British Columbia Land and Investment Agency Ltd. v. Ishitaka

**The British Columbia Land and Investment Agency
(Defendants), Appellants; and
Harry H. Ishitaka (Plaintiff), Respondent.**

(1911), 45 S.C.R. 302

Supreme Court of Canada

1911: October 4 / 1911: December 6.

**Present: Sir Charles Fitzpatrick C.J. and Davies, Idington,
Duff, Anglin and Brodeur JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Ewart, K.C., for the appellants.
Travers Lewis, K.C., and Ladner for the respondent.

Solicitors for the appellants: McPhillips & Wood.
Solicitors for the respondent: Bowser, Reid & Wallbridge.

FITZPATRICK C.J. (dissenting)-- I have nothing to add to what my brother Idington says as to the legal rights of a mortgagee who sells the property mortgaged under his power of sale. His obligation to exercise that right in perfect good faith is fully established by the authorities to which he refers, if authority be required to support that proposition.

On the facts, I would add: The only question is whether or not we should reverse the provincial Court of Appeal on evidence from which we must, at least, admit, putting it at the very lowest, one may fairly infer that the respondent, on receipt of the notice of the appellant's intention to sell, by private sale, the goods and chattels covered by the chattel mortgage, placed himself in a position to redeem them, and, being in that position, did actually offer to redeem them within the stipulated time. Mr. Wallbridge swears very positively, and his memory is refreshed by entries in his day-book made at the time, that on the morning of the first of May he went to the office of the appellants' solicitors prepared to redeem and that he was then told by Garrett that it was too late. It is quite true he is not so positive that he asked for a statement of the amount due on the mortgage; but he swears that

> they were not in a position to give a statement at the time anyway.

In my opinion, the basic fact upon which all turns is that the respondent had at his disposal, or could procure the amount required to redeem before the delay to do so had expired. The value of the

property covered by the chattel mortgage was worth at least double the amount at which it was offered by private sale, and it was, probably, worth more to the respondent in his logging business than to any one else. In these circumstances, it is not reasonable to suppose that he (the respondent) would allow the property to be sacrificed when it was possible for him to redeem it. I am much impressed by an incident which occurred at the trial when counsel for the respondent, on an objection made by the appellants, abstained from putting in some evidence which it was desired to introduce to shew that Ishitaka was actually in a position to redeem the mortgage. The trial judge then declared that there were negotiations to raise $1,500 on Kato's property and that he, Kato, was willing to let that go in as security for the loan and, on that ground apparently, he maintained the objection to the evidence. That this point, upon which so much depends, namely, the ability to redeem the mortgage, should have been and would have been, were it not for this objection, investigated further is obvious, and I am satisfied that the trial judge refused to admit the evidence because, with all the facts fresh in his mind, he was of opinion that the respondent's contention that he then had the money under his control was sufficiently established.

As to the sufficiency of the tender, it is not argued that what Mr. Wallbridge did constituted a legal tender; but, if a debtor tells his creditor that he comes to pay his debt and the creditor says that he is too late, or for any other reason refuses to accept the money, the actual production of the money is dispensed with.

Even if there was doubt as to which of the two views of the evidence should prevail, it seems to me that this court should not disturb the judgment of the provincial Court of Appeal which apparently adopted that view of the evidence which the trial judge entertained at the time of the trial and when the witnesses were all before him. The inherent probabilities are that, in view of the intrinsic value of the property, the respondent was able to raise the money he wanted, that the solicitor was instructed to redeem and that the solicitor did his duty in the circumstances.

In the Court of Appeal, Mr. Justice Martin says:--

> This is a case in which I feel I must bring myself to say, with all deference to the learned trial judge, that the weight of evidence is clearly against his finding, and the facts respecting the important interview between the solicitors, when the plaintiff was endeavouring to redeem the mortgage, must be found substantially as testified to by the plaintiff's solicitor.

Chief Justice Macdonald accepts Mr. Wallbridge's evidence as correct, and says:--

> The evidence of Mr. Garrett falls far short of contradicting that of Mr. Wallbridge, and that of Mr. King, his partner, does not touch upon this point because he was not present when this conversation took place.

I would dismiss with costs.

DAVIES J.-- I agree with Mr. Justice Anglin.

IDINGTON J. (dissenting):-- Want of good faith on the part of the mortgagee selling under a power of sale is sufficient, if the vendee a party to it, to entitle the mortgagor to have the sale set aside. Short of setting the sale aside he has also a right to recover from the mortgagee damages suffered by reason of the existence of want of good faith.

Some indirect motive on the part of the mortgagee operating to the detriment of the mortgagor is sufficient foundation for such an action. As pointed out by Jessel M.R., in Nash v. Eads (25 Sol. J. 95.), mere indirect motives, such as anger, that lead only to a properly conducted exercise of the power, are not such as I refer to. In that case Jessel M.R. added, in speaking for the Court of Appeal, consisting of himself and Cotton and Lush L.JJ., as follows:--

> He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself.

A sale at such a gross undervalue as to lead to the proper inference that a fraudulent purpose existed is also held by all the authorities quite sufficient ground of attack.

In Kennedy v. De Trafford (1896) 1 Ch. 762.), in appeal (1897), Lord Herschell sets forth the principle to be observed, as follows:--

> Lindley L.J., in the court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered, really, by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith," but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.

It is quite clear that when a man has given another an absolute power to sell his goods, in a given event, he must be entitled to presume that it will be exercised honestly and with a proper regard to what honest conduct implies.

On the other hand, he given such a power clearly never was intended to subject himself to be hampered in the business or harassed by reason merely of the goods having brought less than might under other and more favourable conditions have been realized.

In every case I have seen, and I have read all that have been referred to, the court has been (when the case turned on the question of sale at underprice) careful to observe whether or not there was anything but mere underprice; and, I think, in measuring the effect of a sale at less than the goods might have been sold for, regard must be had to all the circumstances in each case.

A man selling at public auction, after due advertisement and proper effort at the sale to realize the best possible price, might be able to justify to the full a sale to a single bidder at a price he could not be able to justify if, he being absolutely ignorant of the value of the goods over which he had such power, had rushed into the street and sold the same goods at the same price to the first man he met.

In this case, the goods mortgaged had, a year and a half before the sale, cost over twice as much as the mortgagee sold for; what, it was assumed, were the same goods.

The mortgage had been taken to secure eighteen hundred dollars, at six per centum per annum.

There was paid before the proceedings in question, a total of $719, according to respondent, and, according to an officer of the appellants, only $674. I assume the latter correct and that, as he puts it, with interest there was $1,274 due.

The appellants allege in evidence the respondent had broken his promises of payment and then a distress warrant was given on 19th April, 1909, to seize.

Respondent having learned in some way not clear, of this, went on the 22nd or 23rd April, 1909, to appellants' office to get a statement of what was due in order to raise the money. When there he was served by appellants' agent with a notice that bears the date of 21st April, 1909, and says that they had entered into possession of all the goods covered by the chattel mortgage, and proposed to sell same by private sale on the first of May, 1909, at twelve o'clock noon, for the sum of $1,500, and that, unless all moneys due on the mortgage were paid on or before the first of May, 1909, the said sale would be consummated and possession transferred to the purchaser for the said sum of $1,500. I may observe that the notice was not addressed to the respondent, but to the original mortgagors.

One Allman, who was with the respondent, says it was after three o'clock in the afternoon, and too late to search the records that day, but next day he would have been ready to pay the amount and take the security offered, and asked for that delay, but was told there was no alternative but paying before eight o'clock that night.

The result seems to have been to discourage and delay respondent and negotiations with Allman fell through. Later he seems to have approached one Kato and arranged with him to raise the money; possibly, I infer, on more moderate terms than Allman was inclined to give.

Kato was examined and, I infer, was quite willing to have raised the money, but, when asked the question, was met by an objection of the appellants' counsel to it as evidence. Without ruling on this, the court seemed to intimate such a reliance on previous evidence relative to such negotiations that the question remained unanswered.

I may remark here that, when the solicitor through whom that loan was to have been made was called to speak thereto, similar objections were raised and were met by a suggestion on the part of respondent's counsel that he supposed Mr. Wallbridge's statement was accepted.

The court replied the solicitor could not know about that. I merely note these tenderings of evidence on this head and will refer thereto and to the objections later when dealing with Wallbridge's alleged intention to tender.

The appellants had sold the outfit to one Bowes for $1,500 on the 18th or 19th of April, to become operative if title could be made on the 1st of May. Bowes paid $100 to bind the bargain. He had never seen the goods and so far as appears knew nothing of them except from the list. He had agreed with the appellants, as part of his agreement to purchase, to go up to where the goods were, with an officer, and take and keep possession till the time had elapsed for his purchase to become operative.

It cannot be said that such a conditional sale was ipso facto invalid unless we discard the authority of Wigram V.-C., in Major v. Ward (5 Hare 598.). But certainly, in observing that case and its authority, we must not overlook what the learned judge there said, at page 604. He said:--

> I do not give any opinion how it would be, if an undervalue or any special circumstance were suggested, calculated to impeach the sale.

This purchaser pretends that what he paid was a fair price, but yet admits his purchase was "a highly desirable one."

The officer was instructed to put the goods, when seized, into the possession of the purchaser.

The whole proceeding tended much to damn respondent's chances of raising the money which a delay of a day, as it impresses me, would, in all probability, have enabled him to do without the expenses being multiplied.

It was a case of one man entirely ignorant of what he was selling, bargaining with another equally ignorant of what he was buying, but willing to gamble upon it.

And even though he does not seem to have got all the goods covered by the mortgage he does not complain.

We have no satisfactory explanation of why such haste was made to prosecute the seizure by sending out an expensive expedition in face of negotiations on the 22nd or 23rd to raise the money though the warrant was issued on the 19th and its execution delayed till these later dates, or why the transaction assumed the form it did when both parties were in the dark as to what they bargained about or its value.

And we have no evidence of any disinterested person to speak on behalf of the appellants as to value and none is given discrediting estimates adduced on behalf of respondent.

The bargain was for the sale and purchase of the goods covered by the chattel mortgage. Strangely enough the bill of sale to Bowes to carry it out assigns goods in a list of which some never were covered by the chattel mortgage and a number of things covered by the description of the goods as given in the mortgage do not appear in this list of goods as assigned. And thus the respondent is left liable for a balance yet payable on the chattel mortgage though, evidently, Bowes would gladly have paid enough to relieve him.

In the absence of evidence of value of these omitted or those wrongfully included this feature of the case is only of some importance as shedding light on the recklessness with which the whole business was transacted.

Another significant thing is that the officer seizing says he was to give up the goods if paid $1,500 and his fees.

What is meant by this? There was no such sum as $1,500 due on the mortgage apart from his fees and expenses.

Was the officer only concerned as to his fees? And had Bowes, in fact, managed all the rest, including the vessel's hire and that of the men?

A cheque was passed afterwards to the sheriff inconsistent with that but why if these instructions were in accord with, and suitable to the actual facts?

The sale would have been hard to maintain in face of the reckless sacrifice made, and the arrogant conduct and contemptuous disregard of the appellants, in their conduct, and all the attendant circumstances here related, of all fair consideration for respondent's rights in the premises; but, when we find, as I think we ought, that early in the forenoon of the first of May respondent's solici-

tor when calling upon the appellants' solicitors to pay them off was told he was too late, that the goods had been sold, I cannot see how such a transaction should be maintained.

It is as clear as anything can well be in this case that respondent, on the 22nd or 23rd of April, as I have taken to be the date of service of notice upon him (though the 23rd or 24th is more frequently given as the time) was negotiating to pay off the appellants, having learnt elsewhere or otherwise of some proceedings being on foot to enforce the mortgage, and that upon receiving this notice he relied thereon and became by virtue of its terms and the circumstances leading up to and surrounding it entitled to rely thereon as giving him the time named to redeem.

It is because of bad faith evinced in all I have shewn on the part of the appellants that the transaction sought to be impeached can be successfully attacked. And if we have to add to that mass of evidence the further finding of a breach of common honesty in violating good faith by withdrawing such a proposal knowing the party was given, both orally and thus in writing, the assurance it shews, can we think of the whole business but as a fraudulent device to defeat the just rights of the respondent?

The case of Williams v. Stern (5 Q.B.D. 409.), so much relied upon, seems beside the point raised here entirely. It was held there that there had been no such reliance put upon the defendant's promise as to furnish binding consideration. That cannot be said here. Indeed, I think respondent's misfortune was to have this notice thrust upon him when, in fact, he was negotiating with a man who would have relieved him next day if that had been the term.

The fatal tendency of some people is to put off till tomorrow for any excuse what should be done to-day.

And respondent does not seem to have been an exception to that class and put off till the last day.

And then, by reason of his solicitor having been told he was too late, nothing more was done.

I think, from expressions of opinion of the learned trial judge he, evidently, at the trial, was impressed with the correctness of Mr. Wallbridge's evidence, though, later in his judgment charitably covering the incident as a misunderstanding.

It is quite likely this latter is correct finding, but it does not displace what Mr. Wallbridge states, or his client's rights. And the Court of Appeal has so found consistently with any theory of honest error on the part of the appellant's solicitor. I do not think the appellate judgment should be disturbed. It rests on ground which is distinctly taken in the pleadings and the notice of appeal and on the facts, apart from the doubt as to time of tender, ought to remain undisturbed.

I may say a word as to the question of Mr. Wallbridge being in a position to carry out his tender. If a man goes with a cheque or anything not legal tender to offer another he is entitled, if the other broadly refuses to accept anything, to act thereon. If the other refuses because of want of legal tender the opportunity to remedy that can be made use of if time permit, and here the time existed, I infer, before noon.

And, short of proof that the tender has been a sham, I see no answer that can let him, peremptorily declining in broad terms, escape the consequences of his refusal.

The case of Jenkins v. Jones (2 Giff. 99.), where tender of the debt without costs, which had not been ascertained, was held sufficient, may well be looked at in this connection and, especially, in light of what Mr. Wallbridge says he was prepared to do.

I think this appeal should be dismissed with costs.

DUFF J.-- The grounds of action relied upon at the trial were: First, that goods not comprised in the bill of sale were sold by the appellant company: and, secondly, that the sale was made after the amount of the mortgage debt had, in effect, been tendered. As to the first of these grounds of action I think the weight of evidence supports the conclusion of the trial judge. As to the second I think the respondent, in order to make that ground the basis of a successful contention that the sale was in violation of his rights must shew either that he made a tender or that the mortgagees, being apprised of the fact that he (the mortgagor) was in a position and ready to pay the amount secured by the mortgage, refused to accept payment.

The learned trial judge obviously entertained no doubts as to the good faith of either Mr. Wallbridge or Mr. Garrett; and, I think the conclusion to which he ultimately came after considering all the circumstances, namely, that there had been a misunderstanding, is the most probable explanation of the conflict of testimony which unfortunately occurred. Mr. Wallbridge appears to have had in his mind and to have been only prepared to tender a sum considerably less than the amount which in fact was required to pay off the mortgage and, in such circumstance, one need not be surprised that he and Mr. Garrett should now prove to have been at cross-purposes.

The mortgage debt had been in arrears for something like six months. Various extensions of time had been granted and, finally, about ten days before the 1st of May, the respondent had been informed that payment must be made before noon on that day. Further requests for extensions continued, but it is not suggested that the respondent actually informed the mortgagees that he was ready to pay the debt until less than two hours before the hour fixed. The onus was on the respondent to shew that he tendered the amount due or that he distinctly and unmistakably made the mortgagees' agents aware that he was ready then and there to pay it and that, thus informed of his readiness to pay, they refused to receive it. In this, I think, he has failed.

A further ground of action was relied upon in the Court of Appeal -- that the property was sold at an undervalue owing to the absence of such steps as the mortgagees were bound to take in order to protect the interest of the respondent in securing the best price. It is to be observed that the duty of a mortgagee in exercising a power of sale (as touching the measures to be taken to secure a good price for the property sold), has in recent years been stated by a very high authority, (Kennedy v. De Trafford ([1897] A.C. 180.)), Lord Herschell, at page 185; Lord Macnaghten at page 192; Nutt v. Easton ([1899] 1 Ch. 873.), per Cozens-Hardy J., at pages 877 and 878. The sum of the matter appears to be this. He is bound to observe the limits of the power and he is bound to act in good faith, that is to say, he is bound to exercise the power fairly for the purpose for which it was given. If the mortgagee proceeds in a manner which is calculated to injure the interests of the mortgagor and if his course of action is incapable of justification as one which in the circumstances an honest mortgagee might reasonably consider to be required for the protection of his own interests; if he sacrifice the mortgagor's interests "fraudulently, wilfully or recklessly," then, as Lord Herschell says, it would be difficult to understand how he could be held to be acting in good faith. But that is a vastly different thing from saying that he is under a duty to the mortgagor to take, (regardless of his own interests as mortgagee,) all the measures a prudent man might be expected to take in selling his own property. The obligation of a trustee, when acting within the limits of the power, would be

no higher, Learoyd v. Whitley (12 App. Cas. 727.), at page 733, and it is clear that in exercising his power the mortgagee does not act as trustee. The evidence quite fails to establish any violation of the respondent's rights according to these principles. There is not a word in the evidence as to the selling value of the property at the date of the sale. Apart, moreover, from the inadequacy of the evidence as it stands there is a fatal objection based upon the principle that, as a rule, a litigant who intends to rely upon a charge of bad faith must bring it forward distinctly at the trial. Such evidence as was relied upon in the Court of Appeal and in the respondent's factum was not put forward with the object of establishing any such cause of action and was not sifted in cross-examination with a view to its bearing on a claim of that character. Of bad faith or recklessness in the sale as constituting in itself a ground of action there was not, at the trial, from first to last, a single word.

ANGLIN J.-- A careful perusal of the evidence of his solicitor has satisfied me that the plaintiff was not, at any time prior to noon on the first of May, 1908, in a position to redeem the defendants' mortgage. For this purpose $1,604.92 ($1,283.65 exclusive of costs) was required. Mr. Wallbridge was, not improbably, misinformed by his client as to the amount due. The latter appears to have assumed from some entries, which he says he saw in some book of the defendants, that about $1,100 was the sum needed for redemption. Negotiations by and on his behalf to raise money for this purpose proceeded on this basis for several days prior to the first of May. Mr. Wallbridge's evidence has convinced me that the money available to the plaintiff for redemption, on the first of May, was only about $1,100 -- at the most $1,150. There never was an offer to pay to the defendants, or their solicitors, more than this amount. If Mr. Wallbridge was informed by Mr. Garrett before noon on the first of May, as he says he was, that the sale had been already concluded -- a fact which I should certainly hesitate, upon the evidence before us, to find had been satisfactorily established -- in the absence of proof that he was in a position to redeem, the plaintiff has not, in my opinion, made out a case entitling him to damages for a premature sale. Unless he was actually able to redeem he, in fact, sustained no such damage.

Without at all determining that it is so as a matter of law, I proceed on the assumption that the notice given by the defendants to the plaintiff operated as a waiver of their right to sell without notice and entitled the plaintiff to redeem at any time prior to noon on the first of May, 1908.

I agree with Irving J. that the plaintiff failed to prove that his chattels were sacrificed by the mortgagees or that the sale was recklessly improvident. Neither did he shew that property not covered by the mortgage was seized.

With respect, I would allow this appeal with costs in this court and in the Court of Appeal and would restore the judgment of the trial judge.

BRODEUR J.-- The respondent has instituted an action in damages against the appellants for an illegal sale of goods subject to a chattel mortgage.

He claims that he offered the amount due on the mortgage before the hour given in the notice, viz., before noon on the first of May.

The only question of fact involved is as to whether or not, on the morning of the first of May, a sufficient tender of the whole amount due was made.

The respondent's solicitor says, in his evidence, that he went on the morning of the first of May to the office of the appellant's solicitor; that he asked him for the amount that was proper to

redeem the mortgage, and that he was willing to give him a cheque, and he was informed that the chattels had been sold.

The appellant's solicitor does not remember having seen the other solicitor, but that, after 12 o'clock, he was telephoned to by him about making a tender and he answered him it was too late.

If the circumstances are such as narrated by the respondent's solicitor, he should have made a quick rejoinder and taken the necessary steps to shew that he was still in time to make the offer. But he said nothing.

Besides he does not prove that he was ready to pay the whole amount due. The evidence shews that the amount due was over $1,500. However, the respondent's solicitor says that he was

> willing to give a cheque for $1,100, and if they said they could not make up an exact statement to $25, or $50, I would have given it,

and his own statements go to shew that he did not expect that an amount of $300 or $400 more could be claimed under the mortgage.

The tender, if made, was not sufficient, and the appellants were justified in making the sale.

It has been stated that the sale was improvident and that the price obtained was not high enough.

In the notice for sale served upon the respondent he was told that the chattels would be sold for $1,500 if the mortgage was not paid. It was, evidently, the best price that could be obtained. It did not even cover the whole amount due.

It was then for the respondent to find out some purchaser at a better price, and I cannot say that the sale was improvident.

I would allow the appeal with costs.

Appeal allowed with costs.

JUDGES
OF THE
SUPREME COURT OF CANADA
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir Charles Fitzpatrick C.J., G.C.M.G.
" Désiré Girouard J.
" Sir Louis Henry Davies J., K.C.M.G.
" John Idington J.
" Lyman Poore Duff J.
" Francis Alexander Anglin J.
" Louis Philippe Brodeur J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Charles Joseph Doherty, K.C.

1911

*Oct. 4.
*Dec. 6.

THE BRITISH COLUMBIA LAND AND INVESTMENT AGENCY (DEFENDANTS) ..... APPELLANTS;

AND

HARRY H. ISHITAKA (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Chattel mortgage—Sale under powers—Notice—Offer to redeem—Tender—Equitable relief—Evidence—Proceedings taken in good faith.

To impeach a sale under powers in a chattel mortgage on the ground that an offer to redeem was made prior to the time fixed by the notice of sale, the person entitled to redeem is obliged to shew that the amount due under the mortgage was actually tendered or that the mortgagee was distinctly informed that the mortgagor was then and there ready and willing to pay what was so due and, being thus informed of the intention to redeem, refused to accept payment.

In the exercise of his power of sale, a mortgagee of chattels is bound merely to act in good faith and avoid conducting the sale proceedings in a recklessly improvident manner calculated to result in sacrifice of the goods.

And per Duff J., he is not obliged (regardless of his own interests as mortgagee,) to take all the measures a prudent man might be expected to take in selling his own property.

Judgment appealed from reversed, the Chief Justice and Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia reversing the judgment of Morrison J., at the trial, and ordering a judgment to be entered in favour of the plaintiff for damages to be assessed.

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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BRITISH COLUMBIA LAND AND INVESTMENT AGENCY v. ISHITAKA.

The plaintiff claimed damages for the wrongful seizure and sale of his goods by the defendant assuming to act in virtue of powers contained in a chattel mortgage. The circumstances in which the sale was made are stated in the judgments now reported.

Ewart K.C. for the appellants. The judgment appealed from is erroneous in respect of the facts in controversy; there was no tender nor any waiver by the appellants of the necessity for tender. Even if the sale took place prior to the hour of sale mentioned in the notice, it was, nevertheless, valid inasmuch as the appellants were not bound to await the expiry of time given voluntarily and without consideration. If the judgment in appeal can be so construed as to hold that the sale was improvident or that the appellants wrongfully seized goods which are not included in the mortgage, then, such findings cannot be justified upon the evidence.

We refer to *Ex parte Danks*(1); *per* Cranworth L.J.; Halsbury, vol. 7, pp. 419, 420, note (*q*); *Hawkins* v. *Ramsbottom*(2); *Major* v. *Ward*(3); *Williams* v. *Stern*(4); *Blumberg* v. *Life Interests and Reversionary Securities Corporation*(5).

Travers Lewis K.C. and *Ladner* for the respondent. The trial judge erred in finding that the respondent did not offer to redeem in time, and in refusing him damages suffered by reason of the appellants preventing redemption, or in the alternative, damages by reason of improper exercise of the power

(1) 2 DeG. M. & G. 936.
(2) 1 Price 138.
(3) 5 Hare 598.
(4) 5 Q.B.D. 409.
(5) (1897) 1 Ch. 171.

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of sale; also in refusing damages for the sale of goods of respondent which were not included in the chattel mortgage. Reference is made to Bac. Ab. 7, 722; *Ex parte Danks*(1); Harris on Tender, pp. 69-70; *Major* v. *Ward*(2); *Kennedy* v. *De Trafford*(3); *Latch* v. *Furlong*(4); *Aldrich* v. *Canada Permanent Loan and Savings Co.*(5); and *Ex parte Moore*(6).

THE CHIEF JUSTICE (dissenting).—I have nothing to add to what my brother Idington says as to the legal rights of a mortgagee who sells the property mortgaged under his power of sale. His obligation to exercise that right in perfect good faith is fully established by the authorities to which he refers, if authority be required to support that proposition.

On the facts, I would add: The only question is whether or not we should reverse the provincial Court of Appeal on evidence from which we must, at least, admit, putting it at the very lowest, one may fairly infer that the respondent, on receipt of the notice of the appellant's intention to sell, by private sale, the goods and chattels covered by the chattel mortgage, placed himself in a position to redeem them, and, being in that position, did actually offer to redeem them within the stipulated time. Mr. Wallbridge swears very positively, and his memory is refreshed by entries in his day-book made at the time, that on the morning of the first of May he went to the office of the appellants' solicitors prepared to redeem and that he was then told by Garrett that it was too late. It is quite true he is not so positive that he asked for a

(1) 2 DeG. M. & G. 936.
(2) 5 Hare. 598.
(3) (1896) 1 Ch. 762.
(4) 12 Gr. 303.
(5) 24 Ont. App. R. 193.
(6) 2 Ch. D. 802.

1911

BRITISH COLUMBIA LAND AND INVESTMENT AGENCY v. ISHITAKA.

The Chief Justice.

statement of the amount due on the mortgage; but he swears that

they were not in a position to give a statement at the time anyway.

In my opinion, the basic fact upon which all turns is that the respondent had at his disposal, or could procure the amount required to redeem before the delay to do so had expired. The value of the property covered by the chattel mortgage was worth at least double the amount at which it was offered by private sale, and it was, probably, worth more to the respondent in his logging business than to any one else. In these circumstances, it is not reasonable to suppose that he (the respondent) would allow the property to be sacrificed when it was possible for him to redeem it. I am much impressed by an incident which occurred at the trial when counsel for the respondent, on an objection made by the appellants, abstained from putting in some evidence which it was desired to introduce to shew that Ishitaka was actually in a position to redeem the mortgage. The trial judge then declared that there were negotiations to raise $1,500 on Kato's property and that he, Kato, was willing to let that go in as security for the loan and, on that ground apparently, he maintained the objection to the evidence. That this point, upon which so much depends, namely, the ability to redeem the mortgage, should have been and would have been, were it not for this objection, investigated further is obvious, and I am satisfied that the trial judge refused to admit the evidence because, with all the facts fresh in his mind, he was of opinion that the respondent's contention that he then had the money under his control was sufficiently established.

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As to the sufficiency of the tender, it is not argued that what Mr. Wallbridge did constituted a legal tender; but, if a debtor tells his creditor that he comes to pay his debt and the creditor says that he is too late, or for any other reason refuses to accept the money, the actual production of the money is dispensed with.

Even if there was doubt as to which of the two views of the evidence should prevail, it seems to me that this court should not disturb the judgment of the provincial Court of Appeal which apparently adopted that view of the evidence which the trial judge entertained at the time of the trial and when the witnesses were all before him. The inherent probabilities are that, in view of the intrinsic value of the property, the respondent was able to raise the money he wanted, that the solicitor was instructed to redeem and that the solicitor did his duty in the circumstances.

In the Court of Appeal, Mr. Justice Martin says:—

This is a case in which I feel I must bring myself to say, with all deference to the learned trial judge, that the weight of evidence is clearly against his finding, and the facts respecting the important interview between the solicitors, when the plaintiff was endeavouring to redeem the mortgage, must be found substantially as testified to by the plaintiff's solicitor.

Chief Justice Macdonald accepts Mr. Wallbridge's evidence as correct, and says:—

The evidence of Mr. Garrett falls far short of contradicting that of Mr. Wallbridge, and that of Mr. King, his partner, does not touch upon this point because he was not present when this conversation took place.

I would dismiss with costs.

DAVIES J.—I agree with Mr. Justice Anglin.

IDINGTON J. (dissenting).—Want of good faith on the part of the mortgagee selling under a power of

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sale is sufficient, if the vendee a party to it, to entitle the mortgagor to have the sale set aside. Short of setting the sale aside he has also a right to recover from the mortgagee damages suffered by reason of the existence of want of good faith.

Some indirect motive on the part of the mortgagee operating to the detriment of the mortgagor is sufficient foundation for such an action. As pointed out by Jessel M.R., in *Nash* v. *Eads*(1), mere indirect motives, such as anger, that lead only to a properly conducted exercise of the power, are not such as I refer to. In that case Jessel M.R. added, in speaking for the Court of Appeal, consisting of himself and Cotton and Lush L.JJ., as follows:—

He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself.

A sale at such a gross undervalue as to lead to the proper inference that a fraudulent purpose existed is also held by all the authorities quite sufficient ground of attack.

In *Kennedy* v. *De Trafford*(2), in appeal (1897), Lord Herschell sets forth the principle to be observed, as follows:—

Lindley L.J., in the court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered, really, by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith," but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.

(1) 25 Sol. J. 95.

(2) 1896) 1 Ch. 762.

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It is quite clear that when a man has given another an absolute power to sell his goods, in a given event, he must be entitled to presume that it will be exercised honestly and with a proper regard to what honest conduct implies.

On the other hand, he given such a power clearly never was intended to subject himself to be hampered in the business or harrassed by reason merely of the goods having brought less than might under other and more favourable conditions have been realized.

In every case I have seen, and I have read all that have been referred to, the court has been (when the case turned on the question of sale at underprice) careful to observe whether or not there was anything but mere underprice; and, I think, in measuring the effect of a sale at less than the goods might have been sold for, regard must be had to all the circumstances in each case.

A man selling at public auction, after due advertisement and proper effort at the sale to realize the best possible price, might be able to justify to the full a sale to a single bidder at a price he could not be able to justify if, he being absolutely ignorant of the value of the goods over which he had such power, had rushed into the street and sold the same goods at the same price to the first man he met.

In this case, the goods mortgaged had, a year and a half before the sale, cost over twice as much as the mortgagee sold for; what, it was assumed, were the same goods.

The mortgage had been taken to secure eighteen hundred dollars, at six per centum per annum.

There was paid before the proceedings in question, a total of $719, according to respondent, and, according to an officer of the appellants, only $674. I assume the latter correct and that, as he puts it, with interest there was $1,274 due.

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The appellants allege in evidence the respondent had broken his promises of payment and then a distress warrant was given on 19th April, 1909, to seize.

Respondent having learned in some way not clear, of this, went on the 22nd or 23rd April, 1909, to appellants' office to get a statement of what was due in order to raise the money. When there he was served by appellants' agent with a notice that bears the date of 21st April, 1909, and says that they had entered into possession of all the goods covered by the chattel mortgage, and proposed to sell same by private sale on the first of May, 1909, at twelve o'clock noon, for the sum of $1,500, and that, unless all moneys due on the mortgage were paid on or before the first of May, 1909, the said sale would be consummated and possession transferred to the purchaser for the said sum of $1,500. I may observe that the notice was not addressed to the respondent, but to the original mortgagors.

One Allman, who was with the respondent, says it was after three o'clock in the afternoon, and too late to search the records that day, but next day he would have been ready to pay the amount and take the security offered, and asked for that delay, but was told there was no alternative but paying before eight o'clock that night.

The result seems to have been to discourage and delay respondent and negotiations with Allman fell through. Later he seems to have approached one Kato and arranged with him to raise the money; possibly, I infer, on more moderate terms than Allman was inclined to give.

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Kato was examined and, I infer, was quite willing to have raised the money, but, when asked the question, was met by an objection of the appellants' counsel to it as evidence. Without ruling on this, the court seemed to intimate such a reliance on previous evidence relative to such negotiations that the question remained unanswered.

I may remark here that, when the solicitor through whom that loan was to have been made was called to speak thereto, similar objections were raised and were met by a suggestion on the part of respondent's counsel that he supposed Mr. Wallbridge's statement was accepted.

The court replied the solicitor could not know about that. I merely note these tenderings of evidence on this head and will refer thereto and to the objections later when dealing with Wallbridge's alleged intention to tender.

The appellants had sold the outfit to one Bowes for $1,500 on the 18th or 19th of April, to become operative if title could be made on the 1st of May. Bowes paid $100 to bind the bargain. He had never seen the goods and so far as appears knew nothing of them except from the list. He had agreed with the appellants, as part of his agreement to purchase, to go up to where the goods were, with an officer, and take and keep possession till the time had elapsed for his purchase to become operative.

It cannot be said that such a conditional sale was *ipso facto* invalid unless we discard the authority of Wigram V.-C., in *Major* v. *Ward*(1). But certainly, in observing that case and its authority, we must not

(1) 5 Hare 598.

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overlook what the learned judge there said, at page 604. He said:—

> I do not give any opinion how it would be, if an undervalue or any special circumstance were suggested, calculated to impeach the sale.

This purchaser pretends that what he paid was a fair price, but yet admits his purchase was "a highly desirable one."

The officer was instructed to put the goods, when seized, into the possession of the purchaser.

The whole proceeding tended much to damn respondent's chances of raising the money which a delay of a day, as it impresses me, would, in all probability, have enabled him to do without the expenses being multiplied.

It was a case of one man entirely ignorant of what he was selling, bargaining with another equally ignorant of what he was buying, but willing to gamble upon it.

And even though he does not seem to have got all the goods covered by the mortgage he does not complain.

We have no satisfactory explanation of why such haste was made to prosecute the seizure by sending out an expensive expedition in face of negotiations on the 22nd or 23rd to raise the money though the warrant was issued on the 19th and its execution delayed till these later dates, or why the transaction assumed the form it did when both parties were in the dark as to what they bargained about or its value.

And we have no evidence of any disinterested person to speak on behalf of the appellants as to value and none is given discrediting estimates adduced on behalf of respondent.

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The bargain was for the sale and purchase of the goods covered by the chattel mortgage. Strangely enough the bill of sale to Bowes to carry it out assigns goods in a list of which some never were covered by the chattel mortgage and a number of things covered by the description of the goods as given in the mortgage do not appear in this list of goods as assigned. And thus the respondent is left liable for a balance yet payable on the chattel mortgage though, evidently, Bowes would gladly have paid enough to relieve him.

In the absence of evidence of value of these omitted or those wrongfully included this feature of the case is only of some importance as shedding light on the recklessness with which the whole business was transacted.

Another significant thing is that the officer seizing says he was to give up the goods if paid $1,500 and his fees.

What is meant by this ? There was no such sum as $1,500 due on the mortgage apart from his fees and expenses.

Was the officer only concerned as to his fees ? And had Bowes, in fact, managed all the rest, including the vessel's hire and that of the men ?

A cheque was passed afterwards to the sheriff inconsistent with that but why if these instructions were in accord with, and suitable to the actual facts ?

The sale would have been hard to maintain in face of the reckless sacrifice made, and the arrogant conduct and contemptuous disregard of the appellants, in their conduct, and all the attendant circumstances here related, of all fair consideration for respondent's rights in the premises; but, when we find, as I think

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we ought, that early in the forenoon of the first of May respondent's solicitor when calling upon the appellants' solicitors to pay them off was told he was too late, that the goods had been sold, I cannot see how such a transaction should be maintained.

It is as clear as anything can well be in this case that respondent, on the 22nd or 23rd of April, as I have taken to be the date of service of notice upon him (though the 23rd or 24th is more frequently given as the time) was negotiating to pay off the appellants, having learnt elsewhere or otherwise of some proceedings being on foot to enforce the mortgage, and that upon receiving this notice he relied thereon and became by virtue of its terms and the circumstances leading up to and surrounding it entitled to rely thereon as giving him the time named to redeem.

It is because of bad faith evinced in all I have shewn on the part of the appellants that the transaction sought to be impeached can be successfully attacked. And if we have to add to that mass of evidence the further finding of a breach of common honesty in violating good faith by withdrawing such a proposal knowing the party was given, both orally and thus in writing, the assurance it shews, can we think of the whole business but as a fraudulent device to defeat the just rights of the respondent ?

The case of *Williams* v. *Stern*(1), so much relied upon, seems beside the point raised here entirely. It was held there that there had been no such reliance put upon the defendant's promise as to furnish binding consideration. That cannot be said here. Indeed, I think respondent's misfortune was to have this notice thrust upon him when, in fact, he was negotiating

(1) 5 Q.B.D. 409.

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with a man who would have relieved him next day if that had been the term.

The fatal tendency of some people is to put off till to-morrow for any excuse what should be done to-day.

And respondent does not seem to have been an exception to that class and put off till the last day.

And then, by reason of his solicitor having been told he was too late, nothing more was done.

I think, from expressions of opinion of the learned trial judge he, evidently, at the trial, was impressed with the correctness of Mr. Wallbridge's evidence, though, later in his judgment charitably covering the incident as a misunderstanding.

It is quite likely this latter is correct finding, but it does not displace what Mr. Wallbridge states, or his client's rights. And the Court of Appeal has so found consistently with any theory of honest error on the part of the appellant's solicitor. I do not think the appellate judgment should be disturbed. It rests on ground which is distinctly taken in the pleadings and the notice of appeal and on the facts, apart from the doubt as to time of tender, ought to remain undisturbed.

I may say a word as to the question of Mr. Wallbridge being in a position to carry out his tender. If a man goes with a cheque or anything not legal tender to offer another he is entitled, if the other broadly refuses to accept anything, to act thereon. If the other refuses because of want of legal tender the opportunity to remedy that can be made use of if time permit, and here the time existed, I infer, before noon.

And, short of proof that the tender has been a sham, I see no answer that can let him, peremptorily declining in broad terms, escape the consequences of his refusal.

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The case of *Jenkins* v. *Jones*(1), where tender of the debt without costs, which had not been ascertained, was held sufficient, may well be looked at in this connection and, especially, in light of what Mr. Wallbridge says he was prepared to do.

I think this appeal should be dismissed with costs.

DUFF J.—The grounds of action relied upon at the trial were: First, that goods not comprised in the bill of sale were sold by the appellant company: and, secondly, that the sale was made after the amount of the mortgage debt had, in effect, been tendered. As to the first of these grounds of action I think the weight of evidence supports the conclusion of the trial judge. As to the second I think the respondent, in order to make that ground the basis of a successful contention that the sale was in violation of his rights must shew either that he made a tender or that the mortgagees, being apprised of the fact that he (the mortgagor) was in a position and ready to pay the amount secured by the mortgage, refused to accept payment.

The learned trial judge obviously entertained no doubts as to the good faith of either Mr. Wallbridge or Mr. Garrett; and, I think the conclusion to which he ultimately came after considering all the circumstances, namely, that there had been a misunderstanding, is the most probable explanation of the conflict of testimony which unfortunately occurred. Mr. Wallbridge appears to have had in his mind and to have been only prepared to tender a sum considerably less than the amount which in fact was required to pay off the mortgage and, in such circumstance, one need

(1) 2 Giff. 99.

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not be surprised that he and Mr. Garrett should now prove to have been at cross-purposes.

The mortgage debt had been in arrears for something like six months. Various extensions of time had been granted and, finally, about ten days before the 1st of May, the respondent had been informed that payment must be made before noon on that day. Further requests for extensions continued, but it is not suggested that the respondent actually informed the mortgagees that he was ready to pay the debt until less than two hours before the hour fixed. The onus was on the respondent to shew that he tendered the amount due or that he distinctly and unmistakably made the mortgagees' agents aware that he was ready then and there to pay it and that, thus informed of his readiness to pay, they refused to receive it. In this, I think, he has failed.

A further ground of action was relied upon in the Court of Appeal — that the property was sold at an undervalue owing to the absence of such steps as the mortgagees were bound to take in order to protect the interest of the respondent in securing the best price. It is to be observed that the duty of a mortgagee in exercising a power of sale (as touching the measures to be taken to secure a good price for the property sold), has in recent years been stated by a very high authority, (*Kennedy* v. *De Trafford*(1)), Lord Herschell, at page 185; Lord Macnaghten at page 192; *Nutt* v. *Easton*(2), *per* Cozens-Hardy J., at pages 877 and 878. The sum of the matter appears to be this. He is bound to observe the limits of the power and he is bound to act in good faith, that is to say, he is bound

(1) [1897] A.C. 180. (2) [1899] 1 Ch. 873.

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to exercise the power fairly for the purpose for which it was given. If the mortgagee proceeds in a manner which is calculated to injure the interests of the mortgagor and if his course of action is incapable of justification as one which in the circumstances an honest mortgagee might reasonably consider to be required for the protection of his own interests; if he sacrifice the mortgagor's interests "fraudulently, wilfully or recklessly," then, as Lord Herschell says, it would be difficult to understand how he could be held to be acting in good faith. But that is a vastly different thing from saying that he is under a duty to the mortgagor to take, (regardless of his own interests as mortgagee,) all the measures a prudent man might be expected to take in selling his own property. The obligation of a trustee, when acting within the limits of the power, would be no higher, *Learoyd* v. *Whiteley*(1), at page 733, and it is clear that in exercising his power the mortgagee does not act as trustee. The evidence quite fails to establish any violation of the respondent's rights according to these principles. There is not a word in the evidence as to the selling value of the property at the date of the sale. Apart, moreover, from the inadequacy of the evidence as it stands there is a fatal objection based upon the principle that, as a rule, a litigant who intends to rely upon a charge of bad faith must bring it forward distinctly at the trial. Such evidence as was relied upon in the Court of Appeal and in the respondent's factum was not put forward with the object of establishing any such cause of action and was not sifted in cross-examination with a view to its bearing on a claim of that character. Of

(1) 12 App. Cas. 727.

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bad faith or recklessness in the sale as constituting in itself a ground of action there was not, at the trial, from first to last, a single word.

ANGLIN J.—A careful perusal of the evidence of his solicitor has satisfied me that the plaintiff was not, at any time prior to noon on the first of May, 1908, in a position to redeem the defendants' mortgage. For this purpose $1,604.92 ($1,283.65 exclusive of costs) was required. Mr. Wallbridge was, not improbably, misinformed by his client as to the amount due. The latter appears to have assumed from some entries, which he says he saw in some book of the defendants, that about $1,100 was the sum needed for redemption. Negotiations by and on his behalf to raise money for this purpose proceeded on this basis for several days prior to the first of May. Mr. Wallbridge's evidence has convinced me that the money available to the plaintiff for redemption, on the first of May, was only about $1,100 — at the most $1,150. There never was an offer to pay to the defendants, or their solicitors, more than this amount. If Mr. Wallbridge was informed by Mr. Garrett before noon on the first of May, as he says he was, that the sale had been already concluded — a fact which I should certainly hesitate, upon the evidence before us, to find had been satisfactorily established — in the absence of proof that he was in a position to redeem, the plaintiff has not, in my opinion, made out a case entitling him to damages for a premature sale. Unless he was actually able to redeem he, in fact, sustained no such damage.

Without at all determining that it is so as a matter of law, I proceed on the assumption that the notice given by the defendants to the plaintiff operated as a

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waiver of their right to sell without notice and entitled the plaintiff to redeem at any time prior to noon on the first of May, 1908.

I agree with Irving J. that the plaintiff failed to prove that his chattels were sacrificed by the mortgagees or that the sale was recklessly improvident. Neither did he shew that property not covered by the mortgage was seized.

With respect, I would allow this appeal with costs in this court and in the Court of Appeal and would restore the judgment of the trial judge.

BRODEUR J.—The respondent has instituted an action in damages against the appellants for an illegal sale of goods subject to a chattel mortgage.

He claims that he offered the amount due on the mortgage before the hour given in the notice, viz., before noon on the first of May.

The only question of fact involved is as to whether or not, on the morning of the first of May, a sufficient tender of the whole amount due was made.

The respondent's solicitor says, in his evidence, that he went on the morning of the first of May to the office of the appellants' solicitor; that he asked him for the amount that was proper to redeem the mortgage, and that he was willing to give him a cheque, and he was informed that the chattels had been sold.

The appellants' solicitor does not remember having seen the other solicitor, but that, after 12 o'clock, he was telephoned to by him about making a tender and he answered him it was too late.

If the circumstances are such as narrated by the respondent's solicitor, he should have made a quick rejoinder and taken the necessary steps to shew that he

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was still in time to make the offer. But he said nothing.

Besides he does not prove that he was ready to pay the whole amount due. The evidence shews that the amount due was over $1,500. However, the respondent's solicitor says that he was

willing to give a cheque for $1,100, and if they said they could not make up an exact statement to $25, or $50, I would have given it,

and his own statements go to shew that he did not expect that an amount of $300 or $400 more could be claimed under the mortgage.

The tender, if made, was not sufficient, and the appellants were justified in making the sale.

It has been stated that the sale was improvident and that the price obtained was not high enough.

In the notice for sale served upon the respondent he was told that the chattels would be sold for $1,500 if the mortgage was not paid. It was, evidently, the best price that could be obtained. It did not even cover the whole amount due.

It was then for the respondent to find out some purchaser at a better price, and I cannot say that the sale was improvident.

I would allow the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *McPhillips & Wood.*

Solicitors for the respondent: *Bowser, Reid & Wallbridge.*

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*Oct. 6, 9.
*Dec. 6.

THE CANADIAN PACIFIC RAILWAY COMPANY AND THE CANADIAN NORTHERN RAILWAY COMPANY ..... APPELLANTS;

AND

THE BOARD OF TRADE OF THE CITY OF REGINA ..... RESPONDENTS.

(REGINA RATES CASE.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Construction of statute—"The Railway Act," R.S.C. (1906), c. 37, ss. 77, 315, 318(2), 323—(D. 1 Edw. VII. c. 53)—(Man.) 52 V. c. 2; 53 V. c. 17; 1 Edw. VII. c. 39—Board of Railway Commissioners—Complaints—Evidence—Agreement for special rates—Unjust discrimination—Practice—Form of order on reference.

In virtue of an agreement with the Government of Manitoba, validated by statutes of that province and of the Parliament of Canada, the Canadian Northern Railway Company established special rates for the carriage of freight, etc., to points in Manitoba, and the Canadian Pacific Railway Company reduced its rates, which had been in force prior to the agreement, in order to meet the competition resulting therefrom. The complaint made to the Board of Railway Commissioners for Canada by the respondents was, in effect, that as similar proportionate rates were not provided in respect of freight, etc., to points west of the Province of Manitoba there was unjust discrimination operating to the prejudice of shippers, etc., to and from the western points. On questions submitted for the consideration of the Supreme Court of Canada,

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.