1881
*Oct. 25, 26, 27.
1882
*March 28.

WILLIAM H. CREIGHTON, Assignee of LEWIS P. FAIRBANKS, under the Insolvent Act of 1875..... APPELLANT.

vs.

SAMUEL CHITTICK, JOSEPH CHITTICK AND JOHNSTON CHITTICK, RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Insolvent Act, 1875—*Trader*—*Pleading.*

This was an appeal from a judgment of the Supreme Court of *Nova Scotia*, making the rule *nisi* taken out by the respondents absolute to set aside verdict for plaintiff and enter judgment for the defendants. The action was brought by *C.* as assignee of *L. P. F.*, under the Insolvent Act of 1875, for several trespasses alleged to have been committed on the property known as the *Shubenacadie* Canal property, and for conversion by *C. et al.* to their own use of the ice taken off the lakes through which that canal was intended to run.

The declaration contained six counts, the plaintiff claiming as assignee of *F.* Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea being that "the said plaintiff was not, nor is such assignee as alleged."

After the trial both counsel declined addressing the Judge, and it was agreed that a verdict should be entered for the plaintiff with $10 damages, subject to the opinion of the court, that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the court should have power to enter judgment for or against the defendants with costs. A rule *nisi* for a new trial to be granted accordingly, and filed.

The rule was taken out as follows:—"On reading the minutes of the learned Judge who tried the cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent subject to the opinion of the court, with

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*PRESENT:—Sir William J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau, and Gwynne, JJ.

power to take all objections arising out of the evidence and minutes, and with power to the court to enter judgment for or against defendants, with costs, be set aside with costs, and a new trial granted herein."

This rule was made absolute in the following terms:—"On argument etc., it is ordered that the rule *nisi* be made absolute with costs and judgment entered for the defendants against the plaintiff with costs." Thereupon plaintiff appealed to the Supreme Court of *Canada*, and it was

Held (*Henry*, J., dissenting), that by traversing the allegation of plaintiff being assignee, the defendants put in issue the fact implied in the averment, that the plaintiff was assignee in insolvency, and that *F.* was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that *F.* bought or sold in the course of any trade or business, or got his livelihood by buying and selling, that the plaintiff failed to prove this issue.

Per *Gwynne*, J: Assuming *F.* to be a trader still the defendants were entitled to judgment upon the merits, which had been argued at length. That the agreement at *nisi prius* authorized the court to render a verdict for plaintiff or defendant according as they should consider either party upon the law and the facts entitled; that the court, having exercised the jurisdiction conferred upon it by this agreement, and rendered judgment for the defendants, this court was also bound to give judgment on the merits, and as judgment of the court below in favor of the defendants was substantially correct to sustain it; and it having been objected that as the rule *nisi* asked for a new trial the rule absolute in favor of defendants was erroneous, that such an objection was too technical to be allowed to prevail, and that the rule *nisi*, having, as it did, recited the agreement at *nisi prius*, and the court below having rendered a verdict for the defendants, it should be upheld, except as to the plea of *liberum tenementum*, which should be found for the plaintiff or struck off the record, and that to order a new trial could be but to protract a useless litigation at great expense.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, making the rule *nisi* taken out by the respondents absolute to set aside verdict for plaintiff and enter judgment for the defendants.

The facts and pleadings sufficiently appear in the head note and in the judgment of Mr. Justice *Gwynne*, hereinafter given.

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Mr. *Thompson*, Q. C., for appellant:—

The verdict in this case was set aside upon the ground that the insolvent was not a trader, and therefore his assignee could not recover in an action of trespass. I will first argue this point and then discuss the merits.

The certificate from the officer of the court was at least *primâ facie* evidence of *Fairbanks* being an insolvent and having regularly and properly assigned, and of the plaintiff's appointment, and of the regularity of all proceedings antecedent to the certificate (1).

Moreover the denial of *Fairbanks* being a trader should have been made explicitly in the pleas, especially in view of the following section, 152 of chapter 94, revised statutes of *N. S.*, 4th series: "The general issue and all general pleas are abolished, and every pleading shall specify particularly and concisely the facts intended to be denied." *Church-wardens* v. *Vaughan* (2).

It was not necessary, as the Supreme Court of *N. S.* seemed to adjudge it to be, that in order to make the insolvent a trader within the meaning of the Act, he should have assets and books which had resulted from his trading business. Ex-parte *Dewdney* (3); *Doe* v. *Laurance* (4); *Baillie* v. *Grant* (5).

On the question of fact as to *Fairbanks* having been a trader, there was some evidence at least for the plaintiff and none for the defendants. The assignee, in his evidence, says: "*Fairbanks* bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron." The Supreme Court said: "We all do that when necessary," and thence concluded that *Fairbanks* was not a trader (6).

The verdict in the plaintiff's favor, therefore, should

(1) Insol. Act of 1875, sec. 144.
(2) 2 Russ. & Ches. 443.
(3) 15 Ves. 495.
(4) 2 C. & P. 134.
(5) 9 Bing. 121, 6 Bligh 459, 2 Rose, 428.
(6) Insol. Act of 1875, sec. 1.

not have been disturbed, and was a finding of that issue in plaintiff's favor.

The learned counsel then argued at length on the merits of the case, claiming that the plaintiff showed a complete title to the *locus*, and proved the trespasses thereon, but the Supreme Court of *Canada* having affirmed the judgment on the ground that *Fairbanks* was not a trader, this branch of the argument is omitted.

Mr. *Rigby*, Q. C., for respondent:

It was upon a consent of the parties in the case that the whole matter was referred to the court *in banc*. It was "agreed that a verdict shall be entered for the plaintiff, with $10 damages, subject to the opinion of the court, that the parties shall be entitled to take all objections arising out of the evidence and minutes, and that the court shall have power to enter judgment for or against the defendants, with costs." Now, the case was heard before the full court, and I contend that the court has as a matter of fact decided that respondent was not a trader, and if this judgment upon this matter of fact can be sustained by any evidence, this court cannot interfere. The court below was put by consent of parties in the position of a jury. What was put in by plaintiff was only *primâ facie* evidence, and in order to rebut it, we cross-examined the insolvent, and proved that his insolvency had only relation to lands. I contend that as the assets and liabilities of *Fairbanks* had reference entirely to this canal property, unless he can be considered as a trader in relation to that, he was not subject to the provisions of the act.

None of the trades, callings, or employments specified in section 1 of the Insolvent Act of 1875, include that alleged to have been followed by *Fairbanks*, nor was his a trade, calling or employment like that of any of them; besides, the property in question was not of a

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character to admit of its being made the subject of trade; it could be serviceable as a canal property in its entirety only. See *Clarke's* Insolvent Law (1). In *re Cleland* (2); *Stuart* v. *Sloper* (3). It is urged also that we did not raise the issue of plaintiff not being a trader. I contend that by denying title in plaintiff, the burthen of proof was on them. See *McMahon* v. *McArdle* (4).

[The learned counsel then argued that the title to the land in question was not in plaintiff.]

RITCHIE, C. J.:—

These were actions brought by the plaintiff, as assignee under the Insolvent Act of 1875, of *Lewis P. Fairbanks*, an insolvent, to recover damages for an alleged breaking and entering certain lands, and lands covered with water of the plaintiff, as such assignee, digging the soil thereof, throwing earth, &c., thereon, and cutting and carrying away the ice formed on the said land covered with water, the property of plaintiff, as such assignee, and converting the same. The defendants pleaded several pleas, *inter alia*, "that the said *Wm. H. Creighton* was not, nor is, such assignee as alleged." An objection was taken at the trial, and at the argument, that *Fairbanks* was not shown to have been a trader, and that plaintiff, as assignee, took nothing by the assignment, purporting to be made by *Fairbanks*, under the Insolvent Act of 1875, unless he was a trader within the meaning of that Act. The Supreme Court of *Nova Scotia* were of opinion that *Fairbanks* was not shown to have been a trader within the meaning of the Act, and therefore plaintiff could not succeed in the action. From this judgment the present appeal is taken. The plaintiff offered no evidence of the insolvent having been a

(1) P. 14 et seq.
(2) L. R. 2 Ch. 466.
(3) 3 Exch. 700.
(4) 33 U. C. Q. B. 252.

trader—the only evidence on the point was brought out by defendants' counsel on cross-examination of the plaintiff, and is as follows: *W. H. Creighton*, cross-examined:—

Fairbanks bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron. No debts or assets of that kind. The insolvent business has relation solely to land. He handed me no books of business, nor cash book. His books had reference only to the Canal property; other lands of his had been wound up. I gave no bond for this estate; it was not required.

The plaintiff was not re-examined to explain, if he could, favorably to himself, that the insolvent had bought and sold, and whether as a trader or not, or what the nature of his dealings were with the insolvent. There is not the slightest evidence that *Fairbanks* purchased articles of merchandise for the purpose of selling them again at a profit, or that he bought the articles referred to with any intention of selling again with a view to profit, or that he was considered a trader by any person who knew or dealt with him.

Lewis P. Fairbanks, the insolvent, was examined, and he does not appear to have been interrogated, or to have said one word, as to having been a trader, or as to his dealings in any way, nor do any other witnesses. The burthen was clearly on the plaintiff under the pleadings to establish that the insolvent was a trader. As it appears by the evidence that the insolvent "had no debts or assets of any kind;" "that his business had relation solely to land;" "that he handed the plaintiff, his assignee, no books of business, nor cash book; that the books he had had reference only to the canal property;" and "other lands of his had been wound up;" and as the objection was taken at the trial that there was no proof that *Fairbanks* was a trader, and as *Fairbanks* himself was on the stand and examined, and if he had been a trader could have established that fact beyond

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all question, I think, so far from the fact of *Fairbanks* having been a trader having been proved, the Court below, had it been necessary, which it was not, would have been quite justified under the circumstances, and the fair inferences to draw therefrom, in coming to the conclusion that *Fairbanks* was not a trader.

The plaintiff in the court below, and also on the argument before this court, invoked the 144th section of the Insolvent Act of 1875, as establishing that the assignment itself was *primâ facie* evidence of the insolvent being a trader. This section enacts that :

> The deed of assignment and transfer shall be *primâ facie* evidence in all courts, whether civil or criminal, of such appointment (the appointment of the assignee), and of the regularity of all proceedings at the time thereof and antecedent thereto.

But this cannot possibly avail the plaintiff for two conclusive reasons. In the first place, whether the insolvent was a trader or not was not matter of procedure, and proceedings having been taken against him as a trader, the deed of assignment by sec. 144, is made *primâ facie* evidence only of the regularity of all such proceedings, but no evidence whatever of the insolvent having been a trader to justify such proceedings. If the statute, however, had the effect claimed for it, the deed is only made *primâ facie* evidence, and the evidence, in the case rebuts such *primâ facie* evidence and uncontroverted, unexplained and unanswered, established that the insolvent was not a trader, at any rate sufficiently so to overcome the *primâ facie* evidence of the deed ; and there being no evidence of the insolvent having been a trader, and though the question was distinctly raised by the pleadings, and at the trial, and the plaintiff not having attempted to prove that he was, the circumstances before referred to and the fact that the plaintiff and the insolvent both were allowed to

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leave the witness stand without being questioned on this point—a matter peculiarly within their own knowledge—are conclusive to my mind that the buying and selling referred to by the plaintiff was not a buying and selling by the insolvent as a trader, and that his business transactions, which it is said by plaintiff were solely in relation to land, were not only no evidence whatever of a trading within the meaning of the Insolvent Act of 1875, but the whole evidence justifies the contrary inference, viz.:—that he was not a trader.

As the court below based their judgment on this point alone, as it is a perfect answer to plaintiff's case, and refrained from expressing any opinion on the other questions raised in the case, I feel I should be exceeding my appellate duties in discussing or determining questions not passed on by the court below, and not necessary for the determination of this appeal.

Had the rule *nisi* been taken out for entering judgment for the defendants, I think it should have been made absolute in those terms, but as the rule *nisi* taken out in the court below appears to have been only "to set aside the verdict with costs" and a new trial granted, it is admitted that, in accordance with the practice in *Nova Scotia*, that the court can only make the rule absolute to the extent asked in the rule *nisi*. I believe it is a rule that the court will never go beyond the rule *nisi* and grant more than is there asked for.

STRONG, J.:—

I think the rule absolute granted by the court below should be modified so as to make it a rule to enter a verdict for the defendants, and, subject to that alteration, the appeal should be dismissed with costs. By traversing the plaintiff's title as assignee the defendants put in issue the fact, implied in the averment that the

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plaintiff was assignee in insolvency, that *Fairbanks* was a trader within the meaning of the Insolvency Act of 1869 (1). This issue the plaintiff failed to prove. The only evidence of trading was that of the plaintiff himself, and was very brief and meagre; he says:

> *Fairbanks* bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron. No debts or assets of that kind. The insolvent business has relation solely to land. He handed me no books of business nor cash book. His books had reference only to the canal property; other lands of his had been wound up. I gave no bond for his estate; it was not required.

The assignment was a voluntary one, but it was in the form prescribed by the Act, and could have no operation to pass the legal estate in the lands in question unless the Act applied. By the 1st section of the Insolvency Act of 1869 it is enacted that it shall apply to traders only. It contains, however, no definition of a trader. The authorities on the Bankruptcy Acts and the description of traders contained in the English Bankruptcy Statutes of 1849 and 1869 show conclusively that the evidence in the present case was entirely insufficient to establish trading so as to bring the insolvent within the operation of the Act. Mr. *Robson* in his treatise on bankruptcy lays it down that buying and selling and dealing in land are insufficient to constitute a person a trader (2). Again the same writer (3) says:

> In order to constitute a trading by buying and selling, or by buying and letting for hire, or the workmanship of goods and commodities, these occupations must be followed as a means of gaining a livelihood; one or two isolated transactions willnot do * * * Buying without selling, or letting for hire, at least without an intention to sell or to let for hire, or *vice versâ*, will not constitute a trading * * * So, also, the buying and selling ought to be in the general way of business and not in a qualified manner, or only for a special purpose.

The evidence does not establish that *Fairbanks* bought or

(1) In *McMahon* v. *McArdle*, 33 U. C. Q. B. 252.

(2) Robson on Bankruptcy, 2nd edit., p. 96.

(3) At p. 98.

sold in the course of any trade or business, or that he carried on any business, or got his livelihood by buying and selling in the way mentioned; it is consistent with the plaintiff's testimony that what he refers to were mere isolated transactions and not in the course of any general dealing. It is therefore insufficient to prove the affirmative of the issue which was on the plaintiff—that *Fairkanks* was subject to the operation of the Insolvency Act of 1869. The consequence is that the plaintiff has no title to sue, and a verdict should have been found at the trial for the defendants.

At the trial leave was reserved to move to enter a verdict for the defendants, at least such is the construction which I place on the note of the learned Chief Justice, which is as follows:

> The evidence being closed, both counsel decline addressing the judge, and it is agreed that a verdict shall be entered for the plaintiff with $10 damages, *subject to the opinion of the court*, that the parties shall be entitled to take all objections arising out of the evidence and minutes, and that the court shall have power to *enter judgment* for or against the defendants * * * A rule *nisi* for a new trial to be granted accordingly and filed.

I read the words "enter judgment" in this minute as synonymous with "enter a verdict," for in no other way would they have any sense or meaning.

Then the rule *nisi* granted was, it is true, a rule *nisi* for a new trial, but it refers to this leave to move, and was granted in pursuance of it. I see, therefore, no reason why the court should not have made it absolute to enter a verdict, which was, no doubt, what was intended instead of judgment for the defendants, as is directed by the rule in its present form. The rule being, therefore, varied in the way I have indicated, will effect such a disposition of the case as the court and the parties contemplated by their consent at the trial, in the event which has occurred, of the court in *banc* being of

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opinion that the plaintiff failed to prove his case. The rule absolute should, therefore, be altered by substituting the word "verdict" for "judgment," and, subject to that variation, the appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J.:—

Having ascertained that a majority of the court had decided to disallow the appeal in this case and to grant a new trial, solely on the ground that there was not sufficient evidence that the appellant was the assignee of *Fairbanks*, in which character he brought the action, without considering the merits of the action, I concluded it would serve no good purpose for me to do so, differing from them, as I do, on the point upon which their decision rests.

By the Practice Act in *Nova Scotia* the representative character of the assignee of a bankrupt is not in issue, unless specially pleaded, and sec. 144 of the Insolvent Act of 1875 provides that "deeds of assignment shall be *primâ facie* evidence in all courts, whether civil or criminal," *of the appointment of the assignee*, "and of the regularity of all proceedings at the time thereof and antecedent thereto." The assignment in this case furnished that *primâ facie* evidence. The words of the section "shall be *primâ facie* evidence of his appointment" to be of any service, must mean his regular and legal appointment to the same extent as the statutory provision, that letters of administration or probate of a will would be *primâ facie* evidence, except, perhaps, in suits as to land, of the death of the intestate or testator, and that the party died in the place over which the judge of probate had jurisdiction. To make the provision of any real value by the power of the words I have quoted

they must be construed to go to the length I have stated. The object was clearly to prevent the necessity of proving that the assignment was legally made in every case where a suit should be tried in respect of any asset of the estate, real or personal.

In the fifteenth and last plea of the respondent that character was denied. The onus of proof was therefore put upon plaintiff. I think there is sufficient evidence furnished by the assignment that *Fairbanks* was a trader. The assignment by him would be sufficient, I think, to vest in the appellant a right to property, so that he could maintain an action against a wrong doer. It was made to the appellant as interim assignee, and he was subsequently appointed assignee by the creditors of the estate. The assignment is in the form prescribed by the statute, 38 *Vic.*, ch. 16, under which it was made; and it vested in the assignee by virtue of the 15th sec. "all the right, power, title and interest," which the insolvent had in and to any real or personal property. It is said, however, that if he were not a trader within the terms of the statutes the assignment passed nothing. The uncertainty and generality of the assignment, as to the property intended to be conveyed, if in an ordinary deed, would, no doubt, render it void, but here we have a statutory provision supplying that defect and removing that objection—for that is certain which can be made certain. As between the insolvent and his assignee, the voluntary assignment is a binding transfer. The former, in the case of a sale of the property by the latter, would be estopped from saying he had not conveyed the title to his assignee. It was in my mind a sufficient transfer to have enabled the assignee to have recovered in an action the property from the bankrupt himself, and the latter would not be permitted to plead that at the time of the assignment he was not a trader. If he were not

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such, and that therefore the assignment was voidable, as I hold it only to have been, as respects creditors, one who did not adopt it, or a debtor of the insolvent whose debt was assigned, might challenge the legality of the assignment, but I don't think outside parties should be permitted to do so in the way contended for in this case. The creditors, at the meeting before mentioned, adopted the assignment by unanimously appointing the appellant assignee, and those who did so would be estopped from saying that he was not such assignee. The assignment was registered in the Insolvent Court and adopted, and all parties interested acknowledge it as correct and valid. Is it then for outside parties to impeach it in the way attempted here?

There is still another objection. The plea in question raises an issue which I think does not touch the question as to whether the insolvent was a trader or not. The words are "that the said *Wm. H. Creighton* was not nor is such assignee as alleged." Notwithstanding the authorities cited in the court below, I am of opinion that the plea is but a denial of the fact that he was *de facto* such assignee. It does not allege that *Fairbanks* was not a trader within the terms of the Insolvency Acts, and therefore that the assignment was void as being unauthorized. They are two separate and distinct issues requiring altogether different evidence to be adduced by the respondent It is one thing to deny the mere making of the instrument and another to allege circumstances that make it void or voidable as the case may be. In the one case the burden of proving the fact of the making of the instrument is thrown upon the party producing it, and although the affirmative of the issue in the other case is on the same party the proof is essentially different. By merely denying the making of the assignment the respondent cannot, therefore, by any rule of evidence that

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I know, be permitted to throw the onus of proof on the other party, of proving that which is not denied. That doctrine is applicable to the plea in this case. The appellant should have been notified that it was intended to question the right of *Fairbanks* to make the assignment. The plea gives no such intimation, and that is the test applied by the rules of pleading. It should, in my opinion, have done so, and without that statement I think the issue raised was only as to the execution of the assignment.

If, however, the issue in question was raised by the plea the evidence in respect of it was all on one side, that of the appellant; he was examined as a witness and amongst other things said that he was the official assignee of the estate and produced the assignment which was put in evidence. He said further:—

Fairbanks bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron. No debts or assets of that kind. The insolvent business has relation solely to land. He handed me no books of business nor cash books. His books had reference only to the Canal property; other lands of his had been wound up.

This evidence was given in reply to questions of the respondent's counsel and is all that was given by the witness or any other on that subject. Here then is a comprehensive statement that the bankrupt "bought and sold all sorts of things," and, no doubt in answer to a further request to name some of the articles he traded with, he replied: "he bought oats and wood and iron," meaning clearly that the witness knew of his trading in those articles. It appears to me that is sufficient *primâ facie* evidence of trading of which the respondent's counsel by not going into a more critical examination would leave the impression that he felt satisfied; or, that further inquiries would lead to the fact being more fully and completely established.

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Suppose that evidence had formed part of the examination in chief, and that no cross-questions were asked as to it, how could it be said to be insufficient?

Is it the less strong because it was given on the cross-examination of the witness?

It was contended that because the evidence was brought out in that way, the appellant should have given additional and more specific evidence, but I cannot adopt that proposition and know of no rule of evidence requiring it. The evidence was such that no judge would be justified in withdrawing it from the consideration of a jury, particularly when there was nothing in rebuttal of it; and I cannot feel justified in sending back the case upon such a point and one which leaves the merits untouched. It has been said that, because the insolvent had no assets, nor owed any debts in immediate relation to his trading, nor handed over any books relating thereto to the assignee, he could not have been a trader; but if while a trader he contracted debts not immediately connected with his trading—such as for the support of his family, or as security for another—that he had real and personal estate while he was such trader, but not the immediate result of his trading, the fact of his having neither assets nor owing debts connected with his trading, would not make him the less a trader, nor would the fact that he handed over no books of account of his trading transactions necessarily disqualify him to make an assignment to creditors for other debts contracted while he was a trader, merely because his trading operations, technically speaking, had been closed.

Section 1 of the act awards the benefit of it amongst others to "persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise in gross or by retail." The section excepts from the operation of the act farmers,

graziers, common laborers and workmen for hire, so that the operation of the act extended to all other classes and all were deemed traders who came within the provisions of the section.

I wish it to be distinctly understood that I do not hold that the evidence as to the bankrupt having been a trader was at all conclusive, or that it might not have been shewn under proper pleas that the debts he owed were incurred after he ceased to be a trader or were barred by the statute of limitations, but it was not alleged or shown that he ceased to be a trader before his assignment, nor that his debts were barred by the statute of limitations. I do not contend that such would not have been a good defence, but what I do hold is that, under the issue raised by the plea in question, the appellant was not bound to prove them, nor was he, I think, any more bound to prove further than he did that he was a trader.

The rule *nisi* in this case was for a new trial but the court appealed to gave a judgment for the defendant. I understand that at least a majority of this court feel that the judgment cannot be sustained and I am of that opinion. The court in *Nova Scotia* has no power to give a judgment in such a case. Our judgment should therefore be to set it aside with costs.

I think on all the grounds I have stated that the appeal should be allowed, the judgment below reversed, and judgment given for the appellant with costs.

TASCHEREAU, J., concurred with the Chief Justice.

GWYNNE, J.:

This is an action of trespass *qu. cl. fr.* wherein the plaintiff, as assignee of the estate and effects of *Lewis P. Fairbanks*, under the Insolvent Act of 1875, complains in his first count that the defendants broke and entered

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certain lands and close of the plaintiff, as such assignee, situate at *Dartmouth*, in the County of Halifax, described as follows, that is to say: "Certain land, and land covered with water, known as section number 2, of the *Shubenacadie Canal*, and forming the reservoir thereof and called "the first and second *Dartmouth* Lakes," &c.; and in his second count, that the defendants entered upon certain lands and lands covered with water of the plaintiff, as such assignee, situate at *Dartmouth* aforesaid, and described as in the said first count, and deposited thereon large quantities of stone, earth and rubbish, and made an embankment thereon, and erected buildings and fences thereon, and dug the soil thereof, and drove posts and stakes therein, and cut and carried away the ice formed on the said land covered with water and converted the same to their own use.

And in his third count the plaintiff complained that the defendants took and carried away and converted to their own use and deprived the plaintiff, as such assignee, of the use and possession of large quantities of ice, to wit: five thousand tons of ice, the property of the plaintiff, as such assignee.

There were also three other counts in the declaration, in the fourth of which the plaintiff complained of an entry by the defendants on the close and lands described in the first count, calling them the close and lands of *Lewis P. Fairbanks*. In the fifth count the plaintiff complained that the defendants broke and entered the close and lands described in the first count, but calling them the close and lands of *Lewis P. Fairbanks*, and committed therein similar trespasses to those set out in the second count. The sixth count was similar to the third, except that the ice was alleged to be the property of *Lewis P. Fairbanks* and of the plaintiff.

The defendant pleaded to the first and second counts as follows:—

1st. Not guilty.

2nd. That the closes, land, and land covered with water and ice, was not the plaintiff's, as alleged, nor was he in possession thereof.

3rd. That the said closes, land and land covered with water are the freehold of the defendants.

4th. *Liberum tenementum* in the defendant *Johnston Chittick*, and others, and that he in his own right and the other defendants, as his servants and by his command, committed the said alleged grievances.

5th. *Liberum tenementum* in one *George A. S. Creighton*, and that the defendants, as his servants and by his command, committed the said alleged grievances.

6th. As to the 3rd count—not guilty.

7th. As to the 3rd count, that the ice therein mentioned was not the property of the plaintiff as such assignee as therein alleged.

There were precisely similar pleas to the 4th and 5th counts, and the defendants lastly and 15thly pleaded:

That the plaintiff was not, nor is, such assignee as alleged in his declaration.

At the trial before the late Chief Justice of *Nova Scotia* sitting as a jury at *Halifax*, the plaintiff produced in evidence divers documents and deeds, by force of which, and of divers acts of parliament, he contended that a certain canal or water communication called the *Shubenacadie* canal, undertaking, works and property, became vested in a certain corporation known as "The Lake and River Navigation Company." He also produced a deed bearing date the 1st April, 1870, purporting to be between "the Lake and Navigation Company," of the one part, and *Lewis P. Fairbanks* of the other part, whereby it was witnessed that the said company did grant, &c., &c., &c., unto the said *Lewis P. Fairbanks*, his heirs, and assigns, all the lands, lands covered with water, messuages, locks and other

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works, water-powers and appurtenances described in a deed from the Hon. *James McNab* to the 'Inland Navigation Company', reserving out of said lands a sufficient quantity of land for roads throughout the same, for the use of Her Majesty's subjects, saving and excepting nevertheless, from the said lands, the premises conveyed to *James Marshall*, and also other estate and interest which the said company have in, or to the said land and premises with the appurtenances; to have and to hold the said lands and premises conveyed, or intended so to be, with the appurtenances, unto the said *Lewis P. Fairbanks* his heirs and assigns forever, &c. This deed purports to be signed by *James F. Avery*, president, and *G. A. S. Crichton*, secretary. The plaintiff also produced a deed of assignment, purporting to be made on the 31st day of May, 1876, under the insolvent act of 1875, between *Lewis P. Fairbanks*, described therein as trader of *Dartmouth* in the county of *Halifax* of the first part, and *William H. Creighton*, official assignee of the county of *Halifax*, of the second part, whereby it was witnessed:

That under the provisions of the insolvent act of 1875, the said party of the first part being insolvent has assigned and hereby does assign to the said party of the second part, accepting thereof as assignee under the said act, and for the purposes therein provided, all his estate and effects real and personal of every nature and kind whatsoever, to have and to hold to the party of the second part as assignee for the purposes, and under the act, aforesaid.

At the trial it was contended that the *Lewis P. Fairbanks* executing this assignment was not proved to be a trader, and competent as such to make such an assignment under the Insolvent Act. The only evidence of this point was that of the plaintiff himself, who said:

Fairbanks bought and sold all sorts of things. I had dealings with him. He bought oats and wood and iron. No debt or assets of that kind. The insolvent business has relation solely to land. He handed me no books of business nor cash book. His books had only reference to the canal property; other lands of his had been wound up.

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Lewis P. Fairbanks having been himself subsequently called gave no evidence of his being a trader. In his evidence he said:

I did not know I owned the shore of the lake till five years ago. [The trial was in 1878.] The property is not used for canal purposes now, some small parts of what is necessary for canal purposes have gone out of me. The first section is entirely gone, the second section, including the lake, remains to me. *I sold the machinery.*

Counsel for the defendants moved a non-suit at the close of plaintiff's case, but nevertheless a vast deal of evidence was entered into upon the part of the defendants, partly with the view of insisting that the description in certain deeds which were produced on the plaintiff's part did not cover the places where the plaintiff stated the alleged trespasses or some of them to have been committed, and partly to shew title in the defendants under their pleas of *liberum tenementum*, and to shew possession in them, or those under whom they claimed, of part of the premises at the time of the execution of some of the deeds under which the plaintiff claimed the title to be in *Fairbanks*. At the close of the evidence, counsel for both parties, instead of addressing the learned Chief Justice, who tried the cause upon the evidence as a jury, declined doing so, and entered into an agreement which was recorded by the learned Chief Justice, as follows:

That a verdict should be entered for the plaintiff with $10 damages, subject to the opinion of the court, that the parties shall be entitled to take all objections arising out of the evidence and minutes, and that the court shall have power to enter judgment for or against the defendants with costs, each party to prepare brief abstracts instead of copies of the documents put in by him, the originals to be produced, if required by the court, a rule *nisi* for a new trial to be granted accordingly and filed.

In the following term of the Supreme Court sitting in *Halifax*, on motion of Mr. *Weatherby*, Q.C, defendants' counsel, a rule *nisi* was issued in the following terms;—

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On reading the minutes of the learned judge who tried this cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent, subject to the opinion of the court, with power to take all objections arising out of the evidence and minutes, and with power to the court to enter judgment for or against defendants with costs, be set aside with costs, and a new trial granted herein on the following grounds:—Because the said verdict is against law and evidence. For the improper rejection and reception of evidence, and on other grounds appearing in said evidence, minutes and papers, unless cause to the contrary be shown before this honorable court within the first four days of the ensuing December term at *Halifax*.

After argument of this rule, and upon the 11th January, 1881, a rule absolute entitled in the cause was issued in the following terms; namely,

On argument of the rule *nisi* to set aside the verdict herein for the plaintiff and on motion. It is ordered that said rule *nisi* be made absolute with costs, and judgment entered herein for defendants against the plaintiff, with costs.

Against this rule the plaintiff appealed, and the case was argued fully upon its merits during three days on the 25th, 26th and 27th October, 1881, by Mr. *Thompson*, Attorney-General of *Nova Scotia*, for the plaintiff (appellant), and by Mr. *Rigby*, Q.C., for the defendants (respondents).

The plaintiff claims title to the closes, lands and lands covered with water in the first count of the declaration described as being "section number 2 of the *Shubenacadie* Canal, forming the reservoir thereof, and called the first and second *Dartmouth* Lakes," and which are declared to be in the second count the same lands, &c., as are in first count mentioned, and which by the evidence taken in the cause appear to be the same lands, &c., &c., &c., from which the ice mentioned in the third count is alleged to have been taken, solely as assignee of the estate and effects of *Lewis P. Fairbanks*, under the Insolvent Act of 1875. The fourth, fifth and sixth counts seem to have been inserted by error, as

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claiming the lands to be the property of *Fairbanks*, the alleged insolvent, and not in the only person who is plaintiff upon the record, although no objection thereto seems to have been taken by the defendants, who have pleaded thereto similar pleas to those respectively pleaded to the first three counts; but on this record no judgment could be rendered upon the fourth, fifth and sixth counts, nor otherwise than upon the issues joined on the first, second and third counts, in which the plaintiff asserts title solely as assignee, under the Insolvent Act, of the estate and effects of *Lewis P. Fairbanks*, and it was upon these issues only that the argument upon the whole merits of the appeal before us took place. The court below, acting upon the agreement entered into at *nisi prius*, set aside the verdict which had been entered *pro formâ* for the plaintiff; upon the ground that *Lewis P. Fairbanks* was not, or was not shown to be, a trader, so as to enable him to assign to the plaintiff, or the plaintiff to take his estate and effects under the Insolvent Act, and to vest such estate and effects in the plaintiff, as the official assignee for the county of *Halifax*. It was argued before us on the part of the plaintiff that the pleadings did not raise any issue upon that point, but I was of opinion at the argument, and still am, that the plea, that the plaintiff was not nor is such assignee as alleged in the declaration, does put the trading in issue and casts the onus of the proof thereof upon the plaintiff, and indeed in an action of this nature, the plaintiff not appearing to have been in possession of any of the closes in which, &c, and being therefore, in order to sustain this action, compelled to show a good title, the onus is cast upon him of proving everything necessary to the vesting of the estate of *Lewis P. Fairbanks* in the plaintiff, as his assignee under the Insolvent Act, as well as to show that the property in question had been, before the In-

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solvent Act operated upon it, the property of *Lewis P. Fairbanks*, the alleged insolvent. After the long argument before us upon the whole case, which extended over three days, during which the learned counsel for the plaintiff strenuously insisted that the plaintiff was entitled to judgment upon all the points, I do not think it desirable that we should dispose of the case solely upon the point as to the trading.

If the question of the trading was the only one which stood in the way of the plaintiff's right to recover, the better course would no doubt be to send the case to a new trial, if the plaintiff wishes to have an opportunity to supply further evidence upon that point, but if, assuming the trading to be established, the plaintiff is not entitled to recover upon the other points, as to which it is not suggested that any further evidence can be given, I cannot see, after the very full discussion which these points have undergone, what possible object there can be in our protracting an expensive litigation by withholding our opinion upon points so exhaustively argued during three days. If the case was to be decided upon the point of trading alone, I do not think we should have thought it necessary to reserve our judgment upon that point, or to have heard the argument upon the other points, but having heard the whole case very exhaustively argued upon a judgment rendered upon an agreement entered into by the parties at *nisi prius*, whereby it was stipulated that the court should be at liberty upon the whole case to render judgment for or against the defendants, I think that in the absence of any suggestion that upon a new trial further evidence could be supplied by the plaintiff, we are called upon to express an opinion upon the whole case, and if the plaintiff, assuming the trading to be established, is nevertheless upon the other and main

grounds not entitled to recover, to terminate the continuance of an expensive and fruitless litigation.

Upon the close of the evidence at the trial, which took place before the learned Chief Justice of the Supreme Court without a jury, the counsel for both parties entered into an agreement whereby it was agreed "that a verdict should be entered *pro formâ* for the plaintiff, subject to the opinion of the court in term, and that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the court should have power to enter judgment for or against the defendants, with costs."

Nothing is said in this agreement to the effect that the court above should have power to draw inferences of fact as a jury could, which words do appear to have been introduced into an agreement made at *nisi prius* in a case of ejectment tried at the same time upon the same title at the suit of the plaintiff against one *Graham*, whereby it was agreed that the agreement in the suit v. *Chittick et al.*, with a verdict for the plaintiff, should extend to the ejectment suit with power for the court to draw the same inference from the facts in proof as the judge on trial or a jury could do. Whether such a provision is necessary in the case of a trial before a judge without a jury seems to me to be questionable, and, indeed, the provision that upon the evidence taken at the trial the court above should have power to enter a verdict for or against defendants without any actual finding of facts by the learned judge who tried the case without a jury, seems to imply the necessity for an adjudication and finding of matters of fact by the court from the evidence so laid before them. The court also seems to have been of opinion that it was competent for them upon the agreement in the trespass case, equally as in the ejectment case, to discharge the functions of a jury and to draw inferences of fact, for that they did in

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fact in this trespass case exercise that jurisdiction, appears from the judgment of the court setting aside the verdict for the plaintiff, wherein it is said:

> The objection that he, *Fairbanks*, was not shown to be a trader was taken at the trial and in the argument, and at the former the plaintiff should, if he could, have given evidence, to justify us in holding that he was such, but that was not done, unless we are to regard the assignment alone as evidence.

And upon this point it is said:

> But admitting that the assignment is *primâ facie* evidence of the insolvent being a trader, how can we uphold the presumption *in the face of the evidence given by the plaintiff himself showing clearly that Mr. Fairbanks was not a trader.*

So that from this it appears the Court proceeded, not upon the absence of all evidence to go to a jury upon the question, but construing evidence offered as a jury, they have found that in point of fact *Fairbanks* was not a trader, thus plainly discharging the functions of a jury, and accordingly they set aside the verdict for the plaintiff and ordered judgment to be entered for the defendants against the plaintiff with costs.

This rule is not printed in the appeal case, as it should have been, but having been called for by us during the argument it has been supplied, and appears to be to the above effect.

Now to order a verdict to be entered for the defendants upon this record, even though it should be amended by striking out the 4th, 5th and 6th counts, and the pleas thereto, on the ground of misjoinder, would give to the defendants judgment upon the pleas of *liberum tenementum* to the first two counts, which it cannot be said that they have clearly established by evidence, and which judgment when entered would operate as an estoppel in the defendants favor as against *Fairbanks*, in whose right the plaintiff claims. Judgment therefore upon the issue proved upon the pleas of

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liberum tenementum should be for the plaintiff unless that plea be removed from the record. But if we amend the record by expunging the 4th, 5th and 6th counts, and the pleadings relating thereto, and by expunging also the pleas of *liberum tenementum* pleaded to the 1st and 2nd counts, I think that for the reasons hereinafter stated the defendants are entitled to judgment in their favor upon the 1st, 2nd and 3rd counts, to which counts the argument before us was confined. As to those counts upon the record being so amended, I can see no object in protracting this litigation by ordering a new trial, as the defendants are, in my judgment, entitled to succeed, even though it should be established that *Fairbanks* was a trader, so as to be within the operation of the Insolvent Act.

As to the close upon the margin of the second lake, the plaintiff's first step in his claim of title to it, is to shew that the canal company acquired the fee simple therein under the 13th section of their act of incorporation. He accordingly produced a petition of the company to the justices in quarter sessions, a precept to the sheriff thereon, and an inquisition taken by the sheriff with a jury in 1826, but no map was produced shewing the lands intended to be covered by the description set out in the inquisition of the lands therein referred to, and if we had such a map, and if it plainly comprised the close in question, there is no evidence that the verdict rendered upon the inquisition has been allowed and confirmed by the quarter sessions as required; and it is not contended that payment was made to any one of the amount assessed, nor, indeed, does the inquisition determine the amount, but leaves it to be ascertained by a measurement to be made after the close should be flooded by the works of the company. Under these circumstances, and as the act of incorporation of the company makes the confirmation

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of the inquisition when taken and the payment to the proprietors of the amount assessed for their lands taken conditions precedent to the vesting of the fee in such lands in the company, it is clear that the plaintiff has not shown that the close in question ever became vested in the canal company. By flooding the close, by the waters of the lake being raised by the works of the company, the latter may have acquired a prescriptive right to keep the close so flooded, but they have not acquired the fee in the close, so that as to this close the plaintiff for that reason alone must fail in this action.

As to the rest of the alleged trespasses which were said to have been committed by the taking of ice from places in the first lake, the act of incorporation of 1824 did not vest or profess to vest in the company the soil and bed of the lakes; it vested in them only, so far as the lakes are affected, "the waters and streams of the said river and lakes, so far as the same might be required or necessary to be used, retained, diverted or appropriated to and for the use and benefit of the canal and the beneficial enjoyment thereof," and also all real estate purchased or obtained for such canal and through which it shall be made, with the towing paths along the canal, river and lakes, for the term of 99 years.

This is the provision contained in the eighth section of the Act of 1824, and it left untouched the title in the bed and soil of the lakes, whether that title was then in the Crown or in some private person or persons.

The Act of 8th *Geo.* 4, c. 17, A.D. 1827, made no difference in this respect, for all that act did was to declare that all and singular those things which by the eighth section of the Act of 1824 had been granted to the company for 99 years should be and were vested in and declared to be the sole and exclusive property of

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the company forever ; and as the eighth section of the Act of 1824 did not affect the soil and bed of the lakes, so neither did the Act of 1827. The company therefore had no title in virtue of the acts of Parliament, to the soil and bed of the lake at the places where the defendants took the ice, for the taking of which this action is brought. But the plaintiff alleges that the canal company became seized of a large portion of the soil and bed of the first lake, comprising those portions from which the ice was taken by the defendants, under and in virtue of a deed dated the 12th April, 1831, and made between *Richard* and *James Tremain* of the one part, and the *Shubenacadie* Canal Company of the other part, whereby after reciting that under and by virtue of an indenture dated the 13th October, 1815, between one *Laurence Hartshorne*, since deceased, of the one part, and the above-named *Richard Tremain* of the other part, and by virtue of another indenture dated the 14th June, 1816, and made between one *Jonathan Tremain*, of the one part, and the above-named *James Tremain* of the other part ; and by virtue of another indenture dated the 25th October, 1828, and made between *Abigail Hartshorne*, widow and executrix, and *Laurence Hartshorne*, surviving executor of the late will of the above named *Laurence Hartshorne*, deceased, of the one part, and the said *James Tremain* of the other part ; and by virtue of another indenture, dated the 1st September, 1830, and made between *Phœbe Tremain*, executrix, and *Thomas Boggs* and *George Norton Russell*, executors of the will of the said *Jonathan Tremain*, deceased, of the one part, and the said *Richard* and *James Tremain* of the other part, they, the said *Richard* and *James Tremain*, then stood seized of

all that flour mill and bakehouse or bakery, and all those lands partly covered with water, and tenements, situate lying and being in *Dartmouth* aforesaid, and hereinafter firstly and secondly described, and also of and in the mill stream or water course and lands

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partly covered with water, hereinafter thirdly described, with the appurtenances in fee simple in possession; that is to say, as tenants in common, each of and in one equal and undivided moiety or half part of the said described premises, as by reference to the said four several indentures will at large appear,

they, the said *Richard* and *James Tremain* conveyed to the company, among other lands, a piece described as follows:—

Secondly: all that piece of land lying between the south end of *Dartmouth* lake, and the two roads leading, the one from *Dartmouth* to the west side of the said lake, and the other to *Preston*, and measuring from the angle formed by the said roads on the road towards *Preston*, north-eastwardly to a marked stone near a spruce tree marked; thence to run into the said lake north 35° west to the north side line of the lot conveyed on the 20th February, 1815, by the executor of the will of *James Creighton* the elder, deceased, to the said *Laurence Hartshorne*, deceased; thence S. 55° west to the stump of a hemlock tree formerly standing at the north end of the mill dam; thence N. 35° W. to the side of the highway leading from *Dartmouth*; thence by the several courses of the said road to the place of beginning at the angle of the said roads. Thirdly: all that mill stream and watercourse and lands wholly or in part covered with water lying between the south end of *Dartmouth* lake at the mill dam from whence the said mill-stream and water-course flows to the *Dartmouth* cove aforesaid.

Now, the plaintiff's contention is, that the piece of land described under the head "Secondly," and above set out, extends along the easterly side of the *Dartmouth* lake, all of which he claims to come under the designation in the deed of "the south end" to a point distant nearly half a mile beyond the point at which the "road towards *Preston*" first reached the lake, and thence on a course N. 35° W. 11½ chains into the lake to a point which, as he contends, is made by the deed of the 26th February, 1815, the north west angle of the piece of land therein described. Now, upon this point it is to be observed that, as the plaintiff does not attempt to trace title from Letters Patent from the crown, he must needs, in order to launch a case

against the defendants upon this record, prove that at the time of the execution of the deed of the 12th April, 1831, by *Richard* and *James Tremain*, they were in the actual possession of the soil and bed of the lake, as it is described in the deed of the 20th February, 1815, and which the plaintiff now claims to have passed under the deed of April, 1831, of which actual possession there is no evidence, Moreover, from the recitals contained in the deeds of April, 1831, and of 25th October, 1828, therein recited, it is plain that all that was intended to be conveyed by those deeds was the flour mill and bakery, lands and mill stream, with the appurtenances thereto, in which *Laurence Hartshorne*, deceased, and *Jonathan Tremain* originally were interested as tenants in common, and in which *Richard* and *James Tremain* became in like manner interested by the deeds of the 13th October, 1815, and the 14th June, 1816, recited in the deed of April, 1831. Now, by the deed of October, 1815, *Laurence Hartshorne*, deceased, conveyed to *Richard Tremain* one undivided part of the property in question by the following description:—

> One full undivided half part of that certain lot or parcel of land lying between the two roads leading from the main road through *Dartmouth* to the lake, as purchased lately at auction at the sale of *James Creighton's* estate, together with one full undivided half part of all and singular the houses, mills, stores, barns, stables, buildings, ways, water watercourses, easements, &c., to the same belonging.

If the purchase "lately at the auction at the sale of *James Creighton's* estate," here referred to, is that represented by the deed of 20th February, 1815, it is plain that the whole of the land described in that deed was not intended to be passed by the deed of October, 1815, but only so much as lay between the roads and the lake, which, as there is evidence to show that the road towards *Preston*" touched the lake at a point

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south of what is called *Glendenning* ice house, on the plan G. G. would seem to indicate a piece of land somewhat in the shape of a triangle, of which the two roads formed the legs and the south end of the lake the base. In the deed of the 14th June, 1816, the description is the same.

From the deed of April, 1831, and from the descriptions contained in the petition by the Company to the Quarter Sessions in 1826, from line 42 to line 68 it is plain that what was regarded and called the south end of the lake was that end of the lake lying between the "road towards *Preston*, where, as the evidence shews, it touched the lake south of *Glendenning* ice house, in the plan G. G., and the opposite or westerly side, where the road from *Dartmouth* struck the west side of the lake, and that a line drawn from the former point of junction of the road with the lake, on a course N. 35° W. to what is called the "north side line," as described in the deed of 13th October, 1815, more properly the "westerly side line" would seem to accord with the description in the deeds of 12th April, 1831, the 13th October, 1815, and the 14th June, 1816; and the piece of land so described, in view of the limits described in the Company's petition to the quarter sessions in 1826, and in the mortgage to the Hon. *Sampson Bowers* and Sir *Rupert D. George*, and in the deed executed upon foreclosure of the mortgage to the treasurer of the province, Mr. *McNab*, and in other subsequent documents, as the northern boundary of section No. 1 of the canal, would seem to constitute the northern extremity of that section. The continuance of the "road towards *Preston*," passed the point where it first touched the lake, and past *Glendenning's* ice house and along the lake shore to the point where the northerly boundary of the line described in the deed of 20th February, 1815, struck the *Dartmouth* lake run-

ning on a course N. 35° W., would be a line running along the eastern side of the lake. I think, therefore, that it must be concluded that the plaintiff has failed to establish, and I confess that I think there will be very great difficulty in its ever being established, that the deed of April, 1831, conveyed to the company the bed and soil of the lake, as is contended by the plaintiff, and to establish which, beyond all reasonable doubt, the onus lies upon him. No argument in support of the plaintiff's contention can, as was contended there could, be adduced from the papers produced in the matter of the partition of the *Hartshorne* estate in the case of *Inglis* v. *Hartshorne* in 1852, for, as the road which ran along the eastern shore of the lake separated the lake from the lands divided, it may well be that the heirs of *Hartshorne* either never considered *Hartshorne* to have had title to the soil and bed of the lake, or that if he had, it was valueless, without drawing from the fact of its not having been divided in the partition suit the inference that the reason was the knowledge of its having been conveyed to the company by the deed of April, 1831, or to the *Tremains*, who executed that deed. Neither the Act of 1824, nor that of 1827, appears to have contemplated the company's borrowing money upon the security of a mortgage, or to have authorized the execution by the company of a mortgage upon the lands acquired by the company, and in and through which the canal should be constructed and necessary for the beneficial use and enjoyment thereof as a water communication. Their power seems to have been limited by these acts to constructing, maintaining, having and holding the canal, when constructed, for the public use and benefit, subject to the payment of tolls, or as is expressed in the fifth section of the act of 1824: "To use and appropriate the waters of the said river,

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lakes and streams, and the channels and water courses thereof, to and for the benefit of, and for rendering effectual, navigable and useful the said intended canal." The mortgage to Mr. *Blowers* and Sir *Rupert George* was executed under the authority of and in pursuance of the power contained in an act of the Imperial parliament (11 *Geo.* 4th and 1st *Wm.* 4, ch. 34), whereby the lords commissioners of Her Majesty's treasury were authorized to advance and lend to the *Shubenacadie* Canal Company for the completion of their canal a sum not exceeding £20,000, and that all sums so advanced should be secured by an assignment of the tolls and profits of the canal to such persons in such manner and under such conditions and regulations as the said commissioners of the treasury should order and direct.

In an act of the general assembly of *Nova Scotia* passed in the year 1837, for the purpose of increasing the capital stock of the company, and of enabling it to make various alterations in the line and direction of the canal and in its depth and width, and in the position, nature and dimensions of the works as originally designed, "whereby the said canal would be rendered more suitable to the purposes for which a great inland water communication through the province with its capital is required and be made more conveniently navigable by steamboats and sea-going vessels, and of greater extent and magnitude than were first intended," it is recited among other things that the Imperial loan of £20,000 stg. was made on the security of the canal and the tolls and profits thereof, pursuant to an act of the Imperial parliament, and that all the funds of the company, consisting of 1,962 shares in the capital stock of the company, £15,000 grant of the general assembly of *Nova Scotia* and the above £20,000 were exhausted, and that the works were still unfinished and had so remained since 1831 for want of funds, and that "foras-

much as completing the said enterprise is deemed an object of great public utility and importance," it was deemed expedient to authorize the Company to increase its capital stock, and to grant to the corporation certain other and further powers for facilitating the enterprise and works of the company, and for more convenient management of its affairs. From these acts it is apparent that the canal authorized to be constructed was designed to be a great public work of vast commercial and provincial importance, and whether or not the mortgage to Mr. *Blowers* and Sir *Rupert George*, which was executed under and in pursuance of the above act of the Imperial parliament, which expressly declared that the security for the loan should be on the tolls and profits of the canal, could be foreclosed in such manner that the fee simple estate in the canal works and in the property necessary for the beneficial use and enjoyment of the canal could become vested in the mortgagees, or transferred to any person or persons and vested in him or them as a fee simple estate, freed and discharged from application to the purposes of a canal or water communication by any authority short of the authority of an act of parliament, it is not necessary now to enquire, because the canal and all the property of the canal company comprised in the mortgage, whatever may have been the effect of the mortgage and of its foreclosure, was subsequently by act of parliament vested in a company, incorporated under the name of the Inland Navigation Company, for the express purpose of acquiring the property of the *Shubenacadie* Canal Company, and of completing the work which the latter company had been authorized but failed to complete.

What was the effect of this mortgage and of its foreclosure? Whether the foreclosure could and did vest in the mortgagees, or in any person, an estate in fee simple

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in the canal and its works and in the property necessary for the beneficial enjoyment of the canal, are questions which will have to be considered in the light of the provisions of the Acts of 1853 and 1859 relating to the Inland Navigation Company, by the 6th section of the former of which the company was empowered "to use the channels and waters of such rivers, lakes and streams in every way necessary for constructing such inland water communication and for rendering and keeping the same at all times navigable and in operation;" and by the eighth section of which it was enacted that "the inland water communication and towing paths should at all convenient times after the construction thereof be kept open for the use of the public, their boats, vessels, goods, horses, and cattle, upon payment of a certain rate of toll money, to be regulated by the company and approved by the Governor in Council and revised every five years." And by the fifteenth that the legislature might at its option at any time after twenty years from the passing of the act take such inland water communication with all the works and appurtenances thereof and keep the same in operation for the benefit and under the control of the government upon paying to the company a sum equal to twenty years purchase of the annual profits divisible upon the subscribed and paid-up capital stock of the company, provided such average rate of profits shall not be less than eight per cent. It was by the act of 1859 alone that the company was authorized to borrow money upon mortgage of the company's property and works, and by that act it was enacted that every mortgage of the property and works of the company for securing payment of monies to be borrowed should be a good legal and valid charge and lien upon such property and works; and that the directors of the company should be, (and they were then first) "at liberty to sell

and dispose of all and any parts of the lands and property which they might deem not actually required for the due and convenient working of the canal.

Now, whether the forclosure of a mortgage executed under this authority can be construed to vest the fee simple estate in the property of the company, which is necessary for the actual and beneficial use and enjoyment of the canal as a water communication, in the mortgagees, or in any person, as their private property freed and discharged from the appropriation of the property to the use intended by the acts incorporating the company authorized to construct it and required to keep it navigable and in operation, and so in effect to disfranchise the company—to terminate its existence,—or relieve it from its obligations, and to defeat the provisions of the Act of 1853, enabling the province to take the work for the public use, raises so grave a question that, as it is not absolutely necessary to decide it to entitle the defendants to judgment in this action, and as there appears to be a probability that it will arise in some other action to which other persons will be parties, I withhold the expression of my opinion upon it.

Then again as to the Lake and River Navigation Company—that company was not incorporated by any special Act of Parliament authorizing it to acquire the property and privileges of, and subjecting it to the obligations of, the Inland Navigation Company. It claims to have been incorporated under the general act, ch. 2 of the acts of 1862, to be found at p. 750 of the 3rd series of the revised statutes; that company in its declaration professes to have been formed under the name of the Lake and River Navigation Company under the provisions of the above act "for the purpose of purchasing, holding and disposing of the property and works formerly belonging to the Inland Navigation Company."

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CREIGHTON v. CHITTICK.

Gwynne, J.

Now, whether a company so formed could acquire the canal and its works, and the property necessary for its beneficial use which the acts incorporating and affecting the Inland Navigation Company, had vested in that company and their successors for ever, to have and to hold subject to the obligation of being at all times kept open for the use of the public as a navigable water communication from Halifax harbor to the bay of mines? whether Messrs. *Gray* and *Stairs* ever acquired any estate in the canal, its works and property necessary for its use? whether any deed purporting to convey that property to any one executed by them could have such operation? whether such property could be conveyed or pass from the Inland Navigation Company to any other company or individual by any mode of conveyance other than an act of parliament passed for the special purpose? whether the Inland Navigation Company is not still an existing corporation having vested in it the canal, its works and the property necessary for its beneficial use, subject to the obligation of its being kept open for public use? whether, if the Lake and River Navigation Company could, and did, ever acquire any estate in the canal, its works and the property necessary for the beneficial use of the canal, they acquired such property otherwise than as a canal company, as their name indicates, and on any other condition than subject to the obligation of keeping the canal open, and subject to the provisions and obligations to which the property was subjected as a water communication, by the acts affecting the Inland Navigation Company? and whether, in view of the terms of the Act of 1859, authorizing the Canal Company to sell only "such lands as should not be required or necessary for the due and convenient working of the canal," the company could sell the canal itself, its works and the property actually

necessary for the use of the canal, freed and discharged from, or even subject to, the obligation of being used as, and appropriated to, the purpose of a navigable canal or water communication, maintained and kept open for public use? these are grave questions upon which, for a like reason, I withhold the expression of my opinion. Independently of these questions, even though the plaintiff should be able to supply sufficient evidence upon the point of trading, I think that upon the record being amended as suggested, the defendants are entitled to judgment in their favor, and in my opinion the form of our order should be to the effect—that the 4th, 5th and 6th counts of the declaration, together with the pleadings relating thereto and the pleas of *liberum tenementum* pleaded to the 1st and 2nd counts be struck off the record, and that then the rule for judgment in favor of the defendants made by the court below shall be upheld as applied to such amended record, and that judgment be entered thereon and this appeal dismissed with costs.

Appeal dismissed with costs, the rule varied and made absolute for a new trial.

Solicitor for appellant: *J. S. D. Thompson.*

Solicitors for respondent: *Rigby & Tupper.*