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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

AUGUST 1ST, 1913.

JONES v. CANADIAN PACIFIC RW. CO.

Negligence—Death of Fireman on Snow Plough—Employment of Incompetent Signalman—Breach of Statutory Duty—Common Employment no Defence—Charge to Jury—Alleged Misdirection to be Read as Whole—Absence of Direct Evidence as to Proximate Cause—Right of Jury to Rely on Inferences.

Plaintiff was the widow and administratrix of Gilbert Jones, a locomotive fireman employed by defendants, killed by a collision between a snow-plough upon which he was riding and another train. The snow-plough was, as far as the giving of the necessary signals was concerned, in charge of a section foreman of no experience and who had never passed any tests for fitness. This was a violation of an order of the Board of Railway Commissioners. Defendants admitted liability under the Workmen's Compensation Act and paid into Court $2,000. CLUTE, J., gave judgment in favour of plaintiff for $6,000 and costs upon the findings of a jury.

COURT OF APPEAL, 22 O. W. R. 439; 3 O. W. N. 1404, *held*, that the findings of the jury were inconclusive and the Judge's charge misdirected the jury insomuch as he did not advise them that the mere breach of the statutory duty did not render defendants liable, but that in addition there must be injury to the deceased resulting from such breach. A new trial was ordered.

PRIVY COUNCIL *held*, that the defence of common employment was no defence when the negligent employe was selected in breach of a statutory enactment.

Johnson v. *Lindsay*, [1891] A. C. 382, and other cases referred to.

That taking the Judge's charge as a whole there was no misdirection therein.

Clark v. *Molyneux*, 3 Q. B. D. 237, 243, referred to.

That while there was no direct evidence that the inefficiency of the section foreman in charge of the signals was the proximate cause of the accident, yet the jury were entitled to make such a finding, the logical inference to be drawn from the circumstances, constituting evidence of such fact.

Ayles v. *S.-E. Rw. Co.*, L. R. 3 Ex. 146. *McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72, referred to.

Appeal allowed with costs and judgment of trial Judge restored.

Appeal and cross-appeal by special leave from a judgment of the Court of Appeal for Ontario dated the 18th June, 1912, 22 O. W. R. 439; 3 O. W. N. 1404, setting aside the

judgment of CLUTE, J., upon the findings of a jury entered on the 24th November, 1911, and directing that there should be a new trial of the action or that, in the event of the plaintiff accepting the sum of $2,000 paid into Court by the defendants, judgment be entered for the plaintiff for that sum.

The appeal was heard by LORD ATKINSON, LORD SHAW and LORD MOULTON.

Sir Geo. C. Gibbons, K.C., and Geo. S. Gibbons, for the appellants.

Sir Robert Finley, K.C., A. McMurchy, K.C., and Geoffrey Lawrence, for respondent railway company.

LORD ATKINSON:—The action was brought by the plaintiff, as administratrix of the estate of Gilbert Jones, deceased, for damages under the Ontario Statute R. S. O. 1897, ch. 166, corresponding to the Fatal Accidents Act in England, in respect of the death of the said Gilbert Jones, who was on the 14th February, 1911, killed in a collision at Guelph Junction between a snow-plough belonging to the defendants and a train belonging to the defendants which was standing in a siding at the said junction. A claim was also made under the Ontario Workmen's Compensation for Injuries Act, liability for which was admitted.

This snow-plough is used to clear the railway line of snow. It is a high truck or waggon furnished in front with metal scrapers, which can be raised or lowered by mechanism worked from the inside, and is also furnished with two wings, one on each side, which can by a similar mechanism be spread out or folded to the sides of the waggon as required. The function of the scraper is to lift the snow off the ground; the function of the wings is to throw it, when raised, off the track. The plough is built with a cupola, as it is styled, on its roof, in which windows are fitted both at the front and at the sides, through which the person in the cupola can get a clear view of what is in front and at the sides of the lines of railway. The plough is also connected by a cord with the engine, by which the steam whistle on the engine can be sounded. The plough placed in front of the train is pushed from behind by a locomotive engine and can be driven at a rate of 20 miles an hour or more.

On the 14th of February, 1911, a train consisting of a snow-plough in front, an engine next, and a caboose or car used by the conductor and brakesman behind, was sent out.

An order called a train order was issued by the proper officials, and was read by the conductor, engine-driver, and a man named Weymark, who travelled in the plough with Gilbert Jones, the deceased, to the effect that the train was to proceed from the city of London to Guelph Junction, and there meet certain trains. It did so. One at least of the expected trains had arrived at Guelph Junction before this snow-plough train.

The proper semaphore red light signals, home and distance, were properly set at Guelph Junction station some time before the arrival of the snow-plough train, but, in entire disregard of them, it steamed into the station and collided with one of the trains it was to meet there, the latter being at the time engaged in getting from the main line into a siding. In this collision Weymark and Jones were both killed. An accident of this kind suggests the greatest want of skill or the utmost negligence in the working and management of this plough train. The employee whose duty it was to look out for the signals ahead, and to draw the necessary conclusions from them if observed, was either incapable of seeing them, or of drawing those conclusions from them if seen, or of taking the necessary action to secure the safe arrival of this train at its destination, or, being possessed of the skill, knowledge, and experience sufficient to enable him to discharge these various duties, he negligently omitted to perform them. Now, the defendant company gave no evidence at the trial.

The statement of claim bases the plaintiff's right to recover on the violation by the company of a statutory duty imposed upon them, namely, by putting in charge of this plough one Henry Weymark, who was merely a section foreman, or, as he would be styled in this country, a linesman, i.e., one whose business it was to see to the keeping in order of a portion or portions of the permanent way, and who had not passed the examination or submitted to the test required by the 5th of the orders of the Board of the Railway Commissioners of Canada of the 9th November, 1910, to be passed by and submitted to every person whom the defendant company should permit to "engage in the operation of trains or handle train orders."

The driver of the engine of the plough train, the conductor of that train, Chas. Kelleher, the conductor of the train with which the plough train collided, Arthur Kelly, and the brakesman of this latter train were all examined as witnesses on behalf of the plaintiff.

By their evidence the following facts were proved. That the plough is as high as the engine, that it to a great extent blocks the view ahead of the engine-driver and fireman; that from Woodstock, a station on the line between the city of London and Guelph Junction, there was snow on the line; that from that station the plough was throwing out snow as it moved along, that the engine-driver's view in front was thereby entirely obscured, that he could not see ahead at all, and that he was obliged to control and work his train by the whistles sounded by the men in the plough; that Weymark was in charge of the plough; that it was his (Weymark's) duty to whistle when approaching a level crossing or a station; that he, Weymark, and his assistant, Jones, were the only officials on the train who could see ahead; that the driver relied upon Weymark to give the proper whistles, and that from a crossing half a mile beyond a station named Schaw, six miles distant from the place of collision, Weymark gave no whistle, made no communication of any kind to the engine-driver, though apparently he had duly whistled about half a mile away from that station as he was approaching it and had also apparently whistled properly up to other points; that it was Weymark's duty to whistle a long whistle a mile from each station and a quarter of a mile from level crossings; that Weller, the engine-driver, slackened down his speed to 12 miles an hour when he thought he was approaching Guelph Junction, but that he could not judge how fast he was going in a storm like that which prevailed at the time, and that he was waiting for Weymark to give the signal to stop.

The collision took place about 7.10 to 7.15. The general train rules of the company were put in evidence. There was no evidence given that Weymark had ever had charge of a plough before, or ever had even travelled in one.

The order of the Railway Commissioners runs as follows:—

"No railway company shall permit any employee to engage in the operation of trains, or handle train orders, without first requiring such employee to pass an examination

on train rules and undergo a satisfactory eye and ear test by a competent examiner."

It was not suggested that the Commissioners had not jurisdiction to make this order, or that it had been complied with in Weymark's case.

The 427th section of the Canadian Railway Act provides as follows:—

"Any company, or any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such company, that does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders or directions of the Governor in Council, or of the Minister or of the Board made under this Act, or omits to do any matter, act or thing thereby required to be done on the part of any such company or person, shall, if no other penalty is provided in this or the Special Act for any such act or omission, be liable for each such offence to a penalty of not less than twenty dollars and not more than five thousand dollars in the discretion of the Court before which the same is recoverable."

"Such company, director, officer, receiver, trustee, lessee, agent or person shall also, in any case, in addition to any such penalty, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby."

The company whose officers permit any employee not qualified in the way prescribed to do work such as Weymark was put to, i.e., to engage in the operation or working of a train, is thus made liable in damages to any person injured by their breach of this statutory duty.

The defendant company in the present case did not rely upon any contributory negligence on Jones's part. And it does not appear to their Lordships that they could, even apart from the above-mentioned provision of the Railway Act, have relied upon the fact that Weymark and Jones were fellow-servants, since Weymark was placed in the position he held in breach of the employer's clear statutory duty, and the breach of such a duty by an employer is not one of the risks which a servant can be assumed to undertake to run when he enters that employer's service. Lord Watson in *Johnson* v. *Lindsay*, [1891] A. C. 371, p. 382, states the general common law principle thus:—

"The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow-servant who has been selected with due care by his master.

It is difficult to see on what principle a servant can be said to be selected with due care by his master when the master, in defiance of a positive statutory prohibition, selects for a particular work a servant whose fitness for that work has never been ascertained in the manner prescribed.

Moreover, there is an entire absence in this case of all evidence to shew that Weymark was in fact fitted to discharge the duties he was put to discharge, or was ever considered so to be by any responsible official of the company. It is not at all the case of a servant of proved and known efficiency for a particular work being selected to do that work without having passed a test which his employers knew, or *bona fide* and reasonably believed, he could pass. Not at all. The defendant company abstained from giving any evidence to that effect. They took that course no doubt for good reason, but they must bear the consequence.

The principle upon which the cases of *Groves* v. *Wimborne*, [1898] 2 Q. B. 402; *David* v. *Britannic Merthyr Coal Company*, [1909] 2 K. B. 146; and *Butler* v. *The Fife Coal Company, Ltd.*, [1912] A. C. 149, were decided, applies, in their Lordships' view, to the present case. In the first-mentioned of these cases it was held that the doctrine of common employment does not apply where a statutory duty is violated by the employers. In the second, the Master of the Rolls, at p. 152, says:—

"But, on the other hand, a master is liable to his servant for the consequences of an accident caused to that servant by the breach of a statutory duty imposed directly and absolutely upon the master, and the master cannot shelter himself behind another servant to whom he has delegated the performance of the duty. In such a case the negligence is the master's negligence, and the doctrine of common employment has no application."

And at p. 157, Moulton, L.J., as he then was, says:—

"The risk of an employer failing to perform a statutory duty incumbent upon him seems to me to be clearly not a

risk that can be considered one of those which the workman must be assumed to have accepted. On the contrary, he in his position as a member of the public has a right to assume that his employer will fulfil the duties which the statutes impose upon him. But we are not left to decide this question only as a matter of principle. There is clear authority to the same effect. In the case of *Groves* v. *Lord Wimborne* this Court decided that the defence of a common employment is not applicable in a case where injury has been caused to a servant by the breach of a duty imposed on the master.

And in the last case of the three, Lords Kinnear and Shaw, at pp. 160, 162 and 174 of the reports, expressly approve of the decision in the last-mentioned case, and Lord Loreburn apparently concurred with them. Indeed it appears to their Lordships that the above mentioned decisions on this point are but applications of the principle laid down in 1856 by the then Lord Chancellor and approved of by the other noble lords in the House of Lords in the case of the *Bartonshill Coal Company* v. *Reid*, 3 Macqueen 266, at pp. 276, in these words:—

"With reference to the law of England, I think it has been completely settled that in respect of injuries occasioned to one of several workmen engaged in a common work (and I know of no distinction whether the work be dangerous or not dangerous) the master is not responsible if he has taken proper precautions to have proper machinery and proper servants employed."

Such being the position and rights of Jones, the deceased, and such the evidence in the case, the learned Judge who presided at the trial left to the jury the following questions, and received from them the following replies:—

1. Were the defendants guilty of negligence that caused the death of Gilbert Jones? A. Yes.

2. If so, what was the negligence? A. By not having a competent employee in charge of snow-plough train.

3. Did the defendants permit Weymark to engage in the operation of the train on which Jones was when he came to his death without first requiring such employee to pass an examination in train rules and undergo a satisfactory eye and ear test by a competent examiner? A. Yes.

4. Did the plaintiff suffer the damage complained of thereby? A. Yes.

5. Did the deceased come to his death by reason of the defendants operating the railway by a negligent system? A. Yes.

6. If so, what was the negligent system? A. By allowing Weymark to operate a snow-plough train without having passed the eye and ear test.

7. Might the deceased, Gilbert Jones, have avoided the accident by the exercise of reasonable care? A. No.

8. At what sum do you assess the damages? A. Six thousand dollars.

(a) To the widow $3,500.

(b) To the daughter $500.

(c) To the son $2,000.

The learned Judge, accordingly, on the 3rd October, 1911, gave judgment for the plaintiff in accordance with the finding of the jury.

The respondents, with the consent of the plaintiff, appealed direct to the Court of Appeal for Ontario, and by the judgment appealed from the latter Court set aside the judgment of the trial Judge on the ground of misdirection and ordered a new trial, on the terms, however, that if the plaintiff would accept the sum of $2,000 paid into Court to the credit of the action, and if the company did not object thereto, judgment should be entered for the plaintiff for that sum.

The misdirection relied upon by the Court of Appeal is, as stated by Mr. Justice Meredith, this, that the jury were not told, as they should have been, that the mere breach of the rule or order of the Commissioners did not give a right of action, that injury must flow from that breach to give such a right, and that unless the injury was caused by the incapacity or negligence of the signalman the plaintiff had no right of action, and again at p. 60 he says:—

"Upon the whole evidence it might reasonably be found that the accident was not caused by any want of qualification or negligence on the part of the signalman, and in that case the defendants' liability would be limited, because, as the defendants admit, the accident was caused, not by any breach of the rule, which, it is admitted, has the effect of an enactment, but by the negligence of the engineer a fellow workman in common employment with the man in respect of whose death this action is brought."

No doubt the learned trial Judge did make to the jury the remarks quoted in the judgment of Mr. Justice Meredith at p. 59 of the Record, but the latter learned Judge omits to notice that earlier in the learned trial Judge's summing up he had addressed to the jury the following words:—

"I must tell you that the company would not be liable for the death of this person while in their employ unless they had neglected some duty owing to him by reason of which the death was caused, that is negligence upon their part."

It appears to their Lordships that this is a clear statement that the violation by the defendants of their statutory duty would not entitle the plaintiff to recover unless the injury to the plaintiff followed from that breach, that is, that the breach of the statutory duty was either the sole effective cause of the injury, or was so connected with it as to have materially contributed to it.

Again at p. 44 the learned trial Judge put to the jury the question, "Has there been a "breach of that rule? Has that breach resulted in the death of Jones?" And again at p. 45, the learned Judge said:—

"The different questions are put in order to bring out your views as far as they can be brought out as to what was the cause of the death of this man, and what was the negligence (if any) on the part of the company, and whether that negligence resulted in the death."

Thus the learned trial Judge has in effect told the jury what Mr. Justice Meredith says he ought to have told them. If the charge of the learned Judge be taken as a whole, as it ought to be (*Clark* v. *Molyneux*, L. R. 3, Q. B. D. 237, 243), and its general meaning and effect be judged of when so taken, their Lordships think that the jury were not left under any erroneous impression whatever as to the real nature of the issues they had to determine, or at all led to think that they were entitled to find for the plaintiff unless they were of opinion that the negligence of the defendants in employing Weymark for the work he was set to do was the cause of the death of Jones. They are, therefore, of opinion that the order directing a new trial on the ground of misdirection cannot be sustained. There remains, however, the much more difficult question raised by the cross-appeal of the respondent company, namely, whether they were entitled to have a verdict entered for them on the ground that there was no evidence before the

jury upon which they could reasonably find that the breach by the company of their statutory duty caused, in the sense already mentioned, the death of the deceased. Many conjectures may no doubt be indulged in as to how it came about that neither Weymark nor Jones sounded the whistle, or applied the brakes they had at their command, or made any communication to the engine-driver, but disregarded all the signals, and allowed the train to steam into the station and collide with one of the trains awaiting them. But is not the most probable reason this, that Weymark was unskilled in, and unfit for, and without any experience of, the difficult work he was set to do? His eyes were in truth the eyes of the engine-driver and fireman. These latter might as well have been actually blind for all that their eyesight enabled them to see. Weymark's ordinary occupation, repairing the permanent way, afforded no training for work such as this; he apparently had no other training, at least no other was proved to have been undergone by him. He was not proved to have been considered in any way fit for the work. He was not tested, and, was it not reasonable for a jury to have believed that he was not tested because he could not pass the test?—No reason was given why he was not subjected to the test. In *Ayles* v. *South-Eastern Railway Company*, L. R. 3 Ex. 146, a train belonging to the defendants was, while stationary outside Cannon Street Station, run into by another train. Several railway companies had running powers over the part of the defendants' line at which the collision occurred. There was no proof as to whether the moving train belonged to, or was under the control of the defendants, but it was urged that no train could pass over their line without some arrangement with them, or by their authority and subject directly, or indirectly, to their control. It was held that in the absence of evidence to the contrary it must be held that the train which caused the accident belonged to or was under the control of the defendants. Baron Martin, at p. 149 of the report, said:—

"The collision which did take place ought not to have taken place. Then what is the presumption as to the ownership of the train which caused the mischief? I think the jury might properly say that it was, in the absence of evidence to the contrary, under the control of the company to whom the line belonged. The fact is not 'proved,' perhaps, but 'proof' of a fact is one thing and 'evidence' of it to go to a jury is another."

In *Williams* v. *The Great Western Railway Company,* L. R. 9, Ex. 157, a child of tender years was found upon a footpath crossing a line of railway on the level, upon which footway the company were bound by statute to erect gates but did not do so, with one of its feet severed from its body by a passing train. It was contended that notwithstanding the negligence of the company in respect of not erecting the gates, this negligence was not so connected with the accident as to entitle the plaintiff to recover; but it was held that though there were many possibilities as to how the accident might have happened, the negligence was so reasonably connected with it as to allow of a jury saying that it did in fact give occasion to it; and that the case ought therefore to have been left to the jury.

In *McArthur* v. *Dominion Cartridge Company,* A. C. (1905) 72, the plaintiff had obtained a verdict against the defendant for $5,000 damages for injury sustained by him while in the defendant's employment, caused by an explosion of an automatic loading machine used in this factory. The explosion was instantaneous and it was not actually proved how it was caused. Evidence was given that the machine had many times failed to work properly, that cartridges were frequently presented in a wrong posture, and that a blow consequently fell sometimes on the side of the cartridge and sometimes on the metal end where the percussion cap was placed. Lord Macnaghten, in delivering the judgment of the Judicial Committee of the Privy Council reversing a judgment setting aside the verdict, said, p. 76:—

"It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator."

In *Richard Evans & Company* v. *Astley* (1911), A. C. 674, a case under the Workmen's Compensation Act, two trains, both belonging to the appellants, were being pushed into a siding, had passed one set of switches, and were approaching another. The deceased was the guard or brakesman of the hindermost, he was stationed in a brake truck. This truck was in touch with, but was not coupled to, the brakesman's van of the other. It was easier to

descend from the van than from the wagon. The guard in the van was about to make his tea. The deceased endeavoured to clamber from his truck into the van. He fell and was killed.

There was no evidence whatever as to what was the object of the deceased in seeking to get into the guard's van. It was suggested it might have been to get a cup of tea from the guard who was about to make his tea, or to gossip with him, or it might possibly have been to descend on to the line to hold open the points the trains were approaching, as it might have been his turn to do so, the other guard having admittedly opened the other points, but no evidence was given as to whether it was the practice for guards to do this work alternately as suggested.

The County Court Judge drew from these facts the inference that this last-mentioned object was the object of the deceased; that he was therefore about to do his master's work, and that consequently the accident arose out of his, the deceased's employment. The case of *Wakelin* v. *London and South Western Railway Company*, 12 A. C. 41, was much relied upon, but it was held by the Court of Appeal and by the House of Lords that the County Court Judge was justified as a judge of fact in drawing the inference he had drawn, and that there was evidence sufficient to support his finding. Lord Loreburn at p. 678 of the Report in the former case says:—

"It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities. In the present case, the theory that this man climbed upon the van or tried to do so for his own purposes, whether to gossip with the other brakesman or to amuse himself, seems to me most improbable. The theory that he meant to get upon the van because in a couple of minutes the train would be passing the points, and he had to arrange the point, and would save time by alighting where the points were, and could conveniently do so by using the

steps which were on the brakes van, whereas there were none on the truck, seems to me very probable."

Applying the principle of these authorities, which could be multiplied, to the present case, their Lordships think that the reasonable conclusion to draw from the evidence is that the flagrant failure of Weymark to discharge his duty on this occasion was most probably due to his want of skill, knowledge, or experience, or to some physical incapacity or defect which the examination or test prescribed for him would have revealed. If so, this failure was but a natural consequence of the act of the company in setting him, such as he was, to do the work actually set him to do; and that their action in that respect was either the sole effective cause of the accident or a cause materially contributing to it. Their Lordships are, therefore, of opinion that there was evidence before the jury from which they could have reasonably drawn the conclusion at which they arrived; that the case could not have been properly withdrawn from them; and that, therefore, the appeal of the appellant should be allowed with costs, and the cross-appeal of the respondents dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: Fox & Preece.

Solicitors for respondents: Blake & Redden.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

AUGUST 7TH, 1913.

IMPERIAL PAPER MILLS OF CANADA, LIMITED, v. QUEBEC BANK.

Banks and Banking — Advances by Bank to Milling Company—Security Taken on Timber under Promise in Writing to Give Security—Validity of Security under s. 90 of the Bank Act—Company in Liquidation—Issues to be Determined—Forum for—Right of Bank to Defend Action without Leave and Press Claim to Timber—Description of Property—What is Necessary to Identify?—Lien of Bank for Payment of Government Dues — Rights of Liquidator—Receiver—Action for Injunction—Damages—Costs.

Action by plaintiff company and one Clarkson, receiver for the bondholders of the company, against defendant bank, for an injunction, and for the recovery of certain spruce and balsam logs claimed by defendant under certain securities taken from the company for advances under s. 90 of the Bank Act. The bond mortgages under which plaintiff Clarkson claimed, expressly excepted from their operation "logs on the way to the mill." The advances made from time to time by defendant bank were made on the strength of letters from plaintiff company to defendant bank, promising that security would be given, and plaintiff urged that they were not sufficiently precise and definite to meet the requirements of the statute.

BRITTON, J., *held*, 19 O. W. R. 908; 2 O. W. N. 1503, that the logs in question were, in part, those covered by the securities given to the defendant bank, and that the advances were made to plaintiff company on the strength of the promises that such securities would be given.—That plainitff company, having admitted all along that the logs belonged to defendant bank, the liquidator was in no higher position than plaintiff company, and was not in a position to dispute the validity of defendant bank's claim.

Rolland v. *L'Caisse d'Economie*, 24 S. C. R. 405, followed. That the letters promising to give the securities in question, were sufficiently definite to satisfy the statute, as was also the description of the property covered by such securities.—Rules as to description of property as set out in Falconbridge on Banking, pp. 188-9, approved of and adopted.—Judgment for defendant, with costs.

Court of Appeal, 26 O. L. R. 637; 22 O. W. R. 703; 3 O. W. N. 1544, affirmed above judgment with costs.—*Per* MACLAREN, J.A.:—Section 90 of the Bank Act should not be construed so strictly as to require a precise and technical promise or agreement to give security where the transactions are honestly conducted and aboveboard.—*Per* MEREDITH, J.A.:—"Logs on the way to the mill" embrace all logs from the time they are cut in the forest until they reach the mill, notwithstanding they are delayed in transit.

PRIVY COUNCIL *held*, that the exception of "logs on the way to the mill" embraced all such logs during the currency of the mortgage and not only such logs at the date thereof.

That mere vagueness in description does not avoid a contract if the articles in question are in fact capable of ascertainment.

Tailby v. *Official Receiver*, 13 A. C. 523, followed. Appeal dismissed with costs.

Appeal from the judgment of the Court of Appeal for Ontario, dated the 28th June, 1912, 26 O. L. R. 637; 22 O. W. R. 703; 3 O. W. N. 1544; which affirmed the judgment of

the High Court of Justice for Ontario, dated the 11th August, 1911, 19 O. W. R. 908; 2 O. W. N. 1503, dismissing the appellants' action.

The appeal was heard by LORD ATKINSON, LORD SHAW, LORD MOULTON, and LORD PARKER OF WADDINGTON.

LORD SHAW:—In September and November, 1903, the Imperial Paper Mills Company executed certain mortgage deeds of trust to secure first and second mortgage bond issues for sums of £100,000 and £200,000 respectively. Nearly all the bonds comprised in both issues were at the time of the action outstanding and unpaid.

The appellant, Mr. Clarkson, was at that time receiver of the assets of the paper mills company comprised in these bond mortgages, having been appointed in a bondholders' action on the 7th October, 1907. In the following year, namely, on the 26th September, 1908, the paper mills company was declared insolvent and ordered to be wound up, Mr. Clarkson being appointed liquidator on the 19th November following. He thus represents all the rights of the Imperial Paper Mills Company and of the mortgage bondholders. The morgtages were granted over "generally the whole assets real and personal and the property undertaking and franchises of the company now owned or enjoyed by the company or in which the company has any right or interest, or which may hereafter be acquired by the company (excepting logs on the way to the mill)."

The matter in issue is the right to the proceeds of certain spruce and balsam logs cut by the Imperial Paper Mills Company. These logs at the time of the action had been brought down the tributaries of the Sturgeon River to McCarthy Creek. They are claimed by the respondents, the Quebec Bank, under certain securities which were granted by the Imperial Paper Mills Company but are subsequent in date to the bond mortgages referred to. On the other hand, the paper mills company and the receiver claim that these bank securities are unavailing as against the rights under the mortgages. These rights, they maintain, cover all the logs in question which were not "on the way to the mill" at the date of the mortgage. Being "on the way to the mill" only at subsequent dates, it is contended that they are not excepted from the assets which the mortgages cover.

The first question in the case is, what is the meaning and scope of this exception? Is it confined to logs on the way to the mill at the date of the mortgage, or is it a general reference to the present and future of the company and an exception of logs on the way to the mill in the ordinary course of their current business?

A later portion of the mortgage declares that the instrument is intended to cover all the property, assets, etc., "and the right to operate the said undertaking in business as a going concern, but except as hereinbefore expressly excepted." In a still subsequent passage the language of charge is in this form: "And the company hereby charges in favour of the trustees its other assets for the time being both present and future, including its uncalled capital (if any), calls in arrear and its undertaking, but excepting logs on the way to the mill," the charge to be a floating charge.

In the opinion of their Lordships, the Courts below have come to an entirely correct conclusion as to the scope of this exception. It was not limited to logs on the way to the mill at the date of the mortgage. It was an exception made truly in the interest of all parties and with the distinct view of facilitating those ordinary financial arrangements which were only possible if advances could be made upon logs in transit during the general and regular course of the trade. To exclude logs on the way to the mill from time to time, which logs provided a means of furnishing a legal security for periodic advances, might be to arrest the industry and to operate seriously to the prejudice of all concerned, including the mortgagees themselves.

The evidence substantially shews that the mode of conducting business was as follows:—(1) An application for advances to cover the expenses in connection with cutting and floating of the timber; (2) in the general case, an inspection by the representatives of both parties; (3) a proportioning of the advances so as to meet the financial requirements; (4) the advance itself—an advance made by instalments and at short intervals; and (5) an accumulation of these instalments into the security granted over the logs. When the logs reach the mill, the final stage takes place in the usual case, namely, that the advances are paid, and the logs, thus, so to speak, on the verge of the open market, are accordingly released. This manner of trading is largely bound up with the success of pioneer or development work. As already mentioned, this whole scheme of working and development would be arrested

unless the logs during the whole course of the contract were excepted from the general mortgage upon the Imperial Paper Mills Company's assets, and were left available as a security for advances proceeding also during the whole course of the contract.

Their Lordships are further impressed by the fact that this, which is pre-eminently a matter of business in which local knowledge is of high advantage, all the Judges in the Courts below are in no manner of doubt.

The next point in the case is this: it is said on behalf of the mortgagees that, even although it should be found that the logs in transport during all the course of the contract were excepted from the mortgage over the general assets, yet the form of the security to the Quebec Bank was bad.

A very lengthy argument was presented to the Board upon this subject, but towards its conclusion it came to resolve itself into this, that the security taken was disconform to sec. 88 of the Bank Act of Canada, the statute being ch. 29 of the Revised Statutes of 1906. It should be premised with reference to this statute that under sec. 76 (2), "except as authorised by this Act the bank shall not lend money or make advances upon the security, mortgage, etc., of lands." This exception as to the provisions of the Act being thus made, the subsequent sections then proceed in positive terms to give very large and indeed comprehensive powers for taking, holding and disposing of mortgages upon real or personal, immovable or movable, property (sec. 80); and in sec. 88 there are two portions, namely, sub-secs. (1) and (3), which seem completely to cover the present case. The first sub-section provides that "the bank may lend money to any . . . dealer in products of . . . the forest." Sub-section (3) provides that "the bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares, and merchandise, upon the security of the goods," etc. And by sub-sec. (5) it is provided that the security may be taken in the form set forth in schedule C. The schedule appears to be not compulsory but optional and a guide. It is further provided (sub-sec. (6)) that "the bank shall by virtue of such security acquire the same rights and powers in respect to the goods . . . as if it had acquired the same by virtue of a warehouse receipt." Schedule C., however, was also founded upon, being the form in which the security is to

be taken. The concluding passage of it is as follows: "The said goods . . . are in (place or places where the goods are) and are the following (description of goods assigned)."

Samples of the securities taken are given in the record, and the description, which according to the argument must be held to be too vague, is as follows: "The said goods, wares and merchandise are now owned by us and are now in the possession of us and are free from any mortgage, lien or charge thereon, and are in and on the banks of the Sturgeon River and tributaries, and are the following, '40,000 cords of logs.'"

In their Lordships' opinion, the argument presented to the Board on this subject of vagueness in description is entirely met by the well-known rules of law laid down in *Tailby* v. *The Official Receiver*, 13 A. C. 523.

"Mere difficulty in ascertaining all the things which are included in a general assignment, whether *in esse* or *in possee*, will not affect the assignee's right to those things which are capable of ascertainment or are identified. Lord Eldon said in *Lewis* v. *Madocks*, 'If the Courts find a solid subject of personal property they would attach it rather than render the contract nugatory.'"

In the case of Tailby, in fact, it was held that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined. And reference may be made to the analysis of the case law on the subject in the judgment of Lord Macnaghten. He affirms broadly the proposition that the vagueness in the case being dealt with did not void the security, and uses this language:—

"When the consideration has actually passed, it is difficult to suppose anything less consonant with equity than a rule which should lay down that a man who has had the benefit of the contract may escape from its burthen merely because he has promised what he can perform and something more too, and promised it all in one breath, and in the most compendious language."

So far as the Paper Mills Company are concerned, they have had the advantage of the advances: and the objection to the form of security granted by the Mills Company, when it proceeds from Mr. Clarkson as liquidator of that company, would seem to be open to Lord Macnaghten's observation as to its being not consonant with equity.

But in so far as the appellant represents the mortgagees, a different consideration might possibly come into play were it

not that the facts of this case appear conclusively to demonstrate, not only that the security was not vague, by reason of the subject of it, namely, the particular logs, being incapable of ascertainment, but that in point of fact, the logs were ascertained. They were known and denominated as "the McCarthy Creek logs." What happened to them, for instance, was this, according to the admissions of Mr. Craig, one of the interim receivers:—

"Q. The plan was that a letter of promise was taken, and then the supplies or men were sent into the bush, and you drew a cheque for whatever you needed on the Quebec Bank, and ultimately, when the logs came out and were skidded and scaled, the security was taken; that is the general course of operations. Now, were these McCarthy Creek logs always recognized as being pledged to the bank? A. Yes, they were all included in the general security to the bank.

Q. Always recognized by you as managing director? A. Yes.

Q. And as receiver, as being pledged to the bank? A. Yes.

Q. Your answer to that is yes? A. Yes, pledged by the company to the Quebec Bank. They were part of the securities supplied to the Quebec Bank recognized by the company."

The evidence need not be gone into at length, for it appears that the logs came to be known, not only as "the McCarthy Creek logs" but also as "the Quebec Bank logs," and that, not only Mr. Craig, but, as he says, everybody, called these McCarthy Creek logs "Quebec Bank logs."

The logs, being thus known to everybody, were known to the Government, and in the beginning, for instance, of 1907, it appears from an official communication, dated the 5th January, and addressed to the general manager of the bank, that the bank, under pressure by the department, had made payment of the Crown dues upon the logs, of no less a sum than $21,017. In Mr. Cochrane's official letter the bank is described as "holders of the wood" and "the department has no objection to your ranking upon the wood and assuming the same position that the Crown held with regard to the same to the extent of the amount paid by you."

It is unnecessary to pursue the matter further. Not only were the logs identifiable, they were identified. Not only were they identified, but they were specifically taxed, and the tax had been paid. All this had been done by the respondent

bank as security holders. The board has no hesitation in thinking that the Courts below have come to a correct conclusion.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

JULY 23RD, 1913.

McMILLAN v. STAVERT.

Banks and Banking—Bank Purchased its own Shares in Violation of Bank Act, s. 76 — Shares Transferred and Promissory Notes Taken Therefor—Action on Notes by Curator of Bank—Defence Illegality—Action Dismissed—Appeal.

The Sovereign Bank used about $400,000 of its funds in purchasing its own shares and divided them into seven equal blocks, which were held by directors, relatives and friends. Promissory notes were taken for the shares, the bank agreeing to indemnify the makers of the notes against any loss arising from the sale of the stock. Plaintiff, the curator of the bank, brought action against a director for $33,110 on some of these notes.

BOYD, C., 16 O. W. R. 126, 21 O. L. R. 245, *held*, that the Bank Act, R. S. C. c. 29, s. 76, prevented the bank from acquiring any title to the shares so purchased; that the bank in transferring said shares to defendant, and taking his notes therefor, gave no legal consideration for the notes, and the action should be dismissed without costs, seeing the defence was illegality.

COURT OF APPEAL *held*, 19 O. W. R. 953, 3 O. W. N. 6, 24 O. L. R. 456, that under the circumstances the proper inference was that the several notes in question were given for the purpose of recouping the bank the money which had been unlawfully, and without authority, employed in the purchase of the shares, and that such money and such recoupment, and not merely the price of the shares, which was a purely collateral matter, formed the true consideration as between the bank and the makers of the notes. Judgment of BOYD, C., set aside, and plaintiff given judgment for amount of notes and interest. Claim over against third parties dismissed, the whole with costs.

PRIVY COUNCIL dismissed appeal with costs.

Appeal by defendants from judgment of Court of Appeal for Ontario, 24 O. L. R. 456; 19 O. W. R. 953; 3 O. W. N. 6; reversing judgment of BOYD, C., 21 O. L. R. 245; 16 O. W. R. 126, in favour of defendants.

The appeal was heard by LORD ATKINSON, LORD SHAW and LORD MOULTON.

LORD ATKINSON:—Their Lordships have carefully considered the judgment appealed from, and they have not heard anything in the arguments which have been addressed to them to induce them to think that it is erroneous in any respect.

Accordingly they adopt it, as they think it deals satisfactorily with the questions in dispute. They only wish to add that the statement in the record on p. 439, line 15: "The other directors seem to have made common cause with Mr. Stewart, thereby becoming parties to the breach of trust, if they were not so already," is, in its phraseology, perhaps unjust to the directors. Their Lordships think that the fairer conclusion is that the bank, having got into the straits described, the directors took upon themselves the risk of putting matters right, but possibly thought that they would not thereby ultimately incur any loss.

Their Lordships think that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

7TH AUGUST, 1913.

CLARKSON v. WISHART.

Execution — Interest in Unpavented Mining Claim — Certificate of Record Issued—Exigible under Execution.

DIVISIONAL COURT *held*, 22 O. W. R. 901; 3 O. W. N. 1645, 27 O. L. R. 70, 6 D. L. R. 579, that an interest in an unpatented mining claim for which a certificate of record had been issued under the Mines Act cannot be seized nor sold by a sheriff under a writ of execution.

Reilly v. *Doucette*, 19 O. W. R. 51, 2 O. W. N. 1053, followed. Judgment of Mining Comr. affirmed.

Per RIDDELL, J.:—"A tenancy at will is not exigible." The intention of the Mines Act is to leave the paramount power of dealing with the land in the Crown until the issue of the patent and consequently the holder of a certificate of record is made a tenant-at-will.

Review of the authorities.

PRIVY COUNCIL *held*, that the interest of the holder of an unpatented mining claim is not a mere tenancy-at-will, and is exigible under a writ of execution.

McPherson v. *Temiskaming Lumber Co. Limited*, followed.

Appeal allowed with costs.

Appeal by special leave from the judgment of the Divisional Court of the High Court of Justice of Ontario dated the 30th August, 1912, 22 O. W. R. 901; 27 O L. R. 70; 3 O. W. N. 1645; 6 O. L. R. 579, which affirmed the judgment of the Mining Commissioner for that Province dated the 16th April, 1912. That officer held that the interest

of the respondent Wishart in a mining claim was not exigible under a writ of *fieri facias* against his lands and goods.

The appeal was heard by LORD ATKINSON, LORD SHAW and LORD MOULTON.

Sir Robert Finlay, K.C., Archibald Read and M. Gordon, for the appellants.

J. M. Godfrey, for the respondents.

LORD SHAW:—The facts are very simple. Wishart was the holder of an undivided interest in a certain mining claim. He had complied with the provisions applicable to prospecting, staking out his claim, and applying to have it recorded; and he had in point of fact received a certificate of record. All this was duly done under secs. 34, 35, 53, 59, and 64 of the Mining Act of Ontario, 1908. Wishart having thus his interest in the mining claim—an interest the nature of which will be afterwards analysed—the Farmers' Bank of Canada, who were Wishart's creditors for $53,552, on the 29th September, 1911, obtained a judgment against him for that sum. On the same day there was issued to the sheriff on that judgment a writ of *fieri facias* against his goods, chattels, lands, and tenements. The form is not objected to; it correctly followed the provisions of the Execution Act. Although Wishart at the date of that execution was, as stated, the duly recorded holder of a mining claim under the Act, no patent had been granted to him in respect thereof.

About three weeks thereafter Wishart, plainly seeking to avoid as against his mining claim the effect of the execution as laid on, purported to sell it to the respondent Myers. At the end of the same month, namely, on the 31st October, the appellant Clarkson, who is the liquidator of the execution creditor, the Farmers' Bank proceeded to sell the execution debtor Wishart's interest in the mining claim. The sale took place, but the recorder refused to record. His principal ground for doing so was that there had not been, in his view, a compliance with the Statute, by reason of the absence of any duly executed transfer from Wishart himself. So far it is manifest that Wishart, by failing to execute a transfer to his creditor and by selling to a third party and ignoring the execution already laid on, had been

enabled to defeat the execution creditor's rights and to part with something of value which he found it to his interest to dispose of and a third party found it to his interest to acquire.

This is the true nature of the case before the Board. The subsequent facts, so far as the question now at issue is concerned, are unimportant.

The purchaser at the execution sale was Mr. J. M. Forgie. On making application to the recorder, that official, as mentioned, refused to record the sale deed from the sheriff. Mr. Forgie appealed from that decision to the Mining Commissioner. And he lodged a notice of claim on the 2nd February, 1912, in accordance with the Mining Act. He claimed to be recorded, and further asked that the transfer by the execution debtor Wishart to the respondent Myers of the 17th October, 1911, should be set aside. The ground stated was that the transfer was fraudulently made with the intent to defeat the appellant and the other creditors of Wishart. In the course of the litigation it was agreed, in the language of the Mining Commissioner, that "the question whether or not Wishart's interest in the mining claim was exigible and, if so, whether it should be sold as land or as chattels, should first be disposed of, Mr. Bayne admitting that if either of these points were decided against him, his client's claims must be dismissed."

The case before the Board was accordingly taken upon the footing that the only question to be determined was whether the interest in a mining claim duly recorded, but not yet the subject of a patent, was exigible for a judgment debt due by the claimant. Or in another form—and one of great general importance in the development of industrial enterprise—the question is whether the interest of a mining claimant at this stage of his operations is unavailing as a source of credit for a secured advance. There may be questions as to whether the actual form of sale should have complied with the provisions as referable to land or referable to chattels. But whatever the form of sale adopted, the question is whether the respondents can have any interest which they could set up in conflict with the seizure in execution made before any sale by the judgment debtor.

The principles of law applicable to a case of this character were fully laid down in *McPherson* v. *The Temiskaming Lumber Company, Limited* (1913, A. C. 145). The

question there dealt with had reference to the nature of the interest in timber lands of a licensee, and the circumstances of the case—an attempt to ignore and to defeat the execution creditor's rights—were closely analogous to those of the present. It was held that "the nature of the title of a licensee is a title (it may be limited in character) to the land itself and, in their Lordships' opinion, accordingly it falls within the scope of the Execution Act." The case followed *Glenwood Lumber Company* v. *Phillips*, [1904] A. C. 405; and the judgment of Lord Davey therein as to the effect of the right of exclusive occupation, subject to reservations and restrictions, seems also applicable in terms to the case now before the Board.

The Mining Commissioner affirmed the refusal to record the sheriff's deed, and this Judgment was, on the 30th August, 1912, affirmed in the Divisional Court of Ontario. The decision of the Temiskaming case by this Board was later in date, and the views taken by the learned Judges in the Courts below do not coincide with those which were here laid down.

But it may be mentioned that in the Divisional Court it was held that the holder of an unpatented mining claim had no interest higher than those of a tenant-at-will. And there seems no reason to doubt that the provisions of sec. 68 of the Mining Act demanded and received careful consideration from the Court below. That section provides as follows:—"The staking out or the filing of any application for, or the recording of a mining claim, or all or any of such acts, shall not confer upon a licensee any right, title, interest or claim in or to the mining claim other than the right to proceed, as in this Act provided, to obtain a certificate of record and a patent from the Crown; and prior to the issue of a certificate of record the licensee shall be merely a licensee of the Crown, and after the issue of the certificate and until he obtains a patent he shall be a tenant at will of the Crown in respect of the mining claim."

Their Lordships are agreed in thinking that the section does not constitute an exhaustive enumeration of the rights of the holder of an unpatented mining claim, and they deem it necessary to give a reference to the other sections of the statute to shew how conclusively this is so. They are further of opinion that the reference to tenancy at will is a reference dealing solely with the relations of the claim-

ant to the Crown before the Crown has parted by patent with the Royal rights. But such denomination, in their view, cannot be allowed to destroy the substance and reality of the rights in the claimant as against other subjects of the Crown if such rights be in truth conferred by the Act.

That they are so conferred is clear from the following provisions:—Under sec. 35 a licensee before patent may work the staked-out lands and transfer his interest therein to another licensee. Under sec. 59 a licensee who has so staked out his claim has the right to make application for a free grant and to have his claim defined and recorded. Under section 64 provisions are made for the granting of a certificate of record, and under sec. 65 it is provided that after a certificate "the mining claim shall not, in the absence of mistake or fraud, be liable to impeachment or forfeiture except as expressly provided by this Act." It is somewhat difficult to imagine anything more substantial.

Then after sec. 68, which has been already referred to, stipulating that before patent the claimant should be a tenant-at-will of the Crown, there come the following sections:—Sec. 72 provides: "A transfer of an unpatented mining claim, or of any interest therein, may be in Form 11, and shall be signed by the transferor or by his agent authorised by instrument in writing." Sec. 73 states the pre-requisites for recording instruments. Sec. 74 provides that after a claim has been recorded "every instrument other than a will affecting the claim or any interest therein shall be void as against a subsequent purchaser," &c. Section 77 makes careful provisions for the recording of orders and judgments, and that the filing of a certificate shall be actual notice to all persons of the proceedings. The whole of the latter provisions just mentioned seem radically inconsistent with a mere tenancy-at-will.

But when it is added that, by sec. 88, where the claimant dies even before the recording of the claim, or where he dies before the issue of a patent, no other person shall without leave of the Commissioner be entitled to acquire any right, privilege, or interest in respect thereof within twelve months after his death, and when there then follow these words, "and the Commissioner may within twelve months make such order as may seem just for vesting the claim in the representatives of such holder," nothing

could, in their Lordships' opinion, more conclusively negative the limitation to a tenancy-at-will.

Their Lordships have thought it right to enumerate these sections so as to shew that, in their view, the reference in sec. 68 to a tenancy-at-will from the Crown must be taken in conjunction with the whole of the other provisions of the Statute, and that on a full view of these no substantial doubt can remain that the interest of a mining claimant in an unpatented claim falls, in the language of the Execution Act of Ontario, within the category of "lands," subject, as in the *Glenwood Case* and the *Temiskaming Case*, to restrictions, to possible forfeitures, but also capable of transfer and of becoming vested in successors after death.

As to the point that no transfer in writing executed by the claimant himself has been made, and that therefore no record could take place, their Lordships would be slow to hold—if the true nature of the execution debtor's rights be what has been above described—that the lack or refusal of his signature should render ineffective against his property the course of law in execution for debt. Reference, in the opinion of the Board, may be usefully made to the powers conferred upon the Commissioner by sec. 123, providing for claims, rights and disputes being settled by him. The section goes on to say that "in the exercise of the power" he "may make such order and give such direction as he may deem necessary for making effectual and enforcing compliance with his decision." The section particularly refers to questions and disputes in respect to unpatented mining claims, including this, namely, whether such an unpatented claim "has before patent been transferred to or become vested in any other person."

Even apart from the statute, the Ontario officials and Courts might well have been considered vested with a power to restore against such a defeat of the law as would have been occasioned by the want, or, say, by the refusal, of the signature of an execution debtor. But under sec. 123 of the Mining Act such a power appears to be conferred in sufficiently wide terms. The writ of execution, in short, should have been treated as the equivalent of a transfer and recorded as such.

Their Lordships will humbly advise His Majesty that the judgments of the Courts below should be reversed and

that the interest of the respondent George Wishart in the unpatented mining claim was seizable in execution by his judgment creditor, and that, the defence of the respondents to the claim of James M. Forgie being unfounded, Mr. Forgie was entitled to be recorded as claimed by him. The respondents will pay the costs of the proceedings throughout, including the costs of the petition to dismiss the appeal as incompetent, which petition His Majesty will be humbly advised should be dismissed.

Solicitors for appellants: Lee & Pembertons.

Solicitors for respondents: Blake & Redden.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

AUGUST 1ST, 1913.

KENNEDY v. KENNEDY.

Will—Trust for Upkeep of Residence—No Time Limit—Infringement of Rule against Perpetuities—Estoppel by Prior Action.

TEETZEL, J., *held*, 26 O. L. R. 105, 21 O. W. R. 501, 3 O. W. N. 924, that a bequest to trustees to be used by them to maintain his family residence for two young ladies as long as they lived, and for his son and his family and descendants or whomsoever said son might will or otherwise give said residence to, and that as to such residence it should until sold and disposed of, be kept up and maintained by said trustees, and those succeeding them in the trust, in the manner in which it had been kept up and maintained by him, was void as infringing the rule against perpetuities.

COURT OF APPEAL, 28 O. L. R. 1, 4 O. W. N. 607, affirmed above judgment.

PRIVY COUNCIL *held*, that the discretionary trust was not vested in different persons but in the holders for the time being of a definite office and that judgment appealed from must be affirmed.

Re Smith, [1904] 1 Ch. 139; *Clarke* v. *Clarke*, [1901] 2 Ch. 110, and other cases referred to.

Judgment appealed from affirmed.

Appeal by James H. Kennedy from judgment of Court of Appeal for Ontario, 28 O. L. R. 1; 4 O. W. N. 607, affirming with variations the judgment of TEETZEL, J., 26 O. L. R. 105; 21 O. W. R. 501; 3 O. W. N. 924, declaring a certain clause in the will of David Kennedy, deceased, invalid.

The appeal was heard by LORD ATKINSON, LORD SHAW, LORD MOULTON, and LORD PARKER OF WADDINGTON.

LORD PARKER OF WADDINGTON:—The testator David Kennedy by his will, dated the 4th June, 1903, appointed his son, the present appellant, Annie Maud Hamilton, and his grand-

daughter, Gertrude Maud Foxwell (thereinafter called his trustee), to be his executor and executrixes, and he devised to the appellant his dwelling-house and premises therein mentioned, subject nevertheless to the provision thereinafter contained for the benefit of Annie Maud Hamilton and Gertrude Maud Foxwell. By this provision each of these ladies was to be entitled to live in the dwelling-house as her home and to occupy a room therein for her life, and was also to be entitled to all necessary maintenance and board which the testator made a charge on the premises. The testator also gave an annuity and various pecuniary legacies and devised and bequeathed his residuary estate both real and personal to his executor, executrixes, and trustees aforesaid, to be used and employed by them in their discretion or in the discretion of the majority of them, so far as it might go in the maintenance and keeping up of his said dwelling-house and premises thereinbefore given to the appellant, with full power to sell the real estate and devote the proceeds to keeping up and maintaining his said residence in the manner in which it had been theretofore kept up and maintained, and if for any reason it should be necessary that the said residence should be sold, the testator directed that upon such sale being completed the residuary estate then remaining should be divided in equal proportions among the pecuniary legatees under his will.

The chief question now arising for decision is whether any definite limit can be assigned to the duration of the discretionary trust affecting the testator's residue. If no such limit can be assigned the trust is void as offending against the perpetuity rule. Their Lordships are of opinion that no such limit can be assigned. It was suggested in the Court below that according to the true construction of the will the discretionary trust is exercisable only by the three persons, or a majority of the three persons by the will appointed to be the testator's executor, executrixes, and trustees, and could therefore not be exercised beyond lives in being. This suggestion was not pressed before their Lordships' Board, and indeed it is, in their Lordships' opinion, fairly obvious that the discretionary trust is not vested in different persons, but in the holders for the time being of a definite office. (See *Re Smith*, [1904] 1 Ch. 139). The argument relied on before their Lordships was to the effect, that according to the true construction of the will, the trust was for the benefit only of the appellant and the two

ladies who were entitled to use the dwelling-house as their home, and, therefore, could only be exercised during the lives of those persons or the lives of the survivors or survivor of them. It is to be observed, however, that the trust is not to keep up a home for these three persons, but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death. It is a trust which, if valid, would enure for the benefit of all persons for the time being interested in the dwelling-house, and is by the testator himself contemplated as coming to an end only if the dwelling-house be sold, an event which may not take place within the period allowed by the rule against perpetuities. The trustees, or a majority of them, are to determine as occasion arises, the amount to be expended, and there can be no person entitled to determine the trust as long as there is any part of the trust fund remaining unexpended, provided the dwelling-house is still unsold. Under these circumstances, their Lordships are of opinion that the trust offends against the perpetuity rule and is void. (See *Clarke* v. *Clarke*, [1901] 2 Ch. 110; *Re Blew*, [1906] 1 Ch. 624; and *Re De Sommery*, [1912] 2 Ch. at p. 630).

The appellant also contended that the respondents were all of them estopped from setting up the invalidity of the discretionary trust by reason of the judgment in the action of *Kennedy* v. *Kennedy*, referred to in the appellant's case. In that action there was some suggestion that the discretionary trust was void for uncertainty, but the point, obvious though it was, as to the effect of the perpetuity rule, appears for some reason to have passed unnoticed. Moreover, the plaintiff in that action based his claim upon interest which he claimed under the will, and not upon his title as next-of-kin or otherwise against the will. Under these circumstances their Lordships are of opinion that there is no such estoppel as alleged.

The appeal, therefore, fails, and their Lordships will humbly advise His Majesty to dismiss the same with costs, but their Lordships consider that there should be one set of costs only as between the several respondents.

With regard to the petition of Madeline Kennedy, no useful purpose could, in the view taken by their Lordships of the true construction of the will, be served by granting the prayer of such petition. Their Lordships will, accordingly, humbly advise His Majesty to make no order thereon.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

JULY 29TH, 1912.

PLAYFAIR v. MEAFORD ELEVATOR COMPANY, LIMITED.

MEAFORD ELEVATOR COMPANY, LIMITED v. MONTREAL TRANSPORTATION COMPANY, LIMITED.

Negligence—Ships—Management of—Damage to Grain Elevator—By Steam Barge—Breaking Moorings—Caused by another Vessel—Damages—Loss of Profit.

Plaintiffs were owners of a grain elevator at Meaford. Defendant Playfair was owner of a steam barge "Mount Stephen," and defendants, Montreal Transportation Co., were owners of steam barge "Kinmount." The barge "Mount Stephen" was moored to plaintiffs' dock unloading wheat into plaintiffs' elevator, when barge "Kinmount" in passing "Mount Stephen," to moor bow to bow at the dock, used her propeller, thus throwing a great force of water against bow of "Mount Stephen," causing the "Mount Stephen to surge rapidly aft, with the result that the marine leg of the elevator at the time in No. 6 hatch of "Mount Stephen," was pulled out of the elevator and so seriously damaged that it could not be repaired during that year's season of navigation. Plaintiffs brought action against both defendants to recover damages for negligence in causing injury to plaintiffs' elevator and for loss of profits.

TEETZEL, J., *held*, 18 O. W. R. 773, that both defendants were guilty of negligence, and that plaintiffs' servants were not guilty of contributory negligence. Judgment for plaintiffs for $700 for injury to the elevator leg and $5,000 for loss of profit, with costs.

COURT OF APPEAL, 20 O. W. R. 931, 3 O. W. N. 525, dismissed with costs an appeal by defendant Playfair.

Appeal of Montreal Transportation Co. allowed with costs; Meredith, J.A., dissenting.

PRIVY COUNCIL *held*, that the accident was an unforeseen and fortuitous occurrence and under the circumstances unavoidable.

Appeal of defendant Playfair allowed with costs, that of Meaford Elevator Co. Ltd., dismissed with costs.

Appeal by defendant James Playfair and by plaintiffs Meaford Elevator Co., Ltd., from judgment of Court of Appeal for Ontario, 20 O. W. R. 931; 3 O. W. N. 525, allowing appeal of defendant, Montreal Transportation Co., Ltd., and dismissing the appeal of Playfair from the judgment of TEETZEL, J., 18 O. W. R. 773, holding both defendants liable in damages for injury to plaintiff's grain elevator, alleged to have been caused by the negligence of those in charge of the respective vessels of defendants.

The appeal was heard by THE LORD CHANCELLOR, LORD DUNEDIN, LORD ATKINSON, and LORD MOULTON.

LORD DUNEDIN:—The plaintiffs in this case are the proprietors of a dock at the town of Meaford. In connection with the dock and on the quay thereof is a grain elevator, which belongs to the plaintiffs. The elevator is a tower-like structure, from which depends a long tube, commonly called the leg of the elevator, inside which are a travelling set of buckets on an endless chain, worked somewhat in the fashion of buckets in a dredger. The leg can be lifted up and let down, and is in practice introduced into the hatch, and then, by an adjustable device in the end of it, kept at the proper level to bail out the grain.

On the 28th of November, 1908, the steam barge "Mount Stephen" was lying at the quay, and the elevator was engaged taking grain out of her. She was secured with her stern towards the entrance of the dock, and was fastened by manilla ropes fore and aft and by two steel cables amidships attached in a fore and aft direction respectively. The cables on board the ship were led from winches round chocks, and the tightening was maintained by the steam power in the winch. Their Lordships are satisfied on the evidence, and it is so found by the Judges below, that the "Mount Stephen" was securely moored according to practice in a manner calculated to resist any ordinary strain, and to the satisfaction at the time of those in charge of the elevator.

While the unloading of the grain was going on another vessel, the "Kinmount," made its appearance in the dock, and approached the stern of the "Mount Stephen." A conversation ensued between the captain and one Wright, who was in charge for the plaintiffs; and Wright told the captain of the "Kinmount" to turn round and lie against the quay beyond the "Mount Stephen" and bow to bow with her. It did not occur to anyone that this manœuvre would be attended with danger. The "Kinmount" accordingly proceeded to steam past the stern of the "Mount Stephen," proceeding on a port helm, so as to have her bow directed towards the opposite side of the dock. In the course of this manœuvre and its inception, it became evident that the moving vessel would go very near the stern of the "Mount Stephen," and the man in charge of the elevator, one Robertshaw, fearing the effect which any collision between the ship might have on the leg of the elevator, drew up the leg of the elevator out of the hatch, No. 2, in which it was then engaged. The "Kinmount" passed on without fouling the "Mount Stephen," and Robert-

shaw satisfied that the danger was passed, re-introduced the leg into the same hatch. Soon after this, having removed sufficient grain for the moment from that hatch, he ordered those in charge of the "Mount Stephen" to move the vessel forward along the quay, so as to allow of the elevator leg being introduced into hatch No. 6, the reason being in order not to disturb the trim of the vessel by lifting too much grain at one time out of the one end of the hold. The vessel was shifted forward about 70 feet, and the leg let down into No. 6, when the unloading recommenced. The mooring of the vessel was done as before. In the meantime the "Kinmount" had not found the turning so easy as expected. Starting, as already said, on a port helm, she had turned so far as to be at right angles to the line of the quay at which the "Mount Stephen" was lying, when her bow grounded in the mud at the other side of the dock. She there remained for the time stuck, and then proceeded to try and get herself round by the expedient of putting out cables from the port side to the shore of the dock on the side away from the "Mount Stephen" and so to warp herself round by means of her winches. While doing so one of the cables broke. During all this time she was also working her screw. Soon after this the wire cable, which was directed forward from amidships on board the "Mount Stephen," suddenly snapped. Almost immediately thereafter the bow manilla rope parted and the "Mount Stephen" began to drift astern. Perceiving the movement Robertshaw attempted to remove the leg from the hatch, but before he got it completely out it jammed by the continued motion astern of the boat, broke off and fell on the deck.

The present action is raised for the plaintiffs, as proprietors of the elevator, for the damage done, and is directed against the owners of the "Kinmount" and the owners of the "Mount Stephen."

The trial Judge found both defendants in fault and gave judgment accordingly. The Court of Appeal exonerated the "Kinmount," but affirmed the judgment as regards the "Mount Stephen."

The ground of action must be negligence on the part of both or either of the defendants, and the finding affirmatively of such negligence is a necessary condition of success. Their Lordships make this remark because there was in the argument a disposition, on the part of the plaintiffs' counsel, to

assume that if they successfully shewed that the plaintiffs had not been guilty of contributory negligence—which had been alleged against them and had been, as their Lordships think, rightly negatived by the learned Judges—it followed from their innocence that one of the defendants, they cared not which, must be guilty. Such a view is erroneous and misleading as to the way in which the evidence should be approached. Each defendant is entitled to have the case as against himself separately considered, and unless the plaintiffs make out that case they must fail.

As regards the physical cause of the accident there can be no doubt that it was a powerful rush or surge of water, which, getting in between the bow of the "Mount Stephen" as she lay at the quay and the quay, forced her away from the quay and broke the moorings. There existed no cause for the water being thus set in motion except the action of the screw of the "Kinmount." But the disastrous effect of the movement of the water really depended on the current being so directed as to get between the vessel and the quay. The main direction of the current, in their Lordships' view, is not clearly accounted for, but it may be surmised was due to the particular angle at which the "Kinmount's" stern lay, and at which her helm was directed, taken along with the reflecting angle which would be obtained by water flowing from the direction of the "Kinmount's" stern and striking against the inner end of the dock. In other words, their Lordships think, upon the evidence, that the water pressure put upon the "Mount Stephen," in the direction of driving her away from her moorings, was not a natural or anticipated result of the manœuvre, which the "Kinmount" was performing. It is here that the case against the "Kinmount" fails. She was executing an ordinary manœuvre, having been told to turn by the plaintiffs' own manager. It is true that he says she might have turned lower down, but she began to turn as she did, with no word of protest at the time, and it did not occur to anyone that there was any danger in what was being done so long as there was no collision between the vessels as the "Kinmount" passed the stern of the "Mount Stephen." The practical proof of this is that Robertshaw, who had removed the leg while collision was possible, replaced it as soon as the "Kinmount" had passed on and was content to resume operation of dipping.

Is there, then, any evidence to shew that the subsequent manœuvre of the "Kinmount" was conducted in a negligent

manner? Their Lordships think not. Her screw was moving all the time, at least till she stuck. The attempted operation of warping was a reasonable one, and the fact of her cable parting was an accident. The evidence is left very vague as to exactly what happened after the cable parted, but it is evident that, warping being no longer possible, the only way which the turning movement could be maintained would be by using the screw coupled with a certain direction of the helm. It is a matter of surmise that it was this renewed action of the screw combined with the direction of the helm that set up the current that did the mischief, but there is undoubtedly no evidence of such undue or sudden action on the part of the "Kinmount" as to bring home to her a charge of negligence with its resulting liability. To do so it would have to be found that the "Kinmount" executed a sudden manœuvre of which the ordinary consequences would be danger to the other vessel. As it is, no one, their Lordships think, anticipated, or could have anticipated, that the current set up by the screw could be reflected by the walls of the dock in the only way that made it dangerous to the "Mount Stephen."

It now remains to consider the case of the "Mount Stephen." As has been already said, their Lordships think it clearly proved that the "Mount Stephen" was sufficiently and securely moored with regard to any normal strain which could be put upon her. The only ground of liability must, therefore, be found in a failure at the moment these incidents occurred to take extra precautions, or a failure to communicate the danger to those in charge of the elevator, which was not apparent to them, but was apparent to those in charge of the "Mount Stephen." As regards extra precautions, their Lordships are satisfied that the dangerous rush of water was a sudden occurrence, and that the breaking of the steel cable occurred before any extra ropes could be used. The failure to warn those in charge of the elevator is the ground on which the learned Judges below have founded liability. Their Lordships are unable on the facts to come to this conclusion. To do so they would have to be convinced on the evidence that the abnormal current, of a force to suggest that under the strain caused thereby the existing moorings might give way, was observed and appreciated by those in charge of the "Mount Stephen" in time to have warned the elevator men of the impending danger.

Now, that the great current was a sudden happening seems certain. The mere working of the "Kinmount's" screw during the earlier stages of the manœuvre had caused current, but nothing of an abnormal character. Robertshaw had apprehended danger by collision, but none by working of the screw. And, indeed, had it not been sudden and of short duration, it is impossible to suppose that it would not have been noticed by Robertshaw and the other men on the elevator. It is the very suddenness and shortness of the accident that absolves them from contributory negligence. So far as the evidence for the plaintiffs is concerned, there is really no proof that the danger was seen and appreciated by the "Mount Stephen" men in time to communicate with the elevator men. Wright, the manager of the elevator company, saw from the window of his office the water surging and immediately thereafter the cable broke. Mott, who was on the elevator, saw the cable break, but saw nothing that indicated that a current was coming from the screw of the "Kinmount." Robertshaw, who had been afraid of collision, thought that all danger was over when that danger was past, and was satisfied that the "Mount Stephen" was securely moored after she had been shifted, and he observed nothing abnormal till the cable parted. Cowel in the elevator saw the cable break and had observed nothing abnormal; and Garfield, who also saw the cable break, though he says he saw a current from the screw, is not examined at all as to whether there was any changing or sudden augmentation of that current. Then the case for the plaintiffs ends. The plaintiffs' counsel was really forced to rely entirely on certain portions of the evidence of David Bourke (the passage of Edward Bourke's evidence has evidently reference to the earlier stages of the manœuvre, when the "Kinmount" was passing the "Mount Stephen"). Their Lordships think this insufficient, because (1st) there is inextricable confusion in the testimony between the various stages of the manœuvre. Taken literally it would prove a dangerous current from the very beginning, a state of affairs sworn to by no one else and negatived by the *res ipsa loquitur* of the behaviour of Robertshaw; (2nd) Bourke was very anxious to make out that he had warned Robertshaw a second time. The trial Judge disbelieved him, and it would, in their Lordships' opinion, be very dangerous and unfair to the defendants to reject that part of his evidence, and accept all else with which it was connected, as an accurate version of facts as to which the plaintiffs' own witnesses had made no case.

Their Lordships are, therefore, of opinion, that the case against the "Mount Stephen" also fails. They have come accordingly to the conclusion that the effect of the "Kinmount's" screw in causing the abnormal current was an unforeseen and fortuitous circumstance; that the accident was in the circumstances unavoidable, and that neither blame nor responsibility can be thrown on anyone, from which it follows that the loss must be borne where it fell.

There Lordships will, therefore, advise His Majesty that the appeal of the "Mount Stephen" ought to be allowed and the action dismissed with costs in all Courts, and the appeal of the Meaford Elevator Company dismissed. The Meaford Elevator Company will pay the costs of the appeals.