *alio intuitu;* and that is undoubtedly true of the Act and the by-law now under discussion.

Of the by-law, it is sufficient to say that it is nothing more than the regulation of certain trades. The purpose is to compel to take licences and the sanction is there. It is essentially a municipal enactment containing revenue or police ordinances with their own provisions for enforcement.

As for the *Motor-vehicle Act,* it does not pretend to deal with the liability for actionable negligence. The obvious purpose of the statute is to regulate the user of the highway for the protection of the public. Its object is not to disturb the ordinary rights of individuals or persons as between themselves.

At common law and as a member of the public, any individual has the right to the user of the highway under the protection of the law; and the liability of the municipality exists towards every member of the public so using the highway. This well established principle should not be taken to have been altered in the *Motor-vehicle Act,* except by express words or by necessary intendment. The whole scope of the Act is to prescribe certain requirements for those using the highway with motor vehicles, and to impose certain penalties upon the offenders, but nothing more.

It does not provide that they will not be entitled to recover damages, if the damages are suffered while they are infringing the Act.

After all, we are concerned here with an action founded on negligence and, in actions of that kind, the guiding principle—we should say the inevitable principle—is the principle of cause and effect. The liability in such a case is based—and can only be based—upon the causal connection between the tort and the resulting damage. Failure by the plaintiff to comply with a statute, in no way contributing to the accident, will not, in the absence of a specific provision to that effect, defeat the right of recovery of the plaintiff; no more than, under almost similar circumstances, the violation of a statutory prohibition by the

defendant will exclude the defence of contributory negligence. (*Grand Trunk Pacific Ry.* v. *Earl*) (1).

We will not pause to emphasize the distinction to be made between the present case and that of *Goodison Thresher Co.* v. *Township of McNab* (2). But we may refer to that case as an instance of the application of the principle. There, in the words of Duff J., at p. 194:

> The mishap was caused by the failure of the plaintiff's servants to perform the conditions under which alone they were entitled to take the engine upon the bridge.

There, as observed by Mr. Justice M. A. McDonald, "the damage was consequent upon the failure to comply with the Act." The damage, in the case at bar, was not caused by the absence of a permit or of a licence. Their absence, under the particular circumstances, did not even show that the deceased was incompetent as a chauffeur; and the jury did not find him incompetent.

The appellant draws a distinction, in the premises, between the position of an ordinary defendant and that of a municipality. It points out that the municipality is the owner of the driveway and contends that the respondent's husband, holding no permit and no licence, was unlawfully upon the street, that he was at all times material a trespasser and the appellant owed him no duty other than not to do or cause him malicious or wilful injury; in other words: that Burchill had to take the road as he found it.

We are unable to accede to the proposition which would, in that respect, assimilate the municipality to an ordinary land-owner or make a trespasser of the unlicensed chauffeur. Under statutes where the fee simple is vested in them, the municipalities are in a sense owners of the streets. They are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land. The land-owner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property. It is idle to say that the municipality has no such rights upon its streets. It holds them as trustee for the public. The streets remain subject to the right of the public to "pass and repass"; and that character, of course, is of the very essence of a street. So that the municipality, in respect of its streets, does not stand in the same position as a land-owner with regard to his property. Under the *Motor-*

(1) [1923] S.C.R. 397, at 403. (2) (1910) 44 Can. S.C.R. 187.

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vehicle Act and similar statutes, the situation is really this: that the unlicensed chauffeur, being on the highway as he has a right to be as a member of the public, fails to observe the rules laid down for the direction of those who make use of the highway and passed for the protection of the public, and thereby becomes subject to certain penalties. But the Act has not the effect of making him a trespasser, more particularly in the sense of an outlaw. The fair way of reading this kind of legislation is to ask the question: Does it impose such a legal incapacity as to make the offender a wrongdoer? And the answer is in the negative. The failure to take the licence or the permit is a failure to comply with the Act and the sanction is the penalty.

We need only point out that in the particular section of the Act relied on by the appellant and quoted at the beginning of this judgment, the mischief aimed at is not the user of a highway without a license, but the operation for hire without a permit from the Chief of Police. The enactment is directed only against the chauffeur's right to "drive a motor-vehicle carrying passengers for hire." There was no intention to prevent him from using the highway. To borrow the expression of Lord Halsbury in *Lowery* v. *Walker* (1), Burchill was certainly not a trespasser in the sense in which that word is strictly and technically used in law.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. B. Williams.*

Solicitors for the respondent: *Beck & Grimmett.*

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*Apr. 26.
*Jun. 15.

GEORGE BAMPTON .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Club—Benevolent Societies Act, R.S.B.C., 1911, c. 19—Place "kept for gain"—Common gaming house—Game of cards played—Criminal Code, section 226—The Societies Act, R.S.B.C., 1914, c. 236.

The appellant was steward of a *bona fide* club organized pursuant to the *Benevolent Societies Act* (now the *Societies Act*) of British Columbia.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

(1) [1911] A.C. 10, at 13.

The club had a membership of 1,700 and provided all the regular facilities of a social club, including meals, billiard rooms, reading rooms, various card games, etc.; it also leased and operated a football field. Members contributed ten cents apiece to the funds of the club for each half hour's play at the poker table, irrespective of whether they were winning or losing. This money was not taken from the stakes or the pot, but was collected by the appellant, as steward, from the players and paid over to the club. Only members were allowed in the premises, a by-law expressly forbidding the introduction of visitors to any part of the club property. The appellant was convicted, under section 226 of the Criminal Code, of unlawfully keeping a common gaming house; and the conviction was affirmed by the appellate court.

Held, reversing the judgment of the Court of Appeal ([1932] 1 W.W.R. 154), that, upon the facts, the club was not "a house * * * kept * * * for gain" within the meaning of section 226 Cr. C. and that the appellant had been wrongly convicted.

R. v. *Riley* ((1917) 23 B.C.R. 192 and *R.* v. *Cherry and Long* ((1924) 20 Alta. L.R. 400) approved; *R.* v. *Sullivan* ((1930) 42 B.C.R. 435) overruled.

APPEAL from the decision of the Court of Appeal for British Columbia (1), maintaining the conviction of the appellant of having kept a common gaming house.

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

J. W. de B. Farris K.C. for the appellant.

E. F. Newcombe K.C. for the respondent.

The judgments of Anglin C.J.C. and Rinfret, Lamont and Smith JJ. were delivered by

ANGLIN C.J.C.—After careful consideration of this appeal, I am satisfied that the order made by Newcombe J. granting leave herein was providently made and that this court has jurisdiction to entertain this appeal, on the ground of conflict between the decision of the Court of Appeal for British Columbia in it and the decision of the

(1) [1932] 1 W.W.R. 154.

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same court in *R.* v. *Riley* (1), which, although impliedly overruled in *R.* v. *Sullivan* (2), had in the meantime been followed in *R.* v. *Cherry and Long* (3), decided by the Appellate Division of Alberta in 1924. No allusion was made by the Court of Appeal, either in the *Sullivan* case (2) or in the present case, to *R.* v. *Riley* (1) or *R.* v. *Cherry and Long* (3), although both were brought to the attention of the court, as appears in the report of the *Sullivan* case (2) at p. 436, and here in the appeal case and factums, probably because they had to do with payments for refreshments and were thought, on that ground, to be distinguishable.

We might have been disposed to hold that this case fell within clause (*b*) (ii) of s. 226 of the Criminal Code, but for the fact that the evidence does not shew that

> the whole or any portion of the stakes or bets or other proceeds at or from such games (i.e., games of chance, or mixed games of chance and skill) (was) either directly or indirectly paid to the person keeping such house, room or place.

In fact, the players would appear to have paid this money to the steward out of their own pockets rather than from any proceeds of the game. This appears from the evidence throughout the case. On this point we adopt the view of Beck J.A. in *R.* v. *Cherry and Long* (3) (at p. 407), where that learned judge says:

> In my opinion, the only reasonable interpretation of this clause ((*b*) (ii) of s. 226 Cr. C.) is that it refers, and refers only, to a payment made to the keeper out of one or all of the "pots" under a rule, regulation, agreement or understanding exacted by the keeper that such a payment shall be made as a rake-off, commission or other form of profit to the keeper.

As to clause (*a*) of s. 226, we find it difficult to say that the "house, room or place (was) kept * * * for gain." No doubt, the moneys paid by the players constituted largely the revenue of the club and belonged to its members, playing being confined to them.

The question really presented for our determination is whether the decision of the Appeal Court of B.C. in *R.* v. *Sullivan* (2) or that earlier delivered by the same court (then (1916) composed of Macdonald C.J.A. and Martin and McPhillips JJ.A.) in *Rex* v. *Riley* (1) appeals to us as the better.

(1) (1917) 23 B.C.R. 192. (2) (1930) 42 B.C.R. 435.
(3) (1924) 20 Alta. L.R. 400.

In *R.* v. *Riley* (1), Macdonald C.J.A. said:

In Halsbury's Laws of England, vol. 4, p. 406, (par. 860), a club is defined as

A society of persons associated together for social intercourse, for the promotion of politics, sport, art, science or literature, or for any purposes *except the acquisition of gain.*

There is no finding that the Pender Club was not a *bona fide* club; there is no suggestion that the accused conducted the house under the name of the Pender Club for personal gain, and apart from the finding as to the "rake-off" it is not suggested that the Pender Club was conducted by the members thereof for gain. The real question involved in the submission therefore turns on whether or not the receipt by the club of moneys for refreshments, in the manner above set out, proves a keeping of the club premises for gain.

The rake-off was not compulsory; that was merely the method adopted by the players of paying for their refreshments. Instead of each one paying for his own refreshments, or treating in turn, they took from their common store from time to time sufficient money to pay for all the refreshments which they consumed.

* * * * *

I think the section is aimed at the keeping of a house for gain to which persons come by invitation, express or implied. The members of a *bona fide* club come as of right. This case is analogous to the case of *Downes* v. *Johnson* (2), where it was held that members of a *bona fide* club were not to be considered persons who resorted to the club.

and Martin J.A. said:

It cannot properly be said, on such facts (i.e., those in the case) that the house or place in question, conducted by the hundred (here seventeen hundred) members of the social club all equally interested (cf. Halsbury's Laws of England, Vol. 4, p. 406, par. 862) was "kept * * * for gain" within the meaning of the section and as defined by e.g., *Rex* v. *James* (3).

That learned judge concluded his judgment as follows:

His Worship has found that this benevolent club is only enabled to be kept open because of the gambling that is admittedly going on there, its revenue being otherwise very insufficient, but the correction of such an evil is for the legislature, and in the circumstances the courts can do nothing to stop it.

In *R.* v. *Cherry and Long* (4), Beck J.A., in delivering the judgment of the Appellate Division of Alberta said,

There is a company, duly incorporated under *The Companies Act* as "The Cooks and Waiters Club." In the memorandum of association, the objects of the company are stated as follows:

* * * * *

(*b*) To carry on a club for the use and recreation of cooks and waiters in Edmonton.

* * * * *

The company was incorporated on December 7, 1923. The company undoubtedly carried on a *bona fide* club * * * there was provision for admitting visitors or temporary members, on the recommendation of two

(2) [1895] 2 Q.B. 203.
(2) [1895] 2 Q.B. 203.
(3) (1903) 7 Can. Cr. Cas. 196.
(4) (1924) 20 Alta. L.R. 400.

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members, for thirty days, after which period, if they desired to become permanent members they had to be voted for. Persons who were not cooks or waiters could not become permanent members; others could become visitors for thirty days.

* * * * *

The club kept generally a small stock of soft drinks, coca-cola, etc., "just ordinary refreshments served in a club," but there was no restaurant in the club. * * *

There was evidence given by the police, who watched the playing through the window on two occasions for a very few minutes, that Cherry was seen taking, sometimes twenty-five and sometimes fifty cents, from the "pot," on several occasions; that Cherry put this in the outside pocket of his coat. It seems to me the natural thing that, if provision was being made for paying for refreshments, the money should be kept by one person. Cherry was evidently selected as that person. It is not probable that he kept his own money in the outside pocket of his coat, so that it is to be inferred that he was keeping this refreshment money separate, to be used as occasion arose for the purpose intended.

It was suggested during the argument that we should infer that Cherry, who was only a visiting member, had in some way rented or got control of the use of the particular room in which he was, for his own purposes and profit, but such an inference from the evidence would, to my mind, be quite unreasonable. Long was a permanent member of the club, and was voluntarily in charge on the occasion in question for a portion of the time during which the play was going on.

* * * * *

The first question for decision * * * is whether the place was being conducted "for gain."

As to whether a place is kept for gain, if, from the stakes, bets or other proceeds at or from the game, money is paid to a *bona fide* club, in whose premises the game is being played, in payment for refreshments supplied by the club, I adopt the decision of the Court of Appeal of British Columbia in *R.* v. *Riley* (1), and hold that in such a case the club is not kept for gain within the meaning of the statute.

* * * * *

Such a payment is not made to the keeper *qua* keeper, but as a seller of refreshments. Nor is the money paid *qua* part of the pot, but is in reality a contribution by the several players out of their own pockets, just as much as if they severally contributed to the fund from their own pockets. It is paid for a purpose and for a consideration in no way incident to the game as a game, and I think, therefore, for the two reasons indicated, it is not the kind of payment which is contemplated by the Act.

This view is strengthened by two considerations: (1) The Act under consideration is criminal, and nothing is to be found in it by intendment, but only what is clearly expressed; and (2) To hold otherwise would be to interfere with a harmless practice which is not uncommon in what perhaps may be called high-class social clubs, those resorted to by persons of divers callings, occupying the highest positions in the public and social life of the country.

(1) (1917) 23 B.C.R. 192; [1917] 1 W.W.R. 325; 26 C.C.C. 402.

The case at bar, in its facts, seems to be clearly indistinguishable from *R.* v. *Sullivan* (1). For instance, here, as there, the *bona fide* existence of the club is conceded, the players, who sat at the poker table for a certain period of time, all contributed (ten cents apiece for each half hour in this case), to the funds of the Club; no profits were or could be distributed amongst the members, although all the property of the Club and its revenues belonged to them (*The Societies Act,* R.S.B.C., 1924, c. 236, s. 5); the steward collected this money from the players and paid it over to the club; only members were allowed in,—in fact, in the present case, by-law no. 18 expressly forbade the introduction of visitors to any part of the club premises; the accused was steward of the club. In all these features the case resembles *R.* v. *Sullivan* (1), where the decision was based on s. 226, 1 (*a*), of the Code, and the Chief Justice, delivering the judgment of the court said,

> The appellant swore that he received nothing but his salary as steward. I think, however, that s. 69 of the Criminal Code is applicable to the appellant, since it is apparent that the club was a common gaming house.

From this passage and the rest of the report, however, it would seem that the main question considered by the court was the responsibility of the steward in the premises, rather than the question now before us.

But, we agree with Martin J.A., where he said, in the case at bar,

> This case cannot, in my opinion, be distinguished in principle from our decision in *R.* v. *Sullivan* (1). Indeed, in some respects it is a stronger case for conviction than that * * *.

Not improbably the learned judge here referred to the fact that, in the *Sullivan* case (1), the club in question had, in addition to other features, a lunch counter where patrons could buy meals, soft drinks, tobacco and cigars,—a feature which was entirely lacking in the present case.

The same points made at bar in the present case would appear to have been made in the Court of Appeal in the *Sullivan* case (1), yet the court there held that,

> The appellant, therefore, was properly convicted of being a keeper (of a common gaming house *kept for gain* within clause (*a*) of s. 226).

The present case, however, would seem to be *a fortiori* a case for conviction in that here the moneys paid by the

(1) (1930) 42 B.C.R. 435.

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card players constituted a chief source of revenue of the club.

After having given to this case, and to the cases cited at bar, the fullest consideration, we prefer the decisions and the reasoning put forward in the *Riley* case (1) and in *R.* v. *Cherry and Long* (2) to the decision and the reasons in support thereof given in the *Sullivan* case (3). That being so, it follows that the *Sullivan* case (3) must be overruled, the appeal herein allowed and the conviction against the appellant must be quashed.

DUFF J.—The question is whether, on the facts disclosed in evidence, the appellant could be lawfully convicted of keeping a common gaming house, within the meaning of section 226 of the Criminal Code. The relevant parts of the section are as follows:

Section 226. A common gaming house is

(*a*) a house, room or place kept by any person for gain, to which persons resort, for the purpose of playing at any game of chance, or at any mixed game of chance and skill; or

(*b*) a house, room or place kept or used for playing at any game of chance, or any mixed game of chance and skill in which

1. * * *

2. The whole or any portion of the stakes or bets or other proceeds at or from such game is either directly or indirectly paid to the person keeping such house, room or place.

The appellant was the steward of the club, which, admittedly, was a social club, incorporated under the *Benevolent Societies Act* (now the *Societies Act*), which owned a club house, as well as a football ground, and provided facilities for the social intercourse and the amusement of its members. The indoor amusements consisted of billiards, card games, including poker.

The point in controversy concerns the manner in which poker games were conducted, and the particular fact upon which the Crown relies is this: every half hour a member occupying a seat at a table and engaged in playing poker was charged a certain sum. It is true also that the respondent, the steward, provided chips to members for which no charge was made, a circumstance, which, so far as I can see, has no bearing on the question at issue.

(1) (1917) 23 B.C.R. 192. (2) (1924) 20 Alta. L.R. 400.
(3) (1930) 42 B.C.R. 435.

Members only were admitted to the premises; and it is well perhaps to emphasize the fact already mentioned that the club was not a proprietary club, but a club incorporated under the *Societies Act*. I have no hesitation in holding that there is no evidence that this club was "a house, room or place kept by any person for gain." There is not the slightest evidence to indicate that the club was not precisely what it purported to be—a club kept for the amusement and recreation, and solely for that purpose, of the members. Fees and other contributions made by the members were for the purpose of defraying the expenses.

The real question seems to be whether or not the accused can be convicted under subsection (*b*) 2 of section 226, i.e., whether or not the room in which poker was played was

> a room or place kept or used for playing therein at any game of chance or any mixed game of chance and skill in which the whole or any portion of the stakes or bets or other proceeds at or from such games as either directly or indirectly paid to the person keeping such house, room or place.

It is argued by Mr. Farris that the small fee charged for the use of the chair cannot be described as a "gain," within the meaning of these words. I pass by that question because my mind is perfectly clear upon this point, namely, that the payment of this fee is not a payment of

> the whole or any portion of the stakes or bets or other proceeds at or from

the games. Admittedly, it is, of course, not a payment from the bets or stakes. Is it a payment of "the whole or any portion" or "other proceeds at or from such games"? The word "proceeds" here must be read in connection with bets and stakes, and I think we are justified in saying that the word is *noscitur a sociis*, and that it is limited to the proceeds of a betting or gambling game as such, and proceeds similar in character to bets and stakes. The broader construction would lead to consequences which it is impossible to suppose could have been contemplated. The section is aimed, I think, at the participation by the owner of the place where the game is carried on, in the profits or other proceeds accruing to members from the game itself.

No doubt where it is shewn that gain is the real object of the keeping of the place, you have a case within subsection (*a*). But, as I have said, no such case is made out

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here, and I think the argument based upon subsection (*b*) fails also.

The appeal should be allowed and the conviction quashed.

Appeal allowed.

Solicitor for the appellant: *T. B. Jones.*

Solicitor for the respondent: *A. C. Bass.*

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*May 18, 19.

*June 15.

ELECTRIC MOTOR & MACHINERY CO. LIMITED (DEBTOR) ..... } APPELLANT;

AND

GEORGES DUCLOS (TRUSTEE)

AND

THE BANK OF MONTREAL (CONTESTANT) ..... } RESPONDENT.

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

Bankruptcy—Proposal of compromise—False statements in writing—Statements made prior to bankruptcy—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 16 (2) and 191 (q. & r.).

Paragraphs *q.* and *r.* of section 191 of the *Bankruptcy Act* (referring to false statements in writing) apply to false statements which the debtor may have made after he had been adjudged bankrupt. Therefore, the refusal by the Bankruptcy Court to approve a proposal of compromise, on the ground that the debtor had knowingly made false statements to the respondent bank, but prior to his bankruptcy, was not justified under section 16 (2) of the Act.

Judgment of the Court of King's Bench (Q.R. 52 K.B. 162) reversed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming by a majority of the court the judgment of the Superior Court sitting in bankruptcy, Panneton J., and refusing to approve a proposal of compromise made by the debtor.

The appellant made an authorized assignment under the *Bankruptcy Act* on the 3rd day of November, 1930, and, subsequently, through its trustee, submitted for approval to the Bankruptcy Court a proposal for a compromise. The approval was refused on the ground that the debtor

*PRESENT: Anglin C.J.C. and Duff, Rinfret, Lamont and Cannon JJ.

(1) Q.R. 52 K.B. 162.

had committed offences mentioned in section 191, subs. *q* and *r*, of the *Bankruptcy Act*, c. 11, R.S.C., 1927, by making false statements in writing, with intent that they should be relied upon respecting the debtor's affairs, financial condition, means or ability to pay, and for the purpose of procuring credit and discount of bills of exchange and notes. It was claimed by the respondent bank that the debtor furnished three false statements: (*a*) Statement of September, 1929, which disclosed liabilities of $1,926.07 instead of $98,509.17; (*b*) Statement of September 29, 1928, which disclosed liabilities of $2,856.68 instead of $90,197.68 (*c*) Statement of 30th of September, 1927, showing liabilities of $1,925.35, while the actual liabilities were then $83,425.35. The trial judge held that the debtor had in fact made these false statements with the intention that they should be relied upon for the purpose of procuring credit from the respondent bank, and he found that these false statements constituted offences mentioned in section 191 of the *Bankruptcy Act*, namely under subsections *q* and *r*. This decision was affirmed by a majority of the judges of the Court of King's Bench (1).

J. G. Ahern K.C. for the appellant.

R. C. Holden K.C. for the respondent.

The judgments of Anglin C.J.C. and Rinfret, Lamont and Cannon JJ. were delivered by

RINFRET J.—We have to construe subs. (*q*) and (*r*) of s. 191 of the *Bankruptcy Act* (R.S.C., 1927, c. 11). They read as follows:

191. Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made, or who has made an authorized assignment under this Act, shall in each of the cases following be guilty of an indictable offence and liable to a fine not exceeding one thousand dollars or to a term not exceeding two years' imprisonment or to both such fine and such imprisonment:—

* * *

(*q*) If he knowingly makes or causes to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom or in which he is interested, or for whom or for which he is acting, for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan, or credit, the extension of a credit, the discount of any account

(1) Q.R. 52 K.B. 162.

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receivable, or the making, acceptance, discount or endorsement of a bill of exchange, cheque, draft or promissory note, either for the benefit of himself or such person, firm or corporation.

(*r*) If he, knowing that a false statement in writing has been made respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom or in which he is interested or for whom or for which he is acting, procures upon the faith thereof, either for the benefit of himself or such person, firm or corporation, any of the benefits mentioned in the preceding paragraph.

The appellant made an authorized assignment under the *Bankruptcy Act* on the 3rd day of November, 1930. Subsequently, through its trustee, it submitted for approval to the *Bankruptcy Court* a proposal for a compromise. The demand of approval was contested by the respondent, the Bank of Montreal, on several grounds. "Leaving aside everything else," the Court found as a fact that in and during the years 1927, 1928 and 1929 the authorized assignor had knowingly made to the bank three false statements of the character described in subs. (*q*) and (*r*). The Court held that these were offences under the subsections mentioned and that,

> these being established, the Court under article 16, paragraph 2 (of the *Bankruptcy Act*) was bound to refuse the approval of the proposal of compromise.

In the Court of King's Bench, that judgment was upheld by the majority of the court (Létourneau and St. Germain JJ., dissenting). The matter is now before this Court by special leave.

It will be convenient to set out here the material part of section 16 of the Act:

> 16. The court shall, before approving the proposal, hear a report of the trustee as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.
>
> 2. If the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in section one hundred and ninety-one of this Act.

As will be observed, the whole question is whether the making of the false statements by the appellant may be held to constitute the offences described in subs. (*q*) and (*r*) of sec. 191, notwithstanding that they were made before the date of the authorized assignment—in fact, the last statement was made more than nine months before, and

the other statements almost two and three years respectively before the assignment.

The acts dealt with in sec. 191 are, in terms, the acts of a person

> who has been adjudged bankrupt or in respect of whose estate a receiving order has been made or who has made an authorized assignment.

Then, subs. (*q*) and (*r*) proceed to describe the particular offences and the present tense is used.

Upon the plain meaning of the words, what is there described as an offence is the act of a person who has already been adjudged bankrupt, etc. And there is no reason, in the premises, why the court should depart from the ordinary and natural sense of the words of the enactment: *Vacher* v. *London Society of Compositors* (1). It was pointed out by the respondent that, in other subsections of s. 191, the present tense is equally used although, in terms, these subsections are made to apply to offences committed

> within six months next before the presentation of a bankruptcy petition, etc.

The obvious answer is that, in those other subsections, the times are fixed and there is an absolutely controlling context. The point is rather that: were it not for the fact that these other subsections, by their context, are expressly given a retrospective operation, the same rule would apply to them and they would have to be construed as prospective only. A retrospective effect should not be given, unless that cannot be avoided without violence to the language. (Maxwell, 7th ed., p. 186.)

The respondent urged that, on the construction put forward by the appellant, the statute would be nugatory or inoperative, in the sense that the acts contemplated could never happen after bankruptcy. But we find nothing absurd or repugnant in the notion of an adjudged bankrupt or an authorized assignor

> making a false statement in writing with intent that it shall be relied upon respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom or in which he is interested

or for the other purposes mentioned in subs. (*q*) and (*r*). Like the minority judges in the Court of King's Bench, we think that any of these acts may yet be attempted after

(1) [1913] A.C. 107, at 118.

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bankruptcy and in connection with the bankruptcy. Both in his factum and at the hearing, counsel for the appellant was able to suggest many instances of how an offence of the nature contemplated may be committed after bankruptcy. Section 192 of the Act, immediately following the section now in discussion, affords an illustration of the fact that Parliament had in mind the possibility of just such acts being indulged in by an undischarged bankrupt or an undischarged authorized assignor. Section 196 is another illustration.

For these reasons, we are of opinion that the Bankruptcy Court was in error when it decided that, on account of subs. (*q*) and (*r*) of sec. 191 of the *Bankruptcy Act*, it was "bound to refuse the approval of the proposal for compromise" and the appeal ought to be allowed with costs.

We do not think, however, we should go any further, and that we should either approve or disapprove the proposal which has been made on behalf of the appellant. On proceedings such as these there are considerations which make it highly desirable that the Bankruptcy Court should be allowed to exercise proper discretion. The conclusion of the minority judges in the Court of King's Bench was that the record should be sent back to the Bankruptcy Court, with the object that that Court may now adjudicate upon the other objections of the contesting respondent, as also upon the advisability of approving the proposal for compromise. That, in our view, is the wise course to follow and the record will therefore be remitted to the Bankruptcy Court for the above mentioned purposes. The appellant should have its costs both here and in the Court of Appeal. The costs of the abortive hearing should follow the event.

DUFF J.—I concur with my brother Rinfret.

The points necessarily involved in this appeal were fully discussed on the argument and the opinion of the Court in respect of them given, except that arising under the second limb of subsection 2 of section 16. That question concerns the effect of subsections (*q*) and (*r*) of section 191; and the precise point in controversy is whether or not those subsections can be brought into play where the act complained of is an act which takes place before the bankrupt has been adjudicated as such.

I am unable to accept the view that the language of those subsections, in its ordinary meaning, is ambiguous in the sense that it applies as well to such acts as to acts committed after bankruptcy. Reading it in the ordinary sense, the scope of the subsections is, in my opinion, limited to the last mentioned character of acts. It is, therefore, incumbent upon the respondent to shew, in order to make good his position (and there is no dispute about this), either, that there is some qualifying context requiring a different reading, or that the subsections read according to their ordinary sense are incapable of practical application under the law of bankruptcy.

As to the first, it is, in my opinion, too plain for argument that there is no such qualifying context.

As to the second, the respondent has quite failed to satisfy me that these subsections, upon the construction contended for by the appellant are nugatory.

The statute contemplates

> 16. Arrangements under the approval of the Court by which the debtor may carry on his business.

Section 196 shews very plainly that the conviction of the debtor, under section 191 of the Act, may have the effect of nullifying any such arrangements, and there is nothing whatever in that section to indicate that this is restricted to offences constituted by some act preceding bankruptcy.

The appeal should be allowed and there should be a declaration that the acts complained of, committed prior to the bankruptcy, are not criminal acts, within the contemplation of section 191; and the case should be referred back to the Court in Bankruptcy to be dealt with accordingly.

Appeal allowed with costs.

Solicitors for the appellant: *Hyde, Ahern, Perron, Puddicombe & Smith.*

Solicitors for the respondent: *Meredith, Holden, Heward & Holden.*

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*Apr. 27.
*Jun. 15.

MUNETAKA SAMEJIMA .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Immigration law—Alien—Entry in Canada—Alleged misrepresentation—Deportation order not stating reasons—Habeas corpus—Order quashed—Same order amended to conform with statute—New order not valid—Immigration Act, R.S.C., 1927, c. 98, ss. 23, 33 (5) and (7), 40, 41, 42.

The appellant, a Japanese subject, entered Canada at the port of Vancouver on September 29, 1928, as a domestic servant, but, though permitted to land, was unable to obtain that kind of work. On January 28, 1931, under an order issued by the Deputy Minister of Immigration he was detained for examination upon a complaint of violation of the *Immigration Act*. Neither the complaint, nor a copy thereof was forwarded to the Board of Inquiry, or served on the appellant who was brought before the Board on April 29, 1931. Finding the appellant had entered Canada by misrepresentation, the Board served on the appellant a deportation order stating that he was rejected because "in Canada contrary to the provisions of the *Immigration Act* and effected entry contrary to the provisions of s. 33 (7) of said Act." An appeal to the Minister having been dismissed, the appellant obtained a writ of *habeas corpus* and succesfully applied for discharge thereunder to Fisher J. on July 8, 1931, on the ground that the order was not in accordance with the provisions of the Act, in that it did not specify with sufficient particularity the reason for his deportation. On September 23, 1931, the appellant was re-arrested on the original order of April 29, 1931, which, however, had been amended by adding to it the reasons for his deportation so as to make it conform to the requirements of the statute. He again sued out a writ of *habeas corpus* and applied to quash the amended order. Murphy J. refused the application holding that, though deficient, the first order could be remedied by issuing the amended order, and he held the new order valid. His judgment was affirmed on appeal.

Held, Anglin C.J.C. and Smith J. dissenting, that the amended deportation order issued by the Board of Inquiry should have been quashed and the appellant discharged from custody. The Board of Inquiry when a deportation order is found defective on its face, has the right to recall it and substitute therefor an order in proper form, so long as the defective order had not been acted upon. Even after it has been served on the person in custody and constitutes the return made to a writ of *habeas corpus,* it may still by leave of the court or judge, be amended, or another order substituted for it, so as to make it conform to the finding of the Board. But after a deportation order

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

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which is not in accordance with the Act has been quashed by a court having jurisdiction, it cannot be amended for there is nothing to amend, the order of the Board no longer existing.

Per Anglin C.J.C. and Smith J. dissenting.—The order made by Fisher J. contravened the prohibition of s. 23 of the *Immigration Act* and was, therefore, invalid and *ultra vires,* since it amounted to a "reviewing, quashing, reversing, restraining, or otherwise interfering with," an order of the Minister, or of the Board of Inquiry, the appellant being, admittedly, neither a Canadian citizen, nor a person having Canadian domicile. That being so, the order of the Board remained effective, as it clearly dealt with matter declared by s. 23 to be outside the authority of any "court or judge or officer thereof" to interfere with. Moreover, this defect in the jurisdiction of Fisher J. who made the order was obvious on the face of it and, therefore, could be taken advantage of by the respondent; the order of Fisher J. being a nullity, the order of the Board, which it purported to set aside, was still valid and was legally amended so as to make it conform to the intention of the Board in making it.

APPEAL from the decision of the Court of Appeal for British Columbia, affirming a judgment of Murphy J. and dismissing the application of the appellant for a writ of *habeas corpus.*

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

C. H. O'Halloran for the appellant.

W. N. Tilley K.C. and *E. Miall* for the respondent.

DUFF J.—I concur with my brother Lamont.

The chief question I desire to discuss is the effect of section 23 of the *Immigration Act.* The words,

had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

are an essential part of this section; and its disqualifying provisions obviously can only take effect where the conditions expressed in these words are fulfilled. In particular, the phrase "in accordance with the provisions of this Act" cannot be neglected; their meaning is plain. The "order" returned as justifying the detention must be "in accordance with the provisions of this Act." It must not, that is to say, be essentially an order made in disregard of some substantive condition laid down by the Act. This applies to the order of the Minister, as well as to the order of the Board of Inquiry. The order of the Minister must

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be an order directing the investigation of facts alleged in a complaint made to him; and such facts, unless the enactment is to be reduced to the merest parade of words, must be alleged, of course, in such a manner as to make the allegation reasonably intelligible to the person against whom the investigation is directed. The jurisdiction of the Board, as an investigating body, is limited to the investigation of the facts alleged, a condition, again, implying intelligibility of allegation. Indeed, unless the person concerned is to have a reasonable opportunity of knowing the nature of the allegations, what is the purpose of requiring his presence? The deportation order must fully state the reasons for the decision, in respect of the allegations. The spirit, as well as the frame, of the whole statute, evinces the intention that these provisions are mandatory.

I gravely fear that too often the fact that these enactments are, in practice, most frequently brought to bear upon Orientals of a certain class, has led to the generation of an atmosphere which has obscured their true effect. They are, it is needless to say, equally applicable to Scotsmen. I admit I am horrified at the thought that the personal liberty of a British subject should be exposed to the hugger-nugger which, under the name of legal proceedings, is exemplified by some of the records that have incidentally been brought to our attention.

Courts, of course, must often draw the distinction between what is merely irregular and what is of such a character that the law does not permit it in substance. I have no difficulty in giving a construction to section 23, which does not deprive British subjects, who are not Canadians, of all redress, in respect of arbitrary and unauthorized acts committed under the pretence of exercising the powers of the Act.

I do not find it necessary to decide whether or not the deportation order was one which fell under the protection of section 23. It is sufficient for me that Mr. Justice Fisher had jurisdiction to decide that it did not; and that the learned judge having done so and set it aside, the chairman of the Board had no authority to issue another.

The appeal should be allowed.

The judgments of Lamont and Cannon JJ. were delivered by

LAMONT J.—This is an appeal from the judgment of the Court of Appeal of British Columbia dismissing by an equal division of the court an appeal by the appellant from a judgment of Mr. Justice Murphy in which he refused the appellant's application under a writ of *habeas corpus*, for his discharge from custody.

The appellant (a Japanese subject) entered Canada at the port of Vancouver on September 29, 1928. His passport and the ship's manifest shewed that he was entering Canada for the purpose of being employed as a domestic servant by one J. Uneo of Nanaimo, B.C. He was permitted to land and, according to his story, he went directly to Nanaimo where he found that Uneo had failed in business, closed his store and, therefore, did not require a domestic servant. He says that although he tried he could not get work as a domestic servant, and had to take what he could get.

On January 28, 1931, the Deputy Minister of Immigration and Colonization directed an order "to any constable, peace officer or immigration officer in Canada" in which he recited that a complaint had been received to the effect that Munetaka Samejima (the appellant)

> was in Canada contrary to the provisions of the *Immigration Act*, and had effected entrance contrary to the provisions of s. 33, ss. 7 of the said Act,

and he ordered that the appellant be taken into custody and detained for examination and an investigation into the facts alleged in the said complaint.

The examination was to be made by the Board of Inquiry or an officer acting as such. Neither the complaint itself nor a copy thereof was forwarded to the Board or served upon the appellant who was taken into custody and brought before the Board on April 29, 1931. On being questioned he admitted that he had not worked as a domestic servant since he landed in Canada, giving as a reason his inability to obtain that kind of work. The Board found that he had entered Canada by misrepresentation, and a resolution for his deportation was passed. On the same day a deportation order was drawn up and served upon the appellant. The order read as follows:—

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This is to certify that the rejected person above named, a person who entered Canada at B.C. ex. *Empress of Asia* from Yokohama, Japan, which arrived at the said port on September 29, 1928, at o'clock M., has this day been examined by the Board of Inquiry at this port, and has been rejected for the following reasons: In that he is in Canada contrary to the provisions of the *Immigration Act* and effected entry contrary to the provisions of section 33, subsection (7) of said Act.

And the said rejected person is hereby ordered to be deported to the place from whence he came to Canada * * *.

Dated at Victoria, B.C., this 29th day of April, 1931.

J. A. ANDERSON,
Chairman of the Board of Inquiry.

The appellant appealed to the Minister but his appeal was dismissed. He then obtained a writ of *habeas corpus,* and an application for his discharge thereunder was made to Mr. Justice Fisher who, on July 8, 1931, discharged him from custody and quashed the deportation order, on the ground that the order was not in accordance with the provisions of the Act, in that it did not specify with sufficient particularity the reason for his deportation. On September 23, 1931, the appellant was re-arrested on what purported to be an order for his deportation signed by the Chairman of the Board of Inquiry, and bearing date April 29, 1931, the date of the original order. This new order will hereafter be referred to as the " amended order." This amended order was in form sufficient to satisfy the requirements of the statute. After his re-arrest the appellant was not again brought before the Board, or examined by it, or given an opportunity to offer a defence to this arrest. He, however, again sued out a writ of *habeas corpus* and applied to Mr. Justice Murphy to quash the amended order under which alone, according to the return made to the writ, the appellant was held in custody. Mr. Justice Murphy refused to set aside the order holding that although the first order was deficient the deficiency could be remedied by issuing a new order, and he held the new order valid. Whether or not he was right in so holding we have now to determine.

Sections 40 and 41 of the *Immigration Act* (R.S.C., 1927, c. 93) provides that where a person belonging to the prohibited or undesirable class, as specified therein, other than a Canadian citizen or person having a Canadian domicile, is found in Canada

it shall be the duty of any officer cognizant thereof and the duty of the clerk, secretary or other official of any municipality in Canada wherein such person may be to forthwith send a written complaint thereof to the Minister giving full particulars.

Included in the prohibited class is a person who enters or remains in Canada contrary to any provision of the Act.

Then s. 42 reads:—

> Upon receiving a complaint from any officer, or from any clerk or secretary or other official of a municipality against any person alleged to belong to any prohibited or undesirable class, the Minister or the Deputy Minister may order such person to be taken into custody and detained at an immigrant station for examination and an investigation of the facts alleged in the said complaint to be made by a Board of Inquiry or by an officer acting as such.
>
> * * * *
>
> 3. If upon investigation of the facts such Board of Inquiry or examining officer is satisfied that such person belongs to any of the prohibited or undesirable classes mentioned in the two last preceding sections of this Act, such person shall be deported forthwith, subject, however, to such right of appeal as he may have to the Minister.

Counsel for the appellant contended that jurisdiction to order the arrest of the appellant under this section depended upon the existence of the conditions precedent required by the statute, that is to say upon the receipt of a complaint from an officer under the Act or from a municipal official, and that in either case the complainant must give particulars of the act or omission which placed the immigrant in the prohibited or undesirable class; that there was no evidence that the complaint in this case had been received from any person specified in the section; that the order of the Deputy Minister would indicate that no particulars other than those contained in his order had been given, and, therefore, no jurisdiction on the part of the Deputy Minister to order the appellant's arrest had been shewn, and jurisdiction would not be presumed. He further contended that as there was no jurisdiction to issue the order which set these proceedings in motion, every step taken subsequent to the order was invalid.

The objection here taken is, to my mind, a very serious one, for the jurisdiction of a Minister or his Deputy, under s. 42, to take an immigrant into custody is conditioned upon a complaint being received from one of the persons specified therein. Parliament has not authorized the exercise of this jurisdiction on the complaint of an unknown person who might be an enemy or competitor or business rival of the immigrant, desirous of harrassing him. It is given only on the complaint of an officer or official, whose official position it may have been thought would warrant

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the inference that the complaint would not be made without knowledge, nor inspired by any but proper motives. It is established law that jurisdiction on the part of an official will not be presumed. Where jurisdiction is conditioned upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised. Failure to establish the right to arrest would ordinarily vitiate all subsequent proceedings following directly as a result of the arrest. Whether this principle would apply to a second arrest I do not find it necessary to determine, for, assuming that it would not, the order in question must, in my opinion, be set aside on another ground, namely, that the amended order itself was wholly invalid.

Section 33 (5) provides that the order of deportation may be made in Form C in the schedule to the Act, which form requires the reasons for the rejection to be "stated in full," and a copy of the order to be forthwith delivered to the rejected person. The statute, therefore, contemplates that the order will shew the reason for the deportation. The only reason for the deportation of the appellant, as found by the Board of Inquiry, was that he had entered Canada by misrepresentation. That reason was not stated in the deportation order which formed the return made to the writ of *habeas corpus* before Mr. Justice Fisher. Because of the Board's failure to state in the order the particular offence found against the appellant Mr. Justice Fisher quashed the order and set the appellant at liberty. Had he jurisdiction to do so?

It was contended that s. 23 deprived him of any jurisdiction to interfere. That section reads:—

> 23. No court, and no judge or officer thereof, shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

It will be observed that the prohibition against interference by a court or judge applies only to

> any proceeding, decision or order had, made or given under the authority and in accordance with the provisions of this Act.

It follows, therefore, that if the proceeding, decision or order has not been had, made or given in accordance with the provisions of the Act, no restriction is placed upon interference therewith by the court, and the immigrant is at liberty to appeal to a court or judge for any remedy to which he may be found entitled.

In this case the original deportation order was not in accordance with the provisions of the Act. Mr. Justice Fisher had, therefore, jurisdiction to quash it, which he did, on July 8, 1931. His order, having been made with jurisdiction, was a valid order and could only be reversed on appeal, if an appeal lay therefrom.

The Crown does not contend that the original order of the Board of Inquiry was valid, but it does contend that where a slip has been made in the drawing up of an order, a new order in proper form may be substituted. Up to a certain point I entirely agree with this contention. If the Board of Inquiry made a deportation order defective on its face, it could, in my opinion, recall it and substitute therefor an order in proper form, so long as the defective order had not been acted upon. Even after it has been served on the person in custody and constitutes the return made to a writ of *habeas corpus,* it may still, in my opinion, by leave of the court or judge, be amended, or another order substituted for it, so as to make it conform to the finding of the Board. *Leonard Watson's Case* (1); *In re Clarke* (2). But after a deportation order which is not in accordance with the Act has been quashed by a court having jurisdiction, it cannot be amended for there is nothing to amend. The order of the Board no longer exists—it is a thing of naught.

What was attempted to be done in this case was to amend the order of April 29, after it had been quashed, by adding to it the reasons for the appellant's deportation so as to make it conform to the requirements of the statute. There is no evidence that the amended order ever was before the Board. The only order made by the Board of Inquiry of which we have any record is the one that was quashed by Mr. Justice Fisher.

(1) (1839) 112 E.R. 1389, at 1419. (2) (1842) 2 Q.B. 619; 114 E.R. 243.

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In the statute ample provision is made for rectifying the situation which arose through the quashing of the original order, and all the Board of Inquiry had to do was to follow the statute. In s. 33 (7) which sets out the various offences constituting a cause for deportation, it is provided that

> any person suspected of an offence under this section may be arrested and detained, without a warrant, by any officer, for examination as provided under this section, and if found not to be a Canadian citizen or not to have a Canadian domicile,

may be ordered to be deported. Every member of the Board of Inquiry is an officer under the Act.

After the Board's deportation order had been quashed, any member thereof could have caused the appellant to be re-arrested and held for examination, for, having found, on April 29, 1931, that he entered Canada by misrepresentation, his presence at large thereafter would justify the suspicion that he was in Canada in violation of the Act. If, on re-examination the Board still found that his entry into Canada had been secured by misrepresentation, a new deportation order could have been made based upon the re-examination and, if it was in proper form, no court or judge would have jurisdiction to quash or reverse it. This re-examination, however, would have entitled the appellant to meet the charge with such evidence as he might be able to put before the Board. How important that right would have been for the appellant is disclosed in his evidence. He says that when the Immigration Officer came to Chemainus where he was working on April 28, 1931, and took him to Victoria, that the officer told him that he might return to Chemainus next day, so, when he was taken before the Board of Inquiry for examination and was asked if he wanted a lawyer he answered "No," because he says he did not anticipate getting into any trouble. The record of his examination before the Board shews that the proceedings were opened by the Chairman stating to him that he was to be examined as to his right to remain in Canada, and did he wish to have counsel. The Chairman then referred to the complaint set out in the warrant of the Deputy Minister, in the language of the complaint. Up to that time the appellant had not been informed that he was to be charged with entering Canada by misrepresentation. Then he was questioned as to his age, place of birth, re-

ligion, relatives in Japan and in Canada, statements appearing in his passport, his object in coming to Canada, his movements after he landed and where and for whom he expected to work when he came here. To all of these questions the appellant answered apparently in a straightforward manner, informing the Board that his destination was Nanaimo and that he expected to work for Mr. J. Uneo as a domestic servant but, that when he got to Nanaimo he found that Mr. Uneo had failed in business, his store was closed and he himself was working in the mill; that after trying in vain for two weeks to get work as a domestic servant in Nanaimo, he went to Vancouver and tried there, but was equally unsuccessful, and he had to take whatever kind of work he could get. Then he was asked:—

Q. When you got back to Vancouver, did you report to the Canadian Immigration Office and report to them that your employer was closed up and could not employ you as a domestic?—A. No. I didn't.

Q. You know that you were permitted to land in Canada for the purpose of being employed as a domestic servant and that you were going to work for Mr. Unyeo; why did you not report that this man was not in a position to employ you when you found he was closed up?—A. I didn't know that I should report to the Immigration what to do.

He was then questioned as to his subsequent employment; the names and addresses of his employers; the rate of wages he received, etc.

Then, practically at the close of his examination, we have the following:—

Q. And when you were questioned by the Immigration Officer, did you not state that you were going to be a domestic servant?—A. I told the officer at Vancouver I was going to be a domestic servant.

Q. After you arrived you made no attempt to be a domestic servant?—A. I tried several times to have domestic work in Vancouver but could not find any.

Q. You have never been in domestic servant work in Canada?—A. No, I have not.

Q. Then you realize that you have entered Canada by misrepresentation, do you?—A. No. I don't know that. Because I try to get work but I could not help it.

Q. But the fact that you have not taken domestic work shows you entered Canada by misrepresentation?—A. I don't know.

This was the first time so far as the material before us discloses that he was made aware that the charge against him was entering Canada by misrepresentation. Had he known that he had to face that charge he could have had the evidence before the Board of Inquiry which he subsequently placed before Mr. Justice Murphy on the *habeas*

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corpus proceedings, namely, that of Mr. J. Uneo, who had carried on business in Nanaimo for twenty-five years and who, in his affidavit, stated not only that the appellant was to be employed by him as a domestic servant, but that more than a year before the landing of the appellant, he (Uneo) had applied to the Japanese Consul at Vancouver for a permit for the appellant's entry into Canada as his domestic servant. This was corroborated by the affidavit of K. Ishii, the appellant's uncle, who for forty years had been a merchant in Victoria, B.C., and, for many years, held office as head of the Victoria Japanese Association, and who swore that he knew of his own personal knowledge that Mr. J. Uneo had, in the latter part of 1926, applied to the Japanese Consul for a permit for the entry of the appellant as Uneo's domestic servant. This evidence although tendered before Mr. Justice Murphy, could not be considered by that learned judge because he had no jurisdiction to review the finding of fact made by the Board of Inquiry. If the evidence of these witnesses had been placed before the Board when the appellant was examined by it, it is possible that the Board might not have found as a fact that the appellant entered Canada by misrepresentation. Had the appellant known that he had to meet the charge of misrepresentation before he announced that he did not want a lawyer, I think it highly probable that he would have had counsel and that the evidence of Uneo and Ishii would have been placed before the Board. I, therefore, find myself entirely in accord with the language used by Martin J.A., in the court below, where his lordship said:—

> even if the proceedings upon the Board's amended Order could be invoked at all they contain the incurable defect that after the re-arrest there was no re-investigation of the accused on the definite charge that was for the first time then laid against him.

The amended order, being simply an amendment of an order which had been quashed instead of a new order based upon a re-examination, had no validity whatever, and should also have been quashed.

For the Crown it was contended that, even if the order was invalid, Mr. Justice Murphy was right in refusing to set the appellant at liberty, and cited, among others, the

case of *Rex* v. *Governor of Brixton Prison* (1). That was an entirely different case and, in my opinion, goes no further than to hold that it does not necessarily follow in every case where some irregularity is shewn to have taken place in the procedure under which a person has been placed in custody that he should be set at liberty. But it is only in cases where the court is satisfied that a *prima facie* case has been made against such person, and that it is in the interests of justice that he should be tried for the offence charged, that he will be detained under an irregular commitment. In the present case the commitment under which the appellant was held was not simply tainted with an irregularity in procedure, but was wholly bad.

The appeal should be allowed with costs; the order of the Board of Inquiry quashed, and the appellant discharged.

The judgments of Anglin C.J.C. and Smith J. (dissenting) were delivered by

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Lamont in this case and regret to find myself unable to agree with his conclusion. Unless, to employ a familiar saying, the crossing of every "t" and dotting of every "i" in all the proceedings taken in this matter is essential to the Crown's success, I do not see how this appeal can be maintained.

Two main questions are open for consideration, (*a*) whether the order of Fisher J. for the discharge of the appellant will sustain a claim of *res judicata* herein; and (*b*) whether, if that order does not stand in the way, or can be gone behind, the action of Murphy J. in refusing to discharge the appellant on *habeas corpus* was justified. As I read the judgment of Lamont J., that learned judge holds (*a*) that the order of Fisher J. amounts to *res judicata* in this matter; (*b*) that that order cannot be gone behind or be ignored; and (*c*) that the order of Murphy J., refusing to discharge the appellant on *habeas corpus* after his re-arrest under the amended order of the Board, was nugatory, on the ground that Fisher J. had definitely set aside the original order of the Board and there was, therefore, nothing left to amend.

(1) (1913) 23 Cox 713.

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It is true that the Court of Appeal for British Columbia has a jurisdiction conferred on it by statute (R.S.B.C., 1924, c. 52, s. 6), so far as I am aware, peculiar to that province, whereby that court is obliged to entertain an appeal from, *inter alia*, "every judgment, order or decree made by the Supreme Court or a judge thereof," no exception being made to the generality of the jurisdiction thus conferred which would exclude a right of appeal by the Crown against the order of a judge who has under *habeas corpus* discharged a person brought before him. The respondent maintains the right to ignore the order of Fisher J., treating it as made without jurisdiction, because of the presence in *The Immigration Act* of s. 23, and, instead of appealing therefrom, to proceed under the order of the Board, either as originally made or amended.

That it is competent for any court to amend its own order as issued so as to make it conform to the intention of the Court making it (especially where, as here, the Board in announcing its decision, had declared in terms, in the presence of the appellant, the order it proposed to make, those terms corresponding with the amendment so made), is a proposition which scarcely requires authority to support it.

But, it is said that the power of the Board to amend ceased with the existence of its order, and that that order ceased to exist when Fisher J. made his order quashing it. We are thus driven back again to the question of the validity of the order made by Fisher J., i.e., not whether that order was proper on the merits, but whether the learned judge had jurisdiction to make it. Ordinarily no doubt, this question of the validity of the order would have been raised on appeal from it, but it does not at all follow that that is the only manner in which the question of jurisdiction can be raised. On the contrary, if a party affected by an order of the Board, or the Board itself, chooses to treat a subsequent order, purporting to set it aside, as a nullity, he or it may do so at his or its peril. Here, the Board adopted the latter course, by ignoring the order of Fisher J. and proceeding to amend its previous order so as to make it conform to the terms in which it had intended to pronounce such order,—terms which were announced at the conclusion of the hearing in the presence of the appellant.

Without at all questioning the propriety on the merits of the order of Fisher J., and confining my observations solely to the jurisdiction of that learned judge, I am of the opinion that the order made by him contravened the prohibition of s. 23 of the *Immigration Act* and was, therefore, invalid and *ultra vires*, since it amounted to a "reviewing, quashing, reversing, restraining, or otherwise interfering with," an order of the Minister, or of the Board of Inquiry, the appellant being, admittedly, neither a Canadian citizen, nor a person having Canadian domicile. That being so, and the order of Fisher J. being, accordingly, invalid and *ultra vires*, the order of the Board remained effective. It clearly dealt with matter declared by s. 23 to be outside the authority of any "court or judge or officer thereof" to interfere with.

Moreover, this defect in the jurisdiction of the learned judge who made the order is obvious on the face of it. It, therefore, could, in my opinion, be taken advantage of by the respondent; and I agree with Murphy J. in his view that the order of Fisher J. was a nullity and that the order of the Board, which it purported to set aside, still stands and was validly amended by the Court so as to make it conform to the intention of the Board in making it.

I also agree with Murphy J. that, having before him such amended order of the Board, he had abundant ground for refusing to interfere with the provision therein contained for detention of the appellant for deportation,—it not being open to that learned judge, or on appeal from him to the Court of Appeal, or to us, to consider the credibility, or weight, or value of the testimony upon which the Board had proceeded, which was reviewable only by the Minister on appeal to him under ss. 18 and 19,—an appeal which was duly taken by the appellant and which proved unsuccessful.

It is satisfactory to have reached a conclusion which seems to me to be in conformity with the requirements of justice, since the appellant was fully aware of the purpose of the inquiry of the Board and of the substance of the charge against him, i.e., that he had procured entrance into Canada by misrepresentation contrary to the provisions of s. 33 (7) of *The Immigration Act*, which, I have no doubt at all, was stated as a basis of the inquiry into the complaint made to the Minister under s. 42 (1). To the absence

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of any formality in the complaint the presumption *omnia rite esse acta*, affords an answer, 13 Hals. par. no. 538.

It must be perfectly apparent to everyone reading the proceedings that this was so. For instance we find the following in the course of the examination of the appellant by the Board:

Q. Then you realize that you have entered Canada by misrepresentation, do you?—A. No, I don't know that. Because I try to get work but I could not help it.

Q. But the fact that you have not taken domestic work shows you entered Canada by misrepresentation?—A. I don't know.

And, at the conclusion of the inquiry, we find the following:

CHAIRMAN: Who told you to say, or to state, that you were coming here as a domestic servant when apparently you have never followed that occupation?—A. My uncle in Nanaimo told me to come as a domestic servant for Mr. Uyeno.

Q. Is he the same man that came across with you on the boat?—A. Yes.

Q. And he it was who told you to say you were coming to work as a domestic servant for Mr. Uyeno at Nanaimo?—A. Yes; I understand I am coming to work as a domestic servant for Mr. Uyeno.

Decision of the Board.

Mr. JONES: Whereas the said Munetaka Samejima, having been found not to be a Canadian citizen or a person having Canadian domicile, and a complaint having been received under Section 40 of *The Immigration Act* to the effect that the said Munetaka Samejima is in Canada contrary to the provisions of *The Immigration Act*, namely Section 33, subsection 7, in that he entered Canada by misrepresentation: therefore, pursuant to the provisions of section 33, subsection 7 of *The Immigration Act*, I move that the said Munetaka Samejima be deported.

Mr. SPEED: I second the motion.

CHAIRMAN: Mr. Samejima, a motion has been duly moved and seconded and I declare it carried unanimously that you be deported under the provisions of Section 33, subsection 7 of the *Immigration Act*. You have the right to appeal to the Minister of Immigration and colonization. Do you wish to appeal?—A. I am going to appeal.

How a man can, after being so notified, contend before this Court that he had not been informed of the substance of the charge against him, as the appellant does in his affidavit I do not understand. To say that he had no notice that the substance of the accusation against him was obtaining entry into Canada by misrepresentation, to put it mildly, strikes me as dishonest. No injustice whatever on this score has been done to the appellant and to require that the circumstances of his entry should be again the subject of investigation after his re-arrest would seem to be to impose procedure that is entirely superfluous in view of the fact that the original order of the Board providing for his deportation still stands.

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In conclusion, therefore, I am of the opinion that Murphy J was right in declining to interfere, under s. 23 of *The Immigration Act*, with the detention of the appellant for deportation, that his order must be sustained and that this appeal, accordingly, should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *O'Halloran & Harvey.*
Solicitor for the respondent: *John L. Clay.*

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

JOHN B. HOLDEN, SOLE SURVIVING EXECUTOR AND TRUSTEE OF THE ESTATE OF DUNCAN McMARTIN, DECEASED... RESPONDENT.

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*Feb. 9.
*June 15.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Income War Tax Act, 1917 (Dom.), c. 28 (as amended)—Right to assess—S. 3 (6), as enacted by 10-11 Geo. V, c. 49, s. 4 (R.S.C., 1927, c. 97, s. 11)—"Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests"—Residence out of Canada—Construction of will—Contingent or vested legacies.

M. died in 1914, domiciled in Canada. His will, after sundry bequests, gave the residue of his estate to his executors and trustees upon trusts to sell and convert, to pay legacies, to invest, to pay an annuity, and "(*e*) to divide the balance of the income * * * into three equal parts and to pay or apply one of such parts, or so much thereof as my executors and trustees in their discretion deem advisable, in or towards the support, maintenance and education of each of my children until they respectively attain the age of 25 years, or until the period fixed for the distribution of the capital of my estate which ever event shall last happen, provided that any portion of any child's share not required for his or her support, maintenance and education shall be re-invested * * * and form part of the residue of my estate given and bequeathed to such child; (*f*) After the death or remarriage of my wife, whichever event shall first happen, to divide the residue of my estate equally between such of my three children as shall attain the age of 25 years, as and when they respectively attain that age, provided that if any of the said children shall have died before the period of distribution arrives, leaving a child or children, such children shall take the share in my estate which his or her parent would have taken had he or she survived the period of distribution * * *." M.'s widow and three children survived him. His widow remarried in 1925. The eldest child attained the age of 25 years in November, 1928. The children, at all material times, resided in the United States, except that one resided in Canada in and from 1926. The respondent (a resident of Canada), the sole surviving executor and trustee of the will, was assessed for the years 1917

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

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to 1928, inclusive, under the *Income War Tax Act, 1917* (Dom.), as amended, for income tax upon the undistributed income, not used in the maintenance, etc., of the children under the above quoted clause (*e*) in the will, from the residuary estate. Respondent claimed that he or M.'s estate was not assessable or taxable in respect thereof.

Held: The income assessed was "income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests," within s. 3 (6) of said Act, as enacted by 10-11 Geo. V, c. 49, s. 4 (now R.S.C., 1927, c. 97, s. 11), and was taxable in the hands of respondent.

Judgment of the Exchequer Court (Audette J.), [1931] Ex. C.R. 215, reversed.

APPEAL from the judgment of Audette J., in the Exchequer Court of Canada (1), allowing the appeal of the present respondent (save as to the interest of Allen A. McMartin for certain years) from the decision of the Minister of National Revenue affirming the income tax assessments herein, notices of which assessments were issued on March 1, 1930, for each of the years 1917 to 1928, inclusive.

The following statement of facts was agreed upon by the parties for the purposes of the trial of the action in the Exchequer Court:

"1. The appellant [appellant in the Exchequer Court—the present respondent] is the sole surviving Executor and Trustee of the Last Will and Testament of Duncan McMartin bearing date the 24th day of April, 1914.

"2. That the said Duncan McMartin died on the 2nd day of May, 1914, at the City of Toronto, in the Province of Ontario, but was domiciled in the City of Montreal, Province of Quebec.

"3. After sundry bequests which are not involved in this appeal, the said deceased gave directions by his said Last Will and Testament for the sale and conversion of his residuary estate, the investment of the balance of the proceeds of such sale and conversion and as to the disposition to be made of the income derived from such investments, or the income or profits from the unrealized portions of the said Estate, which directions are to be found in Paragraph 9 of the said last Will and Testament which is as follows:—

9. I give, devise and bequeath all the rest, residue and remainder of my estate both real and personal to my executors and trustees hereinafter named upon the following trusts, namely: (*a*) to sell and convert the same into money (except my shares in Canadian Mining & Finance Company Limited) as soon after my death as they in their absolute discretion deem it advisable.

(1) [1931] Ex. C.R. 215.

(*b*) To pay out of the proceeds of such sale and conversion the legacies given by this my Will including the said legacy to my wife of one hundred and fifty thousand dollars ($150,000) should same become payable.

(*c*) To invest and keep invested the balance of the proceeds of such sale and conversion in such investments as trustees are by the Laws of the Province of Ontario permitted to invest trust funds.

(*d*) To pay out of the income derived from such investments or the income or profits from the unrealized portions of my estate, the said annuity of twenty-five thousand dollars ($25,000) a year to my wife.

(*e*) To divide the balance of the income from such investments or the income or profits derived from the unrealized portions of my estate, into three equal parts and to pay or apply one of such parts, or so much thereof as my executors and trustees in their discretion deem advisable, in or towards the support, maintenance and education of each of my children until they respectively attain the age of twenty-five years, or until the period fixed for the distribution of the capital of my estate which ever event shall last happen, provided that any portion of any child's share not required for his or her support, maintenance and education shall be re-invested by my said Executors and Trustees and form part of the residue of my estate given and bequeathed to such child.

(*f*) After the death or remarriage of my wife, whichever event shall first happen, to divide the residue of my estate equally between such of my three children as shall attain the age of twenty-five years, as and when they respectively attain that age, provided that if any of the said children shall have died before the period of distribution arrives, leaving a child or children, such children shall take the share in my estate which his or her parent would have taken had he or she survived the period of distribution, if more than one in equal shares.

"4. On the 1st day of January, 1917, there were then living, Iva McMartin, Widow of the said Duncan McMartin, deceased, and Allen A. McMartin, Melba McMartin and Duncan McMartin, children of the said deceased, all of whom resided in the City of New York and had so resided for some time prior to the 1st day of January, 1917. The said deceased left no other child, or any child or children of any deceased child, him surviving.

"5. That Iva McMartin, Widow of the said Duncan McMartin, deceased, remarried on or about the 4th day of March, 1925, and received on or about that date the sum to which she became entitled on such re-marriage and thereafter ceased to have any further interest in the residuary estate or in the income or profits therefrom.

"6. The said Allen McMartin continued to reside in the City of New York or elsewhere in the United States of America until January, 1926, at which date he took up his residence in the City of Montreal, Province of Quebec, and has since resided there. The said Melba McMartin and Duncan McMartin have continued to reside in the City of

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New York or elsewhere in the United States of America and are still residing there.

"7. That the said Allen A. McMartin attained the age of twenty-five years on the 4th day of November, 1928, and that the said Melba McMartin (now Melba McMartin Orr) attained the age of twenty-five years on the 3rd day of March, 1930, and the said Duncan McMartin attained the age of twenty-one years on the 17th day of February, 1930.

"8. That the said Allen A. McMartin was married on or about the 29th day of August, 1923, and there is no issue of such marriage; the said Melba McMartin was married to Leander Lee on the 20th day of September, 1922, and Melba Lee born May 23, 1923, is the only issue of such marriage; the said Melba McMartin and Leander Lee were divorced and the said Melba McMartin was again married to T. W. Orr on the 28th day of October, 1929, and there is no issue of such marriage; the said Duncan McMartin was married on or about the 1st day of July, 1931, and there is no issue of such marriage.

"9. By Notice of Assessment dated the 1st day of March, 1930, the appellant [appellant in the Exchequer Court—the present respondent] was assessed for Income Tax upon the undistributed income, not used in the maintenance of the children under clause (e) in paragraph 9 of the will, from said residuary estate as follows:—

Year	Taxable Income	Tax
1917	$ 6,508 94	$ 40 18
1918	45,378 57	3,469 16
1919	57,766 57	8,152 87
1920	90,167 28	20,394 78
1921	166,896 28	62,508 50
1922	205,433 09	85,438 34
1923	173,036 85	66,119 16
1924	222,788 25	96,372 10
1925	271,469 55	97,321 29
1926	352,884 04	121,063 95
1927	436,480 86	139,366 65
1928	392,875 10	122,649 04

* * *

* * *"

The respondent resides in Canada.

Sec. 3, subsec. 6, of the *Income War Tax Act, 1917*, as enacted by 10-11 Geo. V, c. 49, s. 4, (and which was, by 10-11 Geo. V, c. 49, s. 16 (1), to be deemed to have come into force at the commencement of the 1917 taxation periods), was practically identical with R.S.C., 1927, c. 97 (the *Income War Tax Act*), s. 11, and read as follows:

The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person.

The following extract from the decision of the Minister of National Revenue gives the ground of his decision:

And whereas under the provisions of the Will of the said Duncan McMartin the income not actually distributed to the named beneficiaries therein is being accumulated by the executors and trustees in trust for the benefit of unascertained persons or persons with contingent interests and it is provided by subsection 2 of Section 11 of the Income War Tax Act that income accumulating in such manner shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity as if such income were the income of an unmarried person, which provision of the Act was originally enacted by Section 4 of Chapter 49 of the Statutes of 10-11 George V and made applicable to the 1917 and subsequent periods by subsection 1 of Section 16 of the said Chapter 49.

The Honourable the Minister of National Revenue, having duly considered the facts as set forth in the Notices of appeal and matters thereto relating, hereby affirms the said assessments appealed against on the ground that the Executor of the estate has been properly assessed upon the income accumulating in his hands in trust for the benefit of unascertained persons or persons with contingent interests, irrespective of whether such unascertained persons or persons with contingent interests are or may be in the future resident in Canada or outside of Canada.

Audette J. (1) held that, under the Act (See s. 4 of the original Act, as amended; its present form is found in R.S.C., 1927, c. 97, s. 9), the present respondent was not liable to be taxed in respect of the income of beneficiaries who were non-residents of Canada, and that the corpus of the trust, as well as the income, were the property of non-residents; further, that the funds in question were not income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests; and that, under the Act, the funds in question were not taxable in the hands of the present respondent. He allowed the present respondent's appeal, declaring that

(1) [1931] Ex. C.R. 215.

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the fund sought to be taxed herein is absolutely vested in well known beneficiaries without any contingent interest and that such beneficiaries being admitted not to be residents in Canada are not liable to be taxed; with however this qualification that as Allen McMartin resided in New York until January, 1926, when from that date he took up his residence in the City of Montreal, Canada, he will from such date be liable to the present taxation, * * *

The Minister appealed to the Supreme Court of Canada. The Executor cross-appealed from that part of the judgment which directed that the interest of Allen A. McMartin was to be assessed from the date on which he became a resident of Canada.

By the judgment of this Court, now reported, the Minister's appeal was allowed and the assessments confirmed, with costs throughout.

J. McG. Stewart K.C., C. F. Elliott K.C. and *W. S. Fisher* for the appellant.

N. W. Rowell K.C. and *P. C. Finlay* for the respondent.

The judgment of Duff, Rinfret, Lamont and Smith JJ. was delivered by

DUFF J.—It is quite plain, I think, that a child does not take, under paragraph 9, subparagraph (*f*), unless it attains the age of twenty-five years. It is true that the gift over is limited to the case where the child dies before the "period of distribution." But that cannot affect the plain language which makes the gift of the share contingent upon attaining the age of twenty-five years.

This, it seems to me, in itself leads to one necessary conclusion with regard to all points in controversy. Until a child has attained twenty-five years, the destination of the share is uncertain, and the beneficiary is unascertained and unascertainable. That is sufficient to dispose of the main point. It is also sufficient to dispose of the subsidiary point, because up to that time the accumulated income accumulates as an integer; and the result is that the appeal should be allowed, the judgment of the Court below reversed and the assessments confirmed, with costs throughout.

CANNON J.—The following facts were agreed upon by the appellant and the respondent for the purposes of this action:

[Here is set out the above quoted statement of facts agreed upon by the parties.]

The question of residence or non-residence in Canada does not and cannot arise when the ultimate beneficiary in

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Cannon J.

the accumulating trust fund is not definitely known and determined during the taxation period. The probable beneficiaries could not be definitely ascertained before the contingency, i.e., their survival until they reached twenty-five years of age, actually took place.

We therefore have to deal exclusively with the 1920 amendment (ch. 49, sec. 4) which covers the present case, and, in my view, is a complete taxing provision devised to tax in the hands of a trustee resident in Canada income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests, without, for obvious reasons, distinguishing between residents and non-residents. I feel bound by our decision in the *Royal Trust* case (1) and would allow the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. S. Fisher.*
Solicitor for the respondent: *James Y. Murdoch.*

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*May 11.
*June 30.

IN THE MATTER OF THE ESTATE OF SMITH AND HOGAN, LIMITED, AUTHORIZED ASSIGNOR.

INDUSTRIAL ACCEPTANCE CORPORATION, LIMITED, AND CANADIAN ACCEPTANCE CORPORATION, LIMITED..... } APPELLANTS;

AND

THE CANADA PERMANENT TRUST COMPANY, AUTHORIZED TRUSTEE.... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Conditional sales—Bankruptcy—Validity of conditional sales agreements as against trustee in bankruptcy—Title and possession of the goods at times of agreements—Nature of transactions—Whether compliance required with Bills of Sale Act, R.S.N.B., 1927, c. 151.

Appellants claimed, under certain conditional sales agreements, to be secured creditors of the estate in bankruptcy of certain motor car dealers. Registrations were made under the *Conditional Sales Act,*

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Maclean (*ad hoc*) JJ.

(1) Minister of National Revenue v. Royal Trust Co., [1931] Can. S.C.R. 485.

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In re ESTATE OF SMITH & HOGAN LTD.

INDUSTRIAL ACCEPTANCE CORP. LTD. AND CANADIAN ACCEPTANCE CORP. LTD.

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R.S.N.B., 1927, c. 152, but not under the *Bills of Sale Act,* R.S.N.B., 1927, c. 151. The dealers would order the cars from the manufacturers, who would send the invoice to the dealers, and would send the bill of lading, with sight draft on the dealers attached, to a bank. The dealers would then go to one of the appellants with the invoice, a conditional sale agreement covering the cars would be made, and appellant would give the dealers a cheque payable to the dealers for 85% or 90% (and in one case payable to the bank for the whole) of the amount of the draft. The dealers took the cheque to the bank and it was applied towards payment of the draft, the dealers supplying the balance. The dealers then obtained the bills of lading and took possession of the cars. The Supreme Court of New Brunswick, Appeal Division (4 M.P.R. 39), affirming judgment of Barry, C.J. K.B., (*ibid*), held that the conditional sales agreements were ineffective as against the dealers' trustee in bankruptcy, as appellants, not having been owners of the cars, could not retain ownership or property therein under the agreements.

Held (reversing said judgments below, Lamont and Cannon JJ. dissenting): The conditional sales agreements were valid and effective. These agreements, coupled with the cheques and the evidence of what was done, showed that, on each occasion, an agreement was arrived at between the dealers and appellant by which the dealers, in consideration of the cheque, transferred to appellant their right to acquire from the manufacturer ownership and possession of the cars mentioned in the conditional sale agreement, in consideration of this agreement for sale of the cars to them. When the dealers used appellant's cheque towards payment of the sight draft, they were paying the draft to procure title and possession for appellant, in pursuance of their agreement. When the dealers got the bill of lading on payment of the draft and took possession, they were not taking possession to themselves by virtue of their original right, but by virtue of and in pursuance of the terms of the conditional sale agreement. Sec. 6 of the *Bills of Sale Act* did not apply to avoid title to the cars passing to appellant. That section has reference to a sale of goods and chattels which the seller owns, but the dealers were not selling or transferring to appellant goods and chattels which they owned, but only their right to acquire ownership and possession of the chattels on performance of a condition, namely, payment of the draft. It was a contract carried into effect and completed at the moment by payment of the price. Such a completed contract, not coming within the *Bills of Sale Act,* does not require to be in writing. Ownership of the cars passed to appellant and never became vested in the dealers. (*Commercial Finance Corp. Ltd.* v. *Capital Discount Corp. Ltd.,* [1931] O.R. 22, and *Re Grand River Motors Ltd.,* [1932] O.R. 101, distinguished). Appellant was in position, as such owner, to make the conditional sale agreement by virtue of which it retained the ownership until paid.

Per Lamont J. (dissenting): Upon the evidence, there was not, nor did the transactions justify an inference of, any agreement or arrangement by which the dealers sold or agreed to sell to appellant the cars which appellant purported to sell back to them under the conditional sale agreement. The intention of the parties was a question of fact on which there are the concurrent findings of the courts below. Even assuming there was an implied sale by the dealers to appellant prior to execution of the conditional sale agreement, it was invalid,

as against the trustee in bankruptcy, for want of compliance with s. 6 of the *Bills of Sale Act*. Nor, upon the evidence, could it be said that the dealers assigned to appellant their right to acquire from the manufacturers the ownership and possession of the cars. Upon the facts of the case, on payment of the draft the property must be deemed to have passed to the dealers. The transactions were simply a method of loans to the dealers upon the security of the conditional sales agreements, and these agreements, being simply conveyances intended by the parties to operate as mortgages of goods and chattels, and not being in the form or evidenced in the manner required by s. 2 of the *Bills of Sale Act*, were void as against the trustee in bankruptcy.

Per Cannon J. (dissenting): The evidence did not justify an inference of any agreement or arrangement by which appellant acquired any title to the cars prior to the conditional sale agreement. The transactions were really loans on the security of the conditional sales agreements, and such security was invalid, as against the trustee in bankruptcy, for non-compliance with the *Bills of Sale Act*.

APPEAL (by special leave granted by a judge of this Court) from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1), dismissing the present appellants' appeal from the judgment of Barry, C.J.K.B. (sitting in Bankruptcy) (2), dismissing their appeal from the decision of the Trustee of the Estate in Bankruptcy of Smith & Hogan, Ltd., disallowing the claims of the appellants as secured creditors under certain conditional sales agreements.

The material facts of the case and questions in issue are sufficiently stated in the judgments now reported. The appeal to this Court was allowed with costs, Lamont and Cannon JJ. dissenting.

L. A. Forsyth, K.C., and *G. F. Osler* for the appellants.

C. F. Inches, K.C., for the respondent.

The judgment of the majority of the Court (Rinfret, Smith and Maclean (*ad hoc*) JJ.) was delivered by

SMITH, J.—This is an appeal from a judgment of the Supreme Court of New Brunswick, Appeal Division, sitting in Bankruptcy (1), upholding the decision of the trial judge (2).

The bankrupt, Smith & Hogan, Limited, were dealers in automobiles in the city of Saint John, N.B., and made an

(1) (1931) 4 M.P.R. 39; 12 C.B.R. 468; [1931] 4 D.L.R. 348.
(2) (1930) 4 M.P.R. 39; 12 C.B.R. 93; [1931] 2 D.L.R. 663.

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authorized assignment on the 30th of July, 1930; and the respondent company was duly elected trustee of the estate in bankruptcy.

The appellant, with head office in Toronto, Ont., and a branch office in the city of Saint John, N.B., filed a proof of claim in the estate for sums of money owing under a number of conditional sales agreements of certain automobiles that were in possession of the bankrupt and passed into the possession of the trustee. In each case the appellants valued the security, which was the car, at the full amount of the claim under the agreement against the car.

It is admitted that these conditional sales agreements of the various cars in question were duly filed in compliance with the *Conditional Sales Act*, R.S.N.B., 1927, ch. 152, but they have been held to be ineffective as against the trustee, on the ground that the appellants were never owners of the goods, and therefore could not retain an ownership or property in the goods that they never possessed.

In my view the decision must turn upon this question of whether or not the appellants acquired ownership and property in the goods by virtue of what took place between the bankrupt and the appellant at the time of making the various conditional sales agreements. The statement of facts admitted and the evidence and documents show that Smith & Hogan, Limited, ordered the cars from the factory where they are made or assembled, and that the invoice for the said cars came to Smith & Hogan, Limited. The factory sent the bills of lading to the Bank of Nova Scotia at Saint John with sight draft on Smith & Hogan, Limited, attached for the invoice price. Smith & Hogan, Limited, would then go to the appellants with the invoice, when a conditional sale agreement covering the cars mentioned in the invoice would be made out, and a cheque for the whole or eighty-five or ninety per cent. of the draft would be given to Smith & Hogan, Limited, with which to take up the sight draft. In one case the appellants made their cheque for the whole amount of the sight draft, and payable to the order of the Bank of Nova Scotia, which held the draft and bills of lading; but in other cases the cheques were for eighty-five or ninety per cent. only of the sight draft, and in some cases the cheques were made payable to the order of Smith & Hogan, Limited. In all cases the

appellants' cheques were taken by the firm of Smith & Hogan, Limited, to the bank, and applied in payment or part payment, as the case might be, of the sight draft, Smith & Hogan, Limited, supplying the balance over and above the appellants' cheque, required to pay the draft in full. Smith & Hogan, Limited, then obtained from the bank the bill of lading, upon which they took possession of the cars.

The contention is that, when Smith & Hogan, Limited, thus procured possession of the cars by payment of the sight draft, the title in the automobiles passed to that company; and, if that be the correct view of the results, the decision appealed from would appear to be right.

In support of this contention the respondent refers to a number of English cases decided under the provisions of the English statutes of 1854 and 1878. The former is 17-18 Vic., ch. 36, *An Act for preventing Frauds upon Creditors by secret Bills of Sale of personal Chattels.* The statute of 1878 is 41-42 Vic., ch. 31, which consolidates and amends the law relating to bills of sale of personal chattels. Section 3 reads as follows:

> 3. This Act shall apply to every bill of sale executed on or after the first day of January one thousand eight hundred and seventy-nine (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale.

Section 4 has the following:

> The expression "Bill of Sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, * * *

By an amending Act of 1882, ch. 43, sec. 9, it was provided that

> A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed.

The cases numbered 1 to 24 cited and digested in the respondent's factum all turn upon the question whether or not the documents under which the goods were sought to be held were bills of sale within the provisions of these

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Acts. The object of both Acts is declared to be for preventing frauds upon creditors by secret bills of sale of personal chattels, and there is no provision for the registration of conditional sales or hire and purchase agreements unless they come within the definition of bills of sale set out in the Acts.

The definition quoted above of the Act of 1878 is much more comprehensive than the original definition in sec. 7 of the Act of 1854.

The gist of the various English decisions cited by the respondent is that the real nature of the transactions between the parties must be enquired into, regardless of the form; and if it is found that the document is in fact one made for a loan on the security of the chattels, it is a bill of sale within the meaning of these Acts, and requires to be registered. In most of the cases the transaction commenced with the ownership of the property vested in the party who became the purchaser under the hire and purchase agreement, followed by a sale or pretended sale of the chattels to the vendor in the hire and purchase agreement, and then by the execution of that agreement. The decisions in such cases hinged upon the questions of fact as to whether or not the sale to the ultimate vendor was a real sale or whether the whole transaction was a loan of money on security of the chattels.

In *Redhead* v. *Westwood* (1), R. applied to W. for a loan of £100, which was refused. Then R. sold the furniture in his house to W. for £100, who handed him a cheque for the money, but no receipt was given. Shortly afterwards, by an agreement in writing, W. agreed to let the furniture to R. on the hire and purchase plan. Held, that the agreement was a valid agreement for hire and not a bill of sale, and the transaction was unaffected by the *Bills of Sale Act*.

In *In re Watson, Ex Parte Official Receiver in Bankruptcy* (2), an execution was put into the bankrupt's house. L. agreed to lend her £150. L. made an inventory and an agreement whereby he agreed to sell the bankrupt the goods on the hire and purchase plan, and she was told she was selling the property to L., but it would be hers again on the repayments of the hire being properly kept up; and she handed L. a chair, informing him that she had sold him the

(1) (1888) 59 L.T. (N.S.) 293. (2) (1890) 25 Q.B.D. 27 (C.A.).

furniture. She then signed the hiring agreement. Held, that the true nature, not the form of the transaction, must be regarded, and that the supposed hiring and purchase agreement was a bill of sale.

In *Beckett* v. *Tower Assets Co.* (1), plaintiff applied to defendants for a loan of £30 on a bill of sale. Defendants made an inventory, but recommended a friendly distress. Defendants bought at the distress sale, obtainging a receipt, and then sold back to plaintiff's wife on the hire and purchase plan. Cave J. held that it was not necessary to register either the receipt or the hiring and purchase agreement. The case went to appeal (2). At p. 648, Bowen, L.J., says:

> We ought to find on the facts that there was an understanding between the plaintiff and the defendants that, although the property passed, the defendants should hold it in trust for the plaintiff, except so far as the rights of the parties should afterwards be defined by some document of hiring and repurchase, or other document of that sort, to be afterwards executed.

He goes on to say:

> If the beneficial property in the goods was only to become theirs when some further assurance was executed, then the hiring and repurchase agreement which was executed is such a document as is avoided by the Act if not registered. Again, if it operated only as a licence to seize goods which remained in equity the property of the plaintiff, so far as the beneficial interest was concerned, then also it is avoided by the Act. So that in either view it is a document which is a bill of sale; it is a necessary part of the transaction in order to give the defendants a title to the goods, for without it they were only trustees for the plaintiff. I am glad to think we are only differing upon a question of fact from the learned judge in the Court below.

These cases are sufficient to show that the English cases cited by respondent turn on the special provisions of the English Acts.

The present appeal must be decided, not upon the provisions of these English statutes, but according to the common law and statutes of New Brunswick relating to the matters in question. In New Brunswick there are two Acts which have relation to the transfer of chattels where possession does not accompany the transfer or go with the ownership. These are the *Bills of Sale Act,* R.S.N.B., 1927, ch. 151; and the *Conditional Sales Act,* R.S.N.B., 1927, ch. 152; and it is by virtue of the provisions of the former Act that the respondent claims title; and the question, as

(1) [1891] 1 Q.B. 1. (2) [1891] 1 Q.B. 638.

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I have already stated, is whether, upon payment of the drafts alluded to, the title and ownership of the chattels passed to Smith & Hogan, Limited, or to the appellant.

When Smith & Hogan, Limited, obtained the cheques and gave the various conditional sales agreements, they were not the owners of the cars, as ownership remained with the manufacturers who shipped them until payment of the sight drafts. All that Smith & Hogan, Limited, had was a right to acquire ownership and possession by payment of the draft.

What, then, were the terms of the entire agreement entered into between Smith & Hogan, Limited, and the appellant on each occasion?

It is not necessary, in order to constitute an agreement between parties, that it shall be stated in precise language. The terms may be arrived at from various documents, the acts of the parties and the circumstances. Here we have Smith & Hogan, Limited, going to appellant at various times with an invoice of cars shipped to them of which they can only acquire ownership and possession by payment of a sight draft for the amount of the invoice. They ask appellant to supply the whole or ninety per cent. or eighty-five per cent. of the amount required, and the conditional sales agreement is executed by both parties, and a cheque for the required amount is given Smith & Hogan, Limited, to apply on the draft. This conditional sales agreement by its terms shows that both parties intended that the cheque was given on the condition that title was to pass to appellants, and it could only be so passed by use, on appellant's behalf, of Smith & Hogan's right to acquire ownership and possession. Smith & Hogan, Limited, in the agreement contract to buy from appellants, and expressly agree that title is not to pass to them till payment by them to appellant of the purchase price, that is, the amount advanced. Therefore, when Smith & Hogan, Limited, used appellant's cheque towards payment of the sight draft, they were paying the draft to procure title and possession for appellant, in pursuance of their agreement, and not to acquire title and possession in themselves in breach of their agreement. When they got the bill of lading on payment of the draft and took possession, they were not taking possession to themselves by virtue of their

original right, but by virtue of and in pursuance of the terms of the conditional sales agreement.

I am of opinion, therefore, that the conditional sales agreements, coupled with the cheques and the evidence of what was done, show that an agreement was arrived at between Smith & Hogan, Limited, and the appellant by which Smith & Hogan, Limited, in consideration of the cheques, transferred to the appellant their right to acquire ownership and possession of the cars mentioned in the various conditional sales agreements, in consideration of these agreements for sale of the cars to them.

It is argued that title to the cars could not pass to the appellant by such an agreement because it would have to be in writing and filed, as provided by the *Bills of Sale Act,* R.S.N.B., 1927, ch. 151.

Section 6 of that Act provides that

> Every sale of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, etc.

This section has reference to a sale of goods and chattels that the seller owns, but here Smith & Hogan Limited were not selling or transferring to the appellant goods and chattels that they owned, but only their right to acquire ownership and possession of certain chattels on performance of a condition, namely, payment of the draft. It was not an executory contract to sell this right, but a contract carried into effect and completed at the moment by payment of the price. Such a completed contract, not coming within the *Bills of Sale Act,* does not require to be in writing. Only the part of the agreement relating to the conditional sale was required to be in writing and filed, by virtue of the *Conditional Sales Act,* and that part is in writing and duly filed.

The argument that the real nature of the transaction was a loan of money on the security of the goods, and that therefore the security must be taken by way of chattel mortgage executed and filed in compliance with the provisions of the Act, has, in my opinion, no force. This argument is based on the decisions already referred to under the particular provisions of the English Acts. Here the Act only purports to deal with mortgages not accompanied by an immediate change of possession of the chattels mort-

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gaged, and there is no provision that loans on chattels must be by mortgage filed pursuant to the Act.

So far as the *Bills of Sale Act* is concerned, loans may be secured on chattels otherwise than by chattel mortgage in any way permitted by the common law and statute law. An ordinary way of holding chattels as security at common law is to acquire ownership of the chattels and then to sell them to a purchaser, retaining ownership until the price is paid, but, by virtue of the *Conditional Sales Act*, such a sale must be in writing and filed pursuant to the terms of the Act.

The respondent cited *Commercial Finance Corporation Ltd.* v. *Capital Discount Corporation Ltd.* (1), and *Re Grand River Motors Ltd.* (2); and argued that these were directly in point. An examination shows that they are not at all in point.

The first of these is a decision by the Ontario Appellate Division.

One Lind purchased a car from Leggett Motors Ltd., for $1,349, of which he paid $232, the balance being paid by moneys from the plaintiff. The reasons state that this was apparently an outright sale and transfer of property. The distinction, therefore, between that case and this is that there the transactions by which Lind became purchaser under a conditional sales agreement started with Lind as owner and in possession, and the gist of the decision is that he could not as against creditors and subsequent purchasers transfer that ownership to plaintiff while retaining possession except by a document registered in compliance with the *Bills of Sale Act*.

Re Grand River Motors Ltd. (2) is a decision following the other under the same circumstances.

In my opinion, ownership of the automobiles here in question passed to the appellant, and never became vested in Smith & Hogan Limited. The appellant therefore was in a position as such owner to make the conditional sales agreements in question by virtue of which they retain the ownership till paid. The respondent has therefore a right to acquire ownership and retain possession only on payment to appellant of the balances owing as claimed.

(1) [1931] O.R. 22; [1931] 1 D.L.R. 1007.

(2) [1932] O.R. 101; [1932] 1 D.L.R. 565.

The appeal should be allowed, the judgments below set aside, and judgment should be entered for the appellant as indicated, with costs throughout.

LAMONT J. (dissenting).—I agree with the conclusions reached by my brother Cannon. The question submitted for our determination is: Are the appellants entitled to exercise against the trustee in bankruptcy, or the creditors of Smith and Hogan, Ltd., any rights with respect to certain automobiles by virtue of conditional sales agreements in which the appellants respectively appear as conditional vendors and Smith and Hogan, Ltd., as purchasers?

Each of the appellants filed with the trustee in bankruptcy claims in which they set out that, by reason of being the holders of the conditional sales agreements, they were secured creditors and entitled to maintain their securities as against the general creditors of Smith and Hogan, Ltd. (hereinafter called the "Dealers"). The trustee refused to recognize the appellants' claim to rank as secured creditors. The appellants appealed to a judge in bankruptcy and submitted an agreed statement of facts in each case. As the same point of law was involved in both appeals, and as the facts were similar, the appeals were consolidated and were determined on the statements of facts submitted, supplemented by *viva voce* evidence.

As pointed out by my brother Cannon J., apart from whatever understanding may be implied from the execution of the conditional sales agreements, the evidence shews that there was no agreement or arrangement whatever, either verbal or written, between the Dealers and either of the appellants, to the effect that the Dealers had, at any time, sold or agreed to sell to the appellants the automobiles which the appellants respectively purported to sell back to them under the conditional sales agreements. The material before us does, however, shew the true nature of the transactions which took place between these parties. Mr. Hogan says: "When we first started in the car business we applied to them for credit." The Dealers had to furnish a statement of assets and liabilities. Then the Acceptance Corporations made their investigations with the result that the Dealers obtained from the appellant, The Industrial Acceptance Corporation, a line of credit of

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$12,000, and from the appellant, The Canadian Acceptance Corporation, a line of credit of $20,000. Mr. Casey, the manager of the appellant, The I.A.C., Ltd., gave the following testimony:—

Q. Are you authorized by your head office to give these firms like Smith and Hogan, Limited, a certain amount of credit?—A. After the recommendation has been approved by the head office.

Q. How do you mean?—A. A financial statement is received from the dealer and investigations are made and recommendations are made to head office and if they are approved it is O.K. to give them credit.

Q. And you are allowed to advance them up to a certain sum, is that right?—A. Yes.

Q. I mean a general advance. What is the largest sum that you are entitled to finance Smith and Hogan?—A. I am not sure what the established line of credit is right now, but they had twelve thousand dollars outstanding credit at the time of the assignment.

And Mr. Ogilvie, manager of the appellant, The C.A.C., Ltd., testified as follows:

Q. And what is your limit as to the amount of credit that you could give Smith and Hogan, Limited?—A. They were authorized by our Credit Department at Toronto at the first of 1930—fifteen thousand dollars on Hupmobiles and five thousand dollars on De Sotos. This line of credit was reduced to eight thousand dollars on June first.

Q. How much would you advance each time, the whole amount of the invoice value or only part?—A. Eighty-five or ninety per cent. Usually eighty-five per cent.

Having arranged for credit with which to finance their purchases, the Dealers would from time to time order from the manufacturer a car load of automobiles, and ask him to ship them with sight draft attached to the bill of lading. The manufacturer shipped the automobiles to the Dealers and sent them an invoice thereof and, at the same time, sent the bill of lading with draft for the invoice price attached, to the Bank of Nova Scotia. On receipt of the invoice the Dealers took it to one of the appellants and received, from that corporation, a cheque for 85% or 90% of the invoice price; either then or at a later date they signed a conditional sales agreement which stated that they had agreed to purchase from the Acceptance Corporation the automobiles specified therein, and had also agreed that the property therein should not pass to the Dealers until they had paid an acceptance which was given for the amount advanced. The Dealers took the appellant's cheque and deposited it to their own account in the bank with such additional funds of their own as were necessary to meet the sight draft. They then accepted the draft from the manufacturer, received the bill of lading, took delivery

of the cars and placed them on the floor of their warehouse for sale by retail. Within the time specified in the statute the appellants registered the conditional sales agreement. Only on one occasion was a cheque given to the Dealers for the full amount of the invoice price and, on that occasion alone (April 22, 1930), was the cheque made payable to the Bank of Nova Scotia; in all other cases it was made payable to the Dealers.

On the above state of facts, as to which there is no dispute, can it be said that the conditional sales agreements represented genuine bargains and sales between the appellants and the Dealers, or were the transactions simply a method adopted by the appellants of financing the Dealers and taking security for the moneys advanced?

The argument of the appellants in the Bankruptcy Court, as appears from a report of it in the appeal book, was stated by their counsel in these words:—

> It is to be implied from the conduct and dealing of the parties and from the circumstances of the entire transaction, that there was a sale by Smith and Hogan, Ltd., of their beneficial interest in the cars to the acceptance corporations, before the bill of lading was taken up at the bank and before the conditional sales agreements were executed.

There are two answers to this argument, the first is: that the managers of the appellant corporations admit that in not one of the transactions was anything said by the Dealers from which an intention could be inferred to sell the automobiles to the appellant applied to for financial assistance. It is only from the fact that the conditional sales agreements were executed that it can be argued that such an intention must have existed. The execution of the conditional sales agreements, however, is, in my opinion, just as consistent with an intention to take security on the automobiles for advances made, but with a misconception of the legal effect which would follow the taking of security in that form, as it is with an intention on the part of the appellants to purchase the automobiles. It is wholly a question of the intention of the parties, and that is a question of fact on which we have the concurrent finding of two courts.

The second answer is: that, assuming there was an implied sale of the automobiles by the Dealers to the appellants prior to the execution of the conditional sales agreements, it cannot assist the appellants, for section 6

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of the *Bills of Sale Act* (R.S.N.B., 1927, ch. 151), reads as follows:—

6. (1) Every sale of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Chapter, and shall be accompanied by an affidavit * * * that the sale is *bona fide* and for good consideration * * *.

(2) The conveyance and affidavit shall be filed as hereinafter provided within thirty days from the execution thereof, otherwise the sale shall be absolutely void as against * * * the assignee of the grantor under any law relating to insolvency * * * or an assignee for the general benefit of the creditors of the maker * * *.

In this case there was no immediate delivery of the automobiles by the Dealers to the appellants, followed by actual and continued change of possession. The sale, therefore, to be valid required to be evidenced by a conveyance duly filed. As this was not done, the implied sale cannot, in my opinion, be considered a valid one as against the trustee in bankruptcy.

On the argument before us, counsel for the appellants altered his ground and submitted that, antecedent to the conditional sales agreements, the title to the said automobiles was not in the Dealers, but was either in the appellants respectively or in some third person, and that, by their transactions with the appellants, the Dealers were not selling or transferring automobiles which they owned, but only assigning their right to acquire the ownership and possession of the automobiles they were entitled to receive from the manufacturer upon payment of the sight draft.

That the title could not have been in the appellants is obvious. Up to the moment the sight draft was paid the title was in the manufacturer. The shipping of the automobiles with the draft attached to the bills of lading indicates an intention on the part of the manufacturer of retaining the property in the automobiles and their possession until payment of the draft. Until the draft was paid no property passed. Upon payment, the property passed, and the question is, to whom? In my opinion, on the facts of this case, it could pass only to the Dealers. The manufacturer's contractual obligation was to pass it to them. In the transaction he knew no one else. No agreement between the Dealers and the appellants could have the effect of making the appellants direct purchasers from the manu-

facturer or of altering his obligation without his consent. That consent was not obtained. The manufacturer, by shipping the automobiles and sending to the bank the bill of lading with draft attached, was not offering to sell to anyone who might come forward and pay the draft. None of the bills of lading were put in and there is no evidence of their contents, but, in his evidence, Hogan swears: "The cars would be shipped direct to us." It was suggested on the argument that the bills of lading might have been made out to the manufacturer's order and endorsed by him in blank and this would entitle anyone paying the draft, with the Dealer's consent, to obtain the property in the cars. There is not the slightest evidence that any bill of lading was made out to the order of the manufacturer and, in view of Hogan's evidence, I think we must conclude that it was made out to the Dealers. The appellants did not take an assignment of the bills of lading, but, even if they had, the assignment would not have afforded them any protection unless there had been a *bona fide* sale to them of the automobiles, or a *bona fide* assignment of the Dealers' contract. The evidence, in my opinion, establishes that no such *bona fide* sale or assignment took place.

On examination before the Registrar, Hogan said:—

> I took the invoice down to the Industrial Acceptance Corporation's office, the invoice I received from the factory, and asked them to wholesale this automobile for a period of three or four months, and Mr. Casey made out a cheque for me for fourteen hundred and seventy-six dollars and seven cents.
>
> * * * * *
>
> Q. It was understood that this cheque was to be used to pay for this car?—A. Not necessarily that cheque. They advanced us so much money on the car to help us unload it.
>
> Q. It was understood this cheque was given in consideration of this transaction?—A. Yes.
>
> Q. And for the purpose of paying off the factory draft?—A. To help pay off the factory draft.

And further on:—

> Q. You know the cheque was given to pay off the draft on those specific cars?—A. The cheque was given as a loan towards those automobiles.

It is clear from this evidence that Hogan's conception of the transaction was the obtaining of an advance on the automobiles out of the arranged credits to help them to pay the manufacturer's draft. The appellants' respective managers do not say they had any idea of buying the automobiles outright or of taking an assignment of the Dealers'

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INDUSTRIAL ACCEPTANCE CORP. LTD. AND CANADIAN ACCEPTANCE CORP. LTD.

v.

CANADA PERMANENT TRUST CO.

Lamont J.

contract. Would it, therefore, be reasonable to infer from the execution of the conditional sales agreements alone that the Dealers were absolutely assigning all their interest in their contract with the manufacturer in consideration of the cheques received, and paying the appellants either 10% or 15% of the invoice price to take the contract off their hands? In my opinion it would not. Yet that is what we must infer if we accept the argument of the appellants.

In view of the fact that none of the parties to the conditional sales agreements ever suggested at any of their interviews that the Dealers were selling to the appellants the automobiles, or their right to acquire them from the manufacturer, and in view of the arrangements made for a line of credit and the giving of that credit by means of cheques, I can arrive at no other conclusion than that these transactions were merely loans to the Dealers upon the security of the conditional sales agreements. These agreements, being simply conveyances intended by the parties to operate as mortgages of goods and chattels and not being in the form or evidenced in the manner required by section 2 of the *Bills of Sale Act,* are void as against the trustee in bankruptcy.

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

CANNON J. (dissenting).—This case should be decided, as all other cases, on the material before the court, and not on what the appellants might or should have done, or what they now wish they had done to protect their money. What have the parties done to help us to ascertain the ownership of the automobiles at the time of the signature of the conditional sale agreements by the appellants and Smith & Hogan, Ltd., now insolvent?

We have:

(1) In the statement of facts admitted by the parties the following:

> After the transactions took place * * * Smith and Hogan, Ltd., took up the bill of lading, secured delivery of the cars from the Railway and placed them on their floor for sale at retail.

(2) Moreover, Mr. Anglin, before the trial judge, put the case for the appellant in the following way:

> The question is whether we are secured because we sold under this conditional sales agreement. To be secured and (to have) sold under that conditional sales agreement *we have to have title to the cars first.*

The cars come forward from the factory and we admit to Smith and Hogan that they own them. They come in with the invoice to our office and ask to have the transaction financed. We say that would be all right if they sell us their interest in the cars while they are still in the hands of the railway and we sell the cars back to them reserving the title for security. We feel that in equity we are entitled to that security and that your Lordship after hearing the evidence will be *able to imply although specific language apparently was never used by the dealer with the manager of the acceptance corporation to the effect that the dealer was selling first to the acceptance corporation.* Yet our contention is that the dealer in buying them back and executing that document admitted they are buying them back from one who is holding the security title, and it surely *could be implied in law that they first sold their* interest in the cars to the acceptance corporation. So that the acceptance corporation could be in a position to sell back, reserving the security title.

(3) Casey, the manager of the Industrial Acceptance Corporation, admits that he cannot remember or prove any specific conversation with Hogan as to whether the latter was selling his interest in the cars to the appellants and the latter were buying it before they sold it back to him. Ogilvie's evidence, as manager of the Canadian Acceptance Corporation, the other appellant, does not prove any such agreement.

(4) Hogan himself explains the situation as follows:

A. When we wanted a car load of automobiles we would send a wire from our company to the manufacturer and ask him to ship us so many cars, sight draft, bill of lading attached. The cars would be shipped direct to us. The Hupp Motor Car Corporation in March shipped to Smith & Hogan, Limited. The bill of lading and the draft would come in to the bank of Nova Scotia and they would call us up and let us know it was there. And the invoice or bill for the cars would come through the mail to us from the automobile manufacturers. I would take the invoice down to the finance company's office and they would advance me eighty-five or ninety per cent. of the value of the invoice and they would make me out a cheque payable to Smith & Hogan, Limited, for that amount. I would take—

Q. Did you sign any document?—A. Yes, I would have to sign a sales agreement.

Q. Do you recognize that as an agreement?—A. Yes, I would sign a document and take the cheque and it would be deposited in our bank account. I would either deposit it or somebody from our company would do so. Then one of our company would have to accept the sight draft at the bank which would be charged to our account, and he would get the bill of lading, so we could unload the cars.

Q. (By the Court). Then you would have the cars discharged from any lien of the manufacturers, and the finance company would have paid ninety per cent. of it you paid the other ten per cent. yourselves?—A. Yes, the finance company would advance us a cheque for ninety per cent. and I would put it in the bank and accept their draft which would be ten per cent. larger than the cheque.

Q. Then you signed this agreement between yourselves and the finance corporation whereby you acknowledged them to be the owners of the

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property, and you agreed to pay for it at a certain time and the property remained in them?—A. I was asked a question in the Bankruptcy Court, who I considered had the title to the automobiles and I answered that I considered we had the title to the cars, but we admitted we owed the finance company the ninety per cent.

Mr. Anglin: What Mr. Hogan said in answer to the question, on the examination, he said that he considered he owned the cars, on the examination.

Court: When you sold those cars around to Mr. Jones or Mr. Smith, did the finance corporation release their lien upon the cars?—A. Upon payment of the amount outstanding against them, the ninety per cent.

Q. Did you ever suggest to Mr. Casey or Mr. Ogilvie or either member of their firm, that you use this particular document rather than any other document?—A. No.

Q. Or a chattel mortgage?—A. No.

Q. Did they ever suggest it to you?—A. No.

And also:

Q. What was your idea of what you were giving them?—A. What we were giving the finance company?

Q. Yes?—A. When I took the invoice down we would pay some money down on the car that they were advancing us a portion of the invoice price. We had to sign some kind of a time contract and also sign a note to the finance company to come due either two, three, four or five months.

Q. What was your idea as to what you were giving them by signing this contract when you also signed a note?—A. I could not tell you. I didn't know whether I was giving them a lien or a chattel mortgage or what I was giving them. I never read it through to see what I was giving them.

Q. Do you know the difference between a lien and a chattel mortgage?—A. No, I never read one of those contracts to see what I was giving them.

Q. But you feel you were giving them some kind of security on the cars?—A. I knew the practice with our cars, when either Ogilvy or Casey would come around and check our cars at the last of the month, we had to pay them for the cars that we had sold that were on our financed cars, once they asked us to pay out.

Q. Did you know or feel that they had any rights in these cars under that contract?—A. I knew that they advanced us so much money on the car.

Q. Who did you consider owned the car?—A. *I considered we owned the car.*

Q. Did you consider they had any rights in the car?—A. They had a certain interest in the car.

Q. How would you define their interest?—A. I would pay them back what they advanced us when they car-checked us.

Q. You would pay them what they advanced you people, but what interest would they have in the car, suppose you had not paid?—A. If I did not pay it to them at the time, it would still be owing to them.

Q. Suppose you never paid it, what interest would they have in the car?—A. *If the car was sold I don't think they would have any interest in it.*

Q. If the car was not sold?—A. That money would still be owing to them.

Q. If you did not pay it when the note came due, what would their rights, if any, be in the car?—A. Their interest in the car would be what they advanced us on it.

Facing this evidence, it is impossible for me to reach the conclusion that the learned trial judge and the four members of the Court of Appeal for New Brunswick certainly erred in refusing to infer from these facts the implied tacit contract which Mr. Anglin very fairly stated was necessary to establish a preference in favour of the appellants. I believe, like the trial judge and the Appeal Court, that the record and the admissions of the parties clearly establish that the real transaction in this case was a loan to the dealer. It is remarkable that there is no evidence at all whereby the court could come to any other finding. Not one of the appellants' witnesses even suggested that the dealer sold them the cars. Their counsel argues that before the appellants conditionally sold the cars to the dealer, they must have first obtained title to the cars in some manner which is left a matter of conjecture. The trial judge has found as a fact that the transaction was really a loan on the security of the conditional sale which was invalid because, as a matter of fact, the appellants were never owners of the cars.

This decision has been affirmed in the Court of Appeal and we are practically in the same situation as the House of Lords in *Maas* v. *Pepper* (1); and, using the words of Lord Halsbury, at page 104, I would say that the trial judge came to the right conclusion on a question of fact. It also seems to me that the whole evidence points in the one direction. I do not think that the sale was a reality; these were loans on the security of chattels, without due compliance with the requirements of the law of New Brunswick for the protection of creditors; the bankrupts may have acquired more credit than they ought, when the appellants left in their open and public possession as owners to retail to the public the cars which they now claim as their own. This alleged secret and tacit separation of the legal and beneficial property leaving the alleged assignor with the possession of the property allegedly conveyed as re-

(1) [1905] A.C. 102.

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puted owner, would leave the appellants liable to the casualties of Smith & Hogan's trade, and therefore, in equity, after the latter's failure, they are only entitled to come in *pari passu* with the rest of the creditors.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellants: *W. Arthur I. Anglin.*

Solicitor for the respondent: *Cyrus F. Inches.*

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*May 10.
*June 15.

BENJAMIN JOHNSON (PLAINTIFF).....APPELLANT;

AND

THE BRITISH CANADIAN INSURANCE COMPANY (DEFENDANT).....} RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Insurance—Motor vehicles—Insurance of automobile against loss by fire—Terms of application and policy—Automobile to be "chiefly used for private purposes only"—Insurer's liability excluded if automobile "rented or leased"—Fire Insurance Policies' Act, R.S.N.S., 1923, c. 211—Variation in or addition to statutory conditions—Application of Act where policy covers hazards besides loss by fire—"Change material to the risk" (statutory condition 3)—Onus of proof—Effect of alleged misrepresentation in application as to previous claim for loss by fire.

Appellant was insured by respondent company against loss or damage to his automobile by fire, the policy covering other hazards also. His application, made a part of the policy, stated, item 4, that the automobile "will be chiefly used for private purposes only"; and, item 8, that he had made no claim for loss by fire within the last three years preceding the application in respect of the ownership or operation of any automobile; and that if the applicant knowingly misrepresented or omitted to communicate any circumstance required by the application to be made known to the insurer, the contract should be void as to the risk undertaken in respect of which the misrepresentation or omission was made. The policy provided, under the heading "Exclusions from Perils," that respondent should not be liable for loss or damage arising while the automobile was being used otherwise than for the purposes specified in said item 4, or "if rented or leased." During the term of the policy, appellant, who had taken the car to B.'s garage for repair, agreed, on request of B. who stated he was overhauling his own car and promised, for his use of appellant's car, to make certain adjustments and repairs, to allow B. to use his car

*PRESENT: Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

and to leave it in B.'s garage until said work was done, but stipulated that appellant or his wife could use the car whenever they wished, and they did use it while it remained at B.'s garage. While B. was driving the car it took fire (supposedly from self-ignition caused by the wires having become wet). B. had as yet made no adjustments or repairs. Appellant sued respondent to recover the loss by fire.

Held: Appellant was entitled to recover. Judgment of the Supreme Court of Nova Scotia *in banco,* 4 M.P.R. 280, reversed, and judgment of Carroll J., *ibid,* restored.

Per Lamont, Smith and Cannon JJ.: (1) The arrangement made with B. did not amount to a renting or leasing within the meaning of the policy. (The limitation intended by the words "if rented or leased," and the nature of the arrangement with B., discussed). Even if it did, the provisions of the *Fire Insurance Policies' Act,* R.S.N.S., 1923, c. 211, applied, and the clause excluding liability if the car was rented or leased was a variation in or addition to the statutory conditions and, not being evidenced in the form required by the Act, was not binding on appellant.

(2): The arrangement with B. could not be held to constitute a "change material to the risk," so as to avoid the policy, under statutory condition 3 of said Act. The onus was on respondent to shew that it was a "change material to the risk"; there was no evidence on the point, nor was the case so clear that the court could itself say that it was; in fact, the use of the car from time to time by other qualified drivers, with appellant's consent, was a thing likely, and should be held, to have been within the contemplation of the parties. *Semble,* moreover, giving a reasonable effect to the word "chiefly" in said item 4 of the application, the latitude contemplated would cover such an arrangement as that made with B.

(3): The fact that, prior to his application, a car of appellant's was damaged by fire and the damage ($95) paid by an insurer, which occurrence, appellant explained, had entirely escaped his memory when making his application now in question, did not, upon the facts and circumstances, void the policy as being a misrepresentation in said item 8 of the application. The policy provided that all statements made by the insured upon the application should, in the absence of fraud, be deemed representations and not warranties. This distinguished the present case from *Dawsons Ltd.* v. *Bonnin,* [1922] 2 A.C. 413. Being simply representations, they affected respondent's liability only if material to the risk; and the non-disclosure in question was not material to the risk, as, upon the evidence, the proper inference was that full disclosure would not have influenced respondent, or any other reasonable insurers, to decline the risk or stipulate for a higher premium (*Western Assur. Co.* v. *Harrison,* 33 Can. S.C.R. 473, distinguished on the facts).

Anglin C.J.C. and Duff J. agreed in the result. Duff J. held that there was no renting or leasing; there was a bailment of a very exceptional character, not within the contemplation of the condition relied upon under the head of "Exclusions from Perils"; that, as to statutory condition 3, there was no material change proved; it did not appear that appellant did anything not within the contemplation of the policy; that, in so far as the contract was one of insurance against fire, the statutory conditions in said Act took effect, where not inapplicable by reason of the special nature of the subject matter of the contract.

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APPEAL by the plaintiff (on leave granted by the Supreme Court of Nova Scotia *in banco*) from the judgment of the Supreme Court of Nova Scotia *in banco* (1), which, reversing the judgment of Carroll J. (1) (Paton and Ross JJ. dissenting), dismissed the plaintiff's action, which was brought to recover, under an insurance policy issued by the defendant company, the amount of his loss by destruction by fire of his automobile.

The material facts of the case are sufficiently stated in the judgment of Lamont J. now reported. The appeal to this Court was allowed, with costs here and in the provincial appellate court, and the judgment of the trial judge restored.

J. A. Walker for the appellant.

F. D. Smith K.C. for the respondent.

ANGLIN C.J.C.—I agree in the result of the judgment in this case, but, for want of opportunity to consider and analyze it in detail, cannot commit myself on the various propositions of law which it incidentally enounces.

DUFF J.—I concur with the conclusion of my brother Lamont.

Section 3 of the Nova Scotia statute (cap. 211, R.S.N.S., 1923) settles the question of the applicability of the statutory conditions. In so far as the contract is a contract of insurance against fire, the conditions take effect, where not inapplicable by reason of the special nature of the subject-matter of the contract; otherwise they do not.

As to the special arrangement with which we are concerned, there was, plainly, no rent, and I do not think there was a lease; there was a bailment of a very exceptional character not within, I am satisfied, the contemplation of the condition relied upon, under the head of "Exclusions from Perils."

As to condition 3, there was no material change proved, because, here again, I am not satisfied that the insured did anything not within the contemplation of the policy.

The appeal must be allowed, with the usual consequences.

(1) 4 M.P.R. 280; [1932] 1 D.L.R. 709.

The judgment of Lamont, Smith and Cannon JJ. was delivered by

LAMONT J.—The appellant insured his automobile with the respondent (hereinafter called the Company) by a policy which made the application a part thereof and in which the appellant stated that the automobile "will be chiefly used for private purposes only" (item 4), and that he had made no claim for loss by fire within the last three years preceding the application in respect of the ownership or operation of any automobile (item 8). By the policy the Company agreed to indemnify the appellant against loss or damage suffered by him in various specified ways, including loss by fire. Under the heading of "Exclusions from Perils" the policy provided that the Company should not be liable for loss or damage arising while the automobile was being used (*a*) otherwise than for the purposes specified in item 4 of the application, or (*c*) if rented or leased. The policy was to be in existence for one year, from noon on October 7, 1929.

In the latter part of February, 1930, the appellant's wife, who also drove the automobile, complained of the manner in which the clutch was working. The appellant took the car to the garage of one George Bryden, a friend of his, who had previously made repairs on other cars owned by the appellant, and had the clutch fixed. When he came for the car two days later Bryden asked him if he was using his car for any particular purpose, and, on being informed that he was not, he stated that he was overhauling his own car and asked if he might use the appellant's car when the appellant did not require it. For such use he said he would remove the carbon from the valves and tighten up any part of the machinery which might require it. To this the appellant agreed, and also agreed to leave the car in Bryden's garage, which was heated, until Bryden had made the necessary adjustments and repairs; but stipulated that whenever his wife or himself wanted the car they were to have it, and in fact they both used it while it remained at Bryden's garage. Bryden had the car some two or three weeks when he drove it to a neighbouring village. A severe storm having set in, he remained at the village all night. Next morning he started for home. The

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roads were heavy and the car wet with the rain and, going up a hill, it took fire. As Bryden had nothing with which to extinguish the fire, the woodwork of the car was completely destroyed. The adjuster fixing the damage done by the fire at $1,200. The Company declined to indemnify the appellant for the loss he had suffered, and the appellant brought this action.

The Company contends that it is under no liability in respect of the policy, for the following reasons:—

1. That by the terms of the policy the Company was not to be liable while the automobile was rented or leased, and that, at the time the fire occurred, it was being operated by George Bryden under an arrangement which amounted to a renting or leasing.

2. That statutory condition 3 of the Nova Scotia *Fire Insurance Policies' Act* provides that "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 insurer or its local agent"; that the arrangement with Bryden, even if it did not amount to a renting or leasing, was a change material to the risk and that no notice thereof in writing or otherwise was given to the Company.

3. The policy is void for misrepresentation.

The learned trial judge gave judgment in favour of the appellant. He held that the arrangement between the appellant and Bryden amounted to a renting or leasing within the meaning of the clause in the policy headed "Exclusions from Perils," but that the Company could not take advantage of that clause because it imported a variation in or addition to the statutory conditions which formed part of the policy, and was not evidenced in the manner prescribed by the Act and, therefore, not binding upon the appellant (s. 5). On appeal to the Supreme Court *en banc,* the judgment of the trial judge was reversed (Paton and Ross JJ. dissenting), on the ground that the arrangement made with Bryden constituted a change material to the risk and notice of it should have been given to the Company, as required by statutory condition 3.

1. In my opinion, the arrangement made between the appellant and Bryden did not amount to a renting or leasing within the meaning of the policy. It is undoubtedly

true that goods and chattels may be rented or leased, though the terms "landlord" and "tenant" are inapplicable to the relationship created by such a letting. "Rent" in legal language may be defined as the compensation which a tenant of the land or other corporeal hereditament makes to the owner for the use thereof. It is frequently treated as a profit arising out of the demised land. In this sense the word "rent" as applied to an automobile would not be appropriate. The word "lease" is used in various senses: it is sometimes applied to term or estate created, and sometimes to the conveyance creating the estate. To constitute a lease, however, the possession of the lessee must be exclusive. *Glenwood Lumber Company* v. *Phillips* (1).

The distinction between a lease and a licence to use, as I conceive it, is that under a lease the lessee's right to possession is exclusive until the expiration of the term agreed upon; while under a licence the licensee has no exclusive possession, and his right both to the possession and the use may be revoked at any time by the licensor, unless the licence is coupled with an interest or the circumstances raise equitable considerations to which the court will give effect. *Plimmer* v. *Mayor, etc., of Wellington* (2); *Hurst* v. *Picture Theatres, Limited* (3).

The limitation which, in my opinion, the parties intended to place upon the Company's liability under the policy by the employment of the words "if rented or leased" was that there should be no liability if the appellant for a consideration turned over to another the exclusive possession and control of the car for a fixed period or even at will. What they were endeavouring to exclude was the farming out of the car. The arrangement between the appellant and Bryden cannot, in my opinion, be construed as a farming out. It did not give Bryden the exclusive possession and the appellant could at any time have taken his car away and retained possession of it. The arrangement was simply a licence to Bryden to use the car which was revocable by the appellant, for, at the time of the fire, Bryden had not made any repairs or adjustments to it. His licence was, therefore, neither coupled with an interest nor

(1) [1904] A.C. 405. (2) (1884) 9 App. Cas. 699.
(3) [1915] 1 K.B. 1.

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were there any equitable considerations to prevent revocation. But even if the arrangement had amounted to a renting or leasing it would not assist the Company, for I agree with the courts below in holding that the provisions of the Nova Scotia *Fire Insurance Policies' Act* apply, and that the clause excluding liability if the car was rented or leased was a variation in or addition to the statutory conditions and, not being evidenced in the form required by the Act, was not binding upon the appellant.

2. Then did the arrangement constitute a change material to the risk? Of this there is not, as pointed out by Mr. Justice Paton, any evidence whatever. No one familiar with the business of fire insurance was called to testify that such an arrangement would be considered by any reasonable insurer as in any way affecting the risk. Where an insurer resists payment of a policy on the ground that the policy is voided by reason of a change in the risk prejudicial to him, the onus is upon him to prove it. In Porter's Laws of Insurance, 6th ed., at page 116, the author says:—

> Where it appears that the loss is due to fire, under a fire policy, the burden is upon the insurers to prove all the facts necessary to exclude the loss from the risk.

No evidence having been put in on the point, is the case so clear that we can ourselves say that the arrangement was a change material to the risk? In my opinion we cannot. The fire is supposed to have resulted from self-ignition caused by the wires having become wet. I can see no greater danger of that happening when the car was being driven by Bryden than by the appellant. It seems to me most improbable that any reasonable insurer would refuse insurance if he knew that the insured might allow his friend or neighbour, a licensed driver, to have the use of his car on occasion. Indeed it seems to me that the likelihood of the insured allowing another licensed driver to sometimes have his car would be one of the things to be expected and which the parties at the time the contract of insurance was entered into would contemplate as likely to happen. That would be part of the risk insured against, whether the appellant got any compensating favour for the use of his car or not. Moreover, on the language of the policy itself such an arrangement as was here made was not, in my opinion, excluded. The car was to be "chiefly"

used for private purposes only. Some effect must be given to the word "chiefly"; the use is not limited solely to private purposes; some latitude is contemplated, and, in my opinion, that latitude may well cover the arrangement here made. I, however, wish to rest my judgment on the broad ground above stated, that the use of the car from time to time by other qualified drivers, with the appellant's consent, must be held to have been within the contemplation of the parties.

3. The misrepresentation which it is contended voided the policy is the statement of the appellant in the application that he had made no claim for loss by fire, in respect of the ownership of an automobile, within three years immediately preceding the application, whereas in fact in the year 1928 a car of his which was then standing in front of his office in some way took fire and, before it was put out, the fire had caused damage to the extent of $95, which the company with which it was insured immediately paid without cancelling or altering the policy of insurance. The appellant's explanation of his statement is that it was such a trifling matter it entirely escaped his memory. The application contained a clause to the effect that if the applicant knowingly misrepresents or omits to communicate any circumstance required by the application to be made known to the insurer, the contract shall be void as to the risk undertaken in respect of which the misrepresentation or the omission is made.

The first statutory condition of the policy provides that all statements made by the insured upon the application for his policy shall, in the absence of fraud, be deemed representations and not warranties. This distinguishes the present case from *Dawsons Limited* v. *Bonnin* (1). Being simply representations, they affect the Company's liability only if material to the risk. Every fact is material which would, if known, reasonably affect the minds of prudent and experienced insurers in deciding whether they will accept the contract, or in fixing the amount of premium to be charged in case they accept it.

Mr. Freeman, the general agent of the Company in Nova Scotia, was called as a witness. Although pressed he would

(1) [1922] 2 A.C. 413.

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not say that the policy would have been refused if the appellant had disclosed his previous fire and the fact that he had claimed and received the $95. The furthest he would go was to say that the Company would have obtained a mercantile report on the appellant.

In view of the unwillingness of the Company's agent to negative the acceptance of the risk with full knowledge, and in view of the fact that the then insurers of the car paid the loss and continued the insurance, the proper inference, in my opinion, is that full disclosure would not have influenced the Company, or any other reasonable insurers, to decline the risk or stipulate for a higher premium.

The non-disclosure, not being material to the risk, affords the Company no defence to the appellant's action.

We were referred to the case of *Western Assurance Co.* v. *Harrison* (1), where the application which formed the basis of the contract of insurance contains the following:—

> Q. 12. Have you, or if a firm, has any member of it, ever had any property destroyed by fire?—A. Yes.
>
> Q. 13. Give date of fire, and if insured name of company interested; —A. 1892. National, and London & Lancashire.

The evidence disclosed that the insured had, prior to the application for insurance, three fires while living on the same property in which the insured property had been destroyed, and the insurance by the policy granted on the application in question was on property which replaced that destroyed by the latter fires. The distinction between this case and the one before us is obvious, as it certainly would be material to the risk to know that an insurer was having numerous fires.

In my opinion, therefore, the appeal should be allowed with costs; the judgment below set aside, and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitor for the appellant: *J. A. Walker.*

Solicitor for the respondent: *C. J. Burchell.*

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(1) (1903) 33 Can. S.C.R. 473.

OSCAR GREEN AND GAVIN BRECKENRIDGE (PLAINTIFFS) ..... APPELLANTS;

AND

CANADIAN NATIONAL RAILWAYS (DEFENDANT) ..... RESPONDENT.

1932
*May 4.
*Oct. 4.

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

Negligence—Railways—Motor vehicles—Collision between gas electric coach on railway and a motor car, at highway crossing—Responsibility for accident—Coach bell not rung—Nature of sound made by coach horn—Whether motor car driver guilty of contributory negligence—"Ultimate" negligence.

Appellant claimed for damages caused by his motor car being struck by respondent's gasoline electric coach on respondent's railway, at a highway level crossing near Colinton Station, Alberta, about noon on July 4, 1930. The coach was used for an inspection trip and was for the first time in that locality. Appellant knew the times of the regular trains, that they stopped at the station, and that none was due. He had reason to expect workmen coming on hand-cars or speeders. The coach bell was not rung. Its horn was sounded, but its noise did not resemble that made by a steam whistle, but rather that of a motor-bus horn. Appellant, in approaching the crossing, looked once in the direction from which the coach was coming, but did not see it, as the station (at which the coach did not stop) obstructed his view, and he did not look again. He had heard the horn once, and now heard it again, but thought it was from a car behind him (there was none in fact) whose driver wished to pass him, and he looked back. At no time did he see the coach. Just before the collision the coach operator, as appellant apparently was not going to stop, applied his brakes. Ford J. ([1913] 2 W.W.R. 886) held that respondent, in not ringing the bell, was guilty of negligence causing the accident, and that appellant, under the circumstances, was not guilty of contributory negligence. His judgment was reversed by the Appellate Division (26 Alta. L.R. 49), which held (by a majority) that appellant was guilty of contributory negligence which was the *causa causans* of the accident.

Held (Rinfret and Smith JJ. dissenting), that, under all the circumstances, appellant was not guilty of contributory negligence, and was entitled to recover.

Principles applicable discussed, and authorities referred to.

Canadian Pacific Ry. Co. v. *Smith*, 62 Can. S.C.R. 134, discussed and distinguished by Lamont J., but discussed and applied by Rinfret J. (Smith J. concurring) (dissenting).

The application against respondent of the doctrine of "ultimate negligence" under the circumstances, discussed and favoured by Cannon J. (Anglin C.J.C. concurring) but discussed and negatived by Rinfret J. (Smith J. concurring) (dissenting).

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

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APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which, by a majority, allowed the defendant's appeal from the judgment of Ford J. (2) in favour of the plaintiff Green, in an action for damages for personal injuries and for destruction of his motor car, caused by a collision between the defendant's gasoline electric coach on defendant's railway and the plaintiff Green's motor car at a highway level crossing. The Appellate Division (1) dismissed the action.

The plaintiff Breckenridge was the assignee of the interest of the plaintiff Green in the judgment obtained at trial, and was subsequently added as a party plaintiff.

The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The plaintiffs' appeal to this Court was allowed, with costs in this Court and in the Appellate Division, and the judgment of the trial judge restored. Rinfret and Smith JJ. dissented.

S. Bruce Smith for the appellants.

N. D. Maclean, K.C., for the respondent.

The judgment of Anglin C.J.C. and Cannon J. was delivered by

CANNON, J.—This is an appeal from the Appellate Division of the Supreme Court of Alberta, reversing (Clarke and Lunney, JJ.A., dissenting) Ford, J., and dismissing with costs the plaintiff Green's action for damages for personal injury; the proceeds of the judgment have been assigned to his father-in-law, Breckenridge, the co-plaintiff.

The action arises out of a collision of July 4, 1930, about noon, at Colinton, on the Edmonton to Athabasca line of the respondent, between a motor car driven by Green and a gasoline electric coach owned and operated by the railway company for an official inspection and then for the first time in that locality. Green was proceeding northerly on a street which parallels the railway line, at about 135 feet west of it, and turned east, towards the railway crossing. He was travelling at a speed of about fifteen miles an hour.

(1) 26 Alta. L.R. 49; [1931] 3 W.W.R. 448; [1932] 1 D.L.R. 253.
(2) 1931 2 W.W.R. 886.

Before he reached the turn to go easterly, he heard a horn signal which sounded like a " bus " horn or a " studebaker " horn; and as he was turning the corner, he gave a glance southerly towards the station, to see if any obstruction were on the track. He did not see, approaching from the south, the car which was then hidden by the station to the south of which he could not see from the point where he then was. As he got around the corner, he again heard the horn, but thought it was a bus or automobile on the road, behind him. He did not again look southerly to see if any train was coming along the track and slowly drove up on to the track, where he collided with the railway car. His companion was killed, his car damaged and himself seriously injured.

Green knew nothing of the approach of the gas electric car; the sound of the whistle, the exhaust from the gasoline motor, and the shouts of one Meyer standing about 22 yards northeast of the crossing, who, seeing that Green was looking in a northerly direction, rushed towards the crossing, waving his hand and shouting in a vain attempt to warn him, were insufficient to attract his attention, which seems to have been riveted on the discovery of the doings of the automobile which he mistakingly supposed was signalling in his rear.

It is common ground that the bell of the gas electric car was not at any time material to the issue now before us used by Dean, the engineer, and the trial judge found that had the bell been ringing the accident could and would have been avoided.

The Chief Justice of Alberta and two of his colleagues found that plaintiff's own negligence in crossing the line in broad daylight, without noticing the approaching car, was the main and proximate cause of his injuries.

Section 308 of the *Railway Act* enacts that when any train (which includes, under subsections 25 and 34 of section 2, any description of car designed for movement on its wheels), is approaching a highway at rail level, the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung *continuously from the time of the sounding of the whistle until the engine has crossed such highway.*

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On the 30th May, 1930, previous to the accident, by 20-21 Geo. V, ch. 36, section 301 of the *Railway Act* was repealed and the following substituted therefor:

301. Every locomotive engine propelled on the railway by steam shall be equipped and maintained with a bell of at least thirty pounds weight and a whistle; and every locomotive engine, car or other mechanism, propelled on the railway otherwise than by steam, shall be equipped and maintained with such signalling appliance or appliances as may be approved by the Board.

There is no evidence that the Railway Board have approved of, or determined that any device should be used as a signal by cars propelled otherwise than by steam. The company had, however, equipped this particular car with a horn and a bell, no doubt to be used by their employees as signals to avoid possible danger to the public.

The respondents' car, which was travelling for the first time on this short and not extensively used branch line, was thus equipped with a horn and a bell as signalling devices. It appears from the evidence on discovery of James L. Cameron, the superintendent of the Edmonton Division of the respondents' railway, that the noise of the horn in no way resembled that made by a steam whistle. Its sound is somewhat similar to that of the horn heard on motor "busses". This official has no knowledge of any order of the Railway Board authorizing the use of such gas-electric coaches.

There was no horn, at the time of the accident, at the end of the car then used as the front, although we are told by Cameron that there should have been a horn at each end. The bell is operated by the engineer turning a valve which releases air and runs a little engine which works the clapper on the bell. The bell would ring continuously until stopped, while the sound from the horn would be intermittent.

It is admitted that the bell upon the railway coach was not rung at any time material to this accident. Green knew that there was no train due at that time. There is a regular schedule of only eight trains a week, all stopping at Colinton station. The plaintiff was justified in thinking that no train from the south was due at that hour. Nor is he to be blamed for thinking that all trains would stop at the nearby Colinton station, as was the invariable practice, and that the crossing was safe. These circumstances and the use as a special train by respondents of a new and unfamiliar coach, with a signalling horn never

before used in that locality on a railway train, and resembling an ordinary motor "bus" signal, afford a reasonable excuse for the plaintiff not knowing of the approach of the train.

Counsel for the respondent at trial put in as part of his evidence portions of the examination for discovery of Green which are as follows:

Q. What impression did the sound cause on your mind?—A. Well naturally that someone wanted to go by and I no more than got around the corner when it blew again and I went on a little west and it had not passed me and I looked back to see what was wrong.

Q. And as you approached the railway track you were more or less looking backward over your left shoulder to see whether anything was coming up behind you on the highway?—A. Yes. I looked back to see what had happened to it.

Q. And are you satisfied now that what you actually heard was the horn from this gas electric coach coming up the track?—A. Well I suppose it would be if that was the only horn blowing.

Q. Do you know of any other horn?—A. No I know of no other horn.

Q. And are you satisfied that was the only vehicle trying to pass you? —A. Well there was none passed me as far as I know.

Q. And you did not see any when you made attempts to see what was behind you?—A. No.

Q. Did you have a rear mirror?—A. Yes.

Q. Did you look in the mirror?—A. Yes, when I looked over my shoulder.

* * *

Q. And as nearly as you can recollect after taking the glance southerly along the track at the corner you did not again look southerly along the track until the accident happened?—A. No I did not. On account of this horn blowing I looked back to see what was coming behind.

Q. *Your attention was distracted by what you thought was coming behind you?*—A. Yes.

The engineer Dean states that, when he got opposite the station or at the north end of the station, he noticed the automobile just in the act of turning the corner.

The evidence is that the last time that Dean sounded the horn was when the coach was immediately north of the station. The station was approximately 480 feet from the crossing.

Dean apparently kept his eyes upon the car from the time he first saw it, for the following appears in Dean's cross-examination:

Q. Did you watch the automobile as it came along?—A. Yes.

Q. All the time?—A. Yes.

To quote Lord Hatherly in *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (1), if a special statutory duty

(1) (1878) 3 App. Cas. 1155, at 1172.

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were imposed on a company of whistling at a station, it might be said that this mode of warning strangers, and no other, is what a stranger is entitled to depend upon. The *Railway Act* imposed on the respondent the duty, when a train approached this highway crossing at rail level, of sounding the engine whistle at least eighty rods before reaching such crossing and of ringing the bell from the time of the sounding of the whistle until the engine has crossed such highway. Parliament thought that the *combined* sounds of the whistle and of the bell would be a sufficient warning to any stranger of the approach of a train. It is a fair inference that the sounding of the whistle, without the bell signal, would not be a sufficient warning. Indeed, in this case, even assuming that the opening clause of section 301 of the *Railway Act* as amended does not apply to this peculiar gas electric railway coach or engine, the substitution by the respondent of the horn for the steam whistle, according to all witnesses, justifies the remark of the trial judge, when refusing the motion for non-suit, that " the sounding of the horn was really a menace rather than a warning ".

Moreover, the placing of a bell by the respondent on this coach affords evidence, as against them, of a standard of reasonableness in regard to the precautions to be taken concerning the management of cars in matters affecting the safety of persons using the highways at railway crossings. See *Brenner et al.* v. *Toronto Ry. Co.* (1), and *Preston* v. *Toronto Ry. Co.* (2).

Can the appellant be excused for not having seen the approaching coach? He appears to have been in an anxious and perhaps flurried state of mind on account of the peculiar sound of the horn, which made him believe that a car was coming behind him trying to pass him. He omitted looking again to the left when approaching nearer the railway crossing. I believe that if the driver of the coach had started the continuous ringing of the bell, the confusion caused by the horn would have disappeared from the appellant's mind; his attention would have been called to his

(1) (1907) 13 Ont. L.R. 423, at 428.

(2) (1905) 11 Ont. L.R. 56; (1906) 13 Ont. L.R. 369.

immediate danger and his movement across the line might have been arrested. But even if Green was not entirely excused for the failure to see the train, there is much to be said in favour of the trial judge's finding that when Dean realized the danger and told to his assistant Gardner: "I don't think them fellows is going to stop", he had been guilty of ultimate negligence by not attempting to turn on the bell or again use the horn.

The trial judge has decided that the use of the horn and the omission to ring the bell on the part of the train, and not the want of reasonable care on the part of the deceased was the *causa causans* of the accident. This, in my opinion, is a reasonable inference from the facts, and not a mere guess. In cases like this one, such elements of knowledge and ignorance must be taken into account and the victim's conduct must be viewed in relation to the conduct of the defendant in determining the *causa proxima* (See *Long* v. *Toronto Railway Company* (1), from which leave to appeal to the Judicial Committee was refused). I believe that the cause of the accident was the persistent failure on the part of the engineer in his duty of giving a complete warning, and that Green's want of care is rather to be considered one of the conditions or circumstances on which Dean's continuous failure of duty took effect.

In *H. & C. Grayson Ltd.* v. *Ellerman Line Ltd.* (2), Lord Birkenhead, in the House of Lords, speaks of the "different standards" of care that circumstances may impose on persons in relation to one another. I also believe that different standards were imposed on the parties herein. The respondent owed a direct and definable duty to the appellant. The appellant owed no comparable duty to the respondent, who was bound to warn him that the crossing, which Green had good reason to believe safe at that particular time, had become dangerous by the unexpected presence of this special coach. In some jurisdictions, the driver of a motor car is under statutory obligation to stop at railway crossings; but it is not so in Alberta; there, attenuating circumstances may even be considered to excuse the driver who does not "look

(1) (1914) 50 Can. S.C.R. 224, at 247 and 248.

(2) [1920] A.C. 466, at 473.

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and listen". See: *Grand Trunk Railway Co.* v. *Griffith* (1); *Ottawa Electric Railway Co.* v. *Booth* (2), and *Canadian Northern Ry. Co.* v. *Prescesky* (3).

In my opinion, the appeal should be allowed with costs and the judgment of the trial judge restored.

LAMONT J.—This is an action for damages for injuries sustained by the appellant Green by reason of a collision between his automobile, driven by himself, and a gasoline electric coach (hereinafter called "the coach") belonging to the respondent railway. The collision took place at Colinton, seven miles south of Athabasca, on the respondents' Edmonton-Athabasca line, at a point where the highway crosses the line at level rail. The question for determination is whether, having regard to the circumstances, there was a reasonable excuse for Green's failure to perceive the approach of the coach by which he was injured.

Green lived in Colinton and was familiar with the crossing, which was 480 feet north of Colinton station. He knew on what days of the week the respondents' trains passed. There were two regular passenger trains per week north from Edmonton to Athabasca, passing through Colinton on Tuesdays and Fridays respectively, at 9.11 p.m. There were also two regular passenger trains per week south from Athabasca to Edmonton, on the same days, due at Colinton at 7.19 a.m. There were also two regular mixed trains per week each way: those from the north were due in Colinton in the morning and those from the south in the evening. Green knew the time when these trains were due to arrive, and also knew that no train was due around noon. He further knew that all these trains were due to stop at Colinton.

At twelve o'clock (noon) on July 4, 1930, Green drove his automobile north along Railway street, which is parallel to the railway track and 134 feet distant from it, until he came to the road running east over the respondents' line. As he turned to go east on this road he looked south along the railway and saw there was no train in sight nor was there anything on the track between the crossing and the

(1) (1911) 45 Can. S.C.R. 380, at 398.

(2) (1920) 63 Can. S.C.R. 444, at 458.

(3) [1924] Can. S.C.R. 2.

station. Of this part of the line he had a clear and unobstructed view. He could not see the track farther to the south as his view was obstructed by the station. Just before Green turned east he heard a horn which sounded like the horn of a motor bus or automobile, but he paid no attention to it. After he had gone about 20 or 30 feet easterly towards the crossing, he again heard the horn and thought it was a motor car behind him whose driver wished to go by. He drove on, he says at about 15 miles per hour, expecting this car to pass, and, as none went by, he said to his companion: "What the devil is wrong with the fellow?" Still going on he turned his head and looked back, and this was about the last thing he remembered. He neither saw nor heard the coach and did not know what happened to him. The evidence shews that he was struck by the coach, which came from the south and passed through the station without stopping or slacking speed. The collision smashed the automobile to pieces, grievously injured Green and killed his companion. According to Dean, who was operating the coach, Green had just turned east when the coach was passing the station. The coach, therefore, ran 480 feet to the crossing, while Green ran 134 feet. The coach was fitted with a bell but it was not rung; it was also fitted with a horn or whistle, but it is common ground that the sound it produced did not at all resemble the steam whistle ordinarily used on the respondents' trains on that line. It was the horn of the coach that Green heard. This was the first time that any gasoline electric coach had ever run on this line, and Green had never seen one. The coach was run as a special or extra train, and there is no evidence that any but the regular scheduled trains had ever run on this line after the respondents began to operate it.

On the evidence, Mr. Justice Ford, the trial judge, found that the respondents were guilty of negligence in not ringing the bell as required by statute when approaching a highway crossing, and that this negligence was the efficient cause of the accident. He also found that Green had not been guilty of contributory negligence. His finding that the respondents were guilty of negligence in not ringing the bell is not now questioned. It is, however, contended that Green was guilty of contributory negligence in not again

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looking south before going on the track, and that it was this negligence on his part, and not that of the respondents, which was the *causa causans* of the accident. This contention was upheld by the Appellate Division of the Supreme Court of Alberta (Clarke and Lunney, JJ.A., dissenting), and the judgment of the trial judge was set aside. From the decision of the Appellate Division this appeal is brought.

In *Grand Trunk Ry. Co.* v. *Griffith* (1), Anglin J. (now Chief Justice) stated the law in the following language:—

> We have, however, the fact that Parliament has deemed it wise to enact that railway trains approaching highway crossings shall give certain signals not for the purpose of attracting the attention of those who are already on the alert and need no warning, but for the purpose of arousing those who are distracted or whose attention is absorbed owing to whatever cause and who, therefore, need warning. Parliament has specified the particular signals which in its judgment are best fitted to serve this purpose. Where it is clearly proved that those signals have been omitted and that an accident, which the giving of them *might* have prevented, has occurred, it must, I think, always be within the province of a jury to say whether or not, having regard to all these circumstances, the breach of statutory duty should be taken to be the determining cause of the accident.

It was, however, pointed out by counsel for the respondents that in the *Griffith* case (2), as in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (3), and the great majority of cases cited to us, the question which the court was called upon to determine was whether there was sufficient evidence of negligence on the part of the defendant to justify leaving the case to the jury; while in the present case, the action being tried without a jury, the question before the trial judge was not whether there was evidence to go to the jury and on which the jury might find one way or the other, but whether the evidence established negligence on the part of the respondents, which was the proximate cause of Green's injuries. As negligence on the part of the respondents is no longer disputed, we have only to decide whether the conduct of Green has not so clearly proved him the author of his own wrong that it would be unreasonable to attribute the collision to the negligence of the respondents.

(1) (1911) 45 Can. S.C.R. 380, at 399.

(2) (1911) 45 Can. S.C.R. 380.

(3) (1878) 3 App. Cas. 1155.

Our attention was also directed to the fact that there is a difference between the duty of an appellate court where the action is tried with a jury, and where it is tried by a judge alone. In the former case, if there is evidence of negligence which the jury can connect with the accident in the sense of being the cause of it, and the jury does so connect it, an appellate court will not set aside the jury's finding, for it is the function of the jury to find the facts; whereas in an action tried without a jury an appellate court may review the findings of fact of the trial judge. If it is satisfied, after giving due consideration to his findings, that they are not justified upon the evidence, it may set aside the findings and give the judgment which, in the opinion of the court, the trial judge should have given. This rule is, however, subject to a limitation, namely: that where a finding of fact made by a trial judge is based upon the credibility of the witnesses, the weight which an appellate court should accord to his finding is scarcely distinguishable from the weight which would be given to it had it been found by a jury. In the case before us but little depends upon the credibility of the witnesses. Green's testimony as to his knowledge of the practice of the respondents in the operation of their trains at Colinton, the hours at which they were due to arrive, their stopping at the station and the distraction of his mind by the horn of the coach, is not contradicted and was accepted by the trial judge. The chief controversy between the parties on the argument before us was as to the duty devolving upon each of them under the circumstances, and the inferences to be drawn from the facts established in evidence.

The duty of the respondents when their train was approaching the crossing was to make known its approach to Green, who was lawfully about to cross. Green's duty was to take reasonable care for his own safety—by this is meant the care which a reasonable and prudent man would take under the circumstances. There is no difficulty about the principle to be applied; the difficulty is in determining just what a prudent man would do in Green's situation. What amounts to reasonable care depends entirely on the circumstances of the particular case as known to the person whose conduct is the subject of the inquiry. Whether, in those circumstances, as so known to him, he used due

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care—that is, whether he acted as a reasonable and prudent man—is a mere question of fact as to which no legal rules can be laid down. (Salmond's Law of Torts, 7th ed., at p. 28). Being a question of fact, we cannot hope for much assistance from cases decided on facts different from those before us. There are, however, some cases in which the circumstances in certain material respects were similar to those in the case at bar, and the judgments in which contain expressions which indicate what, in the opinion of the courts pronouncing them, would be reasonable conduct under the given circumstances.

In the *Slattery* case (1), a train ran through a station without whistling when it ought to have whistled. The deceased, without looking to see if a train was approaching, attempted to cross the railway company's line at a point where the company permitted persons to cross, and was struck by the train and killed. The accident occurred at night. In an action for damages the jury found for the plaintiff. On appeal to the House of Lords, Lord Cairns, at page 1166, expressed the following opinion:—

> If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death.

Although Lord Cairns was of this opinion, he upheld the verdict of the jury in favour of the plaintiff because, on all the facts, His Lordship thought the conduct of the deceased might be open to two different views, in which case it was for the jury to decide, and they having decided in favour of the plaintiff, their verdict should not be disturbed. The members of the court made it quite plain however, that, had they been deciding the case as a jury, they would have exonerated the company from liability, because, in their opinion, the real cause of the accident was the recklessness and folly of the deceased in not looking to see if a train was coming, and not the negligence of the company.

In the above quoted illustration it will be observed that Lord Cairns' opinion is predicated upon the facts as stated by him, and is, therefore, applicable only in cases where the

(1) (1878) 3 App. Cas. 1155.

facts are similar, as in *Canadian Pacific Railway Co.* v. *Smith* (1). His Lordship was not there dealing with the rule which would be applicable where the injured person was misled into believing it was safe to cross by the failure of the railway company to observe a customary practice of stopping all trains at the station. Lord Selborne, who agreed with the conclusions reached by Lord Cairns, dealt with this point at page 1193, in the following language:—

> The cases of *Wanless* (2) and *Bridges* (3) in this House (with which that of *Jackson* (4) is consistent), determined, as I understand them, that a man is not necessarily to be regarded as having caused or contributed to his own death by * * * crossing a line of railway, in a manner *prima facie* dangerous and imprudent (from which his death actually followed), if there is evidence of acts or omissions on the part of the company by which he might have been put off his guard and led to suppose that he might safely act as he did.

See also *Pressley* v. *Burnett* (5); *Rex* v. *Broad* (6); *Sharpe* v. *Southern Ry.* (7).

Even though a plaintiff has been thrown off his guard, yet, notwithstanding that, if the probability of injury was so obvious that it would have been present to the mind of a prudent and reasonable man in the same circumstances, the plaintiff would not be entitled to recover. *Mercer* v. *S.E. & C. Rly. Co.* (8).

In Clerk and Lindsell on Torts, 8th ed., there is a passage which bears closely on the facts in the case at bar. At page 461 the learned authors state the law as follows:

> Although there may be no universal duty upon those in charge of a train to whistle on approaching a level crossing, still if the company have made a practice of so doing, and that practice is known to the plaintiff, the latter will, if he hears no whistle when he is about to cross the line, be justified in assuming that it is unnecessary for him to look about to see whether a train is coming.

See also *Smith* v. *South Eastern Ry. Co.* (9), 21 Halsbury, page 449, par. 762.

In view of these authorities I am of opinion that, where a collision occurs at a level crossing to which the public have access, anyone lawfully using the crossing is entitled

(1) (1921) 62 Can. S.C.R. 134.
(2) *North Eastern Ry. Co.* v. *Wanless,* (1874) L.R. 7 H.L. 12.
(3) *Bridges* v. *North London Ry. Co.,* (1874) L.R. 7 H.L. 213.
(4) Metropolitan Ry. Co. v. Jackson, (1877) 3 App. Cas. 193.
(5) [1914] S.C. 874.
(6) [1915] A.C. 1110.
(7) [1925] 2 K.B. 311.
(8) [1922] 2 K.B. 549, at 553.
(9) [1896] 1 Q.B. 178, at 183 and 184.

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to assume the existence of such protection as the public have, through custom, become justified in expecting.

Green was lawfully using the crossing. Having looked along the track and having found it clear to the station, he says it did not occur to him to look again. He knew that, according to the respondents' practice, no train would arrive for hours, and that when it did arrive it would stop at the station. If a train had been standing in the station he knew he could be over the crossing before it could start and reach him. As he did not hear the bell or any whistle which would give him notice of danger approaching on the track, he assumed it safe to cross. That he was justified in making that assumption the trial judge has held.

In reversing the judgment of the trial judge the majority of the Appellate Division of the Supreme Court of Alberta were, as I read the judgment of the Chief Justice, influenced by two considerations, (1) by the argument that although there was no evidence that any train other than those scheduled to stop at Colinton had ever run over this branch of the respondents' line, yet it was Green's duty to assume that there might be a special or extra train running north and not stopping at Colinton. In his judgment the learned Chief Justice says:—

> The evidence shews that the regular trains were few and that they stopped at the station but what other traffic there was on the line does not appear and certainly there is no warrant for anyone assuming that there will be nothing on a railway line except regular trains.

If this language means that a level crossing is in itself a warning of probable danger to which a person lawfully entitled to cross must pay attention at his peril, I am, with deference, unable to agree. That view, in my opinion, is inconsistent with the view of Lord Selborne in the *Slattery* case (1), quoted above, as well as that expressed in the above passage from Clark and Lindsell on Torts.

As I have already said, what amounts to reasonable care on Green's part depends entirely upon the circumstances as they were known to him. If he reasonably believed that any train coming from the south would stop at the station, why should he apprehend danger from that direction? I quite agree that if, to Green's knowledge, it had been customary for special trains to run to

(1) (1878) 3 App. Cas. 1155, at 1193.

and fro at irregular hours, and to pass the station without stopping, the degree of care which would reasonably be required from him would be very different from the degree of care required from a person who is not going to encounter a known risk, but is entitled to assume that there is no risk whatever. But here there is no evidence that any but regular trains had gone over this line and I am not disposed to assume, in favour of the respondents, a fact which they could easily have proved if it had been true.

The second consideration which appears to have influenced the majority of the court below arose from what I consider a misapprehension of the facts in *Canadian Pacific Railway Co.* v. *Smith* (1), and a misconception of the purport of that decision. In his judgment the learned Chief Justice of Alberta says:—

> Though in the *Smith* case (1) above mentioned there was also the distraction of the driver by a motor horn which was even more distracting because there was in fact a motor following and the driver's attention continued to be distracted in the endeavour to reach a suitable place for the following motor to pass him.

In *Canadian Northern Ry. Co. v. Prescesky* (2), my brother Duff, in referring to the *Smith* case (1), pointed out that, although it had been suggested by Smith's counsel that his attention had been distracted by the horn of a motor car following him, the suggestion had no support in Smith's own testimony. In that case Smith had a clear and unobstructed view of the C.P.R. tracks for half a mile before he reached the crossing, and a view along the tracks for a very considerable distance. Yet, in broad daylight, he drove on to the crossing without looking to see if a train was approaching although he knew that one was due about that time. In his testimony Smith did not even suggest, much less affirm, that his mind was distracted by the horn behind him. In my opinion, the Smith case is applicable only where the facts are similar; where there is nothing in the structure of the line or otherwise to obstruct the plaintiff's view and nothing to distract his mind nor any act or omission on the defendant's part to mislead him into thinking it safe to cross. It cannot have any application here. There was in that case no act or practice on the part of the railway company which could possibly have led Smith to

(1) (1921) 62 Can. S.C.R. 134. (2) [1924] Can. S.C.R. 2, at 6-7.

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believe he could cross in safety. Here, Green's mind was distracted and he was thrown off his guard by the acts and omissions of the respondents in not following their ordinary practice of having all trains stop at Colinton.

For these reasons I am of opinion that Green was justified in proceeding upon the assumption that the respondents would follow the theretofore universal practice, or give him due warning if they changed it. In holding that he was justified in the circumstances I am not overlooking the fact that it is open to a railway company, at any time, to alter the schedule on which its trains shall run or add a special train or trains to those already in operation. But, if it does so, it must observe the duty of giving reasonable warning that a train is approaching to anyone legally using the crossing. The statute (*Railway Act*, ss. 301-308) has prescribed what form the warning shall take. In this case, in my opinion, there was no sufficient warning given to Green: the bell was not rung and I do not think that signalling by means of a horn, whose sound resembles that of a motor bus or automobile which may be heard every day on the highways, is sufficient to call the attention of anyone approaching the crossing to the fact that he should apprehend danger on the track.

I therefore agree with the trial judge that, in the circumstances, there was a reasonable excuse for Green's failure to see the approach of the coach by which he was injured.

The appeal should be allowed; the judgment below set aside and that of the trial judge restored.

The appellants are entitled to costs throughout.

The judgment of Rinfret and Smith JJ. (dissenting) was delivered by

RINFRET, J.—This was a collision, at a highway crossing, between a motor car driven by Green and an electric coach operated by the railway company.

It came about in this way:

The highway ran parallel to the railway for a certain distance, then turned at right angles and continued for 134 feet up to the railway track, which it crossed on the level.

The electric coach was equipped with a bell and a whistle sounding like a bus horn.

Thirty or forty feet before he reached the turn, Green heard the whistle but mistook it for the horn of an automobile intending to pass him. Green knew there was a railway crossing. In the words of the trial judge, he "was familiar with the railway and the time for the regular trains". He also knew there were employees working at a bridge in the vicinity and, as it was noon-time, that they were to be expected to come back on speeders or hand-cars for their midday meal.

When he turned into the stretch of the highway leading straight to the railway track, he took "just a glance over his right shoulder" to see if a train was coming. He saw none. He had then 134 feet to travel before he reached the track. He did not look again.

He had "no more than got around the corner" when the locomotive horn blew a second time. He again mistook it for an auto horn, wondered why the auto did not pass him, and "looked back to see what was wrong". We will now transcribe the next question and answer:

Q. And as you approached the railway track you were more or less looking backward over your left shoulder to see whether anything was coming up behind you on the highway?—A. Yes. I looked back to see what had happened to it.

The country surrounding the highway crossing was flat and, all along the straight stretch to the railway track, there was absolutely nothing to obstruct the view from the track for a distance of at least 500 feet. Green was asked the question:

Q. And if at any time after you had made the turn you had looked south you could doubtless have seen anything that was coming on the track?

and he answered:

A. Yes, sir.

David Dean, the engineer driving the electric coach, had noticed Green's car on the portion of the highway parallel to the railway and then on the other portion leading towards the crossing. He fully expected that it would stop. He says it is "an every day occurrence that automobiles come up to the crossing and stop just short of the tracks". But, when Dean got 30 or 35 feet from the crossing, he said to his companion: "I don't think them fellows is going to stop", and he applied the brakes in emergency and "then (they) came together".

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When Dean made this remark and applied the brakes, Green's car was 10 to 15 feet away from the crossing.

The bell on the electric coach was not ringing.

The trial judge said the problem was as follows:

> * * * negligence on the part of the Defendant being clearly proved, and it being admitted by the Plaintiff that he did not see the train approaching, when by looking he could have seen it in time to avoid the accident, are the circumstances such as to afford a reasonable excuse for his failure to see the train?

To that problem the trial judge gave the following solution:

> Apart from the one glance over his right shoulder made before he completed the turn into the road leading to the crossing, and the one glance he made to the north, Green did not look north or south on the railway track. It did not occur to him to look again to the south. He did not ask his companion to look. There is no doubt the horn Green heard was the horn on the Defendant's electric coach which collided with his car. There is no doubt that the sounding of this horn, which he had no difficulty in hearing over the sound of the engine of his own car, when it sounded the last time before the accident, distracted his attention from the railway track to the investigation of what he thought was behind him wanting to pass or wanting him to stop. Green had never seen one of these electric coaches before. He had never heard the sound of the horn of one of them before. He had never known a train to go through the station at Colinton before without stopping at the station. He did not see the coach at all. He did not know what happened until told some time after the collision. If he had seen the coach when he was ten feet west of the track he could have stopped his car. I have no doubt that if the bell had been rung continuously even from the time the coach cleared the station to the time it reached the crossing the accident would not have happened. I am also of the opinion that if Green's attention had not been distracted by the sounding of the horn of the coach he would have seen the approaching train in time to avoid the accident.
>
> * * *
>
> Apart from any other consideration, I think it was negligence having a causal relation to the accident and the injury to the Plaintiff that the bell was not rung. I think the circumstances attending the occurrence of the accident were such as to afford a reasonable excuse for the Plaintiff not seeing the approaching train. Under the circumstances I find that his failure to see the approaching train was not contributory negligence on his part and there is no other ground for holding that he was guilty of contributory negligence debarring him from recovering damages.

The majority of the Appellate Division of the Supreme Court of Alberta reversed that decision.

The learned Chief Justice of Alberta delivered the judgment of the majority; and we agree with his conclusions and, in the main, with his reasons.

The trial judge found that the railway company was negligent because the bell of the electric coach was not

rung. On the other hand, he found Green negligent because he did not look, " when by looking he could have seen (the train) in time to avoid the accident ".

On these findings, Green's contributory negligence disentitled him from recovering unless, as Harvey, C.J., expressed it: " the established facts, for there is no conflict of testimony of importance, furnish sufficient excuse for the failure of the plaintiff to take more care than he did before going upon the track ".

We adopt as our own the following passages of the judgment of the majority in the Appellate Division:

> The evidence shows that the regular trains were few and that they stopped at the station but what other traffic there was on the line does not appear and certainly there is no warrant for anyone assuming that there will be nothing on a railway line except regular trains. * * * * Indeed the Plaintiff had reason to expect hand cars and speeders at this place at this time and therefore knew that he should have kept a watch. Just north of the crossing on a siding were some box cars housing a bridge building crew the members of which would at noon come in for their lunch. Those working south of the crossing would require to cross the highway, but those working to the north would not.

That a person about to pass over a railway crossing upon a level should look to see whether or not a train is approaching is not only the result of all the decided cases, but is a matter of plain common sense. In fact, the trial judge did not dispute that proposition and he exculpated Green only because, in his opinion, the circumstances afforded him a reasonable excuse for not looking. That excuse he found in the fact that " Green's attention had been distracted by the sounding of the horn of the coach ". He did not find any other excuse.

While it is obvious that, in litigation such as this, the special facts of each case must be considered, and a previous decision in one accident case can rarely be relied on as complete authority for a subsequent accident case, one can hardly escape pointing out the striking similarity between the circumstances of the present case and those in *Canadian Pacific Ry. Co.* v. *Smith* (1), where it was also suggested that the driver's attention had been distracted by the tooting of an automobile behind him which he thought wished to pass him. The holding was that, notwithstanding the assumed negligence of the railway company owing to the absence of statutory warnings, the driver of the car

(1) (1921) 62 Can. S.C.R. 134.

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must be held negligent in attempting to cross the tracks without looking for the approaching train, as no evidence was given of circumstances which would warrant a jury in finding he was excused from doing so. And this court dismissed the action of the driver.

In that case, there was in fact an automobile behind the plaintiff's car and the sound of the horn heard by the driver came from that automobile. In this case, the presence of another car was only imaginary; the sound came from the horn of the electric coach of the railway company; but we do not think the difference is of the slightest importance. We do not consider that a circumstance of such a character: just because a driver thinks an automobile behind him intends to pass him, could excuse him for looking backwards while he approaches a railway track which he knows to be there. But, moreover, the horn from the electric coach was heard by Green when, in his own words, he had "no more than got around the corner". He was then still about 120 feet from the crossing. In a moment, the distraction was removed or ought to have been removed. It should not take 120 feet for a man to find out whether a car is behind him or not. The road was wide enough and all he had to do was to go a little more to one side, signal with his hand (if he wanted to) and let it pass. It was an absurd thing to do to look backwards; and, like the Appellate Division, we are unable to accede to the proposition that the circumstances afforded a reasonable excuse for the appellant's failure to perceive the approach of the train by which he was injured.

If Green's failure to look was inexcusable in the circumstances, then he was negligent and his negligence debars him from recovering from the railway company. If, notwithstanding the fact that his momentary distraction might be justifiable, yet after the distraction ought to have been removed, he had sufficient time "in which to use his senses as a careful man about to cross a railway track", still he was negligent and again his action fails.

But it was argued—and the trial judge so held—that "when Dean, knowing the kind of train he was operating,

should have seen the plaintiff's car and realized the danger, he could have avoided the result of (Green's) contributory negligence by using the means provided", that is: by ringing the bell. That holding is based on the theory of ultimate negligence, which is that, notwithstanding the negligence of one or the other or both of the parties to the accident, "there is a period of time, of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe" (*per* Lord Sumner in *British Columbia Electric Ry. Co.* v. *Loach* (1)).

In the present case, there is no occasion for the application of the doctrine. The breach of the statutory duty to ring the bell continued up to the time of the collision; but so also did the plaintiff's failure to look continue up to the moment of the impact. It is said that if the bell had been rung even 35 feet before the coach reached the crossing, the accident might have been avoided. With great respect, for reasons about to be stated, we cannot accept that finding, which was set aside by the Appellate Division and which is, in our view, purely a conjecture (See *Grand Trunk Pacific Railway Co.* v. *Earl* (2)). However, assuming that to be the fact, it was equally found as a fact that "if Green had seen the coach when he was ten feet west of the track he could have stopped his car". If he did not see it, it was because he did not look. That means that if he had looked, even when he was at ten feet from the track, the accident might have been avoided. Surely by that time any effect from the so-called distraction must have vanished. No excuse was left for not looking at least at that spot. And we fail to understand why the ruling which fastens negligence on the railway company should not equally apply to fasten negligence on the plaintiff.

In spite of the absence of warning, if the plaintiff had kept his eyes about him, he would have perceived the approach of the train and would have kept out of mischief. If that be so, his action must fail, for he was certainly guilty of contributory negligence. He owed his injury to his own fault, and whether his negligence was the sole

(1) [1916] 1 A.C. 719, at 726.

(2) [1923] Can. S.C.R. 397, at 402.

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cause or the cause jointly with the railway company's negligence does not matter (*British Columbia Electric Railway Company Limited* v. *Loach* (1)).

Be that as it may, the doctrine of ultimate negligence is predicated on the assumption that the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff (*Tuff* v. *Warman* (2)); and the duty to exercise that special care, breach of which constitutes ultimate negligence, only arises when the plaintiff's danger was or should have been apparent. (*Loach* case (3).)

In *Long* v. *Toronto Railway Co.* (4), the motorman admitted he realized the danger almost immediately when he first saw the deceased. Here, even if we accept the version that Green was in a distracted state of mind because he thought an automobile was about to pass him, that state of mind could neither be discovered nor foretold by the engineer, who was not endowed with the art of divination. According to the trial judge's finding, the likelihood of Green putting himself in danger became apparent when the coach was at most 35 feet from the crossing. On the evidence and at the rate of speed the coach was going, 35 feet would be covered in not quite one second. In that extremely short time, the engineer had to make up his mind, and do one of three things: ring the bell, blow the whistle or apply the brakes. It must be a matter of extreme doubt whether, at that time, either of these things could still be effective. The engineer could not do the three things, nor even two of them. He applied the brakes; and, the moment after, the coach and the motor car were together. Like the Appellate Division, we do not think ringing the bell would have brought a different result. At all events, applying the brakes was a reasonable thing to do, it was the most natural and instinctive thing to do, and even assuming it would have been wiser to ring the bell, the engineer can hardly be blamed, in the emergency, to have adopted the course he did.

(1) [1916] 1 A.C. 719 at 722.
(2) (1858) 5 C.B.n.s. 573, at 585.
(3) [1916] 1 A.C. 719, at 726.
(4) (1914) 50 Can. S.C.R. 224, at 226.

In the *Loach* case (1), when the motorman saw the cart and realized the danger, he was 400 feet from the crossing and the evidence was that, with a brake in good order, the car should have been stopped in 300 feet. In our view, it is clear from the facts of the present case that when Dean became aware of the dangerous position of Green there could have been no time for Dean to do anything to avoid the impact. (*Swadling* v. *Cooper* (2).)

At most, this is one of the cases spoken of by Viscount Birkenhead, L.C., as being " at the other end of the chain " (The *Volute* case (3)), and of which he gives the following illustration:

> A's negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence and A. wholly fails: *The Bywell Castle* (4); *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (5).

It is our view that Dean's and Green's negligence was contemporaneous or " synchronous," as put by the House of Lords in the *Volute* case (6), and that it is impossible to find a period at which Green's negligence had ceased and after which Dean's ultimate negligence had begun. At all events, we do not find it possible to say that " a clear line can be drawn," after which the supposed subsequent negligence of Dean alone could be regarded. Here, both acts of negligence were so mixed up with the state of things as to make it a cause of contribution (The *Volute* case (7)). Green's negligence, if not the sole cause of his being injured, was at least a contributing cause quite as proximate and immediate as the breach of the statutory duty by the railway company's employee (*Grand Trunk Pacific Ry. Co.* v. *Earl* (8)), and we would like to conclude with the remarks of Duff J. in the *Earl* case (9):

(1) [1916] 1 A.C. 719.
(2) [1931] A.C. 1.
(3) *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, at 136.
(4) *London Steamboat Co.* v. *Bywell Castle,* (1879) 4 P.D. 219.
(5) (1880) 5 App. Cas. 876.
(6) [1922] 1 A.C. 129.
(7) [1922] 1 A.C. 129.
(8) [1923] Can. S.C.R. 397 at 403.
(9) [1923] Can. S.C.R. 397, at 400.

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To distinguish this case from the hypothetical case put by Lord Cairns or from the case of *Canadian Pacific Ry. Co.* v. *Smith* (1), or, indeed, from a number of other authorities which could be named would, I think, with the greatest respect, be approaching perilously near to frittering away the substance of the doctrine (of contributory negligence) which it is the duty of the court to apply.

Of the cases relied on by the learned trial judge, or to which we were referred by counsel for the appellant, the following should be said: Most of those cases were jury trials; and, as pointed out by Lord Penzance in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (2),

> in all these cases the question which the Court was deciding was not whether the plaintiff was negligent, but whether there was evidence to go to the jury of negligence by the defendants such as caused the injury.

In many of those cases, the courts clearly indicated that their own opinion was different from that expressed in the verdict; but they would not reverse it because it appeared to them that to reverse, in the words of Lord Cairns (*Dublin, etc., Ry. Co.* v. *Slattery* (3)), "would seriously encroach upon the legitimate province of a jury." Other cases cited concerned street railway accidents; and, in our view, street railway accidents should not be decided according to the same standards as other railway cases; for railway companies, like the respondents herein, are on their own private right of way, while street railways are run on public streets where the people have equal access and the conditions are different.

The appeal should be dismissed, with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Parlee, Freeman, Smith & Massie.*

Solicitors for the respondent: *Maclean, Short & Kane.*

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(1) (1921) 62 Can. S.C.R. 134. (2) (1878) 3 App. Cas. 1155, at 1177.

(3) (1878) 3 App. Cas. 1155, at 1167.

IN THE MATTER OF THE ESTATE OF THEOPHILUS TYHURST, DECEASED

JOHN C. SMITH AND OTHERS.....APPELLANTS;

AND

THE TRUSTEES OF THE HOME OF THE FRIENDLESS IN THE CITY OF CHATHAM AND OTHERS..... RESPONDENTS.

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*May 25.
*June 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Words "legacies" and "bequests"—Whether used by testator to distinguish donations to different classes—"Legatees."

A testator's property, when he made his will, when he died, and at the time for distribution hereinafter mentioned, amounted in value to about $55,000. By his will, he left to his wife (who actually survived him only eight days) the entire income during her life, with provision for payments to her out of principal if required; after her death the estate was to be converted into cash and distributed as follows: specified amounts to four individuals, aggregating $2,500; specified amounts to various charities, aggregating $4,600; then, by clause 5, "All money remaining after payment of the legacies and bequests made herein shall be paid to the said legatees in equal shares, and in case my said estate shall not be sufficient to pay all of the said legacies and bequests in full then I direct that the legacies and bequests shall abate proportionately." Clause 6 provided: "In the event of any of the legatees dying leaving a child or children, then the share which would have gone to the said legatee shall go to the child or children of such legatee in equal shares, and in case any of the said legatees die without leaving a child or children then the share to which they would have been entitled to shall become part of my residuary estate, and shall be divided as aforesaid." The question for determination was whether the residue dealt with in clause 5 was bequeathed to the four individual legatees, or was to be divided in equal shares among them and the charities.

Held, that, upon the true construction of the will as a whole, and considering the circumstances surrounding and known to the testator when he made it, and in view of the effect of the other construction, and the nature of some of the charities, the testator must be taken to have intended the word "legatees" in clause 5 to mean the four individual legatees only; that he intended a distinction between the "legacies" and the "bequests" in clause 5, applying "legacies" to his gifts to the individuals, and whom he referred to as "legatees," and "bequests" to his gifts to charities.

Judgment of the Appellate Division, Ont., [1932] 1 D.L.R. 595, reversed.

In construing a testator's language, where ambiguous, the court may consider not only the provisions of the will, but also the circumstances surrounding and known to him when he made it, and adopt the meaning most intelligible and reasonable as being his intention.

While the words "legacies" and "bequests" are indiscriminately used in testamentary dispositions to mean gifts of personalty, yet a testator

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

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may use them to distinguish donations to different classes, and his intention to do so, if clear, will be given effect.

It is not to be imputed to a testator, unless the context requires it, that he uses additional words for no purpose (*Oddie* v. *Woodford,* 3 My. & Cr. 584, at 614).

APPEAL by certain of the individual beneficiaries named in the will of Theophilus Tyhurst, deceased, from the judgment of the Court of Appeal for Ontario (1), which (reversing, on the question at issue, the judgment of Raney J. (2)) declared that the individual beneficiaries in question and the charitable beneficiaries in question (except, as settled in the formal judgment, the City of Chatham for upkeep of cemetery plot) were all entitled to share equally in the residue of the estate of the said deceased.

The material facts of the case and the question in issue are sufficiently stated in the judgment of Lamont J. now reported, and are indicated in the above head-note. The appeal to this Court was allowed.

G. P. Campbell for the appellants.

John M. Godfrey K.C. for the respondent, the Muskoka Hospital for Consumptives.

J. A. McNevin K.C. for the respondents, the Trustees of the Home of the Friendless in the city of Chatham.

H. D. Smith K.C. for the respondents, the Trustees of the Children's Shelter of the city of Chatham, and the Salvation Army of the city of Chatham.

A. T. Whitehead for the respondents, the Home Mission Fund of the United Church of Canada, the Superintendent of the Sunday School of the United Church at Charing Cross, and the Superintendent of the Sunday School of the Zion United Church, Creek Road, county of Kent.

McGregor Young K.C., Official Guardian, for the respondent Harvey Mitton, an infant (contending the same as appellants).

H. E. Grosch for the Executors of the Estate of the said deceased.

DUFF J.—I concur with my brother Lamont.

One cannot, I think, properly overlook the juxtaposition of the words " legacies " and " bequests," at several points

(1) [1932] 1 D.L.R. 595. (2) (1931) 40 O.W.N. 245.

in article 5 of the will. The argument on behalf of the respondents has not convinced me that this clause does not recognize some distinction between a bequest, as connoting a gift proceeding from something in the nature of a charitable intention, in the legal sense, and a legacy as something in the nature of a personal gift.

I think the use of the term "said legatees," in the second line of article 5, points in the same direction. In article 6 we have the same term "legatee" continued throughout: this term in both articles is unmistakably limited to gifts of the second of the above mentioned classes. It is true that there is no word so precisely descriptive of the recipient of a bequest as of the recipient of a legacy. But I think if the testator had intended all the gifts to be on the same footing, in relation to the provisions of article 6, a very slight modification of the language would have been sufficient to make it clear.

The appeal should be allowed; except as to any disposition of costs in the courts below, which is not disturbed. There should be only one set of costs in this court, payable, respectively, to the appellants and to the respondents out of the estate; two counsel fees may be allowed in each case; the Official Guardian will, of course, have his costs as usual.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

LAMONT J.—This appeal involves the interpretation of the will of Theophilus Tyhurst, deceased, made the 12th day of March, 1928.

After making provision for the payment of his just debts and testamentary expenses, the testator devised and bequeathed the remainder of his estate to his executors upon trust:

1. To pay to his wife the entire income of the estate during her lifetime and to make payments to her out of the principal if, in her discretion, she considers the income insufficient for her personal requirements.

2. After the death of the wife the executors were directed to convert the estate into cash and distribute it as follows:

To John D. Smith, $500.

To his daughter Rose Verna, $500.

To his niece Lillian Roseburg, $500, and

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To Harvey Mitton the sum of $1,000.

To the Trustees of the Home of the Friendless in the city of Chatham, $1,000.

To the Trustees of the Children's Shelter in the city of Chatham, $1,000.

To the Home Missionary Fund of the United Church of Canada, the sum of $500.

To the Muskoka Hospital for Consumptives at Gravenhurst, the sum of $1,000.

To the Salvation Army at the city of Chatham, $500.

To the Superintendent of the Sunday School of the United Church at Charing Cross, $200 for Sunday School purposes.

To the Superintendent of the Sunday School of Zion United Church, Creek Road, in the county of Kent, $200 for Sunday School purposes.

To the proper officials of the City of Chatham, the sum of $200 for the maintenance and upkeep of the family cemetery plot in the Maple Leaf Cemetery.

Then clause 5 of the will reads:

> All money remaining after payment of the legacies and bequests made herein shall be paid to the said legatees in equal shares, and in case my said estate shall not be sufficient to pay all of the said legacies and bequests in full then I direct that the legacies and bequests shall abate proportionately.

The neat question for determination in this appeal is whether upon the true construction of the will the residue (which amounts to $48,000) is bequeathed to the four individual legatees, or whether it is to be divided in equal shares among them and the above mentioned charitable beneficiaries.

In construing a will the duty of the court is to ascertain the intention of the testator, which intention is to be collected from the whole will taken together. Every word is to be given its natural and ordinary meaning and, if technical words are used, they are to be construed in their technical sense, unless from a consideration of the whole will it is evident that the testator intended otherwise.

The learned judge of the first instance construed clause 5 to mean that the residue was to be divided among the four individual legatees only. On appeal to the Second Appellate Division his judgment was reversed (Latchford C.J.

dissenting). From the judgment of the Appellate Division this appeal is brought.

The contention of the respondents, to which effect was given by the Appellate Division, is that the "legatees" mentioned in the second line of clause 5, who are to share in the residue, comprise all beneficiaries receiving under the will a gift of personal estate; that the words "legacy" and "bequest" in a will have exactly the same meaning and that the word "legatee" is just as apt to describe the recipient of a gift intended as support for charity as the recipient of a gift intended as a personal donation.

It cannot be denied that the words "legacies" and "bequests" are indiscriminately used in testamentary dispositions to mean gifts of personal property. A testator, however, is entitled to use them to distinguish donations to different classes and his intention will be given effect to provided he has made it clear what his intention was. As has often been said, a will ought as far as possible to be its own dictionary. In determining whether the testator used "legacies" and "bequests" as synonomous terms or as specifying gifts to different groups, we must bear in mind the canon of construction laid down by Lord Cottenham in *Oddie* v. *Woodford* (1):

> Now I take it to be one rule in the construction of a will, that you are not to impute to a testator, unless the context requires it, that he uses additional words except for some additional purpose; that you are not to suppose he uses additional words for no purpose.

Turning now to what may be called the plan of the will, it will be seen that the testator has made three classes the objects of his bounty: first his wife; second the four personal legatees, each of whom was a relative or friend, and third the charitable beneficiaries. His gifts to the latter two classes were to take effect only after the death of his wife. Contemplating, or, to use the term employed by Blackburn J. in *Grant* v. *Grant* (2), "soliloquizing" as to what distribution he would make of his property after the death of his wife, the testator directs his executors to pay to the beneficiaries, both individual and charitable, the specific sums above set out. These amounted to $2,500 for the four individuals and $4,600 for the charitable bequests.

(1) (1821) 3 My. & Cr. 584, at 614; 40 E.R. 1052, at 1063.

(2) (1870) L.R. 5 C.P. 727.

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His property at the time was worth in the neighbourhood of $55,000, so that, after payment of these specific gifts, there would be to dispose of a residue of some $48,000. This he disposes of in clause 5 by providing that, after the payment of the "legacies" and "bequests" made herein, all the money remaining shall be paid to the "said legatees." Here he designates the specific sums which he directed to be paid as "legacies" and "bequests," and it is contended for the appellants that, by doing so, he was making a distinction between the two terms and applying "legacies" to the payments made to the four individuals (who may be referred to as Group 1), and "bequests" to the charitable beneficiaries (who may be said to constitute Group 2).

It will be observed that in clause 5 the testator uses the terms legacies and bequests no less than three times. If these words meant, to his mind, exactly the same thing, why use the two words? And why repeat them? It is said that one must be considered as surplusage, but words are only to be treated as surplusage when the will or the circumstances to which we are entitled to look satisfies us that the testator could not have been making a distinction between them. In the light of the testator's use of the two words it may not be unimportant to ask if it is not more in accordance with the prevailing custom to refer to gifts to charity, as charitable bequests, rather than as charitable legacies?

The respondents contend that the provision in clause 5, that if the "estate shall not be sufficient to pay all of the said legacies and bequests in full," they shall abate proportionately, shews that two considerations were present to the testator's mind: (1) a possibility that when his wife should die his estate might not amount to $7,100, the amount of the specified legacies and bequests, and (2) that he desired all the beneficiaries of Groups 1 and 2 to be treated alike. While a man would naturally put such a provision in his will, because it is well known that riches have wings, I find it difficult to conclude that the testator was contemplating as a real possibility that his wife would use up not only the income but the greater part of the corpus of the estate as well, or that there would not be a considerable residue to distribute (the wife survived the testator only eight days). As to the argument that the provision indicated

an intention that all beneficiaries should be treated equally, it does not follow, in my opinion, that because he might, in case of deficiency, desire all gifts to abate proportionately, he would, in case of a surplus, desire all beneficiaries to share in it to the same extent.

The appellants rely upon clause 6, which reads:—

> In the event of any of the legatees dying leaving a child or children, then the share which would have gone to the said legatee shall go to the child or children of such legatee in equal shares, and in case any of the said legatees die without leaving a child or children then the share to which they would have been entitled to shall become part of my residuary estate, and shall be divided as aforesaid.

It is contended that in this clause the word "legatee" is clearly limited to the beneficiaries of Group 1, for they are the only ones who might have children, and that, the testator having indicated in this clause the sense in which he uses the word "legatee," that meaning must given to it in clause 5. The only answer made to this contention is that the words "any of the legatees" apply only to such as might have children, but do not exclude other legatees from participating in the residue.

In construing the language of the testator where it is ambiguous, we are entitled to consider not only the provisions of the will, but also the circumstances surrounding and known to the testator at the time when he made the will, and adopt the meaning most intelligible and reasonable as being his intention. If the respondents' contention is right, each of the beneficiaries of Groups 1 and 2 will obtain out of the residue an additional sum of $4,000. Referring to the last three charitable bequests, is it reasonable to think that the testator ever contemplated a gift of $4,000 to each of the superintendents of the two Sunday Schools mentioned, for Sunday School purposes, in addition to the specified gift of $200, and that without knowing who the superintendents might be or what they might consider Sunday School purposes? Or can we reasonably conclude that he contemplated a like contribution to be made to the officials of the City of Chatham for the maintenance and upkeep of his family cemetery plot?

Reading the will as a whole and in the light of the above considerations, I am of opinion that the testator intended to make a distinction between the "legacies" and the "bequests" in clause 5, applying the word "legacies" to

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his gifts to the individuals comprising Group 1, and whom he referred to as "legatees," and the word "bequests" to his gifts to charities.

The appeal should therefore be allowed with costs but the costs payable out of the estate will be limited to one set each for appellants and respondents. The Official Guardian's costs will also be payable out of the estate.

Appeal allowed.

Solicitors for the appellants: *Shaw & Shaw.*

Solicitors for the respondents, the Trustees of the Home of the Friendless in the City of Chatham: *Kerr, McNevin & Kerr.*

Solicitors for the respondents, the Trustees of the Children's Shelter of the City of Chatham, and the Salvation Army of the City of Chatham: *Smith & Smith.*

Solicitors for the respondent, the Muskoka Hospital for Consumptives: *Godfrey & Corcoran.*

Solicitor for the respondents, the Home Mission Fund of the United Church of Canada, the Superintendent of the Sunday School of the United Church at Charing Cross, and the Superintendent of the Sunday School of the Zion United Church, Creek Road, County of Kent: *A. T. Whitehead.*

Solicitor for the respondent, Harvey Mitton: *McGregor Young.*

Solicitors for the executors of the estate of said deceased: *Grosch & Bell.*

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*May 3.
*June 15.

GROFF *v.* HERMAN

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

Appeal—Evidence—Finding of trial judge on conflicting evidence—Finding set aside by appellate court and restored by Supreme Court of Canada—Ownership of carload of wheat.

APPEAL by the plaintiff (by leave granted by the Appellate Division, Alta.) from the judgment of the Appellate Division of the Supreme Court of Alberta (1) allow-

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) 26 Alta. L.R. 9; [1931] 3 W.W.R. 417; [1932] 1 D.L.R. 147.

ing (Clarke and McGillivray, JJ.A., dissenting) the defendant's appeal from the judgment of Boyle J. in favour of the plaintiff.

The plaintiff and defendant were neighbouring farmers, living near Crowfoot, Alta., and in 1928 they had large quantities of wheat, which they assisted each other in hauling, most of which was shipped through different elevators, but two carloads were shipped directly into the cars over the railway platform. The whole question for determination was whether, on conflicting evidence, the wheat in one of these cars belonged to the plaintiff or to the defendant.

On the appeal to this Court, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment allowing the appeal with costs in this Court and in the Appellate Division, and restoring the judgment of the trial judge. Written reasons were delivered by Anglin C.J.C. and by Smith J. Smith J., with whom Rinfret, Lamont and Cannon JJ. concurred, after discussing the evidence at some length and after discussing the judgments below, expressed the view that this was an ordinary case of a trial judge hearing and seeing the witnesses and, from their conduct in the box and the circumstances, arriving at a conclusion as to which side was right as to the facts. After reading all the evidence very carefully, the learned judge was not prepared to say that he would have differed with the trial judge on his finding of fact on the whole evidence, and therefore his judgment should prevail. Anglin C.J.C. stated that he concurred in the result of the judgment on the simple ground that the case involved nothing but a question of fact, upon which the trial judge had made a specific finding based upon evidence which, apparently, fully warranted it, and there was nothing in the case to justify the action of the Appellate Division in setting that finding aside, based, as it was, chiefly upon the credibility of witnesses.

Appeal allowed with costs.

O. M. Biggar K.C. and *M. B. Gordon* for the appellant.

H. A. Aylen for the respondent.

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*May 9, 10.
*June 15.

CORSON *v.* MORGAN

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Appeal—Evidence—Action for rectification of description of land in deed —Conflicting evidence as to real agreement for division of lands— Judgment at trial for rectification reversed on appeal but restored by Supreme Court of Canada.

APPEAL by the plaintiff (by leave granted by the Supreme Court of Nova Scotia *in banco*) from the judgment of the Supreme Court of Nova Scotia *in banco* (1) reversing (Carroll J. dissenting) the judgment of Graham J. (2) in favour of the plaintiff in an action for rectification of the description of the land in a certain deed of land at Middlehead, Ingonish, in the county of Victoria, Nova Scotia.

The question in dispute was one of fact, namely, whether a certain deed to the respondent executed in 1905 by the appellant's husband (since deceased) and the appellant, through their attorney, one Blanchard, and including the land now in question, was according to the agreement and intention of the parties (in dividing certain lands between them), or whether the land now in question should have been excluded from the said deed and included in a deed of the same date from the respondent and his wife to the appellant's husband.

On the appeal to this Court, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment allowing the appeal with costs, and restoring the judgment of the trial judge. Anglin C.J.C., and Cannon J. dissented.

Written reasons were delivered by Smith J., with whom Rinfret and Lamont JJ. concurred, and by Anglin, C.J.C. (dissenting), and by Cannon J. (dissenting). All the reasons discussed the evidence at some length.

Smith J. (Rinfret and Lamont JJ. concurring), after discussing the evidence, stated that "it was for the trial judge to determine the credibility of the witnesses appear-

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) (1932) 4 M.P.R. 409.
(2) (1931) 4 M.P.R. 409, at 410 *et seq.*

ing before him in the box, and he has believed the evidence of the appellant and Blanchard and concludes that the respondent, after a severe illness and the long lapse of years, has forgotten the real terms of the agreement" between him and the appellant's husband. He stated his opinion, not only that the trial judge should not be reversed where the whole matter turns on the credibility of witnesses, but also, on examination of the evidence, that the trial judge arrived at the correct conclusion.

Anglin, C.J.C. (dissenting), held that the circumstances were such that it was impossible to grant the relief prayed for; it is well established law that rectification of a deed, such as was here sought, can be granted only where there has been mutual mistake, and an agreement between the parties contrary to the tenor of the deed is established beyond question by irrefragable evidence (*Clarke* v. *Joselin* (1)), which should be such as to produce on all minds alike the conviction that the deed is wrong and should have been made to conform to the substance of the agreement (*McNeill* v. *Haines* (2); *Howland* v. *McDonald* (3)). After discussing the evidence, he stated that, on the whole record, he was satisfied that no case whatever had been made for rectification, either because the deed had been shown to be false, or because an agreement as to the division as alleged by appellant had been shown to have had pre-existence; if it should come down to a question of preference, as to their credibility, of witnesses, he would certainly prefer to believe the respondent rather than the witness Blanchard. He approved of the reasons of Mellish J. in the court below.

Cannon J. (dissenting) was of opinion, after a careful perusal of the evidence (which he discusses in his reasons), that it was impossible to say that there was a mutual mistake with respect to the boundaries of the land conveyed; the court cannot make a new contract unless it is absolutely certain that in so doing it is rectifying a mistake and giving effect to the clearly proved intention of the parties; they have chosen to make a solemn contract in writing and the court must not substitute another for it after the death of

(1) (1888) 16 Ont. R. 68, at 78. (2) (1889) 17 Ont. R. 479, at 484-5.
(3) (1907) 14 Ont. L.R. 110, at 115.

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one of the parties and the lapse of 25 years, except upon evidence which is reasonably free from doubt; rectification can be granted only if the mistake is mutual and the evidence of the mutual mistake is clear and unambiguous; moreover (a point also referred to by Anglin, C.J.C.), the evidence on appellant's behalf as to where the division line should be drawn lacked certainty and would not enable the court to prepare an unchallengeable description for a new deed. He approved of the reasons of Mellish J. in the court below.

Appeal allowed with costs.

G. F. Henderson K.C. and *D. K. MacTavish* for the appellant.

W. C. Macdonald K.C. for the respondent.

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*May 25.
*June 15.

SAMUEL MAILMAN AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

GILLETTE SAFETY RAZOR CO. OF CANADA, LTD. (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Alleged infringement—Subject matter—Nature, scope and purpose of claims in specification.

Respondent had obtained a patent for an improvement in blade holders. According to the specification, the invention was particularly applicable for detachably retaining blades in safety razors and blade stropping mechanism. A particular feature claimed was that a word or symbol, such as a trade-mark, might be outlined in the blade by means of apertures therein and the projection or projections on the holder might be arranged so as to enter one or more of said apertures to retain the blade in the holder. Another feature claimed was that the projections might be formed in the holder at one period to engage certain of the blade apertures and at another period the projections might be located in a position to receive any other of the apertures, thus enabling the manufacturer, by shifting the position of the projections, to preclude the use in the holder of blades produced by an unauthorized manufacturer. Respondent claimed that appellants had infringed the patent by selling blades, with certain positioned apertures, for use in respondent's holder. Respondent relied on, and its action for infringement was confined to, two claims in the specification, which were those having to do with the blade itself.

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*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

Held: Respondent's action should be dismissed. Judgment of Maclean J., President of the Exchequer Court of Canada, [1932] Ex. C.R. 54, reversed.

Anglin C.J.C. and Duff J. agreed in the result.

Per Rinfret, Lamont and Smith JJ.: Having regard to what was the sole subject matter in the issue, to the nature and scope of the claims in question, to the evidence, to the characteristics in the blade as presented by the claims, and to the purpose of the blade's design, there was no patentable invention in the blade, the claims in question in regard thereto in the specification were invalid and void, and therefore the present action for infringement did not lie.

The claim, in a specification, being primarily designed for delimitation, the monopoly is confined to what the patentee has claimed as his invention (*British United Shoe Machinery Co. Ltd.* v. *A. Fussel & Sons Ltd.*, 25 R.P.C. 631, at 650; *Pneumatic Tyre Co. Ltd* v. *Tubeless Pneumatic Tyre and Capon Heaton, Ltd.*, 15 R.P.C. 236, at 241).

The inventor must in his specification describe in language free from ambiguity the nature of his invention and he must define the precise and exact extent of the exclusive property and privilege which he claims (*French's Complex Ore Reduction Co.* v. *Electrolytic Zinc Process Co.*, [1930] Can. S.C.R. 462).

The idea of merely impressing a trade-mark in a razor blade by means of apertures in the blade, is not patentable.

A device designed exclusively for the protection of the particular manufacturer lacks utility within the meaning of the patent law and does not amount to invention in the patentable sense.

APPEAL by the defendants from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the plaintiff's patent in question was valid and that the defendants, by selling (as found by Maclean J.) razor blades for use in the plaintiff's blade holder, and containing, besides other apertures, all the apertures contained in the plaintiff's blade, and positioned as in the plaintiff's blade, thus enabling the blades sold by the defendants to be used in the plaintiff's blade holder, had infringed the plaintiff's patent.

The material facts of the case are sufficiently stated in the judgment of Rinfret J. now reported and in the said judgment of Maclean J. appealed from. The appeal was allowed and the action dismissed with costs.

O. M. Biggar K.C. and *M. B. Gordon* for the appellants.

G. F. Henderson K.C. and *E. G. Gowling* for the respondent.

(1) [1932] Ex. C.R. 54.

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ANGLIN C.J.C.—I agree in the result of the judgment in this case, but, for want of opportunity to consider and analyze it in detail, cannot commit myself on the various propositions of law which it incidentally enounces.

DUFF J.—I agree in the result.

The judgment of Rinfret, Lamont and Smith JJ. was delivered by

RINFRET J.—The respondents brought action against the appellants, in the Exchequer Court of Canada, for the alleged infringement of certain claims of Canadian letters patent No. 287,676 owned by the respondents. The appellants filed a statement of defence denying infringement and invoking the invalidity of the claims. The court held the patent valid and found it had been infringed by the appellants. (1). Hence the present appeal.

The patent was applied for and granted "for an alleged new and useful improvement in Blade Holders." In the specification, it is stated that the "invention relates to improvements in blade holders and is particularly applicable for detachably retaining blades in safety razors and blade stropping mechanism."

One object of the invention is stated to be:

to provide a blade holder provided with one or more projections adapted to co-operate with a corresponding opening or openings in the interior of the blade between its marginal edges to retain the blade in the holder.

A particular feature of my invention is that a word or symbol, such as a Trade-Mark, may be outlined in the blade by means of apertures therein and the said projection or projections on the holder may be arranged in such a manner as to enter one or more of said apertures to retain the blade in the holder for shaving or stropping purposes.

There follows a description of the mechanical device whereby the blade is retained between the members of the holder, and then the specification runs as follows:

A further feature of my invention is that the means that retain the members of the holder together for use are provided with means in position to co-operate with the blade for positioning it in the holder when the members of the holder are separated to receive the blade, which last named means will release the blade when the retaining means is in position to retain the members of the holder against the blade, so that a blade that is not properly provided with apertures for the previously mentioned projections on the holder will not be retained therein for use.

(1) [1932] Ex. C.R. 54.

Reference is then made to the drawings, followed by a minute description of the blade holder and of the blade, of which it is declared that

it is provided with notches or recesses at its ends near the corners adjacent to the heel of the blade opposite its cutting edge, providing projections at the inner corners of the blade which are adapted to be opposed by lugs or projections located upon the inner portions of the arms or latches (attached to the holder) to oppose the blade projections.

(the function of these arms or latches being described);

and in order to retain the blade between said members (of the holder) when clamped against the blade I provide the blade with apertures (indicated) to receive corresponding projections extending inwardly from member 1 (of the holder) * * * The apertures of the blade are shown related in such a manner to one another as to produce a designation, such as a word or symbol. In the example illustrated the symbol DEFGH is shown * * *.

It is stated that, by means of the projections, "the blade will be prevented from sliding."

Another feature of the invention mentioned in the description is that the projections may be formed in the holder at one period to engage certain of the apertures of the blade, whereas at another period the projections may be located in a position to receive any other of the apertures. "By means of (this) arrangement,"

in case an unauthorized manufacturer of the blades should produce blades having apertures that correspond in location to the projections of (the holder) that have been made by the original manufacturer at one period, the latter manufacturer, by shifting the position of the projections * * * at another period would preclude the use in the holder of such unauthorized blades, because the apertures would not register with the last named projections * * *.

The description then goes on to explain how the "improved blade holder is adapted for use in a safety razor" and it winds up in this way:

While I have particularly referred to my invention with utilizing a designation, such as a Trade-Mark, name or symbol in a safety razor blade, it will be understood that my invention is not limited to such use since the designation may be formed by apertures or depressions in any desired member to indicate the manufacture of the same, which apertures or designations are so located with reference to positioning means carried by another member as will cause said members to properly register with respect to each other when the apertures or depressions and the projections are in co-operation.

Having thus described the invention and its operation or use as contemplated by the inventor, the specification ends with thirteen claims, two of which are limited to the

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razor blade, while the balance refers to the blade holder only or to the combination of the blade and the blade holder.

As between the parties, the case was concerned solely with the two claims dealing with the razor blade alone. This was made clear at the trial both by counsel for the respondents and by their expert witnesses. The action was confined exclusively to claims 1 and 2; and, in order to ascertain the exact scope of these claims, it will be preferable to transcribe them verbatim:

1. A razor blade having apertures or depressions in the form of a designation to indicate the manufacture of the said blade, the said apertures or depressions being so shaped and located that they will co-operate with different holders, such holders having sets of projections differing inter se but such that any one of such sets will prevent such razor blade from sliding or turning on the said holder.

2. A variation of the invention claimed in Claim 1 in which the apertures or depressions in the blade are so shaped and located that they will co-operate with different holders, such holders having sets of projections which have some but not all of the projections in common as and for the purposes set out in the first claim.

The only case the appellants were called upon to meet was whether or not the razor blade described in claims 1 and 2 was patentable as a new and useful manufacture and, if so, whether these claims had been infringed by them.

The question of the patentability of the blade is therefore first to be considered, for, if it be answered in the negative, the issue as to infringement becomes immaterial. On that question, as we read the judgment appealed from, the true effect of the findings of the learned trial judge is that there was invention in the combination of the blade and the blade holder, but that there was none in the blade itself.

The learned judge said:

Whether or not there is invention in Gaisman may first be considered. During the course of the trial I formed the opinion that the patent lacked subject matter but upon a more careful consideration of the case, I have reached another conclusion. I think there is subject matter and that the patent should be sustained. The patented improvement, and it is only an improvement, is, I think, novel; it cannot be said that the blade and blade holder combined in the manner described in the specification does not possess utility; there is no effective evidence of anticipation by prior publication. The general idea or principle of the alleged invention seems an ingenious one, and, I think, involved the exercise of the inventive mind. The means for holding the blade in position has advantages over the means formerly or presently employed in safety razors, for example, the well known Gillette safety razor, where the blade was pushed sidewise into a spring holder, and which, according to the evidence, was difficult at times to remove, and there was also the danger in so doing of

the user cutting his hand. Frequently, it was stated in evidence, that safety razors of this type had to be returned to the manufacturer in order to have the blade removed. The plaintiff's blade is very easily inserted in and removed from the blade holder, and with safety, and in this one respect alone the combination is, I think, an improvement over other known methods of retaining a blade in a blade holder. The idea of employing a blade holder of the type described with projections in the upper plate of the holder to co-operate with apertures in the blade, for holding the blade in the required position, must have required some, if only a small amount, of ingenuity. It cannot be said to be a common idea, or a natural development of an old idea, or one which would readily occur to workers in this particular art. No one had previously suggested it. The invention may be slight, and the patent a narrow one, but that does not mean there is not subject matter for a patent. The invention of course produces no new result and, I think, is protected only in respect of the particular means set forth in the specification. The other feature of the invention, that is, the provision of apertures in the blade by perforating a word or symbol, such as a trade-mark, may possess very practical merits, but that, I think, is but an optional method of using the invention the substance of which lies in the employment of a particular blade holder, with projections in the holder to co-operate with corresponding apertures or openings in the blade.

And later:

The apertures which the plaintiff has selected for the blade happen to spell its trade-mark, but the real importance of such apertures, so far as this case is concerned, is that the apertures—not the trade-mark—are definitely positioned to co-operate with the projections in the upper plate of the blade holder. It is the particular holder and the projections in the holder plate, and the apertures in the blade, designed to co-operate the one with the other, that constitutes the invention.

In our view, that was really conclusive of this case and, on these findings, having regard to the only issue between the parties, the action ought to have been dismissed.

The specification has two purposes. It must

correctly and fully describe the invention and its operation or use as contemplated by the inventor (sec. 14, subs. (*a*)).

And the reason for that is that the information it gives must be sufficient to enable persons skilled in the art to make use of the invention after the expiration of the patent privilege. Further, it must "state" distinctly the

things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

And the object of that second requirement of the Act is to define the ambit of the monopoly and the exact extent of the exclusive rights granted in the patent.

Now, if we turn our attention solely to the specific claims relied on by the respondents as defining the article alleged to have been infringed, and if we analyze them, we find that the new blade is declared to be possessed of two characteristics:

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(*a*) apertures or depressions " so shaped and located that they will co-operate with different holders, such holders having sets of projections differing *inter se* but such that any one of such sets will prevent such razor blade from sliding or turning on the said holder ";

(*b*) these apertures or depressions should be " in the form of a designation to indicate the manufacture."

Let us—as we should—examine the subject-matter of the invention so described, in the light of the evidence given at the trial by those having the technical skill and knowledge enabling them to understand the novelty or the utility of the new manufacture (*French's Complex Ore Reduction Co.* v. *Electrolytic Zinc Process Co.* (1)), always bearing in mind that claims Nos. 1 and 2 alone are to be taken into consideration.

As understood by the experts heard at the trial, these claims disclose the following:

(1) " the idea of prominently, indelibly and conspicuously indicating the origin of the manufacture of the blade ";

(2) " the combination of apertures which serve to locate the blade " and of other apertures " which have no other function " but to " indicate the origin " or, in other words, " perforations indicating origin and locating means ";

(3) " perforations which extend longitudinally across the blade so as to form a resilient section having anything to do with the cutting edge ";

(4) " apertures adapted to take more than one fixed design of lugs."

Of these alleged characteristics, the one having reference to longitudinal perforations and resulting resiliency must be eliminated at once. Admitting for argument's sake that the perforations so made might " bring about a degree of elasticity in the blade which would enable it to assume a curved position " and that the blade would be improved if, instead of being solid, the " perforations make it more elastic and give it the desired curve," the trouble is that the patentee made absolutely no claim for elasticity or flexibility.

The claim, in a specification, being primarily designed for delimitation, the monopoly is confined to what the pat-

(1) [1930] Can. S.C.R., 462, at 466.

entee has claimed as his invention. (Fletcher-Moulton L.J., in *British United Shoe Machinery Co. Ltd* v. *A. Fussel & Sons, Ltd.* (1); Lindley M.R., in *Pneumatic Tyre Co. Ltd.* v. *Tubeless Pneumatic Tyre and Capon Heaton, Ltd.*, et al. (2).) We must envisage the invention as claimed in the patent, not the invention which the patentee might have claimed if, in the words of Romer, J., "he had been well advised or bolder." (*Nobel's Explosives Co.* v. *Anderson* (3).) For that reason, the point about resiliency or elasticity is irrelevant. Further, it should be noted that it was not retained by the trial judge.

The next characteristic claimed for the blade in the shape of novelty is the combination of perforations indicating origin and locating means or—which is the same thing—of apertures adapted to take more than one fixed design of lugs and of others having no function other than to indicate the origin.

Leaving aside, for the moment, the object of indicating the origin (as to which something more will be said later), we are of opinion that the characteristic just mentioned is not invention, at least in the legal sense, even if, as a matter of fact, it may be asserted that there was novelty in the conception of the idea.

In that connection, the Story patent, dating back to the 5th of December, 1911, would have to be considered as a possible anticipation. Under that patent, the blade is provided with a polygonal orifice, preferably cruciform, strongly suggestive of a possible form of designation or trade-mark, co-operating with a projection in the holder; and, as in the impugned patent, certain parts of the orifice or aperture in the blade are alternatively functioning and functionless.

Assuming novelty, the apertures in the respondent's blade, so it is contended, are so shaped as to permit the projections on the holder to be varied or shifted from time to time and still anchor the blade to it. What obtained before, it is said, was a blade with two holes which could fit only with one kind of holders; the improvement consists in the fact that the new blade fits with several holders. But it is sufficient to resort to the evidence to discover the

(1) (1908) 25 R.P.C. 631, at 650. (2) (1898) 15 R.P.C. 236, at 241.
(3) (1894) 11 R.P.C. 115, at 128.

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fallacy of that contention. What the patentee really intended and what he wished to have patented was not a razor blade which could fit with several holders produced by different manufacturers, but a razor blade so perforated that it could fit only with his own holder on which he retained the faculty of shifting the projections from time to time. If that be so, at least two consequences follow: (*a*) the blade the patentee has claimed can be used only in co-operation with the holder he has described and, in that case, the subject-matter is a combination of which the blade is only an element; (*b*) the blade was devised exclusively for the protection of the manufacturer of the holder, and therefore it has no utility within the meaning of the patent law and there was no invention in the patentable sense. A patent granted for an invention of that kind lacks consideration, for the so-called invention is of no use to the public. Once it is designed merely for the protection of the particular manufacturer, the subject-matter is transferred from the field of patent law to that of the *Trade-Mark and Design Act.*

That brings us to examining the remaining characteristic claimed by the patentee and emphasized by the experts: the idea of prominently, indelibly and conspicuously indicating the origin of the manufacture of the blade or, as expressed in the claim itself, " a designation to indicate the manufacture of the blade."

During the course of the trial, it was suggested that the invention consisted in letters—" an aggregation of letters * * * with something added to them." In fact, the drawings sent in with the application and annexed to the patent contain only the letters DEFGH. That would hardly meet the requirements of definiteness imperatively prescribed in the *Patent Act.* The inventor must describe in language free from ambiguity the nature of his invention and he must define the precise and exact extent of the exclusive property and privilege which he claims (*French's Complex Ore Reduction Co.* v. *Electrolytic Zinc Process Co.* (1).) It does not seem probable that the patentee intended to claim the exclusive right of perforating any and all forms of holes in a razor blade. If he did, the claim

(1) [1930] Can. S.C.R. 462.

would be too wide and the specification in that respect would be void. Giving it a benevolent interpretation, we will accept one of the experts' suggestion that, "in order to satisfy the idea of the patent, (the perforations) must be in the form of a *trade* designation." Claim No. 1 refers to "apertures in the form of a designation." The description in the specification further indicates the "designation" as being "such as a Trade-Mark, name or symbol," and states that it "may be formed by apertures or depressions in any desired member to indicate the manufacture of the (blade)." In that sense, the claim enters the domain of trade-mark and is inspired by nothing more than the idea of protection for the manufacturer of the razor. Making apertures to indicate the manufacture of an article is plain common trade-marking. It comes to this that, to have any value at all, the apertures must impress the one particular trade-mark on the razor blade. In the respondent's case, it is the word "Valet."

What the patentee claims is really an obvious method of impressing a trade-mark on the razor blade. It does seem practical and useful, but, as was said by Lord Watson in *Morgan & Co.* v. *Windover & Co.* (1), utility alone, however great it may be, cannot by itself and in the absence of invention support a grant of letters patent. And we are unable to accede to the proposition that a man may patent the idea of impressing his trade-mark in a razor blade by means of apertures in the blade, without more, and thus prevent another man from impressing his trade-mark in a similar way in the blades manufactured by him. We would repeat with the trial judge:

> The other feature of the invention, that is, the provision of apertures in the blade by perforating a word or symbol, such as a trade-mark, may possess very practical merits, but that, I think, is but an optional method of using the invention the substance of which lies in the employment of a particular blade holder, with projections in the holder to co-operate with corresponding apertures or openings in the blade.

As we have pointed out, the latter part of the above holding applies to the combination of holder and blade protected by the claims of the patent which were not in issue between the parties in this case. As for claims Nos. 1 and 2, they do not present characteristics of such a nature as

(1) (1890) 7 R.P.C. 131 at 136.

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may be made the subject of a patent privilege, and they should be declared invalid and void.

It thus becomes unnecessary to consider the complaint about infringement. The appeal should be allowed and the action should be dismissed, with costs both here and in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellants: *Smart & Biggar.*

Solicitors for the respondent: *Henderson, Herridge & Gowling.*

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*Apr. 29.
*Oct. 11.

GEORGE E. DUKE AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

JOSEPHINE ANDLER AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Conflict of laws—Jurisdiction over foreign immoveables—Decrees in rem and in personam—Actions on foreign judgments.

A judgment of a court of the state of California on a question of title and ownership of real property situate in British Columbia cannot be recognized as final and be enforced by the courts of that province, in accordance with the general rule that the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country.

APPEAL from the Court of Appeal for British Columbia (1), varying the judgment of the trial judge, W. A. Macdonald J. (2).

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

Geo. F. Henderson K.C. and *D. K. MacTavish* for the appellants.

Alfred Bull K.C. for the respondents.

The judgment of the court was delivered by

SMITH J.—On the 25th day of September, 1925, the appellant, G. E. Duke, entered into a contract with Josephine Promis, Augusta Col, Sophia, Sophia Promis, Mary Gillespie and Oscar Promis for the purchase of certain real

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*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) (1931) 45 B.C. Rep. 96; [1932] 1 W.W.R. 257; [1932] 2 D.L.R. 19.

(2) (1931) 43 B.C. Rep. 549; [1931] 3 D.L.R. 561.

estate in the city of Victoria, in the province of British Columbia.

The contract reads:

> We the undersigned (naming the above vendors) have this day granted, transferred, sold and conveyed to G. E. Duke the following described real property situated in Victoria city, B.C., Dominion of Canada.

Then follows the particular description, the price, $55,000 payable $10,000 cash and a note for $45,000 to be secured by a mortgage on certain property in the city of Berkeley, in California,

> the said mortgage to be subject to an existing encumbrance now of record in the sum of $22,150 as a first lien on the property.

There is then the following provision:

> Upon evidence of good merchantable title being vested in G. E. Duke, he will immediately cause to be paid in to the Alameda County Title Insurance Company the sum of ten thousand ($10,000) dollars U.S. lawful money, together with note and mortgage to be delivered to the vendors.

All the parties to the contract were, at the time, residents of California, and the survivors and executors of the two vendors, who died shortly after the date of the contract, have continued to be residents of that state.

This contract or another conveyance was placed in the hands of the Alameda County Title Insurance Company, it is claimed in escrow, which company handed over the contract or the other conveyance to the defendant George E. Duke, who registered same and thus became the registered owner of the Victoria property, which he conveyed to his wife, the defendant Margaret E. Duke, who mortgaged it for $30,000.

The vendors brought action in the Superior Court of the state of California in and for the county of Alameda, against the defendants, to rescind and cancel the contract and the mortgage, and to require the defendants to re-convey to the plaintiffs the Victoria property, alleging that George E. Duke obtained possession of the conveyance without the knowledge of the plaintiffs and without complying with the terms of the agreement, and in violation of the escrow agreement, " in this," that he delivered the mortgage stipulated for subject to an encumbrance of $9,605 in addition to the encumbrance of $22,150 mentioned in the agreement.

The defence to the complaint about the $9,605 encumbrance, stated shortly, was that the vendors falsely represented to defendant G. E. Duke that the Victoria property was then producing net earnings of $6,775 per year, and that the then tenants were ready and anxious to obtain new

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leases on the same terms as the existing leases, whereas in fact the net earnings were not greater than $3,903 per year, and the then tenants were unwilling to renew their leases on the same terms, but were preparing to quit unless extensive repairs were made, and that, to retain them, repairs costing $11,525 had to be made, which sum defendant G. E. Duke claimed as damages for false representations inducing him to make the contract, and which he was entitled to set off against the $9,605 encumbrance.

The defence further alleged that the Alameda County Title Insurance Company was authorized by the plaintiff to cause the deed to be recorded, vesting the title to the Victoria property in defendant G. E. Duke before any part of the consideration therefor was to be paid or delivered by the defendant to the plaintiffs, "all in conformity to said contract."

I take it that this means that such is the proper construction to be put on the terms of the contract.

The learned trial judge in the California court found that defendant G. E. Duke agreed to deliver the $45,000 mortgage free and clear of the $9,605 encumbrance before taking title to the Victoria property, and that there were no false representations, and no set off, as alleged.

He also finds that the defendant G. E. Duke got possession of the deed without paying the $10,000, though there is no such claim in the plaintiff's pleadings, the only non-compliance with the terms of the agreement alleged being that referred to above.

The judgment entered in the Superior Court of California, omitting the style of cause, is as follows:

The Court having made and filed its Findings of Fact and Conclusions of Law herein, now, therefore, in accordance therewith,

It is ORDERED, ADJUDGED AND DECREED that the defendants, G. E. Duke and Margaret E. Duke, execute, acknowledge and deliver, and cause to be recorded and registered according to the forms and laws of British Columbia, Dominion of Canada within thirty (30) days of notice of entry hereof, a deed of conveyance of said "Victoria Property" to Josephine Promis, Augusta Col, Mary Gillespie, A. G. Col and Josephine Andler, plaintiffs herein, and vesting in them the title thereto, subject to an encumbrance of Thirty Thousand ($30,000) Dollars now of record, and subject to no other liens or encumbrance whatsoever, and to do and perform, or cause to be done or performed such other act or acts as may be necessary or proper in the premises, to the end that the plaintiffs may be restored to the ownership and possession of said "Victoria Property"—which said "Victoria Property" is described as follows, to wit:

All and singular these certain parcels or tracts of land and premises situate, lying and being

Lots Three and Four, Block Seventy-five, Victoria City, recorded in Absolute Fees Book Fol. 22, Vol. 22, (Date of Registration May 10, 1904, 11, 10 a.m.).

Lots Eleven (11) and Twelve (12) Block Seventy-five (75) Map 219, Victoria City; recorded in Absolute Fees Book Fol. 30, Vol. 23. (Date of Registration, February 21, 1906, 10 a.m.).

Together with all improvements thereon.

It is further ORDERED AND ADJUDGED that in the event of the failure or refusal of G. E. Duke and/or Margaret E. Duke, defendants herein, to so convey said "Victoria Property" within said time, George E. Gross, Clerk of this Court, be, and he is hereby, appointed as Commissioner of this Court; and said George E. Gross, as such Commissioner, is hereby ordered and empowered to make, execute and deliver such deed, and cause the same to be so recorded and registered, and to do and perform any and all other acts as may be necessary or proper, to effect and perfect a conveyance of said "Victoria Property" to the plaintiffs herein named, as and for said G. E. Duke and Margaret E. Duke, defendants herein, as their act and deed.

It is further ORDERED, ADJUDGED AND DECREED that that certain instrument in writing designated as "contract of sale" dated the 25th day of September, 1925, and attached to Plaintiffs' complaint herein as Exhibit "A," wherein and whereby Josephine Promis, Augusta Col, Sophia Promis, Mary Gillespie and Oscar Promis, agreed to grant, transfer, sell and convey to G. E. Duke, one of the defendants herein, the said "Victoria Property" for certain considerations therein mentioned, be, and the same is hereby, cancelled and rendered null and void and of no effect whatsoever.

It is further ORDERED, ADJUDGED and DECREED, that the plaintiffs herein named do have and recover of and from the defendants G. E. Duke and Margaret E. Duke the sum of $16,804.11, together with plaintiffs' costs and disbursements incurred herein, taxed in the sum of $

Dated this 30th day of July, 1928.

(Sgd.) JOHN J. ALLEN,
Judge.

The defendants refused to execute a conveyance, as ordered by this judgment, and a conveyance was executed in their name by George E. Gross, County Clerk and Commissioner of the Superior Court, pursuant to the terms of the judgment.

The plaintiffs then brought the present action in the Supreme Court of British Columbia for a declaration that, by virtue of the conveyance referred to, or, alternatively, by virtue of the conveyance and of the judgment referred to, and in the further alternative by virtue of the judgment alone, the plaintiffs are the owners of and entitled to be registered as owners in fee simple of the Victoria property in question, subject to the mortgage of $30,000 and interest, mentioned above.

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There is the further claim that the court, in the exercise of its jurisdiction to implement the judgment of the Superior Court of the State of California, do vest the property in the plaintiffs.

Judgment was given, declaring that, by virtue of the judgment of the Superior Court of California and of the conveyance made in pursuance of it, the plaintiffs are the owners of the property in Victoria subject to the $30,000 mortgage and a certain registered lease, and that the property vest in the plaintiffs, subject to these charges.

On appeal, the Court of Appeal of British Columbia, by a majority of three to one, varied this judgment by striking out the first adjudicating paragraph and substituting a paragraph in different language, vesting the property in the plaintiffs.

Mr. Justice McPhillips, dissenting, would have allowed the appeal and dismissed the action.

From this judgment of the majority, the present appeal is taken.

The question involved is whether or not the judgment of the foreign court on the question of title and ownership of this real property situate in British Columbia is to be recognized as final and to be enforced by the courts of British Columbia.

The general rule that the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country is not disputed.

Considering the operation of foreign law in regard to real and immovable property, Story's Conflict of Laws (8th ed.), p. 591, says:

> And here the general principle of the common law is, that the laws of the place where such property is situate, exclusively govern, in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title therefore to real property can be acquired, passed and lost only according to the *lex rei sitae*. This is generally, although (as we shall see) not universally, admitted by courts and jurists, foreign as well as domestic.

Then, at page 757, paragraph 543, dealing with the jurisdiction of a nation over a person in its domain, there is the following:

> A suit cannot, for instance, be maintained against him, so as absolutely to bind his property situate elsewhere, and, *a fortiori*, not so as absolutely to bind his rights and titles to immovable property situate elsewhere.

Dicey's Conflict of Laws (4th ed.), p. 393, citing Story and Piggott (3rd ed.), has the following:

> The courts of a foreign country have no jurisdiction—(1) to adjudicate upon the title, or the right to the possession, of any immovable not situate in such country; or (2) (semble) to give any redress for any injury in respect of any immovable not situate in such country.
>
> The undoubted rule, in short, is that, if a court pronounce a judgment affecting land out of the jurisdiction, the courts of the country where it is situated—and, it is presumed, also the courts of any other country—are justified in refusing to be bound by it, or to recognize it; and this even if the judgment proceed on the *lex loci rei sitae*.
>
> This rule is merely an application of a more general principle that no court ought to give a judgment the enforcement whereof lies beyond the court's power, and especially if it would bring the court into conflict with the admitted authority of a foreign sovereign, or what is the same thing, the jurisdiction of a foreign court.

There is, however, a long line of cases in which it has been held that English courts will enforce rights affecting real estate in foreign countries if such rights are based on contract, fraud or trust, and the defendant resides in England.

An early case of this kind is *Penn.* v. *Lord Baltimore* (1), where an agreement in reference to lands in Pennsylvania made in England was sought to be enforced, the residence of the parties being in England. It was held that there was jurisdiction. The Lord Chancellor says, p. 447:

> The conscience of the party was bound by this agreement, and, being within the jurisdiction of this Court, which acts *in personam*, the court may properly decree it as an agreement, if a foundation for it.

See also *Deschamps* v. *Miller* (2).

In numerous decisions, however, besides *Penn.* v. *Lord Baltimore* (1), it has been pointed out that, in exercising jurisdiction in such cases, the courts act *in personam*.

In the case of *Lord Cranstown* v. *Johnston* (3), defendant, being a creditor of the plaintiff, obtained judgment in the Island of St. Christopher, and at the sale under the execution, of which the plaintiff had no notice, purchased the plaintiff's interest in lands of plaintiff there at much less than the value. Both parties residing in England, it was held there was jurisdiction, and the defendant was ordered to reconvey on payment of the amount owing.

In *Norton* v. *Florence* (4), Jessels, M.R., states that the decision in *Lord Cranstown* v. *Johnston* (3) must be understood as limited to jurisdiction *in personam*.

(1) (1750) 1 Ves. Sr. 443.
(2) [1908] 1 Ch. 856, at 863.
(3) (1796) 3 Ves. Jun. 170.
(4) (1877) 7 Ch. Div. 332.

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In *Paget* v. *Ede* (1), it was held than an equity of redemption is not an estate but merely a right, and that a decree of foreclosure, being a decree *in personam,* could be made in England as the mortgagor and mortgagee resided in England, though the lands were not in England.

In Re Pollard, Ex. P. In re Thomas Courtney and *George Courtney* (2), there is the following passage in the judgment:

It is true that in this country contracts for sale or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to operate *in rem;* but in contracts respecting lands in countries not within the jurisdiction of these courts, they can only be enforced by proceedings *in personam,* which courts of equity are constantly in the habit of doing, not thereby in any respect interfering with the *lex loci rei sitae.*

In *Angus* v. *Angus* (3):

To a bill brought for possession of lands in Scotland and for discovery of the rents and profits and of deeds and fraud in obtaining them, it was pleaded that the matter was out of the jurisdiction.

The Lord Chancellor says:

"This court acts upon the person as to the fraud and discovery, therefore the plea must be over-ruled. To have made this a good plea, there ought to have been a further averment, that the defendant was resident in Scotland. This had been a good bill as to fraud and discovery if the land had been in France, if the persons were resident here, for the jurisdiction of the court as to fraud is upon the conscience of the party.

"I am in doubt as to parts of the bill for relief; for I cannot give the plaintiff possession any other way than by compulsion on the defendant's person whilst it is within the jurisdiction of the court."

In *British South Africa Company* v. *Companhia de Moçambique* (4), it was held by the Queen's Bench Division that the courts in England had no jurisdiction to entertain an action for a declaration of title to lands in South Africa; and by the House of Lords, no jurisdiction to entertain an action for damages in such lands. Lord Herschell, p. 624, says:

No nation can execute its judgments, whether against persons or movables or real property in the country of another. On the other hand, if the courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication *in personam,* it is by no means certain that any rule of international law would be violated * * *.

And, at p. 626:

Whilst courts of equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here.

(1) (1874) L.R. 18 Eq. 118.
(2) (1840) 1 Mont. & C. 239.
(3) (1736-7) West T. Hard. 23.
(4) [1893] A.C. 602.

Lord Halsbury, at p. 631, says:

> There is a concurrence of opinion of most jurists, if not all, as to the difference between what we call realty and personalty, by whatever words those things are distinguished in the jurisprudence of foreign countries, which affects very materially the right to try. Vattel distinguishes the questions which may properly be tried when defendant has his settled place of abode, but always subject to this, that, if the matter relates to an estate in land or to a right annexed to such an estate (quoting Vattel) "in such a case, inasmuch as property of the kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends."

In *Henderson* v. *Bank of Hamilton* (1), in this court it is pointed out that courts of equity held that where personal equities existed between parties over whom they had jurisdiction, though such equities might have reference to lands situate without the jurisdiction, they would give relief by a decree operating not directly upon the lands, but strictly *in personam,* and that such decrees would have been unenforceable in the foreign jurisdiction, and might have brought the courts decreeing them into collision with the former, within whose local jurisdiction the lands were situated. *British South Africa Co.* v. *Companhia de Moçambique,* just referred to (2), is cited and relied on.

The title to real property therefore must be determined by the standard of the laws relating to it of the country where it is situated. The grounds upon which, and the circumstances under which a conveyance would be set aside under the law of California may differ from those under which it would be set aside under the law of British Columbia. The conveyance from appellant G. E. Duke to his wife, the appellant Margaret E. Duke, could only be set aside in British Columbia by virtue of the statute law of that province, and the courts of one country are not presumed to know the laws of another country.

In *Norris* v. *Chambres* (3), a claim was made for a lien on real property in Prussia. After stating a certain manner in which a lien on land may be acquired in England, the decision proceeds:

> Assuming this to be so, this is purely a *lex loci* which attaches to persons resident in England and dealing in land in England. If this be not the law of Prussia, I cannot make it so, because two out of three parties dealing with the estate are Englishmen, and I have no evidence before me that this is the Prussian law on this subject, and, if it be so, the Prussian courts of justice are the proper tribunals to enforce these rights.

(1) (1894) 23 S.C.R. 716. (2) [1893] A.C. 602.
(3) (1860) 29 Beav. 246.

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An adjudication as to title to the lands in question, to have any effect in British Columbia, must be an adjudication on the basis of British Columbia law relating to real property applied to the facts.

The objection to accepting the judgment of a foreign court as conclusive on a question of title to land is shewn by what is laid down by Lord Cottingham, L.C., in *Ex Parte Pollard,* cited above (1), in the following language:

> If, indeed, the law of the country where the land is situate, should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act, but where there is no such impediment, the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effects of such contract might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

The courts of California therefore must be assumed to have based their judgments on California law, without being influenced by any consideration of the effect on the title, of the contract and of equities arising from it and what followed, according to the law of British Columbia, and without any regard to the statute law of British Columbia bearing on the conveyance from George E. Duke to his wife.

It may be that on the facts as found, the courts of British Columbia, in applying the laws of British Columbia, would reach the same conclusion as the California courts, but it is to be remembered that findings of fact may in some cases be based on the particular law to be applied to them. For instance, a finding of fraud depends on what constitutes fraud under the particular law to be applied.

In any event, we must deal with the question as a general proposition, and not merely from the point of view of the facts in this particular case.

The question at issue here has come before the Supreme Court of the United States in a number of cases, but it is to be noted that there is a special clause in the constitution of the United States dealing with the credit to be given by the courts of one state to the judgments of the courts of another. It appears, however, that this clause does not make judgments of the courts of one state dealing with lands in another binding on the courts of the latter.

(1) (1840) 1 Mont. & C. 239.

In *Carpenter* v. *Strange* (1), the Court of New York State, where the parties resided, decreed that a conveyance of land in Tennessee alleged to be fraudulent was absolutely null and void. The courts of Tennessee refused to recognize this part of the judgment, and were upheld by the Supreme Court. The following is a passage from the judgment:

> The courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts (p. 106).

Again, in *Fall* v. *Eastin* (2), in the judgment of the same court there is the following passage:

> A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state and may well enforce its decree by process against the defendant. But neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court (p. 9).

Respondents put much reliance on the case of *Houlditch* v. *Donnegal* (3). Upon a bill in chancery in England by creditors a decree was made to execute the trusts of a deed by which lands in Ireland were vested in trustees for payment of debts. A receiver was appointed and an injunction granted, and a bill was filed in the Court of Chancery in Ireland to carry the former decree into execution. The Irish court held that it had no jurisdiction. It was held, reversing this judgment, that there was jurisdiction. The basis of this decision was that a foreign judgment is only *prima facie* evidence, and the propriety of the English decree might be enquired into in the Irish court.

This doctrine, that a foreign judgment is only *prima facie* evidence, is now considered erroneous. Dicey's Conflict of Laws, 4th ed., 449, and cases there cited.

Mr. Justice Martin places reliance on the cases of *Law* v. *Hansen* (4); *Nouvion* v. *Freeman* (5), and, in the House of Lords (6); and a number of others of similar import.

The remarks that he quotes from these decisions are the enunciation of the general rule that the judgment of a foreign court of competent jurisdiction having the force of *res judicata* in the foreign country has the like force in England.

(1) (1891) 141 U.S.R. 87.
(2) (1909) 215 U.S.R. 1.
(3) (1834) 8 Bligh 301.
(4) (1895) 25 Can. S.C.R. 69.
(5) (1887) 37 Ch. D. 244.
(6) (1889) 15 App. Cas. 1.

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The question here is whether or not the judgment of the foreign court in question, adjudicating on the right and title to real property in British Columbia, is one of the exceptions to this general rule.

The numerous decisions referred to above seem to establish beyond question that such a judgment is *in personam* only, and affects the conscience of the parties within the jurisdiction of the court, and stands on an entirely different footing in the courts of the country where the land is situated from the ordinary judgment coming within the general rule, such as a foreign judgment for debt.

In the present case the plaintiffs sue in British Columbia to enforce a judgment of the California courts deciding that the plaintiffs are the owners of the British Columbia land in question, rather than the defendants, one of whom is the registered owner. In California, it must be conceded that that judgment has effect only *in personam,* but if the courts of British Columbia were obliged to enforce it between the same parties, without question, there would be no practical difference, in effect, between such a judgment and a judgment for a debt, and the distinction so much insisted on in the authorities referred to would be of no real consequence.

In my opinion the rule stated by Dicey quoted above, that the courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immovable not situate in such country, and the statement in the authorities referred to, that controversies in reference to land can only be decided in the state in which it depends, and that judgments of foreign courts purporting to deal with the title and with rights to lands in another country can only be enforced by proceedings *in personam,* shew that the judgment of the court of California here in question does not, in British Columbia, affect the title to the lands in question, and is not a judgment that should be enforced by the courts of British Columbia as binding there on the parties.

The appeal should be allowed, and the action dismissed, with costs to defendants throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Crease & Crease.*

Solicitors for the respondents: *Walsh, Bull, Housser, Tupper & Molson.*

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jury would, if asked, have found the ultimate negligence consisted. This lack of proper instruction as to the law bearing on the questions at issue, coupled with the apportionment of the degree of negligence and the finding of ultimate negligence, indicates that there was confusion in the minds of the jury, which may have affected all the findings. There should be a new trial as to the claim under what is commonly referred to as *Lord Campbell's Act.* THE BRITISH COLUMBIA ELECTRIC RY. CO. *v.* KEY.... **106**

2——*Defective brake on railway car—Whether cause of death of operator of brake—Accident not seen—Jury's finding—Reasonable inference.*] An employee of defendant was killed while engaged in switching operations in defendant's yard. The accident was not seen, but he was found dead on the ground after "riding" down a "hump" a car which, as later found, had a defective brake. Plaintiff, mother of deceased, recovered, on verdict of a jury, judgment for damages, which was affirmed by the Appellate Division, Alta.—*Held*: Defendant's appeal to this Court should be dismissed. The jury were justified in concluding, as the reasonable inference from the facts and circumstances in evidence (nature and tendency of the defect in the brake, deceased's duty at the time, his operation and position when last seen before the accident, direction of car, position of body when found, etc.), that it was defendant's negligence in having in use the defective brake which caused deceased to fall and be killed. (*Jones* v. *Great Western Ry. Co.*, 47 T.L.R. 39, at 45; *Cottingham* v. *Longman*, 48 Can. S.C.R. 542, and other cases cited.) CANADIAN PACIFIC RY. CO. *v.* MURRAY..... **112**

3——*Accident—Cement mixer in public lane—Small child injured while playing—Machine unattended and unguarded — Liability—Common fault.*] The respondent, as father and tutor of his minor son, brought an action in damages against the appellant for injuries sustained by his son, then 7 years of age, resulting from a serious accident due to the alleged fault of the appellant. The respondent's son was playing with a small tricycle in a lane behind his father's house; in that lane, facing the house, the appellant had placed a cement mixer at a short distance from a garage which he was constructing. The respondent's son, on his tricycle, approached the mixer and put his hand on the machine while in motion, with the result that his hand was caught and drawn into the machine, where it remained until he was extricated. The evidence shows that the machine had been left unattended and unguarded at the moment

of the accident.—*Held*, that, according to the circumstances of this case, the appellant was liable.—*Per* Anglin C.J.C. and Lamont and Cannon JJ.—The allurement of a piece of machinery in motion for a small child is notorious, and anybody, operating such machinery upon, or so accessible from, a highway or public place as to make it dangerous to children lawfully about the neighbourhood, assumes the burden of so guarding the same as to make it practically inaccessible to them.—*Per* Anglin C.J.C., Lamont and Cannon JJ.—An issue of contributory negligence or common fault cannot be raised as a ground of appeal in the case of a child under eight years of age, such an issue being eminently for determination by the trial judge, who, in the present case, has found in favour of the respondent. BOUVIER *v.* FEE... **118**

4 —— *Landlord and Tenant — Fire in apartment building—Tenant of suite killed and his wife injured, in escaping; and property loss—Claim by wife against owner of building for damages—Negligence alleged, and found by jury, in owner of building, in arrangement existing for garbage disposal—Insufficiency of alleged negligence, under the circumstances, to constitute actionable negligence in law.*] Plaintiff's husband leased from defendant a suite in defendant's apartment building. On each floor, beside the freight elevator, and separated from the hall by swinging wooden doors, was a platform on which were garbage receptacles. A fire occurred in the building and in efforts to escape the plaintiff was injured and her husband was killed. For this and for property loss, the plaintiff sued for damages. The jury found that defendant was negligent in that it caused or allowed inflammable refuse to be deposited beside the elevator shaft and failed to safeguard such refuse against the danger of fire; that such condition amounted to a trap or concealed danger created by defendant and caused the injuries, death and loss; and judgment was entered for damages. The judgment was set aside by the Court of Appeal for Manitoba. Plaintiff appealed.—*Held*, affirming judgment of the Court of Appeal (39 Man. R.L. 399), that plaintiff could not recover (Anglin C.J.C. *dubitante*).—The principle of *Rylands* v. *Fletcher* (L.R. 3 H.L. 330) held not applicable.—The mere deposit and accumulation of inflammable material on an owner's premises does not make him responsible for damages resulting from a fire started in that material by some one else without his knowledge (*Laidlaw* v. *Crow's Nest Southern Ry. Co.*, 42 Can. S.C.R. 355).—Plaintiff could not recover for her husband's death unless he would have had a right of action arising out of

the wrong complained of, had he lived (*C.P.R.* v. *Parent*, 51 Can. S.C.R. 234; [1917] A.C. 195).—A tenant takes the premises as they are and at his own risk, no matter what condition of visible danger there may be (*Robins* v. *Jones*, 15 C.B., N.S., 221; *Lane* v. *Cox*, [1897] 1 Q.B. 415, at 417; *Taylor* v. *People's Loan & Svgs. Corp.*, [1930] Can. S.C.R. 190). Defendant's obligation to plaintiff's husband was a contractual one, under which the latter leased the premises and the approaches by which he had access to them, as they were. During his occupancy prior to, at the time of, and subsequent to the making of the lease, the arrangement for garbage disposal existed the same as at the time of the fire, and he and plaintiff knew of the condition and made use of the facility provided. Any danger therefrom was not a hidden danger, but one as obvious to the tenant and plaintiff as to defendant.—For plaintiff to succeed in her action for personal injuries and loss, she must establish the existence of some concealed trap; and there was no evidence of such. The negligence found by the jury did not in law constitute actionable negligence. (*Cavalier* v. *Pope*, [1906] A.C. 428; *Groves* v. *Western Mansions, Ltd.*, 33 T.L.R. 76; *Lucy* v. *Bawden*, [1914] 2 K.B. 318; *Fairman* v. *Perpetual Investment Bldg. Soc.*, [1923] A.C. 74, cited. *Indermaur* v. *Dames*, L.R. 1 C.P. 274, explained and distinguished. HEAKE *v.* CITY SECURITIES CO. LTD..... **250**

5 —— *Motor vehicles — Collision—Responsibility—Action under Families' Compensation Act, R.S.B.C.*, 1924, *c.* 85 (*Lord Campbell's Act*)—*Application and effect of Contributory Negligence Act, B.C.*, 1925, *c.* 8.] Plaintiff sued for damages for her husband's death in a collision between his automobile and defendant company's motor bus, on a wet morning, on Connaught Bridge, Vancouver. The trial judge gave judgment for plaintiff, which was reversed by the Court of Appeal, which dismissed her action (44 B.C. Rep. 24). She appealed.—*Held* (Anglin C.J.C. and Cannon J. dissenting): Plaintiff's appeal should be dismissed. Deceased was himself guilty of negligence, and the evidence did not establish negligence in the bus driver.—The question arose whether or not, deceased being guilty of negligence contributing to the accident, plaintiff's action was maintainable under the *Families' Compensation Act*, R.S.B.C., 1924, c. 85 ("Lord Campbell's Act"), having regard to the *Contributory Negligence Act*, B.C., 1925, c. 8. The judgment of the majority of the court, without deciding the question, assumed, for purposes of the judgment, that the action was maintainable.—*Per* Anglin C.J.C., dissenting: On the evidence, both deceased and the bus driver were equally guilty of negligence causing the accident, the fault of each being in driving at a speed which, under conditions existing, was excessive, and the effect of which continued right down to the impact. A case was thus made for the application of the *Contributory Negligence Act*. That Act is applicable to cases under the *Families' Compensation Act* for the purposes both of enabling plaintiff to maintain an action under the latter Act notwithstanding contributory negligence of deceased, and of providing for apportionment of the liability for damages; and as, in the present case, the evidence did not satisfactorily establish degrees of fault, the liability should be apportioned equally, and defendants held liable for one half the damages found.—*Per* Cannon J., dissenting: On the evidence, the bus driver was guilty of ultimate negligence, in that prior to the impact he did not do everything reasonably required of him to avoid the possible consequence of deceased's loss of control of his car; and the judgment at trial in plaintiff's favour should be restored. PRICE *c.* B.C. MOTOR TRANSPORTATION LTD..... **310**

6 —— *Contributory negligence — Action under Fatal Accidents Act, R.S.O.*, 1927, *c.* 183 (*"Lord Campbell's Act"*)—*Application and effect of Contributory Negligence Act, R.S.O.*, 1927, *c.* 103—*Excessive assessment of damages by jury—Insufficiency of findings—New trial.*] In an action under the *Fatal Accidents Act*, R.S.O., 1927, c. 183 (*"Lord Campbell's Act"*), where the deceased has been guilty of contributory negligence, and though his degree of fault has much exceeded that of defendant, the *Contributory Negligence Act*, R.S.O., 1927, *c.* 103, is applicable to enable the action to be maintained; and it is also applicable for the purpose of providing for apportionment of the liability for damages. (Lamont J., dissenting, *contra*).—Plaintiffs claimed damages for the deaths of the occupants of a motor car through its collision with defendant company's electric train. The jury found negligence both in defendants and in the driver of the motor car, assessed damages, and apportioned the fault, 25 per cent to defendants, and 75 per cent to the driver of the motor car. This Court *held* that, having regard to the evidence, the assessment of damages was unreasonably large and such as must have been occasioned by a misunderstanding of the basis upon which the amount ought to be determined; also that the jury should have been asked who was actually driving the motor car, and whether any of the other occupants stood in such a relation to the driver as to imply his responsibility for

jurisdiction. Nor would the facts that a part of the B.C. Co.'s line formed a connecting link between two lines of railway under the Board's jurisdiction, one of which extended beyond the limits of the province, and that the B.C. Co. handled traffic over its provincial lines to and from lines of railway under Dominion jurisdiction, extending beyond the limits of the province, pursuant to agreements with companies owning and operating those lines under Dominion jurisdiction, be a ground for invoking, s. 92 (10) (*a*) of the *B.N.A. Act* in support of the Board's jurisdiction. Nor could the order be upheld on the ground that it dealt with the regulation of trade and commerce. Nor did the Board have jurisdiction by virtue of ss. 314, 316 and 317 of the *Railway Act*, the remedying of any discrimination in the manner provided in the order involving, as it did, the exercise of jurisdiction over said mile of railway which was under provincial jurisdiction.—*Montreal* v. *Montreal Street Ry.*, [1912] A.C. 333, cited and discussed. *Luscar Collieries* v. *McDonald*, [1927] A.C. 925, distinguished.—*Per* Cannon J., dissenting: The B.C. Co. fell under the wording and operation of said s. 6 (*a*), and s. 6 (*a*) was *intra vires*. BRITISH COLUMBIA ELECTRIC RY. CO. *v.* CANADIAN NATIONAL RY. CO..... **161**

2——*Orders of Board of Railway Commissioners—Authorizing Construction of subways in connection with highway crossings—Directing appellants to move utilities—Railway Act, sections* 39, 255, 256, 257—*Jurisdiction of Board under the Act—Whether these sections apply to Canadian National Railways—Whether appellants "interested or affected by" the Orders—Railway Act, R.S.C.*, 1927, *c.* 170, *ss.* 33 (5), 39, 44 (3), 52 (2), 162, 252, 255, 256, 257, 259, 260—*Expropriation Act, R.S.C.*, 1927, *c.* 64—*Canadian National Railways Act, R.S.C.*, 1927, *c.* 172; 19-20 *Geo. V, c.* 10—*Canadian National Montreal Terminals Act, (D)* 19-20 *Geo. V, c.* 12.] The Canadian National Railways, a railway company within the legislative authority of the Parliament of Canada, applied to the Board of Railway Commissioners for the approval of plans and profiles for carrying its tracks across certain highways. The Board, in final Orders granting the applications, authorized the construction of subways or other structures in connection with the highway crossings and, at the same time, directed the present appellants, amongst others, to move such of their utilities as may be affected by the construction or changes so authorized. The appellants urged that the Board was without jurisdiction to make the Orders in so far as it directed the appellants to move their utilities; that, in any event,

the orders were made irregularly and not in accordance with the rules binding upon the Board; that sections 255, 256 and 257 of the *Railway Act* were not applicable to the Canadian National Railways and that the Board had not the power to compel public utilities companies to remove their facilities without previous compensation.—*Held* that these Orders were made within the exercise of the powers vested in the Board by the *Railway Act*, and more particularly by the provisions of sections 39, 255, 256 and 257 of that Act.—*Per* Duff, Rinfret and Lamont JJ.—The powers of the Board, under the sections above mentioned, are set in motion not alone at the request of the railway companies, but equally at the request of the Crown, of any municipal or other corporation or of any person aggrieved; or the Board may act *proprio motu*. The primary concern of Parliament in this legislation is public welfare, not the benefit of railways. With that object in view, almost unlimited powers are given the Board to ensure the protection, safety and convenience of the public, and it may prescribe such terms and conditions as it deems expedient, its decisions being conclusive as to the expediency of the measures ordered to be taken.—*Per* Duff, Rinfret and Lamont JJ.—The appellants fall within the class of companies or persons "interested or affected" by the Orders, within the meaning of section 39 of the *Railway Act*, and, therefore, could competently be ordered to do the works in the manner specified in these Orders, unless it be "otherwise expressly provided" in some other part of the Act. But there is no other section of the Act which provides that the Board may not order a subway or any other work contemplated by sections 256 and 257 to be constructed in whole or in part by a person other than a railway company.—*Per* Duff, Rinfret and Lamont JJ.—Sections 39, 252, 255, 256 and 257 of the *Railway Act* apply to the Canadian National Railways, as there are no other provisions, either in the *Special Act* or *Terminals Act* of the Canadian National Railways which are inconsistent with these sections of the Railway Act. Moreover, that being so, it is unnecessary to inquire whether they are inconsistent with the *Expropriation Act*, as that Act cannot prevail against the provisions of the *Railway Act* relating to highway and railway crossing plans.—*Per* Duff, Rinfret and Lamont JJ.—Applications under sections 252, 255, 256 or 257 of the *Railway Act* are not complaints within the meaning of subs. (*a*) of section 33 and the Board may conduct its proceedings in these matters in such manner as may seem to it most convenient. The Board itself is the proper

STATUTES—*Continued*